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Thin or Thick Inclusiveness? The Constitutional Duty to Consult and Accommodate First Nations in Canada

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Abstract

What has the addition of aboriginal rights to the Canadian constitution in 1982 meant for the place of First Nations' interests in the Canadian constitutional order? This article considers this question in the context of natural resource exploitation – specifically, the exploitation of the oil or tar sands in Alberta. It details some of the leading jurisprudence surrounding Section 35 of the Constitution Act 1982, the section of the Constitution recognizing existing aboriginal and treaty rights. Arguably, Section 35 represented an important effort to improve the status of aboriginal peoples in Canada, to enhance the extent to which Canada included and respected the values and interests of First Nations. The article specifically considers how the judicial interpretation of the Crown's duty to consult and accommodate aboriginal peoples is related to the theme of inclusivity. It argues that the general thrust of judicial interpretation has promoted a thin, or procedural, version of inclusiveness rather than a substantive, or thicker, one. Such a thicker version of inclusiveness would be one in which the pace of oil sands exploitation is moderated or halted in order to allow First Nations to engage in traditional activities connected intimately with aboriginal and treaty rights.

Keywords: aboriginal rights, Canadian constitution, duty to consult, oil sands, tar sands, indigenous

The Haida case confirms that provinces have a duty to consult and accommodate First Nations' concerns and involve us in resource decisions and revenue sharing in our traditional territories.

Shawn Atleo¹

Oilsands development not only devastates our shared climate, it is also stripping away the rights of First Nations and affected communities to protect their children, land and water from being poisoned.

Archbishop Desmond Tutu²

Introduction

Immediately following the patriation and amendment of the Canadian Constitution in 1982, 17 distinguished Canadian academics assessed the politics and substance of the Constitution Act 1982. Their shared sentiment was foreshadowed in the title of the volume they published: *And No One Cheered*.³ That title captured well what all of the contributors concluded – ‘we could have done better’.⁴ It was a collection to avoid for anyone who sought a celebration of the Canadian politics of constitutional change.

Some of the disappointment in *And No One Cheered* may be understood according to the theme of ‘inclusivity/exclusivity’ that is the focus of this colloquium. The government of Québec and many Québécois complained of exclusivity; they were disappointed or angered by the failure to accord Québec the enhanced constitutional status they expected from a process of constitutional change initiated by Québec’s grievances. Gays and lesbians were disappointed that they were excluded from the constituencies enumerated in Section 15, the foundational section for equality rights in the Charter of Rights and Freedoms. Section 15 generally pleased the women’s movement but feminists were very concerned about the possibility that equality rights could be violated if governments invoked Section 33, the notwithstanding clause. Would governments use Section 33 to exclude them from the protections and benefits they hoped to secure through judicial review of the Charter’s equality rights? Alternatively, would the judiciary interpret the ‘reasonable limits’ on rights clause in Section 1 of the Charter in a way that would steal the promise out of entrenching rights in the Constitution?⁵

That the second part of the Constitution Act 1982 was devoted to identifying the rights of Canada's aboriginal peoples was one of the more surprising outcomes of the politics of constitutional change. When constitutional negotiations began in earnest in 1978, aboriginal peoples were not expected to play a significant role in this episode of constitutional politics; little change was expected with respect to the constitutional status of aboriginal peoples in Canada in a constitutional environment preoccupied with Québec, provincial rights and Prime Minister Trudeau's commitment to securing constitutional rights for individuals and linguistic minorities.⁶ The National Indian Brotherhood sought a formal role in the constitutional reform process and the constitutional entrenchment of aboriginal and treaty rights. Denied the former, they secured the latter concession, but governments may have regarded this inclusive act as more symbolic than substantive. Douglas Sanders wrote that the federal concession was:

only offered when the federal government felt it was in serious political trouble. But the government had already defined aboriginal and treaty rights in non-political terms. The Canadian legal system had delivered only limited recognition to these claims, and it was doubtful that section 34 would seriously alter the character of that recognition. Aboriginal title claims were uncertain with or without section 34.⁷

Have the last 35 years confirmed or challenged Sanders' conclusion? What has the inclusion of aboriginal and treaty rights in the Canadian constitution delivered? This article offers an answer to such questions in the limited context of exploiting natural resources, specifically the oil or tar sands resources of north-eastern Alberta. It explores this issue by looking at the post-Constitution Act 1982 jurisprudence on the duty to consult and accommodate. It then looks at the extent to which the constitutional duty to consult and accommodate has figured in the politics of exploiting the Athabasca Oil Sands area in north-eastern Alberta (for the location of the oil sands, see Figure 3).

The article suggests that if inclusiveness is to be understood as respecting traditional or longstanding rights and practices, only a thin version of inclusiveness has been realized in Canada generally and in the oil sands in particular. This thin version of inclusiveness has been articulated through the judiciary's insistence that First Nations must be consulted to varying degrees about government-permitted initiatives that affect or may affect aboriginal or treaty rights. This thin version is

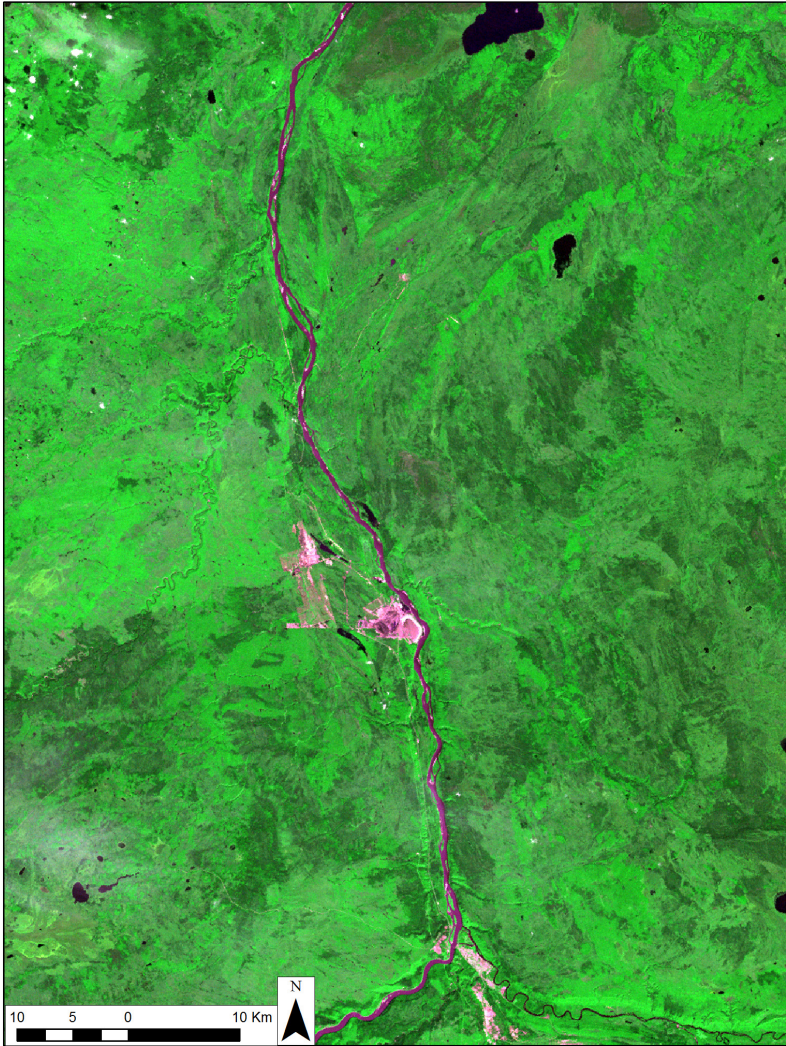


Figure 1. The Athabasca Oil Sands area north of Fort McMurray in 1974. The Suncor mine and plant hugs the bank of the Athabasca River; the site of the Syncrude project is west of Suncor. Map: © P. Lee.

fundamentally procedural; it demands consultation processes between governments and First Nations.

A thicker version of inclusiveness would be more substantive. It would be a version where traditional rights and practices are respected through government policies and actions that temper – perhaps even halt, in some cases – the natural resource exploitation that severely

damages the ability to practise traditional rights. This thicker version is largely absent on the Canadian political landscape. Its absence should be linked both to judicial review and to the strategies of some First Nations themselves.

Section 35(1): Extending the Breadth of Aboriginal and Treaty Rights

Section 35(1) of the Constitution Act 1982 reads: ‘The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.’⁸ With this wording, federal legislative power over aboriginal peoples was limited for the first time. Prior to 1982, Section 88 (originally Section 87) of the federal Indian Act protected treaties and the rights they bestowed on Indians against provincial legislative interference. Provincial laws of general application (for example, traffic laws) applied to Indians and their reserve lands. But provincial legislation singling out Indians or affecting ‘Indianness’ – understood as ‘a relationship integral to a matter outside of provincial competence’ – ran afoul of Section 88.⁹ The Natural Resources Transfer Agreements of 1930 further limited the ability of provincial governments in western Canada to restrict Indians from exercising their treaty rights to hunt and fish.¹⁰ These agreements, made without any consultation with Indian peoples, also merged, consolidated and modified the treaty rights Indians had exercised up to that point.¹¹

The Supreme Court of Canada took its first step in interpreting the implications of Section 35 for the state power of the federal level of government in *R. vs Sparrow*. At issue in this 1990 decision was an aboriginal, not a treaty, right claimed by a member of the Musqueam Indian Band. Ronald Sparrow claimed his aboriginal right to fish had not been extinguished and further that the federal government’s gill net length restriction infringed unjustifiably on this Section 35(1) right. *Sparrow* established that key terms in Section 35(1), such as ‘existing’ and ‘recognized and affirmed’, should be interpreted generously and liberally.¹²

But the Supreme Court also made it clear in *Sparrow* that the state could limit the aboriginal and treaty rights guaranteed in Section 35(1). In effect, the Court invented a ‘reasonable limits’ clause similar to Section 1’s that could restrict aboriginal and treaty rights; it signalled that state actions could limit the exercise of Section 35(1) rights under some circumstances. The constitutional status and recognition

gained in 1982 did not necessarily stop the state from regulating and setting important limits on aboriginal and treaty rights. If the state could demonstrate the legitimacy of restricting an aboriginal right then its actions would be constitutional. Justified interferences with aboriginal rights were those that, in the first instance, pursued a 'valid legislative objective' – a rather all-embracing term. Such objectives included preserving Section 35(1) rights 'by conserving and managing a natural resource', preventing 'harm to the general populace or to aboriginal peoples themselves' through exercising Section 35(1) rights, or pursuing 'other objectives found to be compelling and substantial'.¹³ The Court wrote that if the state could demonstrate that restrictions on First Nations rights pursued valid legislative objectives, it then needed to conduct a proportionality analysis. Such an analysis would consider whether a government had gone too far in restricting rights as it pursued its legitimate legislative objective. In the context of aboriginal and treaty rights it was important for the state to demonstrate its fealty to a longstanding principle – the honour of the Crown.

The honour of the Crown, like the generous/liberal interpretive guidelines affirmed in *Sparrow*, became an important thread joining post-patriation aboriginal and treaty rights jurisprudence to the pre-1982 jurisprudence. Upholding the honour of the Crown figured prominently in that earlier era and has figured prominently in the duty to consult and accommodate jurisprudence considered here. Aboriginal and treaty rights should be interpreted generously so as not to tarnish the honour of the Crown.

In *Sparrow* the honour of the Crown demanded the Court first consider 'the special trust relationship and the responsibility of the government vis-à-vis aboriginals'.¹⁴ There the government's legitimate interest in conserving the salmon resource had to be secured through measures that 'treat aboriginal peoples in a way ensuring that their rights are taken seriously'.¹⁵ Justified interferences with aboriginal rights also needed: to limit aboriginal rights as little as possible; to consider whether fair compensation was provided in cases of expropriation; and to consider whether the aboriginal peoples had been consulted about the state's regulatory measures.¹⁶ This need to consult aboriginal peoples and to accommodate their interests if necessary would become one of the key principles of aboriginal constitutional jurisprudence.

Sparrow considered aboriginal, not treaty, rights. In *R. vs Badger* the Supreme Court examined the *Sparrow* doctrine in the context of the Treaty 8 right to hunt for food.¹⁷ Justice Cory, writing for a majority in 1996, opened his analysis with the reminder that this treaty right 'was

circumscribed by both geographical limitations and by specific forms of government regulation'.¹⁸ Geographical limitations appeared in the form of any lands taken up for purposes incompatible with exercising the right to hunt. Justice Cory concluded, based on the Indians' understanding of Treaty 8 terms, 'that the geographical limitation on the existing hunting right should be based upon a concept of *visible, incompatible land use*'.¹⁹ Indians understood the treaty promises to mean that land would be taken up for settlement, farming and mining, and that they would not be able to hunt in those areas. They also believed most Treaty 8 lands would not be occupied and they would be able to exercise their hunting, fishing and trapping rights on those lands.²⁰ So important was the continuity of land use rights to the Indians that Treaty 8 Commissioners solemnly assured Indians that apart from conservation laws and laws intended to be in the interest of the Indians, 'they would be as free to hunt and fish after the treaty as they would be if they never entered into it'.²¹ Game conservation laws and regulations then constituted the second limitation on the treaty right to hunt.

Justice Cory raised *Sparrow's* justification analysis in examining the impact of Alberta's Wildlife Act 1997 with subsequent amendments, on the treaty right to hunt for food. He concluded that the provincial legislation conflicted with the treaty's hunting right and that, following *Sparrow*, it was incumbent on the provincial government to justify this treaty right of infringement. Since conservation was fundamentally important and the government had not introduced any evidence to justify such a limitation on the treaty right, Mr Ominayak Justice Cory ordered a new trial. There the justification issue could be considered. *Badger* then was a decision that stipulated that governments must maintain the honour of the Crown and interpret treaty rights liberally, but it also opened several doors through which the state could pass in order to infringe treaty rights.

The Duty to Consult and Accommodate: Privileging Procedural Rights Over Substantive Ones

When it came to consulting aboriginal peoples, *Sparrow* said only that, in respect to salmon conservation measures, government needed to consult the aboriginal peoples who would be affected by those measures. It did not provide a general framework for defining the parameters of consultation between the state and aboriginal peoples. The Supreme Court began to articulate a more comprehensive interpretive framework

in *Delgamuukw*.²² In this landmark 1997 decision, the Court stipulated that there always was a duty to consult with aboriginal peoples and the nature/scope of the duty would vary according to circumstances. When breaches of rights would be relatively minor, good faith discussions about decisions affecting aboriginal lands should suffice. More often, however, the interaction would need to be:

significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.²³

But Chief Justice Lamer then went on to outline a very wide range of legislative objectives that could justify the infringement of aboriginal title. He wrote:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.²⁴

A list of legislative objectives that would not justify infringing aboriginal title to the land might have been considerably shorter.

In *Haida Nation vs British Columbia (Minister of Forests)* the Court developed the interpretive framework for the duty to consult and accommodate further.²⁵ This 2004 decision focused on a tree-harvesting licence the British Columbia government issued to Weyerhaeuser on lands subject to a Haida land claim. Chief Justice McLachlin wrote on behalf of a unanimous court that, like the Crown's fiduciary obligations to aboriginal peoples, the duty to consult was rooted in the honour of the Crown. This duty was instrumental to the goal of reconciliation between aboriginal and non-aboriginal peoples. The duty to consult existed regardless of whether the aboriginal interests were legally recognized or not. It arose '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'.²⁶

According to the justification analysis outlined in *Sparrow*, consultation, at a minimum, must take place if it is established that an

existing or potential right may have been infringed. *Haida* offered the ambiguous addition that ‘consultation must be meaningful’.²⁷ The scope of consultation will be determined first by assessing the strength of the case supporting the existence of the right or title. Second, the courts should examine the seriousness of the potentially negative effect upon the right or title claimed.²⁸ The Court envisaged a ‘spectrum’ of consultation. At one end, where the claim to a right is weak or the potential infringement is minor, the duty to consult may be limited to giving notice, disclosing information and discussing any issues raised by aboriginals. At the other end, where there is a strong claim to a right, the right is of high significance to aboriginal people, and where the risk of non-compensable damage is high, deep consultation would be required. Deep consultation may demand opportunities for First Nations to make submissions to decision-makers and, more significantly, to be formal participants in the decision-making process.²⁹ According to Monique Passelac-Ross and Veronica Potes, the low level trigger of the duty to consult requires governments to consult about the nature of the consultation process itself;³⁰ Justice Tysoe of the British Columbia Supreme Court clearly stated this in *Gitksan and other First Nations vs British Columbia (Minister of Forests)* when he agreed with the Gitksan position that ‘there must be a discussion of the process of consultation and accommodation’.³¹

The honour of the Crown places on the shoulders of the state the ultimate responsibility for ensuring a meaningful consultation process is in place and has been followed. *Haida* made it clear that the duty to consult with aboriginal peoples cannot be delegated to interested third parties, such as corporations. For example, government cannot delegate the duty to consult to a corporation proposing to develop natural resources such as the oil sands. If government attempts to delegate the duty to consult to a company, it is unlikely the consultation requirement would be met adequately. Chief Justice McLachlin wrote:

The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments ... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.³²

Consultation may and should occur between industry and aboriginal groups; however, such engagement does not excuse the government from its legal duty to undertake its own consultation with aboriginal peoples.

For inclusivity or exclusivity, *Haida* is significant for not establishing that the Crown's duty to consult requires aboriginal consent to the state's actions; it does not require government necessarily to accommodate the aboriginal right affected. The Supreme Court declared the process of accommodation 'does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim'.³³

Haida considered a situation where aboriginal interests in the land had not yet been recognized. *Mikisew Cree First Nation vs Canada (Minister of Canadian Heritage)* examined what the duty to consult and accommodate meant with respect to treaty lands – lands where aboriginal title is extinguished and treaty rights established.³⁴ Did the Crown need to consult the Mikisew Cree when exercising the Crown's Treaty 8 right to take up surrendered lands to build a winter road in Wood Buffalo National Park?³⁵ The Mikisew argued the proposed road reduced the lands over which they would be able to practise their treaty rights to hunt, fish and trap. For this article, the case's significance rests in the fact it dealt with Treaty 8 lands, which are at the heart of Alberta's oil sands.

The Supreme Court ruled that extinguishing aboriginal title to lands through Treaty 8 did not extinguish the duty to consult. It rejected federal and Alberta submissions to the contrary. The Crown could not exercise its right under Treaty 8 to take up lands without first consulting the aboriginal signatories to that treaty; the Crown's duty to consult had not been completed when Treaty 8 was signed in 1899. Parks Canada had not fulfilled the government's ongoing duty to consult satisfactorily in the case of the proposed winter road. The duty to consult survived the surrendering of lands; the federal government breached this duty and thereby undermined the process of reconciliation between aboriginal peoples and non-aboriginal peoples.³⁶

It is tempting to read the Court's judgment as one that concluded the federal government dealt cavalierly with Mikisew interests. For example, historical Mikisew land uses in and around the Peace Point Reserve were immaterial to the Minister of Canadian Heritage. The Minister suggested that the promises of Treaty 8 would still be honoured as long as the Mikisew could exercise their hunting, fishing and trapping rights somewhere in Alberta. Here is Justice Binnie's caustic reaction to that contention:

This cannot be correct. It suggests that a prohibition on hunting at Peace Point would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometres distant across the province, equivalent to a commute between Toronto and Quebec City (809 kilometres) or Edmonton and Regina (785 kilometres). One might as plausibly invite the truffle diggers of southern France to try their luck in the Austrian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfilment of the promises of Treaty 8.³⁷

Such biting criticism notwithstanding, the Court did not believe the proposed road significantly infringed on Mikisew treaty rights. Justice Binnie characterized the proposed project as ‘a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the “taking up” limitation’.³⁸ Consequently, the Crown’s duty to consult was at the less demanding end of the spectrum outlined in *Haida*. The Crown owed the Mikisew information about the proposed road as well as the government’s views on the road’s adverse impacts on treaty rights and what the government would do to minimize those impacts. Ottawa owed the Mikisew direct engagement on these issues. The federal government had taken no such action.

In 2013 Janna Promislow wrote that the ‘parameters of accommodation ... remain one of the least developed areas in the duty to consult jurisprudence’.³⁹ In *Mikisew*, where the Supreme Court distinguished between the procedural rights (consultation) and substantive rights (hunting, fishing and trapping activities) promised by Treaty 8, accommodating the Mikisew required only consultation. The permit to build the road was quashed and the federal government was instructed to engage the Mikisew in meaningful consultation. Dejected by the Court decision, the commitment of the Thebacha Road Society – formed to promote the project – to pursuing the winter road, withered. In 2017 the proposed road remained just that – proposed.

Importantly, *Mikisew* did not find that the government’s proposed action would significantly damage Mikisew substantive rights. The proposed winter road was a permissible purpose for the Crown to pursue under the terms of Treaty 8 – it was ‘fairly minor’. These positions, plus the affirmation in *Haida* and *Taku River* that consultation does not require aboriginal consent or agreement, make it unlikely the Supreme Court would have found major substantive treaty rights violations in this case.

Mikisew also challenged the tenet that the treaty right to hunt was an enduring right to be exercised by future generations across most of the territory surrendered to the state by the Indians. *Mikisew* instead portrayed the right to hunt as an evolving right, one that likely would be diminished by settlement and industrialization. On the one hand, *Mikisew* recognized that the Crown's 'assurances of continuity in traditional patterns of economic activity' were key to the successful negotiation of Treaty 8.⁴⁰ On the other hand, other language from the decision denies continuity. It sees both Indian and white negotiators as recognizing in 1899 that the treaty promised transition when it came to Indian practices on the land; treaty language 'could not be clearer in foreshadowing change'. A unanimous Court concluded that neither side believed the treaty was 'a finished land use blueprint'; instead, it signalled 'the advancing dawn of a period of transition'.⁴¹ Views such as these led the Court to reject a crucial interpretation of Treaty 8 rights. The Court rejected the *Mikisew*'s presupposition 'that Treaty 8 promised continuity of nineteenth-century patterns of land use'.⁴² There Justice Binnie, writing for the Court, rejected the very continuity endorsed and emphasized at another point in the judgment.

In *Mikisew* one thread of the judgment suggested that aboriginal rights and interests, not government policies, would do the accommodating. They would need to accommodate modern circumstances, the wide range of industrial activities on the land which Chief Justice Lamer had identified in *Delgamuukw* as potentially legitimate infringements on aboriginal title. A diminishing evolution in the nature and extent of the original rights of Treaty 8 lived in rejecting the presupposition of the *Mikisew* Cree that the nineteenth-century land use practices of their ancestors would not be impaired in the twenty-first century. Diminishing original rights does not thicken the inclusion of aboriginal peoples in the Canadian constitutional order if inclusion is understood as respect for traditional interests and practices.

From this perspective of seeing the thickness of inclusion as respecting tradition, the case of *West Moberly First Nations vs British Columbia (Chief Inspector of Mines)* stands out. The case considered whether the Crown had fulfilled its duty to consult and accommodate the West Moberly First Nations regarding coal mining applications from First Coal Corporation. West Moberly First Nations asserted that when British Columbia approved those applications, it gave insufficient consideration to the First Nations' interest in hunting caribou in the area; furthermore, the government failed to restore the Burnt Pine caribou herd. To the West Moberly First Nations, the British Columbia government failed to follow Treaty 8.

At trial in British Columbia Supreme Court, the Honourable Mr Justice Williamson ruled in favour of the West Moberly First Nations. Procedurally, he found British Columbia's consultation insufficient. Substantively, he ruled that 'the Crown's failure to put in place an active plan for the protection and rehabilitation of the Burnt Pine herd is a failure to accommodate reasonably'.⁴³ The Justice ordered a 90-day stay of the government's authorization, during which time British Columbia should consult further with West Moberly First Nations and then 'proceed expeditiously to put in place a reasonable, active plan for the protection and augmentation of the Burnt Pine caribou herd'.⁴⁴ First Nations and environmentalists alike applauded the decision.⁴⁵ With respect to the treaty right to hunt for food, Justice Williamson had declared that since hunting caribou was part of the West Moberly's historical seasonal hunting pattern, the First Nations had a treaty right to be able to hunt this specific species. With respect to the duty to consult, the British Columbia Supreme Court expanded the scope of the duty. Consultations, in this case, should not be restricted to considering only what the company proposed to do in the future. It demanded evaluating the cumulative effects of past resource exploitation as well as future impacts. At least as importantly, Justice Williamson had ordered the government to make a very significant, very substantive accommodation to West Moberly First Nations. He ordered the government to develop and implement a plan not only to save the Burnt Pine caribou herd from disappearing from the British Columbia landscape but also to increase the size of the herd. The state would have to do more than just talk to the West Moberly.

Not surprisingly, British Columbia appealed the British Columbia Supreme Court decision. The province challenged the conclusion that it had not fulfilled its duty to consult; it said that Justice Williamson erred in interpreting the Treaty 8 right to hunt for food in this case as a 'species specific right'; it said the justice also erred in stipulating that the First Nations' interests could be accommodated only through a plan to protect and augment the 11-member caribou herd; finally, it claimed the justice erred in respect to his views of the authority possessed by departmental officials.⁴⁶

First Coal Corporation and the Attorney General of Alberta supported British Columbia's position. First Coal saw errors in Justice Williamson's conclusion that the duty to consult demanded looking to the past and future to consider cumulative effects. Instead, the company contended the duty went no further than considering the potential impact of the permits it had applied for. Furthermore, it contended that the British Columbia Supreme Court decision should regard the

company's caribou mitigation and monitoring plan as a reasonable accommodation. Alberta intervened to support British Columbia's position that Justice Williamson misinterpreted the Treaty 8 right to hunt for food; Alberta further argued that restoring caribou was a public policy question that should not be decided by the judiciary.⁴⁷

When it came to the duty to consult, Chief Justice Finch and Justice Hinkson of the British Columbia Court of Appeal accepted the broad interpretation of this duty expressed in the lower court decision. Cumulative effects, past and future, should be considered. Chief Justice Finch also reaffirmed the importance of the historical understandings of nineteenth-century negotiators to how treaty rights should be interpreted in modern times. This reaffirmation applied not just to the specific right to hunt caribou but, in a statement possibly of great importance to exploiting the oil sands, also to the meaning of mining. The Chief Justice suggested provincial officials did not share the treaty negotiators' view of mining as an activity carried out by 'prospectors using pack animals and working with hand tools'.⁴⁸ He concluded the government could not consult with the West Moberly First Nations in a reasonable or meaningful way unless British Columbia shared that historical understanding. The majority suspended the corporation's permits until a satisfactory consultation process had been completed.

The thicker version of inclusion suggested here was diminished, however, by the fact that none of the three justices of the British Columbia Court of Appeal accepted the specific, very substantive accommodation ordered by Justice Williamson. Chief Justice Finch set aside the specific accommodation ordered by Williamson so that unfettered consultations could take place between the provincial government and the West Moberly First Nations. He held out the possibility that a plan to protect and augment the caribou population still might be appropriate, but, in his view, this was something for the consultation process to consider. Justice Hinkson rejected the condition that a caribou plan must augment the herd size. While past practices and harms should inform the duty to consult, he did not believe they should guide accommodation measures. The duty to accommodate should be limited to the adverse consequences flowing from current Crown conduct. It did not justify obliging government to restore caribou numbers to historic levels; the duty to accommodate applied only to activities after 2005, the year First Coal Corporation applied to the state to develop its project.⁴⁹ Justice Garson stated that when a government reasonably performs its duty to consult – as she believed British Columbia did in this case – the judiciary should not mandate a specific measure of accommodation.⁵⁰

In 2012 the Supreme Court of Canada denied the West Moberly First Nations' application to appeal the British Columbia Court of Appeal decision. Several legal commentaries seemed disappointed with the Supreme Court's refusal to hear the appeal; they suggested that this refusal would lead to uncertainty and a lack of clarity regarding the state's obligations as to the cumulative effects of resource exploitation.⁵¹ Ultimately then, the courts interpreted the Crown's duty to consult and accommodate in primarily procedural terms.

Generally, judicial interpretation of Section 35(1) and the duty therein to consult and accommodate First Nations has promoted a thin version of inclusiveness. I say 'thin' because the gains for First Nations have largely been procedural gains. Government to First Nation consultation certainly is a much more important feature on the landscape of natural resource exploitation in Canada now than it was prior to the adoption of the Constitution Act 1982. But creating a Section 1-like 'reasonable limits' interpretative framework for Section 35(1) opened the door to placing significant limits on traditional rights if the state did so in the name of legitimate legislative objectives. The 'accommodation' side of the duty, understood in substantive terms as limiting resource exploitation in order to give meaning to traditional rights, has suffered. The tables of accommodation have been turned; the exercise of traditional aboriginal and treaty rights is being asked to accommodate the demands of the modern Canadian natural resource economy. A thicker version of inclusion in judicial interpretation of Section 35(1) would see more substantive accommodation, greater recognition and more respect for the ability to pursue traditional activities.

Accommodation in the Oil Sands: A Duty to Accommodate Industrialization

Does the situation in the Alberta oil sands confirm or challenge the theme of the previous section? The 1990s inaugurated what hindsight may regard as the greatest resource boom in Canadian, if not North American, history. A tsunami of petroleum industry investment crested over Alberta's northern boreal landscape.⁵² Between 1996 and 2006 companies wrote cheques for nearly C\$50 billion for new projects to develop the petroleum potential locked in the bitumen-impregnated sands of north-eastern Alberta.⁵³ This exuberance grew mightily through the first decade of the twenty-first century. By September 2018 oil sands developers had invested an estimated C\$301 billion in

exploiting bitumen.⁵⁴ At C\$34 billion, oil sands investments in 2014 set a new annual record.⁵⁵ These investment totals, even when measured in Canadian dollars, are staggering.

Dramatic investments reaped dramatic increases in production. By the beginning of the twenty-first century, unbeknownst to most North Americans, this boom had made Canada the largest foreign source of crude oil to the United States – overtaking Saudi Arabia, Venezuela and Mexico.⁵⁶ Oil sands production in 1996 averaged nearly 432,000 barrels per day; by 2015 it had exploded to 2.381 million barrels per day.⁵⁷ Compared to those of many mature oil-producing jurisdictions, Canadian production totals stand out because they are still increasing – and this is due almost entirely to the oil sands. The calamitous post-June 2014 drop in oil prices tempered, but did not stop, this growth. In 2017, the Canadian Association of Petroleum Producers predicted oil sands production would grow to 3.12 million barrels per day by 2020 and to 3.67 million barrels per day by 2030.⁵⁸ The Alberta government's 2018 budget contained an even more optimistic short-term prediction; it assumed raw bitumen production would increase to 3.462 million barrels per day in the 2020–1 fiscal year.⁵⁹

The impact of this boom on traditional aboriginal pursuits is suggested by comparing the figures on pages 152 and 169. Figures 1 and 2, images of what the Athabasca oil sands area looked like from space in 1974 and 2017 respectively, really do not require any commentary. Given the scale of what industry and government like to call this 'disturbance' to the boreal forest and Treaty 8 lands, one might have expected Treaty 8 First Nations to have used Section 35(1) to try to stop the juggernaut of exploitation that has rolled across their traditional lands. The reality disappoints this expectation. Section 35(1) and the courts were not used early in this contemporary history of development. In fact, it was not until a decade after the Mikisew Cree First Nation (MCFN) went to court to stop the winter road proposal in Wood Buffalo National Park that First Nations tried to play the constitutional card to stop or slow down major tar sands developments. How successful was this litigation? Why have constitutional challenges to exploiting the tar sands not figured more prominently in the politics of this issue?

In the 2010 Total Joslyn North environmental assessment hearing, the Mikisew indicated they would raise constitutional law questions in the public hearings. The Mikisew presented a damning list of complaints about consultation and accommodation issues. The document asserted that oil sands exploitation had seriously infringed Treaty 8 harvesting rights. The First Nation's lawyers maintained that these infringements

could not be justified according to the *Sparrow* test because: consultation had been ‘inadequate and incomplete’; consultation had ‘not been carried out in good faith or with any genuine intention of understanding, addressing or remediating the concerns’ of the beneficiaries of Treaty 8; and the government had offered ‘no meaningful accommodation’ to the MCFN with respect to protecting habitat, minimizing the cumulative harm of oil sands projects on the Mikisew way of life, or balancing the interests of the Mikisew and the Crown.⁶⁰

However, one day into the Total hearing, the Mikisew had a change of heart. The First Nation reached a confidential agreement with the company; the MCFN withdrew its objections to the project as well as its intention to raise a constitutional law question.⁶¹ The MCFN agreement with Total was not filed with the Joint Review Panel so the extent to which the agreement and subsequent discussions with the corporation offered economic and social accommodations to the First Nation is unclear. It would be naive to assume that some such accommodations were not made.

The Athabasca Chipewyan First Nation (ACFN) also signalled their intention to raise constitutional law questions before the Total Joslyn North Mine Joint Review Panel. The ACFN asserted that the Total project, combined with the past and likely future pattern of oil sands developments on ACFN traditional lands, adversely affected the ACFN’s treaty rights. Neither the federal nor the provincial governments had discharged adequately their duty to consult and accommodate the Athabasca Chipewyan. Consequently, the ACFN declared it would ask the Joint Review Panel not to authorize the project ‘unless and until the Crown has fully discharged its duties to consult and accommodate ACFN with respect to potential adverse effects on its Treaty Rights’.⁶²

The ACFN submission, like that of the Mikisew, presented a compelling portrait of the importance of traditional lands to aboriginal culture, identity and way of life. The waters of the Athabasca were the ‘lifeblood’ of this territory. The proposed Joslyn mine represented yet another project promising to reduce the amount of land available for the meaningful exercise of Treaty 8 rights. The brief urged the Panel not to approve the mine because it ‘would have profound impacts on traditional resources in the Regional Study Area and further diminish the land base and resources available to support the meaningful exercise of ACFN’s Treaty Rights’.⁶³ *Haida, Mikisew, and West Moberly First Nations* were some of the cases the ACFN used to support their constitutional position.

When the hearings began, the ACFN also withdrew their objections to the project and their intention to raise constitutional questions.⁶⁴

They did not say whether they had reached an agreement with Total, only that 'ACFN intends to continue discussions with Total E & P Joslyn Ltd. (the 'Proponent') to address ACFN's concerns related to the Integrated Application'.⁶⁵ Like the Mikisew Cree, they wrote to the Joint Review Panel to say they planned instead mainly to monitor the hearings. In light of the historic failure of the regulatory process to ever delay or deny an oil sands application due to First Nations' interests, the ACFN lawyer wrote: 'While ACFN does not object to this Integrated Application, it hopes that future ERCB and joint panels will take an active role in ensuring – prior to project approval – that the federal and provincial Crowns have met their constitutional duties to First Nations.'⁶⁶ Alberta responded by saying that it was unfortunate that both the ACFN and the MCFN had decided not to participate meaningfully in the Joslyn hearing. Perhaps with an eye to the ACFN inference that the provincial Crown was not satisfactorily performing its constitutional duties, the province described the hearing process as an 'important forum' for First Nations and as 'a central aspect of Crown consultation for the Project'.⁶⁷

In 2012 the ACFN again filed a notice of questions of constitutional law with a federal-provincial Joint Review Panel. This time the application was for the expansion of Shell's Jackpine mine. Most significantly, the ACFN broke with the past by not withdrawing its notice. The focus, as for the Joslyn mine project, was on the constitutional duty to consult and accommodate and whether the provincial and federal governments had fulfilled that duty. As in the Joslyn hearing they asked the Panel not to authorize the project until the Crown had consulted meaningfully. Alternatively, they asked the Panel to defer a decision on the project until such time as the duty had been discharged or to recommend to the federal Minister of Environment that the project's adverse impact on ACFN treaty rights could not be justified until governments had fulfilled these duties.⁶⁸

Frustrated by the Review Panel's failure to respond positively to their concerns, the ACFN went to the Court of Appeal to seek leave to appeal the Panel's treatment of the First Nation's constitutional law questions. The Court of Appeal dismissed that application; subsequently, the Supreme Court of Canada refused to grant the ACFN leave to appeal the Alberta Court of Appeal's decision.⁶⁹ The Joint Review Panel approved the Jackpine mine expansion on the grounds that, in light of the significant economic benefits associated with the project, the project was in the public interest, despite the significant adverse environmental impacts the project would also have.

The ACFN then asked the Federal Court of Canada to overturn the federal Environment Minister's December 2013 approval of the Jackpine expansion. The First Nation repeated the thrust of the constitutional law argument that it wanted the Joint Review Panel to consider: the Crown had breached its duty to consult and accommodate. The ACFN argued that the consultation was rushed, too short, not transparent enough and insufficiently attentive to the ACFN's concerns and to the cumulative effects of the project. It also claimed government neglected consultation process commitments to the ACFN and broke its promise to consider accommodations after the Joint Review Panel had submitted its report.⁷⁰

Justice Tremblay-Lamer relied on the standard of reasonableness to review the adequacy of the Crown's efforts to discharge its constitutional duties. Here the fact that more consultation could take place did not necessarily make the amount of consultation that took place unreasonable. The Justice accepted the Review Panel's conclusions that the project would deliver 'significant adverse environmental effects' and that the cumulative effects of Jackpine plus all the other development in the region 'would likely result in significant harm to Aboriginal rights and the environment'.⁷¹ Nonetheless, the Justice rejected every ACFN submission. The consultation was not rushed – it had lasted for more than six years and, in the Justice's view, was ongoing. During that time the government and Shell had provided funding to facilitate the First Nation's participation in the process; the ACFN had filed more than 6,000 pages of submission, had marshalled witnesses and presented its views at dozens of meetings.⁷² She identified a list of measures – all indicating the ACFN's views were 'seriously considered'. Government had modified the original project; the ACFN's interests were reflected in numerous recommendations from the Review Panel; many of those recommendations became conditions that the project needed to meet. 'I fail to see,' Justice Tremblay-Lamer wrote, 'what more could be done to ensure meaningful consultation'.⁷³ The Justice had the same view of whether the Crown had upheld its honour with respect to accommodating the Athabasca Chipewyan: 'Canada accommodated the ACFN's concerns by imposing a long list of conditions binding Shell. I do not believe that the duty to accommodate required Canada to adopt all of the mitigation measures that the Panel recommended.'⁷⁴

In the case of the Jackpine expansion the Mikisew did not turn to the courts. They instead withdrew their objections to the project after negotiating a confidential agreement with Shell Canada. This course of action, negotiating confidential agreements with oil sands companies,

has been the norm in First Nation–corporate relations – not constitutional litigation. From 2003 to 2013, the Mikisew negotiated seven confidential agreements with oil sands miners largely responsible for the condition of the land shown in Figures 2 and 3.

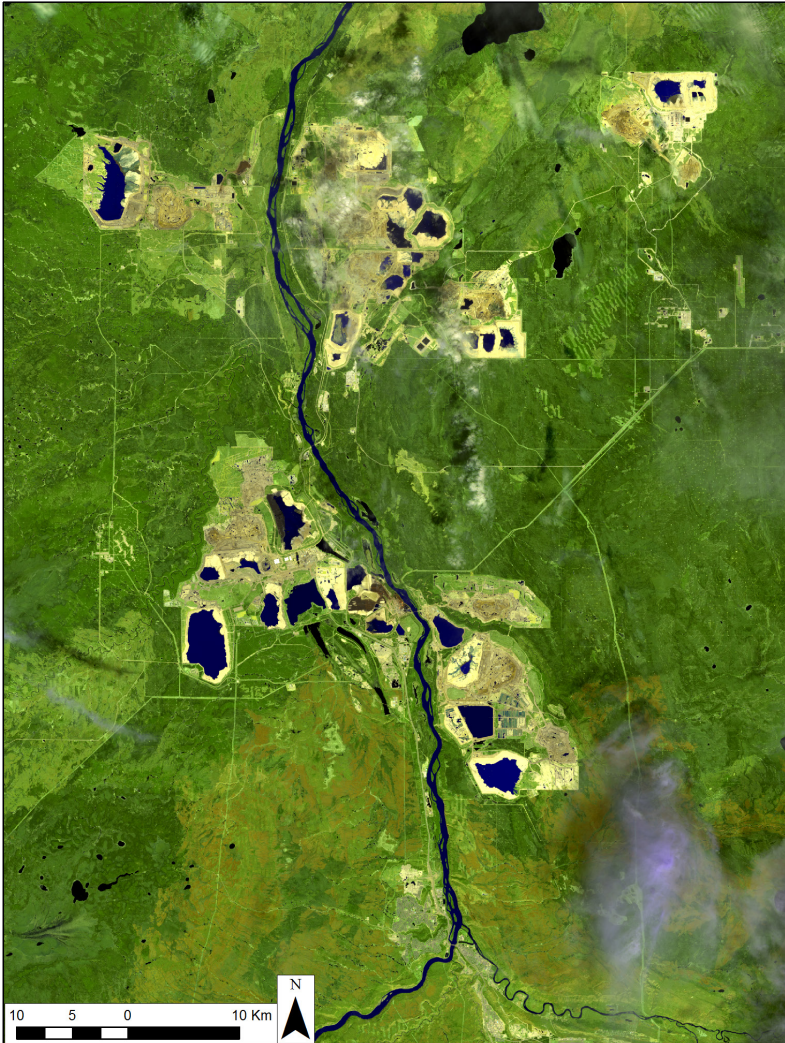


Figure 2. The Athabasca Oil Sands area north of Fort McMurray in 2017. Since the mid-1990s the original Syncrude and Suncor mines have expanded. Those expansions were joined by six other mining projects: Muskeg River, Jackpine, Aurora North, Horizon, Kearl and Fort Hills. This satellite imagery also shows the footprints of the Firebag, MacKay River, Joslyn Creek and Sunrise in-situ projects. Map: © P. Lee.



Figure 3. Map of oil sands in Alberta. Map: © Norman Einstein

Through these confidential agreements Mikisew Cree leaders accommodated their people and their future to the developing pattern of industrial expansion in their territories. They did not object to the lion's share of the 'filth' – oil sands development according to Archbishop Desmond Tutu – despoiling north-eastern Alberta. By the

time the Jackpine mine expansion was approved in 2013, the MCFN occupied an ironic or paradoxical position. It was concerned about the cumulative effects of exploiting the oil sands but refused to object to a specific project that would increase those cumulative effects:

Shell has addressed the Project-specific concerns of MCFN associated with these projects to MCFN's satisfaction. MCFN remains concerned about issues related to cumulative effects of development in the Athabasca region and with issues related to Crown consultation. In light of Shell's efforts to address Project-specific concerns, MCFN hereby withdraws its Statements of Concern dated September 26, 2008 filed in connection with the Projects ...

For greater clarity, MCFN does not object to the regulatory approval of the Projects.⁷⁵

To an important extent First Nations have chosen to accommodate tar sands exploitation on their traditional lands.

Conclusion

The history of duty to consult and accommodate litigation in the oil sands is recent. It has been very ineffective from the point of view of promoting a thicker version of inclusiveness, one where the pace of oil sands exploitation is moderated or halted in order to preserve the ability of Treaty 8 First Nations to engage in the activities flowing from traditional aboriginal and treaty rights. It is not mistaken to see Section 35(1) and the duty to consult and accommodate jurisprudence as encouraging a different version of thicker inclusiveness. The substance of this inclusiveness concerns participating in and deriving socio-economic benefits from the oil sands economy. This outcome brings us back to the observation made near the beginning of this article. It is a mistake to view First Nations as monoliths; their communities are homes to many aspirations and interests. Some leaders and members of First Nations in the Athabasca Oil Sands area see a brighter future in accommodating themselves to the oil sands economy than in resisting it. This should not surprise us. As Neil Reddekopp argues, it is not unprecedented to address the most serious crisis (poverty, a vanishing way of life) at the cost of ignoring or magnifying other challenges (environment and human health).⁷⁶ For some members of First Nations

in north-eastern Alberta, the duty to consult and accommodate is a useful political resource and lever to be used to secure compensation from oil sands companies for the massive disturbances industrialization has inflicted on the boreal forest and Treaty 8 lands. Whether First Nations will be able to reclaim and/or retain a vibrant, meaningful understanding of traditional aboriginal and treaty rights while accommodating themselves to the oil sands economy is the great question that First Nations in north-eastern Alberta face.

Notes

- 1 Assembly of First Nations, 'National Chief Responds to Supreme Court Decisions: Calls on Governments to Negotiate in Good Faith with First Nations Governments', news release, 18 November 2004, <http://www.turtleisland.org/discussion/viewtopic.php?p=4512> (accessed 3 July, 2019).
- 2 Bob Weber, 'Desmond Tutu calls Alberta oilsands "filth"', *Toronto Star*, 31 May 2014, http://www.thestar.com/news/canada/2014/05/31/desmond_tutu_calls_alberta_oilsands_filth.html.
- 3 Keith Banting and Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983).
- 4 Banting and Simeon, *And No One Cheered*, xi.
- 5 Canada, Constitution Act 1982, s. 1: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.
- 6 Douglas Sanders, 'The Indian Lobby,' in *And No One Cheered: Federalism, Democracy and the Constitution Act*, ed. Keith Banting and Richard Simeon (Toronto: Methuen, 1983). Prime Minister Trudeau's longstanding commitment to the importance of individual rights to Canadian constitutionalism may be seen in Pierre Elliott Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan of Canada, 1968).
- 7 Sanders, 'The Indian Lobby', 327.
- 8 Canada, Constitution Act 1982, s. 35(1).
- 9 The phrase was coined by Chief Justice Laskin in *Natural Parents vs Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, 760–761. I believe Laskin linked the phrase both to federal constitutional responsibility for Indians and Indian identity. His statement that the provincial adoption legislation at issue would 'constitute a serious intrusion into the Indian family relationship' suggests the link to integral characteristics of identity.
- 10 These natural resource transfer agreements are most noted for transferring public land ownership in Manitoba, Saskatchewan, Alberta and British Columbia from Ottawa to the provincial governments. Peter W. Hogg, *Constitutional Law of Canada, 2007 Student Edition* (Scarborough: Thomson Canada, 2007), 613–14.
- 11 Paragraph 12 of the Natural Resources Transfer Agreements of Alberta and Saskatchewan enlarged the territories in which treaty Indians could hunt and fish for food and made the non-food fishing and hunting rights of Indians subject to provincial fish and wildlife regulations. *Frank vs The Queen*, [1978] 1 S.C.R. 95, 100.
- 12 Hogg, *Constitutional Law of Canada*, 639. This interpretive guidance followed from the Supreme Court's 1980 unanimous court decision in *R. vs Sutherland*. Justice Dickson concluded that treaty rights should receive a 'broad and liberal construction' and ambiguous language 'should be interpreted so as to resolve any doubts in favour of the Indians.' See *R. vs Sutherland*, [1980] 2 S.C.R. 451, 461, 464.
- 13 *R. vs Sparrow*, [1990] 1 S.C.R. 1075, 1113.
- 14 *R. vs Sparrow*, 1114.
- 15 *R. vs Sparrow*, 1119.

- 16 *R. vs Sparrow*, 1119.
- 17 *R. vs Badger*, [1996] 1 S.C.R. 771.
- 18 *R. vs Badger*, 791.
- 19 *R. vs Badger*, 800. My emphasis.
- 20 *R. vs Badger*, 803.
- 21 This quotation is from the report of the Commissioners who negotiated Treaty 8 and is taken from *R. vs Badger*, 792.
- 22 *Delgamuukw vs British Columbia*, [1997] 3 S.C.R. 1010.
- 23 *Delgamuukw vs British Columbia*, 1113.
- 24 *Delgamuukw vs British Columbia*, 1110.
- 25 *Haida Nation vs British Columbia, vs (Minister of Forests)*, [2004] 3 S.C.R. 511.
- 26 *Haida Nation vs British Columbia*, vs513.
- 27 *Haida Nation vs British Columbia*, vs520.
- 28 *Haida Nation vs British Columbia*, vs543.
- 29 *Haida Nation vs British Columbia*, 533.
- 30 Monique M. Passelac-Ross and Verónica Potes, *Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal?* (CIRL Occasional Paper #19) (Calgary: Canadian Institute of Resources Law, 2007), 20.
- 31 *Gitsan and other First Nations vs British Columbia (Minister of Forests)*, [2002] BCSC 1701, para. 113.
- 32 *Haida Nation vs British Columbia*, 537.
- 33 *Haida Nation vs British Columbia*, 535.
- 34 *Mikisew Cree First Nation vs Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.
- 35 A winter road is a temporary road that will be opened only when the ground is frozen and there is sufficient snow/ice cover to prevent damage to the ground.
- 36 *Mikisew Cree First Nation vs Canada*, 395.
- 37 *Mikisew Cree First Nation vs Canada*, 412.
- 38 *Mikisew Cree First Nation vs Canada*, 421. Emphasis in original.
- 39 Janna Promislow, 'Irreconcilable? The Duty to Consult and Administrative Decision Makers,' *Constitutional Forum/forum constitutionnel* 22 (2013): 66.
- 40 *Mikisew Cree First Nation vs Canada*, 413. Emphasis in original.
- 41 *Mikisew Cree First Nation vs Canada*, 403.
- 42 *Mikisew Cree First Nation vs Canada*, 405.
- 43 *West Moberly First Nations vs British Columbia (Chief Inspector of Mines)*, [2010] BCSC 359, para. 51.
- 44 *West Moberly First Nations vs British Columbia*, [2010], para. 83. In fact, although stay was not put in place, the permit authorizing the bulk sampling was not acted upon.
- 45 Larry Pynn, 'Landmark court decision upholds first nation's coal mining concerns, forces B.C. to protect threatened caribou herd', *The Vancouver Sun*, 23 March 2010.
- 46 *West Moberly First Nations vs British Columbia (Chief Inspector of Mines)*, [2011] BCCA 247, para. 6.
- 47 *West Moberly First Nations vs British Columbia* [2011], para. 8, 10.
- 48 *West Moberly First Nations vs British Columbia* [2011], para. 135.
- 49 *West Moberly First Nations vs British Columbia* [2011], para. 180, 181, 182.
- 50 *West Moberly First Nations vs British Columbia* [2011], para. 287.
- 51 Bennett Jones, 'Supreme Court of Canada Declines to Clarify the Scope of the Duty to Consult and Accommodate First Nations', 28 February 2012, <https://www.bennettjones.com/Publications-Section/Updates/Supreme-Court-of-Canada-Declines-to-Clarify-the-Scope-of-the-Duty-to-Consult-and-Accommodate-First-Nations> (accessed 3 July 2019). Shawn Denstedt, 'Supreme Court Denies Leave to Appeal in West Moberly Case,' *Osler Updates*, 27 February 2012, <http://www.osler.com/NewsResources/Supreme-Court-of-Canada-Denies-Leave-to-Appeal-in-West-Moberly-Case/?langtype=4105> (accessed 3 July 2019).
- 52 Ian Urquhart, *Costly Fix: Power, Politics, and Nature in the Tar Sands* (Toronto: University of Toronto Press, 2018).
- 53 Alberta, Employment, Immigration, and Industry, *Oil Sands Industry Update* (December 2007), 27.
- 54 Natural Resources Canada, 'Crude Oil Facts', <https://www.nrcan.gc.ca/energy-facts/crude-oil-facts/20064> (accessed 3 July 2019).
- 55 Ben Brunnen, 'Upstream Oil and Gas Industry Outlook' (Presentation to the Petroleum Services Association of Canada, Canadian Association of Petroleum Producers, 3 November 2015), 31, www.capp.ca/~media/capp/customer-portal/documents/272494.pdf (accessed 3 July 2019).
- 56 U.S. Department of Energy, Energy Information Administration, *U.S. Imports by Country of Origin*, http://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbbldp_a.htm. A February 2004 Ipsos-Reid poll on North American energy issues for the Woodrow Wilson Center revealed that only 15 per cent of Americans knew that Canada was the largest supplier of crude oil to the United States; only 29 per cent of Canadians knew this. Ipsos-Reid,

- Canadians and Americans Give their Views on North American Energy Issues*, 29 February 2004, <https://www.ipsos.com/en-ca/canadians-and-americans-give-their-views-north-american-energy-issues>.
- 57 Oil sands grew from 21.6 per cent to 60.9 per cent of Canadian oil production between 1996 and 2015. Canadian oil production in these respective years was 1.994 and 3.909 million barrels per day. See Canada, National Energy Board, *Estimated Production of Canadian Crude Oil and Equivalent, Annual (1998–2015)*, <https://www.neb-one.gc.ca/nrg/sttstc/crdlndptrlmprdct/stt/stmtdprctn-eng.html>. The 1996 figures are taken from the 1998 archived annual report.
- 58 Canadian Association of Petroleum Producers, *Crude Oil: Forecast, Markets & Transportation (2017)*, 6.
- 59 Alberta, *Fiscal Plan: Budget 2018*, 14.
- 60 Prowse Chowne LLP, 'Notice of question of constitutional law filed by Prowse Chowne LLP on behalf of Mikisew Cree First Nation', (Document #252), 3 September 2010, 25–26, Joslyn North Mine Project, Townships 94–96, Ranges 11–13 West of 4th Meridian, Canadian Environmental Assessment Agency.
- 61 Prowse Chowne LLP, 'Letter from the Mikisew Cree First Nation regarding their agreement with Total E&P Joslyn Ltd.', (Document #296), 22 September 2010, Joslyn North Mine Project, Townships 94–96, Ranges 11–13 West of 4th Meridian, Canadian Environmental Assessment Agency.
- 62 Woodward and Company Lawyers LLP, 'Notice of question of constitutional law filed by Woodward & Company Lawyers LLP on behalf of Athabasca Chipewyan First Nation', (Document #250), 6 September 2010, 3, Joslyn North Mine Project, Townships 94–96, Ranges 11–13 West of 4th Meridian, Canadian Environmental Assessment Agency.
- 63 Woodward and Company, 4.
- 64 Energy Resources Conservation Board and Canadian Environmental Assessment Agency, *Report of the Joint Review Panel Established by the Federal Minister of the Environment and the Energy Resources Conservation Board, Decision 2011–005: Total E&P Joslyn Ltd., Application for the Joslyn North Mine Project* (Calgary: Energy Resource Conservation Board, 2011), 7, 13.
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- 68 Woodward and Company Lawyers LLP, 'Athabasca Chipewyan First Nations – Written Submission to Participate in the Hearings and Notice of Question of Constitutional Law,' (Document #465), 1 October 2012, Jackpine Mine Expansion, Canadian Environmental Assessment Agency, <http://www.ceaa-acee.gc.ca/050/documents-eng.cfm?evaluation=59540&page=3&type=0&sequence=0>. ERCB is the abbreviation for Alberta's petroleum regulator, the Energy Resources Conservation Board. After administrative reorganization, it is now known as the Alberta Energy Regulator.
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- 70 *Adam vs Canada (Environment)*, [2014] FC 1185, paras. 26–30.
- 71 *Adam vs Canada (Environment)*, para. 11.
- 72 *Adam vs Canada (Environment)*, para. 74.
- 73 *Adam vs Canada (Environment)*, para. 86.
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- 75 Melody Lepine, 'Letter from Mikisew Cree First Nation (MCFN) to Alberta Environment and Water – Withdrawal [sic] of Mikisew Cree First Nation (MCFN) Statement of Concern – Jackpine Mine Expansion and Pierre River Mine Projects (see Reference CEAR #21)', 2 October 2012, <http://www.ceaa-acee.gc.ca/050/documents/p59540/81960E.pdf> (accessed 3 July 2019).
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Conflict of Interests

The author declares there are no conflicts of interest with this work.