

BEYOND THE DUTY TO CONSULT: COMPARING ENVIRONMENTAL JUSTICE IN  
THREE ABORIGINAL COMMUNITIES IN CANADA

by

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Submitted in partial fulfilment of the requirements  
for the degree of Master of Arts

at

Dalhousie University  
Halifax, Nova Scotia  
August 2013

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## **ABSTRACT**

First Nations in Canada have long struggled to participate effectively in resource development decisions. In 2004, the Supreme Court established that the federal and provincial governments of Canada have a duty to consult First Nations in cases where their treaty rights, land claims, or traditions may be adversely affected by government decision-making or third-party development. To determine whether the duty to consult has made an impact on the empowerment of First Nations in these decisions, I assess three case studies using four criteria. This research finds that, while the duty to consult has made a positive impact on the empowerment of First Nations, it still does not go far enough in truly empowering communities to achieve sustainable development on their own terms. This study concludes that the duty to consult may be supplemented with Aboriginal self-government – signaling the potential for positive change in the empowerment of communities seeking environmental justice.

## **LIST OF ABBREVIATIONS USED**

|        |  |
|--------|--|
| BC     | British Columbia   |
| CP     | Cutting Permit   |
| CRCQL  | Chester Residents Concerned for Quality Living                 |
| DEP    | Department of Environmental Protection                         |
| DETR   | Department of Environment, Transport, and the Regions          |
| DIPS   | Deliberative and Inclusionary Processes and Procedures         |
| ENGO   | Environmental Non-Governmental Organization                    |
| KI     | Kitchenuhmaykoosib Inninuwug                                   |
| LUP    | Landscape Unit Plan  |
| NDP    | New Democratic Party   |
| TFL    | Tree Farm License  |
| UNWCED | United Nations World Commission on Environment and Development |

## **ACKNOWLEDGEMENTS**

I would first like to acknowledge the work of my supervisor, Dr. Anders Hayden, whose advice and encouragement guided me from an idea to a completed project.

I would also like to thank my parents, my brother, and Ben for supporting me as always.

# CHAPTER 1 INTRODUCTION

Since 2004, the Supreme Court of Canada has reconceptualized its approach to balancing Aboriginal rights with competing Crown objectives. During that year, the Court established for the first time that the federal and provincial governments of Canada have a constitutional duty to consult<sup>1</sup> First Nations in cases where their treaty rights, land claims, or traditions may be adversely affected by government decision-making or third-party development (Newman 2009, 29). This constitutional duty to consult flows from the Court's interpretation of section 35 of the Canadian Constitution, which is centred on the protection of Aboriginal and treaty rights in Canada (14; see also *Halsbury's Laws of Canada*, 1<sup>st</sup> ed., vol. 1, para. 157-61). In this thesis, I explore the impacts of the duty to consult on the ability of First Nations communities in Canada to engage meaningfully in resource development projects on their own terms.

Canada's historical relationship with First Nations peoples has been rocky at best. Early European settlers in North America did not recognize the validity of Aboriginal societies, and denied Aboriginal peoples their right to sovereignty, property, and religious and cultural freedom (Dickason 1992, 14). As British imperial power became firmly established in North America in the early 19<sup>th</sup> century, the drive to assimilate Aboriginal peoples increased; this period saw the beginning of land-cession treaties, by which the British sought to extinguish what limited land rights Aboriginal peoples still had (15). In 1876, the Canadian *Indian Act* was first enacted – which introduced new measures such as the reserve system, Indian status, and more, allowing the

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<sup>1</sup> In this thesis, the terms “constitutional duty to consult” and “legal duty to consult” are used interchangeably. Since 2004, the Court has added to its interpretation of section 35 of the Canadian Constitution the federal and provincial governments' duty to consult First Nations, giving rise to the term “constitutional duty to consult”. Both terms refer to the legal requirement on governments to consult with First Nations in cases where their rights and title may be adversely affected.

federal government to control most aspects of Aboriginal life. From 1879 to 1996, tens of thousands of Aboriginal children were obligated to attend residential schools intended to make them forget their language and culture, where many of whom suffered abuse; in 2008, Prime Minister Stephen Harper formally apologized to Canada's First Nations for this policy (CBC News 2011, para. 2-3). In 1969, Prime Minister Trudeau and the Aboriginal Affairs Minister, Jean Chrétien, unveiled the *Statement of the Government of Canada on Indian Policy* – most commonly referred to as the White Paper – which proposed to eliminate Indian status, dissolve the Department of Aboriginal Affairs, abolish the *Indian Act*, convert reserve land to private property that can be bought and sold by bands and their members, and more (*Statement of the Government of Canada on Indian Policy* 1969, 7). The White Paper was criticized heavily by Aboriginal peoples, who argued that the document represented a move by the federal government to absolve itself of its responsibilities to First Nations for historical injustices and of its obligation to uphold treaty rights and maintain its special relationship with First Nations (Vowel 2012, n.p.). In 1996, the Royal Commission on Aboriginal Peoples in Canada investigated the historical relationships between governments, First Nations, and Canada as a whole, proposing 440 recommendations and calling for sweeping legislative and democratic reforms to improve these relationships (Aboriginal Affairs and Northern Development Canada 2010, n.p.). In response, First Nations groups pressured the federal government to take action regarding the Commission's recommendations (Hurley & Wherrett 1999, para. 1), but were met with little to no success.

Throughout this tumultuous history, Aboriginal peoples in Canada have spoken out against environmental injustices related to the loss of traditional territories and the devastation of lands and ecosystems (Hazula-DeLay et al. 2009, 7). Today, many First Nations communities



continue to rely closely on the environment for their culture and livelihood; as a result, these communities will often be the first to face any environmental problems that may subsequently affect society as a whole (Borrows 2002, 33). A great deal of resource development has taken place on Aboriginal land which threatens the future of Canada's natural resources and ecosystems. Aboriginal communities have mobilized in order to resist the destructive effects of natural resource development, advocating for the protection of vulnerable ecosystems as well as development practices that are sustainable and just. For example, an alliance of First Nations leaders from British Columbia and Alberta have resisted plans for the proposed Northern Gateway pipeline (which would transport oil from the Alberta oil sands to the West Coast) and the Keystone XL pipeline (which would transport Alberta bitumen to the American Gulf Coast); however, the alliance has yet to see their activism translate into any real environmental policy changes, as representatives from oil companies continue to enter Western Aboriginal territories to survey the land for development (The Canadian Press 2013, para. 1; Hume 2012, para. 11). For the most part, the voices of Aboriginal peoples have been ignored, dismissed or overridden when it comes to issues of the environment – only in the past few decades have Aboriginal peoples even been acknowledged in the ongoing discussion regarding Canada's natural resources (Hazula-DeLay et al. 2009, 3, 10-11).

In 1987, the United Nations World Commission on Environment and Development (UNWCED) recognized Aboriginal peoples and their traditional knowledge in its report on sustainable development entitled *Our Common Future*. The publication – which is commonly referred to as the Brundtland Report – suggested that development “meet the needs of the present without compromising the ability of future generations to meet their own needs” (UNWCED 1987, 15). One of the most oft-cited contributions of this ground-breaking report is that it placed

environmental issues firmly on the international political agenda; in addition, it emphasized the vital need for the active participation of all members of society in making decisions that deal with economic development (40). In particular, the Commission – which was led by former Norwegian prime minister Gro Harlem Brundtland – recognized the importance of indigenous participation in development decisions, emphasizing the traditional knowledge which has allowed these peoples to regulate environmental obligations in their communities and maintain harmony with nature for generations (ibid; Borrows 2002, 32). The Commission noted that indigenous knowledge and customs can be built upon in order to halt the environmental degradation that we currently face (UNWCED 1987, 40); therefore, allowing indigenous peoples a democratic voice in regulating environmental rights and obligations may contribute to the improvement of our communities and natural resources (Borrows 2002, 32-3). While this is not to say that indigenous knowledge alone is the solution to all of our environmental problems, the meaningful inclusion of Aboriginal peoples in the ongoing discussion regarding Canada's natural resources is vital. As the Brundtland Commission noted, some indigenous cultures have enjoyed substantial and long-term environmental successes (UNWCED 1987, 40), and it is important that these lessons be integrated with broader environmental institutions and ideologies in Canada.

Within the context of these broader environmental discussions, very few scholars look to the duty to consult as a way to incorporate indigenous knowledge into the environmental discourse in Canada; in general, there has been very little written on the duty to consult, and misunderstandings of the doctrine are widespread (Newman 2009, 10). It is important that the terms of meaningful consultation be more clearly defined within the context of Aboriginal law in Canada, as one of the main aspirations of the doctrine is to foster negotiation processes that will allow governments, Aboriginal peoples, and corporate stakeholders to develop new futures for

Canada's natural resources while respecting the interests of all parties involved (80, 94).

Ongoing development of the duty to consult may also serve to clarify the complex and often conflicting notions related to the doctrine and its interpretation; like many legal doctrines in Canada, the duty to consult is not static, but contains potential for ongoing growth (92).

The dominant academic literature is not the only area in which discussions of the duty to consult are largely absent; indeed, the doctrine gains little to no attention from the media, the public, or the mainstream political parties in Canada. Surprisingly, the duty to consult has not been featured in the discourse put forward by the Aboriginal rights movement Idle No More, which has instead focused its efforts on pressuring the Canadian government to repeal bills C-38 and C-45 (which allegedly violate treaties, Aboriginal inherent rights and title, and long-standing environmental protections of the land and water), to adopt alternative energy practices and sustainable development, and to abide by the provisions set out in the United Nations Declaration on the Rights of Indigenous Peoples ("Calls For Change", Idle No More 2013, para. 3). The duty to consult is not mentioned in the official mandate of Idle No More; however, the mandate does argue that "[t]he current government and industry have been disregarding [Aboriginal peoples'] collective right to be consulted with any changes that affect us" (para. 1). While it is true that the Canadian government has often failed to meet its duty to consult (Isaac & Knox 2003, 53-4), the duty to consult doctrine still warrants analysis. According to lawyer and author Bill Gallagher, First Nations in Canada have secured an almost unbroken series of 171 legal victories when it comes to resource cases (Gallagher in Ivison 2012, para. 5). Gallagher has argued that the basis for those victories flows from the duty to consult First Nations regarding development on their traditional lands, and considers the legal winning streak "a de facto constitutional amendment" (Gallagher in Schwartz 2013, para. 8).

Environmental justice is defined as the “principle that all people have a right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment” (Agyeman & Evans 2003, 36), and seeks to redress inequitable distributions of environmental burdens arising from environmental racism – discrimination that results in a disproportionate amount of environmental degradation affecting various minority groups around the world (US EPA 2013). Many environmental justice scholars emphasize that grassroots mobilization is highly successful in raising public awareness for environmental injustices (Chambers 2007; Hazula-DeLay et al. 2009; Agyeman 2005; Agyeman et al. 2003); however, an analysis of the communities in which environmental justice victories have been attained – such as Chester, Pennsylvania (against toxic waste facilities), South Central Los Angeles (against the LANCER mass-waste incinerator) and St. James, Louisiana (against Shintec Inc. and their proposed chemical plant) – suggests that real policy changes will not be implemented until appropriate legal counsel is obtained, as each of these communities launched a federal lawsuit to address their environmental inequity concerns (Agyeman 2005, 19). The arguments in favour of the duty to consult – and of legal action in general – coupled with the empirical evidence regarding the number of court cases fought and won by First Nations, render the lack of attention the doctrine receives all the more surprising. Therefore, the goal of this study is to assess the impact of the duty to consult on the ability of Aboriginal peoples to be involved in the processes that govern Canada’s natural resources on their own terms.

In the chapters that follow, the impacts of the duty to consult on First Nations’ engagement in resource development projects in Canada are explored. The discussion is guided by one major research question: what are the effects of the duty to consult on First Nations’ empowerment in resource development projects in Canada? It is important to note that the term

‘empowerment’ in this case could mean many things; for example, it could mean the ability of First Nations to become an economic partner when approached by developers, the ability to ensure that all development on Aboriginal land is sustainable, the recognition by governments and the courts that First Nations must be involved in all aspects of resource development negotiations and that their involvement must be meaningful, or the incorporation of Aboriginal jurisprudence into the Canadian legal system. Empowerment could also mean the ability of a community to achieve its sustainable development goals vis-à-vis the state, or the empowerment of individuals within a community to feel as though they are contributing to a movement towards positive change (while perhaps achieving fewer concrete policy goals vis-à-vis the state). It is more likely, however, that empowerment in this case could mean all of these things and more. By examining the doctrine from an environmental perspective, this thesis presents a new take on interpreting the duty to consult while ultimately contributing to the much-needed efforts in ongoing development in this area.

In order to provide answers to these key questions, I compare the impacts of the duty to consult on three Aboriginal rights cases – *Halfway River First Nation v. British Columbia (Minister of Forests)*, *Haida Nation v. British Columbia (Minister of Forests)*, and *Wii’litxw/Gitanyow First Nation v. British Columbia (Minister of Forests)*. The first case, *Halfway River*, which took place in 1997, is a pre-duty to consult case in which the Court contemplated whether a constitutional duty to consult First Nations exists. The second case, *Haida Nation*, is the first of a trilogy of landmark duty to consult cases in which the Court determined for the first time that the federal and provincial governments of Canada do in fact have a constitutional duty to consult First Nations; of the three landmark cases in duty to consult history, *Haida Nation* has arguably had the most transformative effects on the field of Aboriginal

law in Canada as it is in this case that the Court set out the fundamental terms of the doctrine. The third case, *Gitanyow*, is a more recent duty to consult case that took place in 2008. By comparing these cases, this thesis presents a timeline depicting the evolution of the duty to consult doctrine. In an attempt to isolate the duty to consult as the independent variable, all three of these case studies took place in British Columbia and featured forestry as the type of resource development involved. I have selected four criteria – compensation, reconciliation, meaningful consultation, and the ability of the community to achieve its desired outcome from the legal proceedings – by which the impacts (or lack) of the duty to consult on community empowerment are judged in each case. A situation that meets all four of these criteria may contribute to a more inclusive, collective system for determining the futures of Canada’s natural resources – in which governments no longer act as the sole decision-making power. The analysis of these case studies is guided by three approaches: environmental justice, the Honour of the Crown (a legal concept that guides the Court’s interpretation of the duty to consult), and the Indigenous Knowledge Framework (a set of laws and traditions passed on in Aboriginal communities to protect and govern the land). The conclusions drawn from this comparative case study are connected back to the broader literature pertaining to these three main frameworks.

Chapter 2 of this thesis presents a review of the dominant literature pertaining to the duty to consult. The review begins with a broad introduction to the concepts of sustainable development and environmental justice – in which I provide an analysis of an oft-cited American environmental justice movement located in Chester, Pennsylvania, comparing this movement to the environmental justice movements currently taking place in First Nations communities across Canada. I then review the literature pertaining to the concept of just sustainability in order to highlight the importance of integrating local communities in environmental politics – namely

resource development decisions. The literature review then moves to an analysis of the literature on the duty to consult before examining the dominant legal concept which guides the Court's interpretation of the doctrine – the Honour of the Crown. I then provide further information derived from the literature on the four criteria that I have selected by which the impacts of the duty to consult on community empowerment in each case study are judged. In the final section of the literature review, I examine the Indigenous Knowledge Framework, which contributes to a more comprehensive interpretation of the duty to consult in two ways: (1) it helps us to understand First Nations' unique relationships with the land, which potentially motivate their actions and decisions during processes of consultation, and (2) it gives insight into the relationship between First Nations and the levels of government in Canada, dating back to the time when the Crown assumed sovereignty over traditional lands (Hazula-DeLay et al. 2009, 4). The inclusion of indigenous knowledge is one of the most important ways for First Nations communities seeking environmental justice to become empowered throughout resource development negotiations; in addition, the inclusion of indigenous knowledge may be used to bolster the duty to consult in future resource development decisions. By surveying the literature available on indigenous knowledge, I argue that the duty to consult ought to be interpreted in a way that gives a greater role to indigenous knowledge, citing one example in which the doctrine has already demonstrated its ability to understand, include and reflect Aboriginal perspectives.

Chapters 3, 4, and 5 are dedicated to an analysis of each of the three case studies. These analyses – which are in chronological order – first provide background on the Aboriginal communities involved and the circumstances in which each judicial review case was filed. Second, I provide an overview of the case law arising from each dispute, focusing primarily on the Court's contemplation of whether or not to trigger the duty to consult as well as the processes

of consultation that took place between governments, developers and First Nations. Third, these analyses go beyond the Court's final decisions, outlining the impacts of the rulings 'on the ground' in each community. To determine the varying degrees of success with regards to community empowerment in resource decisions, I evaluate each case using the four key criteria outlined above. These criteria provide the basis for a series of comparisons and conclusions that are outlined in the final chapter.

In Chapter 6, I outline the comparisons drawn from each of the three case studies. From there, I discuss my conclusions and their implications, connecting the discussion back to the broader literature on environmental justice, the Honour of the Crown, and the Indigenous Knowledge Framework. I conclude my argument by suggesting that if the duty to consult is supplemented with Aboriginal self-government, meaning that consultations between First Nations and the Crown take place on a government-to-government basis, the inherent flaws in the way the duty to consult is currently interpreted (discussed in more detail below) could theoretically be eliminated. The establishment of a system of self-government could also conceivably lead to a more inclusive relationship between First Nations and the Crown, as the meaningful involvement of First Nations in all processes regarding the development of Canada's natural resources could result in a less active role for the judicial branch in these circumstances. Given the current political climate of reluctance to engage meaningfully with First Nations on issues of resource development, the duty to consult constitutes a step in the right direction for Aboriginal communities pursuing environmental justice. In the pages that follow, I argue why this has been the case.



## **CHAPTER 2                    LITERATURE REVIEW**

This chapter begins with a broad introduction to the concepts of sustainable development and environmental justice, just sustainability, and the criteria that I have selected which will be used to judge the impacts of the duty to consult in each of the following case studies. After reviewing the literature pertaining to these broader themes, this chapter moves to a review of the literature available on the duty to consult – a legal doctrine which I argue in later chapters has the potential to assist First Nations communities in achieving their just sustainability goals. This chapter concludes with a discussion on the Indigenous Knowledge Framework – which may be used to guide governments and third-party developers throughout processes of consultation so that indigenous knowledge and just sustainability may be featured more prominently in resource development decisions.

### **Sustainable Development**

As mentioned previously, the Brundtland Report recognized the importance of indigenous participation in development decisions, emphasizing the long-term and substantial environmental successes that many of the world’s indigenous populations have enjoyed as a result of their traditional knowledge and customs (UNWCED 1987, 170). More broadly, the Brundtland Report recognized the importance of community participation in decision-making processes – which would help individuals at the local level articulate and effectively enforce their common interest (42). According to the report, “the law alone cannot enforce the common interest”, as it requires community knowledge, support, and greater public participation in decisions that affect the environment (49). Therefore, enforcing the common interest of a community is best achieved by

decentralizing the management of resources upon which local communities depend, promoting citizens' initiatives, empowering people's organizations, and strengthening local democracy (ibid). The report also states that processes of development will generally lead to the gradual integration of local communities into a larger social and economic framework; however, some local communities – namely indigenous peoples – remain isolated due to geographic barriers or social and cultural differences (82). Therefore, empowering these vulnerable groups will require measures to protect the institutions that enforce sustainable resource use as well as an emphasis on giving local communities a decisive voice in the decisions about resource use in their area (83).

Prominent conceptions of sustainable development within the literature place emphasis on collaboration and the sharing of ideas; for example, some scholars have argued that sustainable development is a “co-evolutionary” outcome reconciling economic and environmental paradigms (Carvalho 2001, 63). On the other hand, a more radical branch of the literature suggests that the achievement of sustainable development would only be possible if it involved a transformation of the way humans interact with the natural environment (64). This strand of the literature usually disagrees with the conventional perception that economic growth and modernization are necessary components of development, arguing instead for alternative models of development where more local participation and further inclusion of different social groups is important (ibid). Carvalho therefore concludes that one of the primary strengths of sustainable development is that it can be interpreted in many different ways, holding out the promise of reconciling these divergent views and establishing environmentally friendly forms of development that appeal to a wide variety of interests (ibid). While conceptual imprecision is also one of the main weaknesses of sustainable development (ibid), the broad nature of the term

leaves much room for collaboration with indigenous peoples and the inclusion of indigenous knowledge in ensuring sustainable resource development decisions (2009, 92-3; McLaren 2003, 20-1).

In recent years, scholars have identified a veritable shift away from uniquely environmental approaches to sustainable development toward a more “joined-up” approach that links the environmental, social and economic principles of sustainability (Agyeman 2005, 61). This shift is most clearly seen in the movement toward sustainable communities – which espouse a number of environmental, social and economic goals (63-4). According to the UK Department of Environment, Transport and the Regions (DETR), a sustainable community seeks to “protect and enhance the environment, meet social needs, and promote economic success” (1998). For example, the environmental goals of a sustainable community may be achieved through the responsible use of energy, water, and other natural resources or the minimizing of waste (ibid). DETR suggests that the social needs of a sustainable community may be met by “[maximizing] everyone’s access to the skills and knowledge needed to play a full part in society” or by “[empowering] all sections of the community to participate in decision-making and [considering] the social and community impacts of decisions (ibid). Finally, a community’s economic goals may be met by “[creating] a vibrant, local economy that gives access to satisfying and rewarding work without damaging the local, national, or global environment” (ibid). Agyeman (2005) argues that the individual characteristics of sustainable communities are not “a simplistic wish list of unachievable goals”; in addition, he noted that a number of rural areas and small towns in the United States had already taken steps toward becoming sustainable communities (64).

## **Environmental Justice**

The environmental justice framework has most commonly been applied to poor African-American communities in the southern United States (Agyeman 2005, 2); more recently, however, the framework has been applied to First Nations communities in Canada that have been affected disproportionately by environmental degradation (Hazula De-Lay et al. 2009, 7). Cable and Cable (1995) argue that environmental injustice results from instances where the costs of pollution are unfairly distributed among individuals or areas; in other words, environmental injustice occurs where there is inequity in the impact of environmental hazards (Bowen et al. 1995, 641) or in the distribution of environmental protections (Hartley 1995, 277). Agyeman and Evans (2003) define environmental justice as “the principle that all people have a right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment”, adding that the concept of environmental justice is theoretically compatible with sustainable development as it is situated at the nexus of social equity, economic growth and environmental protection (36). Environmental justice encompasses both procedural – the meaningful involvement of all people in litigation – and substantive – the right of all people to live in and enjoy a clean and healthful environment – justice aspects (Agyeman & Evans 2003, 36). Mitchell (2002) emphasizes self-actualization and community empowerment in his definition of environmental justice, adding that only with recognition and a commitment to equity can there be adequate community participation in the political processes that develop and manage environmental policy (557), while Draper and Mitchell (2001) argue that environmental justice is “best realized through governments in consultation and negotiation with local communities” (96-7).

In some cases, environmental injustice is perpetuated by financial hardship within the community. Bullard argues that the “environmental protection apparatus is broken and needs to be fixed”, adding that environmental injustice promotes a false choice that poor people have had to make between no jobs and no development versus risky, low-paying jobs and pollution (Bullard n.d., n.p.) – a choice which he referred to as “environmental blackmail” (*Dumping in Dixie*, Bullard 2000, 99). Indeed, a number of internal conflicts exist within Aboriginal communities which divide their populations; for example, some members of the community may support development because of the jobs it will bring, while other more traditional members may want to preserve the land – even in cases where the proposed development is sustainable. Therefore, an additional challenge in these situations will be to reconcile the economic interests of the community with the traditions and practices that shape Aboriginal culture.

Academics have argued that the origins of the environmental justice movement are rooted in a standard narrative in which civil society groups and academic researchers organize and mobilize to protest government policies and industrially-produced environmental hazards (Hazula-DeLay et al. 2009, 7). Ikporukpo argues that environmental justice is increasingly being perceived as a human rights issue, largely because of the discriminatory location of toxic waste facilities in the United States (especially in African-American neighbourhoods) that triggered the emergence of the environmental justice movement in the early 1980s (Ikporukpo 2004, 324). Similarly, Bullard and Johnson (2000) argue that environmentalism is now equated with social justice and civil rights (555). Hazula-DeLay et al. argue that the standard environmental justice narrative needs contesting, as First Nations communities in Canada have mobilized to protest environmental injustices since European contact (Hazula-DeLay et al. 2009, 7). They assert that the term ‘justice’ should no longer be limited to Western legal concepts (though the term is

deeply rooted in and originates from the Western legal tradition), due to the fact that Canada is increasingly becoming a land of people who do not only originate from North Atlantic regions (9). They argue that environmental justice involves “fairness of treatment and the ability of all marginalized peoples to be able to make substantive qualitative changes to the impositions of the larger society, especially those that adversely affect their rights and freedoms” (ibid). Only in the past few decades have Aboriginal peoples been included in the ongoing environmental justice conversation in Canada (McGregor 2009, 36), and their perspectives have informed new and diverse ways for governing the land (Hazula-DeLay et al. 2009, 11). McGregor (2009) writes that, in most Aboriginal cultures, all things in nature are considered persons – rocks, salmon, trees, etc. (28). In this regard, Borrows (2002) writes that “procedural realignments, through institutional reform and interest group reconfiguration,” require not only the environmental knowledge of Aboriginal peoples to be taken into account, but also full participation of Aboriginal peoples, so that it is less a [Western] legal discourse and more a conversation of interrelationship and interdependency of spirit, law and culture (46, Hazula-DeLay et al. 2009, 10).

### **Grassroots Activism and Legal Action: Environmental Justice in Chester, Pennsylvania**

As previously stated, many environmental justice scholars place emphasis on grassroots activism as a way to generate public awareness and to capture the attention of the government and the media regarding a particular environmental issue; however, an analysis of the communities in which steps towards environmental justice have been taken suggests that community-level activism is limited in how much it can accomplish, and that pursuing legal action is one of the most important steps toward achieving environmental justice. Chambers (2007) argues that

community-level mobilization can be successful in raising public awareness for environmental injustices, but that real policy changes will not be achieved until appropriate legal counsel is obtained (28). A classic example of an environmental justice movement that aligned itself with the legal community in order to bolster its political influence is the Chester Residents Concerned for Quality Living (CRCQL) movement, which began as a result of extraordinary grassroots activism to resist the clustering of commercial waste treatment facilities in Chester, Pennsylvania – a predominantly poor African-American community (Foster 1998, 777). From 1986 to 1996, the Pennsylvania Department of Environmental Protection (DEP) issued five permits for waste treatment facilities in Chester, promising much-needed jobs to the community’s residents which instead brought many forms of pollution (780). The residents of Chester began to fear for their health as the fumes, smoke and noise from the waste incinerators worsened (ibid). These conditions prompted the formation of a citizen’s group – the CRCQL – and, under its leadership, the community launched a series of protests, petitions, blockades, and town halls to resist the waste treatment operations (780-1). The grassroots activism of the Chester residents resulted in several minor successes for the community; in addition, the plight of the CRCQL began to attract local media coverage (814-15). As a result of this media attention, several public interest lawyers began to contact the CRCQL, and soon the community discovered a new weapon in its fight against the waste facilities – legal action (815).

The CRCQL won a series of important legal victories over the waste processing corporations that operated in Chester; for example, the organization reached settlements with DELACORA and Westinghouse, operators of the two largest waste incinerator facilities in the area (824). The CRCQL also ensured that the DEP denied permits to two waste incinerator companies that intended construct facilities to burn contaminated soil in Chester (824). In 1998,

the CRCQL filed a judicial review case under Title VI of the Civil Rights Act, which states that “no person ... shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal financial assistance” (Civil Rights Act 1964, para. 601). In this case, the CRCQL claimed that the DEP discriminated against their community when it permitted five waste treatment facilities to be built in Chester (Foster 1998, 779). In one of the CRCQL’s most significant victories, the Federal Court ruled that citizens have a “private right of action” to challenge the proliferation of waste facilities on the grounds of environmental racism (825). Throughout these legal battles, the CRCQL learned that legal action brings much-needed attention to environmental justice struggles; however, it also learned that legal strategies rarely address the larger political and structural problems at hand (819). Instead of relying solely on legal action in order to achieve justice, the CRCQL used its legal victories to reinforce its position as a political actor (ibid).

### **Environmental Justice and the Duty to Consult: Connecting the Chester Case to First Nations Communities**

The grassroots activism of Aboriginal peoples in Canada has garnered significant media attention for Aboriginal rights issues; in addition, public awareness of movements like Idle No More is widespread (“Awareness of Idle No More”, CBC News 2013). First Nations have employed similar tactics to those of the CRCQL; for example, Idle No More protesters have organized rallies, petitions and blockades to resist environmental injustices (“9 Questions About Idle No More”, CBC News 2013). Like the CRCQL, Idle No More has garnered significant media attention for environmental justice issues; however, unlike the CRCQL, Idle No More has



brought both Aboriginal rights and environmental concerns to the forefront of mainstream political discourse. In some cases, First Nations communities acting independently of the Idle No More movement have supplemented their grassroots activism with legal action; for example, the Mikisew Cree and Frog Lake First Nations have launched duty to consult cases in Federal Court regarding the changes to the Fisheries Act and the Navigable Waters Protection Act contained within bills C-38 and C-45 (MacKinnon 2013, para. 1). Both bands maintain that these changes adversely impact lands, waters, and resources that are subject to Aboriginal or treaty claims; in addition, both bands claim that they were not consulted at any stage by the federal government prior to the bills' implementation (para. 2). These cases have not yet come to a close in Federal Court; however, as stated previously, First Nations have an almost unbroken series of legal victories in resource cases in which the government is found to have a legal duty to consult (Gallagher in Ivison 2012, para. 5). Like the CRCQL, First Nations groups in Canada have made significant strides for the environmental justice movement by supplementing grassroots activism with legal action.

There are several key differences between the environmental justice movements in Chester and in First Nations communities in Canada; however, perhaps the most prominent of these differences is the duty to consult. Currently, there is no duty to consult with minority groups (like the residents of Chester) – let alone indigenous peoples – in the United States. First Nations peoples in Canada are therefore in a unique legal position which stems from the Crown's acquisition of sovereignty over indigenous peoples and their territories, giving rise to Aboriginal rights and title in the common law of Canada (Slattery 2005, 434). These rights continue to be enforced in Canadian courts; however, Aboriginal peoples are required to prove the existence of these rights on a case-by-case basis in order to gain judicial protection (ibid). Prior to *Haida*

*Nation*, the Supreme Court maintained that Crown sovereignty over indigenous peoples was legally unassailable; however, many indigenous peoples in Canada view the Crown's acquisition of control over their lands as an illegitimate act which took place without their consent (434-5). In the *Haida Nation* decision, a new constitutional paradigm for governing Aboriginal rights emerged (436). This paradigm – on which the duty to consult is based – mandates the Crown to negotiate with Aboriginal peoples for the recognition of their rights in a contemporary form that balances their needs with the broader needs of Canadian society (ibid). In *Haida Nation*, the Supreme Court was careful to avoid suggesting that the Crown gained sovereignty over Aboriginal territories in a *de jure* or lawful manner; instead, it maintained that the Crown gained *de facto* sovereignty – which it accepts for practical purposes (437).

The unique nature of the duty to consult – and the impressive series of legal victories for First Nations in resource cases following the landmark *Haida* decision – may lead one to believe that environmental justice movements in First Nations communities are more likely to result in legal action than American environmental justice movements; however, this is often untrue. As mentioned previously, the duty to consult is surprisingly absent from the mandate of the largest and most well-known Aboriginal rights movement in Canada – Idle No More. One can only speculate why this has been the case. First, launching judicial review cases in Federal Court is expensive, making the courts inaccessible for the multitude of First Nations communities that struggle financially (Patterson 2013, para. 2).

Second, there is a deep level of mistrust among First Nations communities towards the levels of government in Canada that dates back to the Crown's acquisition of sovereignty over Aboriginal territories (Slattery 2005, 434). This act – which is viewed as illegitimate by many Aboriginal peoples in Canada – was exacerbated by the ensuing policies of dispossession,

segregation and disenfranchisement imposed on many Aboriginal communities by the Crown (ibid). According to Morley Googoo, regional chief for Nova Scotia and Newfoundland for the Assembly of First Nations, government trust has continued to diminish in First Nations communities (Googoo in Carlson 2013, para. 4). Several other chiefs in the Assembly of First Nations added that their bands are more suspicious of the federal government than ever due to the passage of bills C-38 and C-45, new financial transparency rules for reserves that were allegedly passed without proper consultation, and the unwillingness of the Prime Minister to meet with First Nations leaders alongside the Governor General (para. 8). These events are compounded by the fact that the governments of Canada often fail to meet their duty to consult (Isaac & Knox 2003, 50), which has reportedly sparked feelings of restlessness and anger among many First Nations communities (Kulchyski in Carlson 2013, para. 10).

A third possible reason why legal action is not a natural choice for many Aboriginal communities pursuing environmental justice is that the courts are often perceived as a forum where participation is restricted to a small number of elites, leaving little room for what Agyeman (2005) calls “deliberative and inclusionary processes and procedures (DIPS)” (2). According to Agyeman, DIPS include “visioning, study circles, collaboration, consensus-building and consensus conferencing, negotiation and conflict resolution, and citizen’s juries” (2-3). The overall aim of DIPS is to involve a broad cross-section of “average” citizens in the development of shared values, consensus, and a vision of the common good (3). For large, national movements like Idle No More, grassroots activism is arguably more effective in rallying widespread community support and capturing the hearts and minds of larger, more diverse populations (Smith 2008, 27).

Despite the lack of attention the duty to consult receives from movements like Idle No More, there are still a number of First Nations communities in Canada who choose to pursue environmental justice in the courts. The interests of these communities vary on a case-by-case basis; for example, some more traditional bands engage in legal action in order to ensure the total protection of the lands, waters, and ecosystems, while others use the courts in order to become economic partners in resource development projects, ensuring that practices of sustainable development are established on their lands.

### **Just Sustainability**

Agyeman et al. (2003) define just sustainability as “the need to ensure a better quality of life for all, now and into the future, in a just and equitable manner, whilst living within the limits of the supporting ecosystems” (5). There are four main areas of concern that arise from this definition: quality of life, present and future generations, justice and equity, and living within ecosystem limits (Agyeman 2005, 92). Justice is, in terms of just sustainability, not simply about procedural justice or the ability to access decision-making processes or decision-makers; as mentioned previously, it is also about distributive and substantive justice – affordable housing, a clean and aesthetic environment, and so on (ibid). More specifically, just sustainability is founded on the principles of intergenerational equity and intra-generational equity, but it is important to note that intra-generational equity is the reason for the development of the environmental justice movement and is of great importance to the development of sustainable communities (94). Intra-generational equity refers to fairness among present populations, such as quality of life or equality of opportunity. Inter-generational equity refers to fairness between current and future generations; for example, inter-generational equity is concerned with striking a reasonable

balance between the ability of present generations to meet their own needs without compromising the ability of future generations to meet their own needs.

Low and Gleeson (1998) argue that “sustainable development without environmental justice is an empty formula” (14). Indeed, one of the central aims of just sustainability is to expand the dialectic of justice to ecological justice, which requires a shift in our thinking about the non-human world from instrumental to moral and a re-evaluation of the way we define our self-interest and moral values (94-5). Agyeman argues that just sustainability increasingly questions the justice and equity implications of international agreements, especially those related to economic development (95), while Sachs (1995) argues that one of the best ways to protect environmental rights is to uphold the basic civil and political rights of the individual. These ideas are increasingly becoming recognized and, once they are enshrined in policy, they have the capability to enable legal challenges to existing practices that could not be affected previously (Agyeman 2005, 95). An example of this confluence of activism, policy and law is the aforementioned use of Title VI of the 1964 Civil Rights act by the CRCQL to prove discriminatory intent in an environmental justice case (ibid). Just sustainability is an acknowledgement of the successes of the environmental justice movement in getting justice on the environmental agenda (99).

Another central premise of just sustainability is the development of sustainable communities where development is not only economically and ecologically sound but also just (99-100). Just sustainability uses deliberative tools to help communities develop common values and visions and monitor progress toward their shared goals (106). Agyeman argues that proactivity (communities working towards what they want) rather than reactivity (communities working to prevent things they do not want) is a much better position around which to articulate

policy demands (ibid). The role of communities in resource development decisions as outlined by the literature on sustainable development, environmental justice and just sustainability guides the analysis of the duty to consult in each case study.

### **The Duty to Consult**

The Crown's duty to consult First Nations was first enunciated by the Court in 1990 in *R. v. Sparrow* – an important decision regarding Aboriginal fishing rights (Isaac & Knox 2003, 50). In this case, Ronald Sparrow of the Musqueam First Nation was charged under the Fisheries Act for using a drift net to fish for food that was longer than permitted by the terms of his community's fishing license (*R. v. Sparrow* 1990, 1076). Sparrow admitted to fishing with a net larger than permitted, but rejected the federal government's charges on the basis that he was exercising his Aboriginal right to fish for food, arguing that the fishing net regulations were inconsistent with section 35(1) of the Constitution (ibid).<sup>2</sup> The Court held that Aboriginal fishing rights are protected under section 35 of the Constitution and that any limitation on these rights by the federal government without justification constitutes a *prima facie* or self-evident infringement of the collective Aboriginal right to fish for food (1119-20). In his ruling for this case, Chief Justice Dickson contemplated whether the Aboriginal group in question had been consulted by the federal government with respect to the restrictions on fishing nets prior to their establishment, arguing that, "[t]he Aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed

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<sup>2</sup> The established rights of the Aboriginal peoples of Canada are outlined in section 35 of the 1982 *Constitution Act*. Section 35 of this Act reads as follows: "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed; (2) in this Act, the "Aboriginal Peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada; (3) for greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired; (4) notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons" (*Constitution Act* 1982).

regarding the determination of an appropriate scheme for the regulation of the fisheries” (1119). The Court ruled in favour of Sparrow, establishing a “Sparrow test” to determine the degree to which government legislation can limit Aboriginal rights (1115). The Court did not recognize the need for a legal duty to consult based on the presumption that the Crown’s fiduciary duty to First Nations – a duty which encompasses the concepts of confidence, good faith, and loyalty – was sufficient in ensuring that governments would not engage in ‘sharp dealings’ with Aboriginal peoples (1120).

The Crown’s fiduciary duty to First Nations continued to define the relationship between governments and Aboriginal peoples until the landmark *Haida Nation v. British Columbia* ruling in 2004, in which the Court established a legal duty to consult Aboriginal peoples for the first time (*Haida Nation* 2004, para. 35). According to Chief Justice McLachlin, who set out the fundamental terms of the duty to consult in *Haida Nation*, “[a legal] duty [to consult] 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” (ibid). During this case, the final shape of Aboriginal rights and title had not yet been established, presenting unforeseen challenges to the Court whose interpretation of the *Haida* case required a clear definition of Aboriginal rights and title (Newman 2009, 12; see also *Halsbury’s Laws of Canada*, 1<sup>st</sup> ed., vol. 1, para. 157-61). As a result of these challenges, the Supreme Court determined that governments must consult with Aboriginal peoples in order to avoid detrimentally impacting their interests during the process of proving and resolving a claim (ibid).

In *Haida Nation*, McLachlin also established that the duty to consult is owed solely by the federal and provincial governments; therefore, third-party developers are not obligated to consult Aboriginal peoples (para. 53). This decision was based on the theory that the duty to

consult flows from the Crown's assumption of sovereignty over lands and resources formerly owned by Aboriginal peoples, providing no support for an obligation on third parties to consult; however, this assertion does not mean that third parties can never be held liable to Aboriginal peoples (ibid). In addition, the duty to consult is not currently owed by municipal governments (Newman 2009, 30-1). In cases where local governments carry out mandates previously established by another level of government, lower court case law suggests that the duty to consult will not arise, based on the expectation that consultation should have occurred at the stage at which the mandate was initially established (31). This dismissal of a municipal-level duty to consult has led to criticisms regarding the method by which the Court determines whether or not a constitutional duty to consult will arise.

The Court determines whether the federal and provincial governments in Canada have a duty to consult with First Nations through the use of a "trigger test" (24) – which has been subject to a number of critiques from scholars and Aboriginal peoples alike. In general terms, the duty to consult will be triggered when knowledge of the existence of Aboriginal title claims, Aboriginal rights claims, or treaty rights claims is demonstrated by the Court (29; see also *Halsbury's Laws of Canada*, 1<sup>st</sup> ed., vol. 1, para. 161-3). Without these triggering conditions, there is no duty to consult (Newman 2009, 25); however, in particular circumstances, the duty to consult will be triggered when, as Newman points out, "the knowledge of a particular title or rights [claim] must be linked to the contemplation of government action that, on the Supreme Court of Canada's description, 'might adversely affect it'" (29). According to Newman, the adverse effect element creates internal limits on when the duty to consult is triggered; for example, in order to pass the Court's trigger test, the potential adverse effects facing the Aboriginal community in question must be "specifically detrimental", meaning that the duty to



consult will not be triggered where there is only relatively minimal adverse effect (ibid). A second internal limit on the duty to consult is that, in cases where the economic benefits of a proposed initiative or project are large, the Court can order a cost-benefit analysis that would determine whether or not the potential economic prosperity outweighs the adverse effects (60). If the Court determines that this is indeed the case, or if it determines that the damage caused to a community's traditional territory by governments or developers is significant during the course of a dispute, the duty to consult shifts to a duty to accommodate, and the Aboriginal community affected would negotiate with government and third-party developers in order to receive economic compensation (61, see also *Halsbury's Laws of Canada*, 1<sup>st</sup> ed., vol. 1, para. 163-4). According to Newman (2009), supporters of these cost-benefit analyses claim that this type of economic accommodation is "broader than that of compensation, and it allows for a more nuanced consideration of possible win-win combinations that build economic activity within Aboriginal communities"; however, critics have claimed that this particular course of action constitutes a breach of the duty to consult, and that it has serious implications for possible precedents (61).

Much of the duty to consult literature is focused on developing a clear definition of the term 'consultation'; for example, some scholars have focused their conceptions of consultation on the Crown's moral and legal obligations to First Nations (Isaac & Knox 2003, 50-4), while others have focused on the potential for the duty to consult to reconcile the interests of all parties involved in resource development decisions (Newman 2009, 46-7, 63-80). Following the trilogy of landmark duty to consult cases, reconciliation has been used to structure the processes of interaction between the Crown and First Nations which, in most cases, has led to ongoing requirements of responsive consultation, accommodation or compensation where Aboriginal

rights have potential application (Newman 2008, 85). The concepts of balance and compromise are inherent in the notion of reconciliation, suggesting that the Court continually renews and extends the requirements for governments attempting to engage in meaningful consultation with First Nations (ibid). Conversely, Ariss (2012) and Borrows (2002) focus their definitions on the ability of the duty to consult to incorporate Aboriginal law and customs into processes of consultation. The dominant legal approach to consultation – discussed below – combines various elements of these varying definitions, basing its interpretation of the duty to consult on historical obligations of the Crown as well as current constitutional duties.

### **The Duty to Consult and the Honour of the Crown**

According to Chief Justice McLachlin in *Haida Nation*, “[t]he government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the Honour of the Crown” (*Haida Nation* 2004, 3). As a result of this landmark ruling, the Honour of the Crown has become the most commonly advanced theoretical foundation for the duty to consult doctrine (Newman 2009, 16). The approach maintains that the federal and provincial governments in Canada must act in good faith when dealing with Aboriginal peoples in order to facilitate meaningful consultation that is appropriate to the circumstances (16-17, *Haida Nation* 2004, para. 41). The Honour of the Crown is founded on the claim that ‘settler peoples’ in Canada – who engage in ongoing relations with indigenous peoples – must deal honourably with them and, more broadly, act in accordance with the virtue of honour (Newman 2009, 17). Put simply, Aboriginal peoples inhabited North America before European contact but they were never conquered; as a result, many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties while others – notably those in British Columbia – did not sign such

treaties with the Crown (*Haida Nation* 2004, para. 25). When Aboriginal rights and titles are not outlined clearly in treaties, these *potential* claims are embedded in section 35 of the Constitution (ibid). The Honour of the Crown obliges governments to respect both proven and unproven Aboriginal rights, which in turn requires them to negotiate with First Nations in order to determine the scope and content of those rights (Slattery 2005, 436). The approach also obliges the Crown to consult with Aboriginal peoples in all cases where its activities may have a potential adverse effect on their asserted rights and, in appropriate circumstances, to accommodate Aboriginal rights by adjusting these activities (436-7). In sum, the Honour of the Crown is founded on the presumption that the special relationship between the Crown and First Nations – which dates back to the period in which the Crown claimed sovereignty over pre-existing Aboriginal territories – requires the governments of Canada to deal honourably with Aboriginal peoples (436).

The Honour of the Crown has been criticized extensively in the duty to consult literature; however, it is important to note its strengths. First, the Honour of the Crown fits readily with the claim that governments must consult Aboriginal peoples regarding unproven claims like those in *Haida Nation*, as undermining or stalling an Aboriginal right during litigation or negotiation would be considered dishonourable (Newman 2009, 17). Second, the easy triggering of the duty to consult – in cases where there is a significant adverse effect on the Aboriginal community in question – fits readily with the conception of honour (ibid). Newman argues, then, that the Court's conception of honour must carry considerable weight, prohibiting all 'sharp dealings' with Aboriginal peoples regardless of the severity of the potential adverse effects; however, due to the nature of the Court's trigger test, the duty to consult is considered a spectrum, suggesting that certain stronger adverse effects will trigger the duty while other weaker adverse effects will

not (ibid). This aspect of the duty to consult does not act in accordance with the Honour of the Crown, which is founded on the claim that honourable dealing with First Nations is of the utmost importance. The Honour of the Crown is thus incompatible with the notion of a spectrum, which limits the Court's ability to trigger the duty to consult in cases where the potential adverse effect on an Aboriginal community may be considered minimal. Indeed, there are a number of discrepancies between the Honour of the Crown in theory and in practice; as discussed below, the courts' interpretations of the duty to consult and its related concepts like the Honour of the Crown often differ greatly from the functioning of the doctrine in practice.

### **The 'Law in Books' Versus the Law in Action**

In 1910, Roscoe Pound famously distinguished between the "law in books" and the "law in action", claiming that there is often a significant divide between legal theories and judicial administration (Pound 1910, 15). He argued, however, that these two concepts would inevitably diverge, particularly in circumstances where social progress rendered the established law less relevant, where static legislation did not allow for flexibility, and where administrative mechanisms were not functioning properly (24). The duty to consult is one area in which the law in books differs greatly from the law in action, due to the fact that the doctrine is being shaped not only in the courts, but also in the day-to-day policies of governments, Aboriginal communities, and third-party stakeholders (Newman 2009, 66). In developing policies of consultation, it is potentially dangerous for decision-makers to rely solely on the dominant legal perspectives without attempting to incorporate the law in action – which could result in a rather limited view of the duty to consult (ibid). This limited view, for example, would not take into consideration the practical concerns of governments, First Nations or stakeholders regarding the

processes of consultation, nor would it consider things like indigenous knowledge. The coalescence of the efforts of governments, First Nations and stakeholders to implement the law into action through the development of policies that facilitate meaningful consultation constitutes an important area of study within the duty to consult literature, describing a great deal about the ability of the duty to consult to reconcile the law in books with the law in action (ibid). In the section that follows, I outline the four criteria by which the impacts of the duty to consult on community empowerment in resource decisions are judged.

### **Explaining the Four Criteria Used to Assess the Duty to Consult In This Study**

The four criteria that I have selected by which the impacts (or lack) of the duty to consult on First Nations' empowerment in resource development decisions are judged in this study are compensation, reconciliation, meaningful consultation, and whether the community in question was able to achieve its desired outcome from the legal proceedings. The first criterion – compensation – refers to the monetary reimbursement of a community's legal fees, transportation costs to and from consultations or the courts by the federal or provincial government, and, in some cases, of resources that had been damaged or extracted unlawfully throughout the course of a dispute. In *Delgamuukw v. British Columbia* (1997), the Supreme Court of Canada acknowledged that Aboriginal title has an “inescapably economic aspect” (para. 169). Often, when a Court rules in favour of a First Nation, the presiding judge will order the government that has perpetrated the injustice to allocate funds to the First Nations community to pay for its legal or transportation-related expenses. In addition, funds may also be allocated to the community to compensate for natural resources that had been damaged or extracted unlawfully from their traditional territory during the dispute; for example, in *Mikisew Cree First*

*Nation v. British Columbia* (2005), the Court recognized that government development had caused significant harm to the traditional lands and way of life of the Mikisew Cree. Therefore, in addition to repaying the community's legal and transportation fees, the British Columbia provincial government was also ordered to allocate funds to the community based on a court-determined formula in an attempt to restore the damage caused to the community.

The second criterion – reconciliation – is less clearly defined than compensation. In the most basic terms, reconciliation refers to the re-establishment of cordial relations between two parties that were once on opposite sides of a dispute. In the context of Aboriginal affairs in Canada, however, the ways in which governments and First Nations engaged in resource disputes may accomplish this are unclear; in addition, many critics of Canadian Aboriginal affairs argue that cordial relations have never existed between governments and First Nations, creating even greater problems for governments and First Nations seeking to reconcile their interests. Legal scholars have worked extensively to define the terms of reconciliation as outlined by law; for example, Slattery (2008) argues that reconciliation is a central objective within the context of providing a strong legal basis for achieving just settlements between First Nations and the larger society, adding that, “reconciliation must strike a balance between the need to remedy past injustices and the need to accommodate a full range of contemporary interests” (43, 45). According to Newman (2008), the concept of reconciliation demands justification on any government action that infringes upon Aboriginal rights or title; therefore, he argues that reconciliation functions as a restraint on government action (82). Schwartz (2013) notes that reconciliation has sometimes taken the form of revenue-sharing agreements between governments and First Nations or of partnerships with resource developers that involve both governments and First Nations (para. 8). These types of arrangements require compromise and a

willingness on the part of both parties to alter their original development plans – which, in theory, contributes to reconciling government interests with those of the First Nations communities affected.

The definition of the third criterion – meaningful consultation – has been debated at length in the duty to consult literature. For Newman (2009), consultation means going above and beyond the minimum requirements set out by the legal requirements of the duty to consult, and he argues that consultation embodies “the possibility of genuinely hearing one another and seeking reconciliations that work in the shorter-term while opening the door for negotiations of longer-term solutions to unsolved legal problems” (63-4). For the governments, Aboriginal communities, and corporate stakeholders potentially engaged in consultations, Newman claims that it is important to bear in mind not only the legal parameters of the duty to consult but also the longer-term prospects for trust and reconciliation contained within the doctrine that will enable all Canadians to live together in the years to come (64). In the case studies that follow, I assess the level of meaningful consultation in each case based on the willingness of governments to take into account, understand, respect, accept, and accommodate the interests of the First Nations communities potentially affected by the proposed resource development. This willingness on the part of governments to consult meaningfully may be reflected in the extent to which a community’s interests are included in formal agreements or other arrangements arising from consultation. The assessments of meaningful consultation in each case are also based on the willingness of First Nations to consider new approaches and ideas with regards to the proposed resource development in the spirit of compromise and good faith relations.

The fourth criterion used in this thesis to determine the impacts of the duty to consult on First Nations’ empowerment in resource decisions is whether or not the community in question

was able to achieve its desired outcome from the legal proceedings. In the case law for each case, I examine the communities' petitions to the Court – lists of claims, requests, and other demands presented to the Court which clearly outline what the Aboriginal claimants hoped to achieve in each case – in order to present a summary of the desired outcomes of each community from the legal proceedings. These desired outcomes are then compared to the actual outcomes of each case, highlighting which requests were granted by the Court and which were not. In the following section, I examine the set of indigenous laws and traditions that potentially motivate and shape the claims, requests, and other demands put forward by Aboriginal communities seeking environmental justice.

### **The Indigenous Knowledge Framework**

The Indigenous Knowledge Framework is a theoretical approach that I apply to the duty to consult founded on aboriginal storytelling, knowledge and traditions, which are too often overlooked by the literature on the duty to consult doctrine. Research on the duty to consult has mostly been carried out by “socially dominant newcomers”, and Western knowledge forms have often been treated as the one true story of how the world works, dictating what should and should not count as ‘legitimate’ forms of knowledge (Hazula-DeLay et al. 2009, 4). Dismissing or marginalizing other epistemologies leads to inequalities within the literature; for example, Aboriginal knowledge is passed down via word-of-mouth, whereas Western nations place emphasis on the value of the written word – therefore, unwritten stories are often dismissed and the written text becomes the de-facto account (5). In the *Haida Nation* ruling, Chief Justice McLachlin recognizes indigenous laws for governing the land, but refers to Crown sovereignty as the assumed, de-facto approach (*Haida Nation* 2004, para. 20).



Many Aboriginal cultures in Canada believe that the knowledge required to protect the land was given to them by the Creator thousands of years ago (McGregor 2009, 33). This knowledge has subsequently been passed on by Aboriginal peoples for generations, so that individuals, communities and nations are able to ensure the continuation of Creation for future generations – today, this concept is referred to as sustainable development (ibid). The Indigenous Knowledge Framework also includes understandings, beliefs, perceptions, customs and laws for governing the land (34). Lawrence (2009) argues that, for indigenous peoples, land is crucial to how identity is understood (42). Indeed, being severed from their traditional lands by settler governments has frequently resulted in struggles between First Nations and government bodies created to manage resources (ibid). Lawrence claims that today, activities like hunting, fishing, and gathering of berries and medicines allow for some degree of cultural continuity in Aboriginal communities, even though much of the younger generation has lost the traditional language and extensive indigenous knowledge on which their culture is based (43). Indigenous knowledge has become increasingly important for environmental activists at the grassroots level, as it provides a unique perspective on appropriate relationships with the land; however, recognition of the Indigenous Knowledge Framework or indigenous jurisprudence in the courts continues to remain limited (36).

The duty to consult constitutes an important step toward the inclusion of indigenous knowledge and natural law in Canadian jurisprudence; however, some scholars believe that the doctrine ought to be interpreted in a way that gives a greater role to indigenous knowledge. Ariss (2012) argues that there is further to go than espousing the duty to consult legally and politically in constructing a relationship between First Nations and Canadian governments that may truly recognize and affirm Aboriginal rights (32-3). In order to develop wider recognition and richer

application of Aboriginal natural laws for governing the land, it is important to understand the central values in indigenous legal traditions (41).

In *Platinex v. Kitchenuhmaykoosib Inninuwug (KI) First Nation* – an Ontario duty to consult case from 2006 that arose from a mining dispute – the KI community developed a guide expressing the traditions and natural laws that it has abided by for generations; in addition, the guide expressed the community’s view on what meaningful consultation with potential developers and the Ontario government should look like once the duty to consult had been triggered (51). In this case, the KI community presented their understanding of their connection to the land to the court, relying on its traditions and laws as outlined in the aforementioned guide (62). These actions allowed the KI community to assert their inherent, Aboriginal and treaty rights in a way that was true to their responsibility to protect the land (62-3). The court’s initial response to these claims reflected an understanding of the KI community’s attachment to the land and that the proposed mining project would cause irreparable harm to the community (63). The court’s ability to hear, understand, accept and apply KI’s legal perspective played a central role throughout the dispute (53).

In the chapters that follow, I assess the impacts of the duty to consult on First Nations’ empowerment in resource development decisions. To accomplish this, I assess each case based on four main criteria: meaningful consultation (which takes into account indigenous knowledge and natural law), compensation, reconciliation, and whether or not the Aboriginal community in question was able to achieve its desired outcome from the legal proceedings. The impacts of the duty to consult (or lack thereof) in each case are then compared in the final chapter.

## CHAPTER 3

## HALFWAY RIVER FIRST NATION

This chapter presents an overview of a pre-duty to consult case – *Halfway River First Nation v. British Columbia (Minister of Forests)* – which arose from a dispute regarding the Aboriginal right to hunt, trap and gather on traditional lands. This chapter accomplishes four main things. First, it establishes a timeline of the events leading up to the launching of the case, suggesting that consultation between the provincial government, third-party developers and the Halfway River First Nation was either insufficient or non-existent in the absence of a legal duty to consult. Second, it provides an analysis of the case launched by Halfway River in the Supreme Court of British Columbia. Five of the eight claims put forward by Halfway River in its petition to the Court were centred on the need for a legal duty to consult; however, the Court responded by arguing that the fiduciary duty of the Crown, the “duty of fairness” and the “right to be heard” were sufficient in protecting Aboriginal rights (*Halfway* 1997, 17). It also argued that the fiduciary duty prevented the Court from compelling the Ministry of Forests to consult with Halfway (*Halfway* 1997, 23, 65). I critique the Court’s logic, arguing that, without a constitutional duty to consult, discussion around any consultation duties is limited to the rules on infringement of established section 35 rights – which leaves little room for the inclusion of indigenous knowledge or any attempts at reconciliation. Third, I examine the case brought to the British Columbia Court of Appeal by the Ministry of Forests as a result of the first decision, highlighting the presiding judge’s recognition of the duty to consult (*Halfway* 1999, 2, 79). Fourth, using the criteria outlined in the previous chapter, I assess the lack of the duty to consult on the empowerment of the Halfway River community throughout the forestry negotiations.

## **Background**

Throughout the 1990s, ongoing disagreements between parties with competing interests in the futures of temperate old growth forests came to a boiling point in British Columbia (Coady et al. n.d., 1). At this time, British Columbia's forestry sector was undergoing major economic transformations in response to the increasing global demand for forest products (Hayter & Barnes 1997, 7-8) – which led to rising concerns regarding the deforestation and degradation of British Columbia's forest ecosystems (Coady et al. n.d., 2). On one side of the dispute, the provincial government, forestry companies and logging contractors advocated for the continued development of British Columbia's coastal forests, while on the other side, local communities, First Nations and environmental non-governmental organizations (ENGOS) argued in favour of forest conservation (ibid). Eventually, the dispute reached a stalemate – with local communities, First Nations and ENGOS challenging any plan that did not address social, cultural and environmental concerns – leading all parties to the realization that none was in a position to achieve its goals on a unilateral basis (1, 4). The disagreements regarding the futures of British Columbia's forests underscored the Halfway River First Nation dispute, in which tensions flared between the local indigenous community and the British Columbia Ministry of Forests regarding the proposed development of an area of forested land traditionally used by members of the Halfway River.

In 1995, the British Columbia Ministry of Forests issued a cutting permit to Canadian Forest Products Limited (Canfor) that authorized the company to harvest trees on an 850-acre area of forested land referred to as Cutting Permit or CP 212 (*Petition re: CP 212 and the JRPA* 1998, 6). This area of land borders directly on the Halfway River First Nation reserve, which is located about 120 kilometers northwest of the city of Fort St. John, British Columbia (*Halfway*

*River* 1999, 9). At the time of the case, Halfway River was an extremely poor community that relied extensively on CP 212 – an area rich in plants and wildlife – for its physical, cultural, and spiritual sustenance (*Petition re: CP 212 and the JRPA* 1998, 5-6). The members of the Halfway River community are the direct descendants of the Hudson Hope Beaver people who, from time immemorial, were part of an organized Aboriginal society that occupied and used the territory in and around what is now the Halfway River First Nation reserve (5, *Halfway* 1997, 2). In 1900, the Beaver people signed Treaty No. 8 with the Crown, which recognized and affirmed their Aboriginal right to hunt and gather food in or around the area encompassed by CP 212 (*ibid*). On March 3, 1995, the Treaty 8 Tribal Association (acting on behalf of Halfway River) notified the Ministry of Forests that CP 212 was in an area that was subject to a Treaty Land Entitlement Claim – which requires the Crown to set aside additional reserve lands for First Nations from time to time – asking that no cutting permits be issued for the CP 212 area (6-7). The validity of the underlying factual basis of Halfway’s Treaty Land Entitlement Claim was confirmed by the Department of Aboriginal Affairs and Northern Development Canada (6). Halfway River was not consulted at any time regarding the transfer of the cutting permit to Canfor.

In late March 1995, the Ministry of Forests notified the Treaty 8 Tribal Association that it would withhold all cutting permits with regards to CP 212 (7). By April of that year, the Ministry had advised Canfor that it would not approve cutting permits in CP 212 pending the review of the Treaty Land Entitlement claim issue raised by Halfway (*ibid*). Then, in March of the following year, the Minister of Forests wrote to the Treaty 8 Tribal Association advising that “it is not the policy of the government to halt resource development pending the resolution of the Treaty Land Entitlement claim” (*ibid*).

A few months later, the Ministry of Forests offered to undertake, with Halfway, a joint Traditional Land Use Study of Halfway's traditional lands (ibid). According to Lifeways of Canada (2008), a private company specializing in archaeological and heritage consulting, a Traditional Land Use Study "seeks to gauge the extent of past and present use of the land for traditional purposes important to First Nations peoples including, but not limited to, hunting, fishing, trapping, collection of plants including berries and herbal medicines and ceremonial pursuits" (para. 4). The data for these studies is typically collected via interviews with Elders or other community members, as well as field visits to areas where specific information from oral sources is recorded (ibid). These studies provide information which enables governments, First Nations and third parties to gauge the use of the area and to preserve the cultural significance of Aboriginal territories that may be adversely affected by resource development or other government decision-making; in addition, they help build the collective traditional knowledge of the community (ibid). Halfway agreed to conduct a joint Traditional Land Use study, but repeatedly urged the Ministry to provide sufficient funding so that it may engage in such a study to determine the traditional and continuing land uses of CP 212 (*Petition re: CP 212 and the JRPA 1998*, 7-8). In June of 1995, the Ministry of Forests indicated that it could fund a Traditional Land Use Study of Halfway's lands; however, the Court found that the Ministry did not at any point provide any resources to Halfway to fund such a study (ibid).

During this time, Canfor had notified Halfway that it was unwilling to refrain from going through with its proposed logging project until after a consultation process with members of the First Nation had taken place, and that it would only consider consultation with respect to activities while they were ongoing (8). Halfway consistently informed both Canfor and the Ministry of Forests that the attempts at consultation were, in their view, insufficient; in addition,

Halfway did not have the financial or the human resources needed to respond adequately to the range of issues proposed by the forestry plans (ibid). Despite this, Canfor submitted an application to the Ministry of Forests for cutting permits in three cutblocks in CP 212 in the fall of 1995 (ibid).

Halfway did not give up on the Traditional Land Use Study for CP 212. In December of 1995, Halfway and the Treaty 8 Tribal Association submitted a proposal and budget summary to Forest Renewal British Columbia – a now-defunct Crown corporation that delivered various programs aimed at supporting the forests and the forestry industry – in order to fund the study (ibid, FRBC 2013, para. 1). In response, the Ministry of Forests assured Halfway River Chief Bernie Metecheah that it would support the community’s funding proposal for the Traditional Land Use Study – which would consist of an inventory of all traditional uses of CP 212 (*Petition re: CP 212 and the JRPA* 1998, 9). In February of 1996, the Ministry of Forests expressed concerns regarding Halfway’s Forest Renewal funding proposal, suggesting that the First Nation re-submit the proposal for reasons unknown to the Court – Halfway was not advised of the Ministry’s concerns (ibid). In May of 1996, Forest Renewal British Columbia rejected Halfway’s funding proposal for the Traditional Land Use Study (ibid).

Prior to the rejection of Halfway’s funding proposal for the Traditional Land Use Study, the Ministry of Forests commissioned a Cultural Heritage Overview – a report that summarizes information pertaining to traditional, historic and contemporary First Nations land use – for CP 212 (10). Halfway was not consulted with regards to the scope, nature, or extent of the overview, their participation in it, or the approval of the third-party consultants who would be conducting the overview (ibid). The Cultural Heritage Overview was completed over a period of five days in February of 1996 without any input from Halfway (11).

Upon completion of the overview, the Halfway River band council received a letter from the Ministry of Forests informing it that the cutting permit for CP 212 issued to Canfor was ready for final review (ibid). The Ministry indicated that it wished to meet with representatives from Halfway to discuss the community's concerns regarding CP 212 on March 1, 1996 (ibid). Halfway contacted the Ministry to indicate that it was unable to prepare a complete list of the community's concerns regarding the proposed forestry activity by the date specified in the letter, and asked that the meeting be rescheduled for March 29, 1996 (ibid). The meeting proceeded between the Ministry of Forests and Canfor without the representatives from Halfway on the original date specified (ibid).

In September of that same year, Canfor sent a letter to the Halfway River band council expressing its intention to log, in the 1996-1997 season, four additional cutblocks in the CP 212 area that were not specified in its initial proposal (12). All permits applied for by Canfor were subsequently approved and issued to the company by the Ministry of Forests at a meeting with representatives from the British Columbia Ministry of the Environment and Canfor (12-13). Representatives from Halfway River were not invited to attend this meeting (13). Following the meeting, Halfway met with an official from the Ministry of Forests to ask that the decision to issue permits to Canfor be reconsidered; during the following month, the Ministry indicated to Halfway that its request had been refused (ibid).

In December of 1998, Chief Bernie Metecheah of Halfway River filed a petition to the Supreme Court of British Columbia on behalf of himself and all members of his community, declaring that "the Ministry of Forests has a fiduciary and constitutional duty to adequately consult with the Halfway River First Nation [regarding the decision to log CP 212] and [...] that the level of consultation to date is insufficient" (2). Therefore, the petition featured two main



requests: (1) that the Court establish a constitutional duty to consult First Nations, and (2) that the Ministry be required to consult with Halfway regarding any proposed logging activity in CP 212 (ibid). To support these requests, the petition featured three main claims: (1) the Ministry's discretion regarding the CP 212 decision was unlawfully fettered<sup>3</sup>; (2) the Ministry's decision was significantly biased, and (3) the Ministry failed to address relevant considerations regarding the traditional uses of CP 212 (13-14). With regards to the fettering of discretion, the petition noted that Krista Gunnarsen, an Aboriginal Forestry Advisor for the Ministry of Forests, had indicated that, in her view, Halfway had not been adequately consulted with respect to CP 212, that the decision to log had been made by officials in Victoria, British Columbia, and that "the District's hands were tied" (13-14). The petition also noted two instances of bias throughout the CP 212 decision. First, after meeting with representatives of the Treaty 8 Tribal Association, a representative of the Ministry of Forests noted that he was "getting tired of this sort of lamenting on the injustices of the past during the pre-Treaty environment" (14). Second, the District Manager of the Ministry of Forests for the Fort St. John area was quoted as commenting on the "possible replacement" of "some of the more vocal [Treaty 8] chiefs", including one he referred to as "blockade Bernie" (14). Third, the petition demonstrated that the Ministry was aware that there were archaeological sites located on CP 212 when it made its decision to issue the cutting permits to Canfor; in addition, the Ministry considered the policy of the provincial government throughout its decision with respect to Aboriginal and treaty rights in circumstances where this policy was not in compliance with the existing law on Aboriginal and treaty issues (15-16). After submitting the petition to the court, a judicial review case regarding the CP 212 issue was launched by Halfway in 1997 in the Supreme Court of British Columbia.

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<sup>3</sup> If a decision maker unlawfully ignores relevant information or judges a situation prior to obtaining all relevant information, then he or she has fettered their discretion (Le Sueur et al. 1999, 244).

### **Halfway River First Nation v. Ministry of Forests (1997)**

In this case, the Court was tasked with addressing each of the three claims presented by Halfway in its petition regarding the CP 212 cutting permit; in addition, it was tasked with providing answers to two questions related to Aboriginal law: (1) does the approval of the cutting permit infringe on the rights guaranteed to Halfway in section 35 of the Constitution, and (2) does the provincial Crown owe a fiduciary duty to Halfway and, if so, what is the scope of this duty and has the Ministry of Forests breached it (*Halfway* 1997, 3-5)? Regarding the first claim – the fettering of the Ministry’s discretion – the Court sided with Halfway, arguing that, by treating the government policy of not halting development as a given and by simply following the direction of the provincial government not to halt development, the Ministry did in fact fetter its decision to proceed with the cutting permit pending the resolution of the Treaty Land Entitlement Claim (15).

The second claim in Halfway’s petition – which alleges real bias as well as a reasonable apprehension of bias – was struck down in part by the Court (16). Regarding its allegations of real bias, the petitioners pointed to instances of “improper conduct, [failure] to consult, irrelevant considerations, ignoring reasonable requests, making errors in law and patently unreasonable findings of fact” (*Petition re: CP 212 and the JRPA* 1995, 3-4). The Court decided that these improprieties were not adequately proven and were therefore insufficient in establishing real bias; however, the Court did side with Halfway regarding the reasonable apprehension of bias – a decision which was based on the aforementioned “duty of fairness” (*Halfway* 1997, 16-17). The duty of fairness encompasses an obligation on the Crown to make all reasonable efforts and provide every opportunity for First Nations affected by resource development to be heard (28). To illustrate the Ministry’s reasonable apprehension of bias and its failure to comply with the

duty of fairness, the Court pointed to one event in particular – the decision to proceed with consultation meetings, and the proposed forestry development, despite Halfway’s absence at the negotiating table (18). In doing so, the Court decided that the Ministry implied that if representatives from Halfway were able to attend the consultation meetings, the application approval for Canfor’s cutting permit may not have proceeded (ibid). This implication, however, was struck down by the Court after it reviewed a statement made by the Ministry of Forests District Manager, David Lawson, who is quoted as informing Chief Metecheah that, “if [Canfor’s] application is in order, and abides by all Ministry regulations and the Forest Practices Code I have no compelling reasons not to approve their application” (Lawson in *Halfway* 1997, 19). According to the Court, “this statement strongly suggests that Lawson had already concluded that there was no infringement of Treaty or Aboriginal rights” (*Halfway* 1997, 19). Lawson had come to this conclusion without any information from Halfway, constituting a breach of the duty of fairness (25).

The third claim in Halfway’s petition – the failure of the Ministry to adequately address the traditional uses of CP 212 – was arguably the most important consideration that was brought before the Court as it attempted to tackle the issue of “meaningful consultation”. The Court had already ruled that the Ministry’s assumption that there was no infringement on Aboriginal or treaty rights without obtaining any input from Halfway regarding CP 212 was patently unreasonable; in addition, it determined that there was substantial evidence to suggest that logging in CP 212 would have a significant adverse effect on Halfway’s way of life (25-8). As mentioned previously, Halfway emphasized the need for a constitutional duty to consult (*Petition re: CP 212 and the JRPA* 1995, 2); however, the Court disregarded this need, deciding that the

fiduciary duty of the Crown encompasses a consultation requirement and that the fiduciary duty alone was sufficient in protecting Aboriginal rights (28).

At the time of the case, the courts referred to the Sparrow test to determine whether the Crown's infringement on Aboriginal rights was justified (33). The Sparrow test consists of a series of questions that the Court must ask itself regarding the validity of Crown objectives and the protection of Aboriginal rights (ibid). The Sparrow test establishes a requirement to consult with First Nations<sup>4</sup>; in addition, it states that the Aboriginal community in question is responsible for proving that the Crown interfered with its rights (ibid, 36). To accomplish this, Halfway turned to Treaty 8, which states that, in return for the surrender of their lands, the Beaver people would reserve "the right to pursue their usual vocations of hunting, trapping, and fishing throughout the tract surrendered" (36). The Court concluded that any interference with these rights would therefore constitute a *prima facie* infringement on Halfway's Treaty 8 rights (39). Citing Sparrow, the Court set out several terms and conditions for meaningful consultation to occur: (1) the government must carry out meaningful and reasonable discussions with representatives of the First Nations community involved; (2) the Crown must fully inform itself of the practices and views of the community affected, and (3) it must ensure that the group affected is provided with full information regarding the proposed legislation or decision and its potential impact on Aboriginal rights (50). The Court concluded that the Ministry of Forests did not pass the Sparrow test due to its failure to consult with Halfway; in sum, the Court ruled in favour of the Halfway River First Nation and ordered that the decision to approve the CP 212 cutting permit be quashed (57, 65).

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<sup>4</sup> Governments must prove that any infringement of Aboriginal rights is justified; therefore, they must consult with First Nations to determine what rights (if any) are at stake. It is up to governments to prove that they have consulted First Nations regarding these rights; however, the Sparrow test does not clearly define what the terms of this consultation should be, nor does it legally require governments to consult First Nations in all cases (Brackstone 2002, 2, 16).

Since the duty to consult was not imposed by any statute, but rather as a consequence of the Crown's fiduciary duty to First Nations and the requirements of procedural fairness, the Court ruled that it could not compel the Ministry of Forests to consult with Halfway (65). This decision was based on the rulings from previous Aboriginal rights cases – *R. v. Delgamuukw* and *R. v. Perry* – as well as the common law concept of *mandamus* (64-5).<sup>5</sup> In the final paragraph of the written decision for the case, the Court remarked that it “*hoped* that no further decision [would] be made [regarding CP 212] without meaningful consultation with, and inclusion of, the petitioners, which is an integral component of the Crown's fiduciary obligation as well as being vital to the requirement of procedural fairness [emphasis added]” (ibid). This type of language is simply not strong enough to prevent development projects on Aboriginal lands from happening in the future without proper consultation – especially considering the fact that forestry companies like Canfor may re-submit harvesting proposals for particular areas of forest every five years (3).

For Halfway, it might seem that justice was served without the duty to consult; however, this outcome did nothing to prevent future logging disputes in CP 212 from happening all over again. When the Court relies on the Crown's fiduciary duty to protect the rights of First Nations, consultation duties become limited to the rules on infringement of established section 35 rights (through the use of the Sparrow test) – which leaves little room for the inclusion of indigenous knowledge or attempts at reconciliation. This legal victory did nothing to facilitate good relations between Halfway River and the Ministry of Forests, nor did it attempt to bring the disputing parties together to collaborate or consider sustainable economic solutions going forward; in fact,

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<sup>5</sup> An order of *mandamus* is issued by a court of superior jurisdiction and commands an inferior tribunal, corporation, government department or individual to perform or refrain from performing a particular act – the performance or omission of which is required by law as an obligation (Bellissimo n.d., 1.). In addition, *mandamus* can only be used to compel performance of a statutory duty (*Halfway* 1997, 64). The Ministry of Forests claimed that the request for a constitutional duty to consult outlined by Halfway in its petition constituted an order of *mandamus* – and the Court agreed (65).

as stated previously, the Court outright refused to oblige the Ministry of Forests to consult with Halfway. Like many aspects of Aboriginal law in Canada, the act of consultation is highly symbolic. In 1900, Halfway's ancestors – the Beaver people – signed Treaty 8 with the Crown; therefore, shouldn't Halfway and the Crown continue to come together in consultation to honour these agreements when disputes arise? Indeed, in resource cases, the courts have proven to be an effective forum for Aboriginal communities seeking environmental justice; however, without the duty to consult, the court is the sole arbiter of the dispute, relying on highly legalistic practices – like the fiduciary duty, the Sparrow test, and procedural fairness – that are more inclusive to elites from the legal community and less so to members of affected Aboriginal communities.

The need for a legal duty to consult figured prominently in Halfway's petition to the Court – it wished to reshape the field of Aboriginal law and the methods for solving resource disputes between the Crown and First Nations in future situations. While Halfway was successful in preserving its surrounding forest, nothing changed for future Aboriginal rights disputes. The goal of the duty to consult is to foster reconciliation, giving an equal voice to governments, third-party stakeholders and Aboriginal peoples within the context of meaningful consultations and honourable relations; furthermore, it is about collaboration and the generation of new norms regarding the future of Canada's natural resources (Newman 2009, 94). Critics have argued that the Court had a duty to compel the Ministry to consult with Halfway given that the Honour of the Crown was not the only thing at stake – the relationship between Halfway and the government was also threatened. By failing to compel the Ministry to consult Halfway, the Court may have indirectly facilitated a relationship of confrontation and mistrust between Halfway and the government of British Columbia.

### **Halfway River v. British Columbia (1999)**

The legal battle between Halfway and the Ministry of Forests did not end following the Supreme Court of British Columbia's decision. In 1999, the Ministry of Forests appealed the Court's decision to quash the approval of Canfor's application to log in CP 212, arguing that the judge "erred on all counts" (*Halfway* 1999, 4-6). They claimed that, properly construed, Halfway's right to hunt and trap in CP 212 as outlined by Treaty 8 is subject to the Crown's right to "require" or "take up" lands for, among other purposes, "lumbering" and that the issuance of the cutting permit to Canfor did not breach Halfway's right to hunt (6). Justice Finch of the British Columbia Court of Appeal maintained that the cutting permit infringed Halfway's right to hunt in CP 212 and established that the Crown "had failed in its duty to consult" (7, 81). Justice Finch further remarked that it would be inconsistent with the Honour of the Crown to justify the infringement on Halfway's rights where the Crown had not met this duty (81). Justice Finch did not specify the scope or content of the duty to consult, nor did he establish that governments would be required to consult First Nations in future situations. Whether or not the Court of Appeal would compel the Ministry to consult with Halfway was not discussed, and the request for a legal duty to consult put forward by Halfway in its petition was ignored yet again.

At the time of the *Halfway River* court cases, the decade-long reign of the British Columbia New Democratic Party had entered its final years. The failure of the BC NDP government and the Ministry of Forests to consult with Halfway regarding the traditional uses of CP 212 suggests that, at the time, no government – regardless of party – could be fully trusted to protect Aboriginal rights. One might expect the left-leaning BC NDP to be more sympathetic to Aboriginal rights; however, even the BC NDP – through the BC Ministry of Forests – failed to consult Halfway throughout the CP 212 dispute. This failure reinforced the need for a legal duty

to consult First Nations – which would require all governments to consult First Nations prior to engaging in resource development projects in which Aboriginal or treaty rights may be adversely affected.

### **Assessing Community Empowerment in Halfway River**

The members of the Halfway River community struggled to empower themselves inside and outside the courtroom throughout the CP 212 dispute. In June of 1995, Halfway threatened to blockade the entrance to CP 212 if loggers from Canfor approached the area (*Halfway* 1997, 70); however, the effectiveness of this tactic is unknown – especially considering the financial, political and human resources the Ministry of Forests and Canfor had at their disposal. From 1996-1997, Halfway was consistently denied the opportunity to provide input to the Ministry of Forests regarding the traditional uses of CP 212 (*Petition re: CP 212 and the JRPA* 1995, 9-13). When Halfway took legal action against the Ministry in 1997, members of the community struggled to get involved in the deliberation as the courts are less inclusive than processes of consultation. Despite its legal victories in both the British Columbia Supreme Court and the Court of Appeal, the Halfway River community was denied its request for a constitutional duty to consult; in addition, the Court refused to compel the Ministry of Forests to consult with Halfway, hoping that meaningful consultation would take place between the two parties in the future (*Halfway* 1997, 65). This outcome did nothing to prevent similar resource disputes from happening in CP 212 all over again.

Following the Court's decision, Halfway River continued to pressure the Ministry of Forests to complete its review of the outstanding Treaty Land Entitlement Claim for CP 212 – which, if approved, would recognize CP 212 as official, treaty-protected Halfway River territory.



In 2001, the Ministry of Forests finally completed its review of this claim – which had been pending since April of 1995 (*Petition re: CP 212 and the JRPA* 1998, 7). Two years later, the Ministry of Forests released a report entitled *Fort St. John Timber Supply Area and Timber Supply Review* (BC Ministry of Forests 2003, 1). This report, which had been completed in conjunction with Canfor, noted that the timber supply analysis outlined in the report “does not consider restrictions imposed on harvesting in the Halfway River First Nation Treaty Entitlement Claim Area” (7). Canfor noted that Halfway’s Treaty Entitlement Claim Area had been deferred from harvesting indefinitely and “should not contribute to the [timber harvesting land base] at this time” (ibid). Therefore, even without a duty to consult, Halfway River was empowered to secure an important environmental victory by preventing Canfor from logging in CP 212.

However, there are three important considerations that must be discussed here. First, the fact that the community continued to pursue the approval of its Treaty Land Entitlement Claim demonstrates that the outcome of the court case in *Halfway River* – which rejected the community’s request for a legal duty to consult – did not go far enough in reassuring community members that logging would not take place on their traditional lands. Second, following the court case, the onus was on Halfway River to ensure that CP 212 would not be logged in the future, whereas in duty to consult cases, it is the responsibility of governments to prove to communities and the Court that resource development projects will not infringe on Aboriginal rights – conversely, if a project is found to infringe on those rights, governments must prove that the infringement is justified. Third, the process of reviewing and approving the Treaty Land Entitlement Claim was extremely slow – taking just under seven years to complete. The duty to consult provides communities with the opportunity to express their concerns regarding a particular resource development issue to governments and developers and receive an immediate

response. Despite these complications, by pressuring the Ministry of Forests to approve the Treaty Land Entitlement Claim following the court's decision, Halfway was able to solidify an important environmental victory in CP 212.

The criteria used to assess the impacts of the duty to consult on community empowerment in each case are compensation, reconciliation, meaningful consultation and whether the community was able to achieve its desired outcome from the legal proceedings. With regards to the first point – compensation – the BC Supreme Court first turned to the Sparrow test to determine what compensation, if any, would be appropriate in this case. Section 2(b) of the Sparrow test asks, “[i]s there a valid [government] objective, has the Honour of the Crown been upheld” (*Sparrow in Halfway* 1997, 33)? The Court then determines the answer to this question by asking a series of follow-up questions, which includes question (iii), “[i]s compensation available” (*ibid*)? The Sparrow test then states that compensation should only be made available in cases where an Aboriginal community's lands had been expropriated by the government either before or during the dispute; since Halfway's lands had not been expropriated, the Court determined that this type of compensation was irrelevant and would not be awarded (*ibid*). Similarly, the Court decided that none of the timber resources on Halfway's traditional territory had been unlawfully taken up or damaged by Canfor during the dispute at hand; therefore, once again, no compensation was awarded as there was no duty to accommodate. The Court did, however, order the provincial government to reimburse Halfway for its costs throughout the case, making this the only economic compensation the community received. In the BC Court of Appeal, the outcome of the 1999 *Halfway River* case echoed the Supreme Court's decision. In sum, these outcomes reflect the legality of the situation brought before the Court; therefore, the fact that Halfway was not awarded compensation is entirely appropriate in

this case – in the following two case study chapters, compensation is a more relevant consideration as compensable logging activity took place unlawfully on Aboriginal land.

The second point – reconciliation – refers to striking a balance between government and Aboriginal interests (which most often involves a restraint on government action) and re-establishing good relations between governments and communities once engaged in disputes. Reconciliation also encompasses the idea of compromise and a willingness of both parties to alter their original stance on resource development issues in the spirit of establishing good relations. In *Halfway River*, the Ministry of Forests was unwilling to alter its original decision to develop the timber resources on Halfway’s traditional lands; in addition, it consistently refused to consult with Halfway or to establish any type of compromise regarding initiatives such as the Traditional Land Use Study, the Cultural Heritage Overview, meetings with Canfor, and, ultimately, the approval of the forest licenses (*Petition re: CP 212 and the JRPA 1997*, 8-12). The Ministry of Forests refused to strike a balance between its interests and the interests of Halfway River via a restraint on its actions or other means (although the Court did impose restraint on the Ministry’s actions by rejecting its decision to approve the forest licenses); in addition, it refused to establish any type of revenue sharing agreement or economic partnership to reconcile the interests of the disputing parties going forward. Due to the lack of consultation, the community struggled to empower its members to establish good faith relations with the Ministry of Forests during the CP 212 dispute.

The third point – meaningful consultation – embodies the idea of governments going above and beyond mere consultation to genuinely hearing, understanding, respecting, accepting and accommodating the interests of First Nations communities in resource disputes. As stated previously, in this case, the Ministry of Forests consistently refused to consult the Halfway River

community regarding its interests and Aboriginal rights and title with regards to CP 212. Prior to the establishment of the duty to consult, governments were not legally required to consult First Nations communities that may be negatively affected by resource development. The Halfway River community clearly struggled to empower its members to consult meaningfully with the Ministry of Forests and Canfor regarding the proposed development of CP 212 given the Ministry's refusal to take into consideration the interests of the community and the absence of a legal duty to consult. It is uncertain whether Halfway would have altered its stance on the proposed resource development in CP 212 in the spirit of compromise as no open dialogue was ever established between the community and the Ministry of Forests.

The Halfway River First Nation also struggled to empower its members with regards to the fourth criterion – the ability of the community to achieve its desired outcome from the legal proceedings. In its petition to the Court, Halfway River requested an order that would quash the approval of the forest licenses for CP 212, declare that the Ministry of Forests owes a duty to adequately consult with Halfway and that the level of consultation that had taken place was insufficient, compel the Ministry to consult with Halfway regarding the effects of timber harvesting in CP 212 on its Aboriginal rights, and prohibit any decision regarding CP 212 until consultation had been completed (*Halfway* 1997, 64). Of these four requests, the Court, which ultimately ruled in favour of Halfway River (as it quashed the approval of the forest licenses), granted only one – the request to quash the approval of the forest licenses to Canfor for CP 212 (which is arguably the most important request in terms of environmental sustainability). The granting of this request suggests that important environmental victories for First Nations were possible even without a duty to consult. With regards to the other three requests – which were centred on consultation and the establishment of a legal duty to consult – the Court stated that it

“hoped that no further decision [would] be made [regarding CP 212] without meaningful consultation” (65). As stated previously, this type of language is simply not strong enough to prevent future environmental injustices in CP 212, especially given the ability of logging companies to reapply for forest licenses for this area once every five years (at the time, it was uncertain whether or not the community’s Treaty Land Entitlement Claim for CP 212 would be approved by the Ministry of Forests). In sum, this victory only guaranteed Halfway the ability to exercise its Aboriginal hunting rights in CP 212 without interference from Canfor logging for the next five years; therefore, the community struggled to empower its members to achieve their desired outcomes from the legal proceedings.

## **Conclusion**

Consultation – when conducted honourably – has the potential to lend a community-based focus to resource development projects while giving members of the community an equal voice in deciding the future of Canada’s natural resources. With no constitutional duty to consult, the members of the Halfway River First Nation struggled to empower themselves regarding reconciliation, meaningful consultation, and the ability to achieve its desired outcome regarding a legal duty to consult from the legal proceedings. While justice was served in the Courts – meaning that Canfor’s proposal to cut trees in CP 212 was quashed – the rules surrounding the resubmission of forestry proposals and the political climate of promoting forestry development threatened to create more Aboriginal rights disputes for Halfway and other First Nations communities in British Columbia. This demonstrates the mixed nature of Halfway River’s legal victory – which was important in terms of environmental sustainability, but did not prevent potential logging problems from taking place in the future. In 2004, however, a similar

Aboriginal rights case regarding a forestry dispute would be brought before the Supreme Court of Canada – granting Halfway’s request for a constitutional duty to consult.

## CHAPTER 4

## HAIDA NATION

This chapter presents an overview of a landmark duty to consult case – *Haida Nation v. British Columbia (Minister of Forests)* – which arose from an issue regarding the transfer of a Government of British Columbia tree farm license to a forestry company called Weyerhaeuser Co. – which permitted forestry activities to take place on lands traditionally claimed by the Haida (*Haida Nation* 2004, para. 4). Again, this chapter accomplishes three main things. First, it presents a timeline of the events leading up to the launching of the case, highlighting the changing discourse surrounding the Crown’s moral and legal obligations to First Nations (para. 5-6, 9). Second, it provides an analysis of the case launched by the Haida in which the Supreme Court established for the first time that the federal and provincial governments of Canada have a constitutional duty to consult First Nations and, in some cases, accommodate their interests (para. 10). Third, I once again use four criteria – compensation, reconciliation, meaningful consultation, and the ability of the community to achieve its desired legal outcomes – in order to examine the impacts of the newly-established duty to consult on the empowerment of members of the Haida community during resource development decisions.

### **Background**

By the early 2000s, the parties engaged in the previously-discussed conflict regarding the future of British Columbia’s coastal rainforests had reached a preliminary agreement based on collaboration and the development of new conservation-based approaches to forest management (Coady et al. n.d., 1). The agreement – which was entitled the *2001 BC Coastal Framework Agreement* – came as a result of several key events founded on compromise and reconciliation;

for example, all parties agreed to halt conflicts for a certain period of time during which the focus of the discussions would be turned to innovation (7). During this time, many BC coastal forest companies announced that they were willing to engage in voluntary harvesting moratoria, ENGOs began to allocate funding to locally-based forestry solutions processes, First Nations agreed to negotiate and develop land use plans with developers and the government, and the BC provincial government agreed to apply conservation biology and ecosystem-based management practices to forest planning (ibid). According to Coady et al., “[t]he pathway to the 2001 Coastal Framework Agreement demonstrates how the complex issues around forest management and conservation require commitments by adversarial interests to conflict free periods in which all parties focus on innovation. Through ongoing dialogue and collaboration, solutions can emerge” (ibid).

2001 is also significant as it was during this year that the BC Liberals formed government, putting an end to the BC NDP’s decade-long reign and signaling an even less conciliatory approach to consultation with First Nations. In cases such as *Gitksan v. British Columbia* (2002), *Paul v. British Columbia* (2001), and *R. v. Shanoss* (2002), First Nations communities continued to struggle to empower their members throughout resource disputes in the forestry industry and others, as the government would not engage in consultations regarding the traditional uses of lands designated for development or the Aboriginal right to hunt, fish, trap and gather. While innovation may have been the focus of newer debates regarding forestry, this case demonstrates beyond a doubt that, regardless of political leanings, no government in British Columbia was eager to voluntarily engage in consultations in order to protect Aboriginal rights. *Haida Nation* is the culmination of years of emphasis on the need for a legal duty to consult First Nations and signifies a turning point in Aboriginal affairs in Canada.



In 1999, the British Columbia Ministry of Forests authorized the transfer of a tree farm license (TFL 39) to a forestry company called Weyerhaeuser Co., permitting the company to cut down trees in an area of the Haida Gwaii islands designated as Block 6 (para. 3-4). The Haida Gwaii islands are located west of the mainland of British Columbia and have traditionally been the homeland of the Haida people for hundreds of years (para. 1). At the time of the case, the Haida had unofficially claimed ownership of these islands for over a century, maintaining that the islands' cedar forests remain central to their livelihood and culture (para. 1-2). The tree farm license issued to Weyerhaeuser was challenged by the Haida, who claimed that the license was transferred from the government to the company without their consent and, for several years, over their objections (para. 4). Despite this, Weyerhaeuser continued to harvest trees on Haida Gwaii, which led the Haida to launch a lawsuit objecting the transfer of the tree farm license to Weyerhaeuser and asking that the license be set aside (para. 5). According to the Court, the Haida argued "legal encumbrance, equitable encumbrance and breach of the fiduciary duty, all grounded in their assertion of Aboriginal title" (ibid).

The Haida had claimed ownership of the Block 6 lands for centuries; however, at the time, these claims were not recognized by the Crown (para. 7). During the case, the Haida had begun the process of proving their Aboriginal title to the Court – a task in which they were confident they would succeed due to the strength of their claims to Haida Gwaii (ibid). The Haida were worried, however, that by the time this process was complete (which could take years) they would already find themselves deprived of the forests that are vital to their livelihood and culture as Weyerhaeuser would not halt operations pending the approval of the land claim (para. 7-8). The Court noted that, at the time of the case, official ownership of the lands belonged to the Crown and, exercising its legal title, the Crown granted Weyerhaeuser the right to harvest

trees in Block 6 of the land; however, the Haida also claimed title to the land – a title which they were trying to prove – and objected to the forestry activities in Block 6 (para. 6). The Court was therefore required to reconcile these opposing land claims and to determine what duty, if any, the government owed to the Haida people; more concretely, its task was to determine whether the provincial government was required to *consult* with the Haida regarding the transfer of the tree farm license and *accommodate* their concerns with regards to the forests before they had proven their title to the land and their Aboriginal rights (para. 6).

### **Haida Nation v. British Columbia (2004)**

Throughout *Haida Nation*, the Court relied on previous Canadian Aboriginal law cases – like *R. v. Sparrow* and *Delgamuukw v. British Columbia* – as well as the New Zealand Ministry of Justice’s *Guide for Consultation with Maori* in order to inform its decision (para. 46-8). These precedents provided the basis for the Court’s decision that the government of British Columbia had a duty to consult with the Haida prior to the transfer of the tree farm license and prior to any timber harvesting by Weyerhaeuser Co. in Block 6 (para. 75). Due to the fact that the Haida title to Block 6 had not yet been established and that the Court’s interpretation of the case required a clear definition of Aboriginal rights and title, the Court ruled that governments must consult with Aboriginal peoples in order to avoid detrimentally impacting their interests during the process of proving and resolving a claim (Newman 2009, 12). This decision was rooted in the concept of the Honour of the Crown, as it would be considered dishonourable for governments or developers to proceed with resource development projects against the wishes of the Aboriginal community pending the approval of a land claim. The Court concluded that the province of British Columbia failed to meet its duty to consult with the Haida; however, due to the fact that

the tree farm license had already been transferred, and that cedar had already been harvested from Block 6, the duty to consult shifted to a duty to accommodate (*Haida Nation* 2004 para. 75-9). The strength of the Haida title to Block 6, coupled with the serious impacts of tree harvesting on Haida culture and way of life, suggested that the province of British Columbia would be required to provide significant accommodation to the Haida in order to preserve their Aboriginal rights (para. 79). The Court also established that Weyerhaeuser Co. did not have a duty to consult with the Haida, and that third parties in general are not obligated to consult Aboriginal peoples (para. 53). This decision was based on the theory that the duty to consult and accommodate flows from the Crown's assumption of sovereignty over lands and resources formerly owned by Aboriginal peoples, providing no support for an obligation on third parties to consult or accommodate (ibid); however, this assertion does not mean that third parties can never be held liable to Aboriginal peoples (para. 4). In sum, the Court ruled in the Haida's favour, ordering the province of British Columbia to end all forestry operations in Block 6 and to allocate compensation to the Haida in order to fulfill its duty to accommodate (para. 80).

### **Assessing Community Empowerment in Haida Nation**

Following the outcome of *Haida Nation*, the Haida community garnered national attention for its community-driven protests of logging activities in Haida Gwaii. The community's former chief, Guujaaw – who led the First Nation from 1999 to 2012 – became a Haida icon for mobilizing community members to participate in protests to protect the Haida Gwaii islands from Weyerhaeuser logging (Harvey 2012, para. 8). The work of the Haida – first in protest, then in collaboration with opposing parties – led to the creation of the Gwaii Haanas National Park and a logging regime managed jointly by the provincial government and the Haida people (Paris 2012,

para. 22). With governments now owing a legal duty to consult First Nations, coupled with the mobilization and protest activity of the community, the Haida have become a formidable political entity that has successfully preserved the forests in Haida Gwaii, resisted offshore oil drilling, and opposed the construction of pipelines through traditional Haida territory (para. 23). The Supreme Court's establishment of the duty to consult created a more level playing field for First Nations engaged in resource disputes over traditional lands, lending a community-driven, collaborative focus to decision-making processes and causing governments to reconsider the advancement of development projects slated to take place on Aboriginal territories without having consulted the communities affected. The duty to consult underscores the continued grassroots activism of the Haida, giving the community newfound power in determining the futures of Haida Gwaii's natural resources.

The criteria used to assess the impacts of the duty to consult on community empowerment in each case are compensation, reconciliation, meaningful consultation and whether the community was able to achieve its desired outcome from the legal proceedings. With regards to the first point – compensation – the Court did not turn to the Sparrow test to determine whether compensation was to be awarded to the Haida; therefore, the Court was not locked into the Sparrow test's rules which dictated that compensation should only be provided to communities whose lands had been expropriated. Instead, the Court was tasked with determining whether the Crown's newly-established duty to consult in this case went beyond consultation regarding resource decisions to a duty to accommodate the Haida's Aboriginal rights and title. The Court decided that the strength of the Haida's claims to Haida Gwaii, coupled with the significant adverse impacts that logging would have had on the Haida's way of life suggested that the Crown would be required to provide significant economic accommodation to the Haida

to preserve the community's interests pending the resolution of their land claims (*Haida Nation* 2004, para. 77). The Court also ordered the government of British Columbia to pay all of the community's costs relating to its application for leave to appeal and its appeal to the Supreme Court of Canada; therefore, the duty to consult empowered the Haida to secure funding for their community to compensate for the tree farm license dispute.

As stated previously, the second point – reconciliation – refers to striking a balance between government and Aboriginal interests (which most often involves a restraint on government action) and re-establishing good relations between governments and communities once engaged in disputes; in addition, reconciliation involves compromise and a willingness of both parties to alter their original stance on resource development issues in the spirit of establishing good relations. During the tree farm license dispute, the Ministry of Forests refused to strike a balance between its interests and the interests of the Haida, allowing Weyerhaeuser to continue to harvest trees from Haida Gwaii despite the Haida's objections (para. 4). This suggests that the Ministry of Forests was unwilling to compromise, alter its development plans, or halt Weyerhaeuser's actions in an attempt to establish good relations with the Haida. Following the Court's ruling in *Haida Nation*, logging disputes on Haida Gwaii persisted; more recently, however, a logging regime managed jointly by the Haida and the provincial government was established on the islands (Paris 2012, para. 22), suggesting that the duty to consult has contributed to the empowerment of the Haida to reconcile its interests with those of the provincial government regarding forestry development.

As stated previously, the third criterion – meaningful consultation – embodies the idea of governments going above and beyond mere consultation to genuinely hearing, understanding, respecting, accepting and accommodating the interests of First Nations communities in resource

disputes. During the tree farm license dispute, the duty to consult had not yet been established – meaning that the Ministry of Forests was not legally required to consult the Haida regarding their Aboriginal rights and title. The absence of a legal duty to consult allowed the Ministry of Forests to consistently refuse to consult the Haida and ignore the community’s objections to the transfer of the tree farm license to Weyerhaeuser. The Ministry did not take into account, understand, respect, accept or accommodate the interests of the Haida due to the fact that an open dialogue was never established between these two parties; therefore, it is once again uncertain whether or not the Haida would have altered their stance on the proposed resource development in the spirit of compromise as consultations did not take place between the community and the Ministry of Forests. The absence of the duty to consult during this dispute contributed to the lack of community empowerment in terms of meaningful consultation with the Ministry of Forests.

The impacts of the duty to consult on the ability of the Haida to achieve their desired outcomes from the legal proceedings cannot be assessed due to the fact that the duty was not established prior to the Court’s final ruling in *Haida Nation*. In its petition to the BC Supreme Court, the Haida requested that the following five orders be granted: a declaration that the Haida assert Aboriginal rights and title over all forests located on Haida Gwaii, a declaration that the transfer of the tree farm license for Block 6 will affect lands belonging to the Haida, a declaration that the Ministry of Forests had failed to fulfill its duty to consult meaningfully with the Haida, an order quashing the transfer of the tree farm license for Block 6, and a declaration that TFL 39 was invalidly issued and is otherwise of no force or effect (*Haida Nation* 1995, para. 1). After a series of appeals, the Supreme Court of Canada ultimately granted all five of the requests outlined in the Haida’s petition. In sum, this legal victory held great potential for future

resource disputes in Canada, signaling an important turning point in government-Aboriginal relations in resource disputes to come.

## **Conclusion**

The Haida community struggled to empower its members throughout the dispute regarding the cedar forests on Haida Gwaii; however, in the Supreme Court of Canada, the Haida secured a landmark legal victory in which Weyerhaeuser's Tree Farm License was quashed and a legal duty to consult was established that would theoretically revamp the way governments interact with First Nations regarding resource development projects. The establishment of a legal duty to consult signaled a new beginning for First Nations communities in pursuit of environmental justice, paving the way for more community-driven, collaborative decision-making processes and contributing to the empowerment of First Nations communities to determine the futures of Canada's natural resources on their own terms. Indeed, the Court's establishment of the duty to consult in *Haida Nation* carried great potential for future Aboriginal rights cases; in the following chapter, I examine the impacts of the duty to consult on the empowerment of a community faced with a more recent forestry dispute, weighing the effects of the doctrine at a time when it had been in use for several years.

## CHAPTER 5

## GITANYOW FIRST NATION

This chapter presents an overview of a more recent duty to consult case – *Wii'litswx/Gitanyow First Nation v. British Columbia (Minister of Forests)* – which arose from an issue regarding the provincial government's approval of six forest licenses that cover portions of Gitanyow traditional territory (*Gitanyow* 2008, para. 1). With regards to the decision to approve the licenses, the Gitanyow community argued that the provincial Crown had “failed to adequately perform its duty to consult [...] and accommodate its Aboriginal interests” (*ibid*). Once again, this chapter accomplishes three main things. First, it presents a timeline of the events leading up to the launching of the case, highlighting the consultations that did take place between the Ministry of Forests and Gitanyow as a result of the Supreme Court's establishment of a legal duty to consult in *Haida Nation*. Second, it provides an analysis of the case launched by Wii'litswx, a Gitanyow chief, on behalf of the entire Gitanyow community – in which the British Columbia Supreme Court was tasked with determining whether the consultations that had taken place between the Ministry and Gitanyow were sufficient in recognizing and affirming Aboriginal rights and title. This included determining whether the Ministry had taken into consideration the community's interests and, given the circumstances, whether it had provided adequate compensation as a result of the Crown's duty to accommodate (para. 146-177). Third, I once again use four criteria – compensation, reconciliation, meaningful consultation, and the ability of the community to achieve its desired outcome from the legal proceedings – to examine the impacts of the duty to consult on the empowerment of leaders and members of the Gitanyow community throughout the resource development decisions.



## **Background**

In 2008, the government of British Columbia – which was still under the leadership of the BC Liberals – continued to make controversial decisions with regards to logging in many of the province’s coastal rainforests (CBC News 2008, para. 2). The innovation and collaboration that led to the establishment of the *BC Coastal Framework Agreement* in 2001 seemed to have been long forgotten as the interests of the government and industry regarding the futures of BC’s coastal rainforests continued to clash with those of environmentalists (para. 1-2). By this time, environmental groups in British Columbia had launched social media campaigns to protest the proposed development of the rainforests and to lobby the provincial government to reconsider its economic and ecological agendas (para. 7). The role of First Nations communities throughout these ongoing disputes had changed with the establishment of the duty to consult. Indeed, the doctrine resolved many existing problems with regards to the resolution of disputes arising from Aboriginal rights claims; however, as the following case demonstrates, the ambiguous nature of the scope and content of the duty to consult – which led to varied interpretations of the doctrine – presented new challenges for First Nations communities pursuing environmental justice.

The Gitanyow First Nation community asserts Aboriginal rights and title to approximately 10 000 square kilometers of territory in north-western British Columbia – which the Gitanyow people have traditionally used and occupied for generations (*Gitanyow* 2008, para. 20). The Gitanyow community is organized into eight sub-units called Wilps, or clans – each Wilp has its own land, collectively forming the traditional territory of the Gitanyow people (*ibid*). Every Gitanyow person belongs to a Wilp; as part of this membership, each person has rights to the territory and resources owned by his or her Wilp (*ibid*). The provincial Crown, through the Ministry of Forests, has permitted logging on Gitanyow territory for many years; in

addition, the rights to the timber resources on its traditional territory have long been a point of contention between the parties (para. 25). The precise amount of timber that has left Gitanyow territory is disputed; however, there is no question that substantial logging and road-building has taken place on these lands – which have had significant impacts on the sustainability of the timber resources and on many aspects of Gitanyow tradition and culture (ibid). The removal of these resources has also prevented the community from maintaining its Wilp culture, ensuring future sustainability, and practicing traditional activities; instead, the community must use personal funds to maintain the Wilp system – which has caused a great deal of financial and spiritual hardship among residents (para. 26).

In 2006, the Ministry of Forests informed the community that it intended to replace the forestry licenses that permitted logging activities on Gitanyow land (para. 47). The Ministry, recognizing its duty to consult, entered into negotiations with Gitanyow regarding these replacements in an attempt to reach a forestry accommodation agreement (ibid). During these negotiations, Gitanyow expressed four main concerns: recognition of Gitanyow rights and title to the lands in question, sustainability of forest resources within traditional territory (including reforestation and silviculture<sup>6</sup>), implementation of joint land use planning, and economic accommodation through revenue sharing or other means (para. 48). In response, the Ministry of Forests undertook several new initiatives in an effort to address Gitanyow’s concerns (ibid). As consultations continued, the stated goal of both parties was to integrate Gitanyow’s indigenous knowledge and cultural values with the Crown’s interests regarding the lands and to use that information in planning for future timber harvesting projects in the area (para. 49).

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<sup>6</sup> According to the BC Ministry of Forests (1999), silviculture refers to “a complex integration of both the art and science of forestry, and reflects an understanding of ecological relationships, long-term desires of the landowner, operational realities, and a creative spirit of innovation and discovery” (para. 1).

The negotiations progressed, ultimately resulting in the creation of a document entitled *The New Relationship*, affirming a new “government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights, and a commitment to reconciliation of Aboriginal and Crown titles and jurisdictions” (*The New Relationship* 2006, 1). This document guided further consultations between Gitanyow and the Ministry of Forests, with both parties coming to the agreement that consultations would be completed by September 2006 (*Gitanyow* 2008, para. 64). Gitanyow chiefs notified the Ministry of Forests that the community wanted the replacement schedule for the forestry licenses to include a recognition clause of Gitanyow’s Aboriginal rights and title and of the Wilp system of governance; in response, the Ministry agreed to recognize the community’s rights and title in the replacement schedule, but refused to put Wilp recognition in the forestry licenses – a decision for which the Ministry offered no explanation (para. 64-7). The Gitanyow community also expressed outstanding concerns regarding silviculture obligations, issues of sustainability, and economic accommodation; the Ministry responded that these items would be addressed in later consultations (para. 67-9). In August of 2006, the Ministry of Forests and Gitanyow concluded negotiations of the Gitanyow Forestry Agreement, a forestry accommodation agreement with a five-year term (para. 67). The agreement acknowledged the Ministry’s ongoing duty to consult Gitanyow regarding logging activities (GFA 2006, para. 1).

Following the creation of the agreement, members of the Gitanyow community wrote a letter to the Ministry of Forests indicating that it still wished to have the Wilp system recognized in the forestry agreement, proposing that an additional clause addressing the system and including a map of the Wilp boundaries be incorporated into the agreement’s preamble (para. 87). The Ministry stated that, “for practical reasons”, it was unable to include acknowledgement

of the Wilp system in the agreement but that it would notify logging companies about the Wilp territory boundaries for their use and information during preparation of their forestry licenses; furthermore, no explanation as to why the acknowledgement was impractical was provided (ibid). The Ministry notified Gitanyow that consultations would be wrapped up by the end of August and that the forestry licenses would be replaced by October 2006 – despite Gitanyow’s outstanding concerns regarding silviculture, sustainability and economic accommodation (para. 89-90). Gitanyow disputed both the Ministry’s assumption that consultations had been completed and its view that the economic accommodation discussed by the parties to date was an adequate fulfillment of the Crown’s obligations to First Nations (para. 92). The Ministry responded by stating that,

“[w]e have done everything in our power to address Gitanyow’s concerns around the replacement of these licenses, but the outstanding issues are beyond the scope of [the consultation] process and need to be resolved through government to government negotiations. Delaying a decision further will not change this situation and will potentially lead us down a path that is at odds with the processes and policies being developed through *The New Relationship*” (para. 115).

The Ministry acknowledged that Gitanyow may challenge its decision in court; in 2008, Gitanyow – maintaining that the Ministry had failed to address its legal obligations of consultation and accommodation – did just that (para. 92, 132).

### **Gitanyow v. British Columbia (2008)**

In the case brought before the British Columbia Court of Appeal, Justice Neilson acknowledged that the Ministry’s replacement of the forestry licenses triggered a duty to consult with Gitanyow – due to the Crown’s knowledge of Gitanyow’s rights and title to the land as well as the potential

adverse effects posed by the logging (para. 141). Justice Neilson also acknowledged that consultation had taken place between the parties, deciding that the issue at hand was whether that consultation process was reasonable and whether the resulting accommodation was adequate (ibid). The parties did not dispute the applicable law, nor did they disagree regarding the facts of the case; the sole issue was the adequacy of the consultation and accommodation reached in the course of the Ministry's decision to replace the forestry licenses (para. 3).

The Court turned to *Haida Nation* and section 35(1) of the Constitution to guide its decision throughout the case, ultimately deciding that the Crown failed to fulfill its duty to meaningfully consult and adequately accommodate Gitanyow's interests (para. 4-6, 248). The Court had several reasons for reaching this conclusion. First, the Gitanyow community had a strong claim to Aboriginal rights and title for the lands affected by the forestry licenses, and the decision to replace the licenses posed significant adverse effects regarding the community's interests; therefore, the Court concluded that the scope of the Crown's duty to consult was accordingly broad (meaning that the Crown was legally required to go to great lengths, if need be, to accommodate Gitanyow's interests) (para. 243). While the Crown had no duty to agree to Gitanyow's requests, the strength of the community's claims to the land suggested that if the Crown did not make reasonable concessions, then it did not conduct meaningful consultation (ibid). Second, the Court found that the Ministry did not make a proper preliminary assessment of the scope and extent of the duty to consult and accommodate, leading the Crown to underestimate its obligation to understand and address Gitanyow's concerns (para. 245). Third, the Crown chose to rely on inappropriate measures of accommodation, meaning that the Crown mistook the creation of the Gitanyow Forestry Agreement as adequate consultation – which resulted in the premature foreclosure of meaningful discussion regarding Gitanyow's concerns

(para. 246). Fourth, the Court found that the Ministry of Forests failed to act in accordance with the Honour of the Crown when it dismissed the inclusion of the Wilps and Wilp boundaries in the strategic decision to replace the forestry licenses (para. 247). According to Justice Neilson, “[d]ismissing such recognition as impractical, without discussion or explanation, fell well below the Crown’s obligation to recognize and acknowledge the distinctive features of Gitanyow’s Aboriginal society, and [to] reconcile those with Crown sovereignty” (ibid).

The Court also found that the Crown’s treatment of Gitanyow’s concerns regarding silviculture and sustainability demonstrated a similar failure to understand the scope of what was required by the Honour of the Crown (para. 248). Justice Neilson argued that, in this case reconciliation – which, as stated previously, is one of the main goals of meaningful consultation – recognized Gitanyow’s Aboriginal rights and title to limited resources on claimed territory as well as the importance of sustaining those resources while land claims are pending (ibid). According to Justice Neilson, “[i]f [those resources] are destroyed, there is nothing left to reconcile” (ibid).

While the Court “appreciate[d] that the Crown’s efforts to accommodate other Gitanyow concerns were adequate”, on the whole, it found that the Ministry’s aforementioned fundamental errors regarding the strength of Gitanyow’s title, the appropriate forms of accommodation, the scope and content of its duty to consult and its failure to act in accordance with the Honour of the Crown regarding recognition of the Wilps and silviculture led to the conclusion that the Crown failed to fulfill its duty to meaningfully consult and accommodate Gitanyow’s Aboriginal interests (para. 249). The Court ruled in Gitanyow’s favour, but did not quash the Ministry’s

decision to replace the forestry licenses (para. 253).<sup>7</sup> The Court stated that it required further evidence to support quashing the forest replacement licenses as neither party had addressed this issue to its satisfaction (para. 257).

Gitanyow's request for the forest licenses to be quashed was eventually dismissed by the Court (*Wilitswx v. HMTQ* 2008, para. 39). The Court did, however, grant Gitanyow all three counts of declaratory relief that it had sought throughout the case: a declaration that the Crown had a legal duty to meaningfully consult with Gitanyow in good faith and seek to accommodate its Aboriginal rights and title, a declaration that the Crown failed to fulfill its constitutional duty to consult and accommodate Gitanyow's interests, and a declaration that the provincial government failed to uphold the Honour of the Crown throughout its decision to replace the forestry licenses (para. 25). Gitanyow was awarded the economic compensation it sought as accommodation for the logging activities that had long taken place on its traditional lands; in addition, the Crown was ordered to reimburse Gitanyow's legal fees (para. 35-40). All other claims raised by Gitanyow – which included extensive declaratory relief stating that the community was entitled to a fair share of the revenue generated by logging on its territory, that the Ministry failed to recognize the Wilp system throughout its decision, and more – were dismissed by the Court. The Court found that these claims – which were central features of the community's stance on the entire issue regarding the licenses – were “impractical” (the Ministry had already made its decision to replace the licenses and that decision could not be revisited as

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<sup>7</sup> Gitanyow argued that the forestry licenses would nevertheless remain in place – even if the Court did quash them – as they represent a contract between the Crown and the logging companies that would not be affected by the Court's order; however, at a later point in the legal proceedings, Gitanyow argued that, even if the licenses were quashed, the logging companies would be able to operate on their existing licenses – which would remain in force even if the forest license replacement decision had not taken place (para. 254). The Crown pointed out that, under section 15(6) of the *BC Forest Act*, forest licenses formerly in force expire on the commencement of the replacement license, making Gitanyow's argument unclear (para. 256).

the Court must recognize parliamentary sovereignty) and that they implied “an Aboriginal right of self-government, which has not yet been established” (para. 21).

### **Assessing Community Empowerment in Gitanyow**

The Gitanyow community did not employ grassroots tactics throughout the dispute; instead, community members and leaders engaged in consultations with Ministry negotiators surrounding the replacement of the forest licenses as required by the Crown’s duty to consult (*Gitanyow* 2008, para. 47). Throughout these consultations, it became clear that the Ministry of Forests and Gitanyow shared many of the same goals; for example, both parties wished to see indigenous knowledge and customs integrated in the forestry accommodation agreement as well as the sustainable development of the timber resources on Gitanyow land (para. 48). These shared goals helped foster a more collaborative environment in which both parties worked together to achieve a common goal; in addition, these consultations helped create a more level playing field for the Gitanyow negotiators as they did not have to strive to make their voices heard.

There are several examples that demonstrate the level of empowerment the community was able to achieve throughout the negotiations. First, unlike in past situations, the Ministry was legally required to take into consideration the interests of the community; for example, when Gitanyow negotiators raised four main concerns during talks surrounding the forest accommodation agreement, the Ministry undertook new initiatives – within the context of ongoing negotiations – in an effort to address these concerns (para. 48). Second, members of the Gitanyow community were instrumental in implementing joint land use planning throughout consultations for its traditional territories and in developing a landscape unit plan (LUP) alongside representatives from the Ministry (para. 50). The LUP also promoted the creation of a



joint resources council comprised of members of the Gitanyow community and the Ministry, with both parties agreeing to the creation of such a council and negotiating collectively its mandate and terms (para. 52). Third, many additional concerns raised by the Gitanyow community – such as the expansion of the joint land use planning initiative to cover all of Gitanyow’s traditional territory – were taken into consideration by the Ministry and subsequently accommodated throughout the course of the consultations (para. 55).

As stated previously, the duty to consult has created a more level playing field for First Nations communities throughout consultations with government bodies; however, in the case of Gitanyow, the community still encountered obstacles throughout the discussions regarding the replacement of the forest licenses that proved to be insurmountable. The community’s request to have the Wilp territories recognized in the forest accommodation agreement was rejected without explanation by the Ministry of Forests, leaving Gitanyow little choice but to launch a judicial review case in the BC Supreme Court. The Ministry’s simple dismissal of the community’s concerns suggests that, while the duty to consult has made positive contributions to the empowerment of the Gitanyow community throughout the forest license dispute, the doctrine still does not go far enough in empowering First Nations communities in pursuit of environmental justice to engage meaningfully in resource development decisions on their own terms. While the Court recognized that the Ministry did not act honourably when it dismissed the community’s request to include the Wilp system, it was unable to compel the Ministry to include the Wilps in the forest licenses due to the fact that the forestry agreement had already been approved by Ministry and Gitanyow as well as the implication inherent in the Wilp system that Gitanyow had a right to Aboriginal self-government (which does not currently exist). Indeed, in *Haida Nation*, the Supreme Court clearly stated that the duty to consult does not constitute a duty

to agree; furthermore, it established that the consultation process does not give Aboriginal groups a veto over what is to be done with the land in question pending the resolution of their claims (*Haida Nation* 2004, para. 27, 42, 48). The Crown may continue to develop the resource in question pending final proof of the community's claims, but its actions must be conducted in accordance with the Honour of the Crown (*Gitanyow* 2008, para. 9). Indeed, the duty to consult only commits parties to a meaningful and reasonable process of consultation (ibid). Throughout the *Gitanyow* court case, the community was empowered to achieve its goals only in part. Representatives of the community that attended the hearing were able to achieve four counts of the declaratory relief they sought and were able to secure economic compensation for Gitanyow; however, the majority of the community's claims were dismissed by the Court.

The criteria used to assess the impacts of the duty to consult on community empowerment in each case are compensation, reconciliation, meaningful consultation and whether the community was able to achieve its desired outcome from the legal proceedings. With regards to the first point – compensation – the Court once again did not turn to the Sparrow test to determine whether the provincial Crown was obligated to allocate funds to the community following the dispute; instead, the Court was tasked with deciding whether the provincial Crown's duty to consult Gitanyow encompassed a duty to accommodate. The Court determined that the Honour of the Crown ordinarily requires fair compensation in cases where Aboriginal rights have been infringed, and that the logging that had already taken place on Gitanyow territory suggested that the Crown's duty to consult included a duty to accommodate (para. 207). Gitanyow argued that, in this case, a system of revenue sharing was an essential component of the Crown's duty to accommodate its interests as timber resources were being extracted from its traditional territory (para. 207). Although the community was unable to establish its desired

system of revenue sharing based on the volume of timber extracted from its lands, the Ministry of Forests did offer to share the economic benefits of the forestry development in such a way that, according to the Court, reflected the budgetary constraints the Ministry faced at the time (para. 239). While imperfect, this outcome did provide financial support to the community; in addition, the provincial government was ordered to reimburse Gitanyow for its costs associated with the court case (*Gitanyow v. HMTQ* 2008, para. 41). The duty to consult and accommodate thus empowered the Gitanyow people to secure economic compensation for their community following the forestry dispute.

As stated previously, the second point – reconciliation – refers to re-establishing good relations between governments and Aboriginal peoples once engaged in resource disputes and involves a willingness of both parties to alter their original stance on resource development issues in the spirit of compromise (which most often results in a restraint on government action). Throughout consultations regarding the approval of the forest licenses, members of the Gitanyow community expressed concerns regarding sustainability, silviculture, joint land use planning, and revenue sharing – while consultations continued, the Crown undertook new initiatives in an effort to respond to the community’s concerns (*Gitanyow* 2008, para. 48). The Crown noted that these ongoing initiatives, coupled with the Ministry of Forests’ development of an ongoing consultation framework to consider alternative means of accommodating the economic aspects of Gitanyow’s interests, clearly demonstrate the provincial government’s efforts to establish good relations with Gitanyow (para. 239). In addition, regarding the drafting of the Gitanyow Forest Agreement, the community altered its original position on several items outlined in the agreement in the spirit of reaching a compromise and establishing good relations (para. 130). In sum, given the ongoing consultation, Ministry-led initiatives to accommodate the community’s

interests, and the system of revenue-sharing outlined previously, Gitanyow was significantly empowered in terms of reconciliation with the provincial government.

As stated previously, the third criterion – meaningful consultation – embodies the idea of governments going above and beyond mere consultation to genuinely hearing, understanding, respecting, accepting and accommodating the interests of First Nations communities in resource disputes. While the Court did find that the Ministry of Forests consulted with Gitanyow regarding the approval of the forest licenses, the level of consultation that took place still fell short of being truly meaningful consultation. The Honour of the Crown and the importance of sustainability to the Gitanyow community required the Ministry to do *more* to genuinely hear, accept, and accommodate Gitanyow’s interests; according to the Court, meaningful consultation in this case should have included “discussion of a process by which Gitanyow would regularly receive information regarding the performance of silviculture obligations on its traditional territory, and assurances from the Crown that silviculture obligations under the replaced [forest licenses] would be strictly enforced” (para. 238). The Court also noted that, while the Crown had no duty to agree with Gitanyow, the strength of Gitanyow’s claims to the land suggested that if the Crown did not make reasonable concessions (regarding inclusion of the Wilps, silviculture obligations, etc.), it is likely that it did not conduct meaningful consultation (para. 243). The Court ultimately decided that the Crown failed in its duty to meaningfully consult Gitanyow (para. 249), meaning that the Ministry was required to continue to consult the community with the goal of accommodating Gitanyow’s asserted Aboriginal rights and title (*Gitanyow v. HMTQ* 2008, para. 25). In sum, despite the improved relations between the Ministry and Gitanyow, the community still struggled to empower its members to consult meaningfully with Ministry representatives regarding the approval of the forest licenses for their traditional lands.

With regards to the fourth criterion – the ability of the community to achieve its desired outcome from the legal proceedings – the duty to consult empowered Gitanyow only in part. In its petition to the BC Supreme Court, the community presented an extensive list of orders, requests, and other demands. Some of the main points of declaratory relief sought by the community were included: a declaration that the Ministry of Forests failed to consult meaningfully with Gitanyow, a declaration that the Ministry acted contrary to the Honour of the Crown, a declaration that the Wilp system is integral to Gitanyow way of life and that Gitanyow is entitled to have its Wilp system recognized and accommodated in the forest licenses, and a declaration that Gitanyow is entitled to its fair share of the revenue generated by the forestry activity (*Gitanyow v. HMTQ* 2008, para. 11). Of this extensive list of orders, requests, and demands, the Court granted Gitanyow all of its desired outcomes relating to the failure of the Ministry of Forests to consult meaningfully with the community and to act in accordance with the Honour of the Crown; however, Gitanyow was denied all of its requests with regards to the recognition, inclusion, and accommodation of the Wilp system in the forest licenses and the Gitanyow Forest Agreement (para. 39-40). As stated previously, the Court refused Gitanyow these requests for two main reasons: (1) the Ministry had already made its decision to replace the licenses – which could not be revisited as the Court must recognize parliamentary sovereignty on such matters, and (2) recognition, inclusion, and accommodation of the Wilps implied “an Aboriginal right of self-government, which has not yet been established” (para. 21). In sum, the duty to consult empowered the community to achieve some of its desired outcomes from the legal proceedings, still falling short of empowering Gitanyow to achieve all of its desired outcomes.

## **Conclusion**

Throughout the forest license replacement dispute, the Gitanyow community engaged meaningfully in consultations with representatives from the Ministry of Forests regarding the recognition of their Aboriginal rights and title, joint land use planning, and landscape unit planning of the timber resources located on their traditional territories (para. 50). The community was significantly empowered regarding these three issue areas as the Ministry of Forests undertook new initiatives to accommodate the community's interests; however, Gitanyow was less than successful in empowering its members to secure recognition of the Wilp system in the forest accommodation agreement and the replacement schedule for the forest licenses – which would notify logging companies of the traditional boundaries of each Wilp in an attempt to preserve the Wilp system's basic structure (para. 5, 239). The Court's decision not to quash the forest licenses or to compel the Ministry to renegotiate the terms of the licenses with Gitanyow – who continued to advocate for the inclusion of the Wilp system – negatively affected the empowerment of the community. The ability of the Ministry to deem the inclusion of the Wilp system impractical and to wrap up consultation without discussing this issue further suggests that, while the duty to consult has made a positive difference in empowering First Nations seeking environmental justice, communities like Gitanyow still fall short of achieving their goals as the duty to consult does not constitute a duty to agree. In the following chapter, I compare the three cases examined thus far in order to establish a timeline of the evolution of the duty to consult and to draw conclusions regarding the effectiveness of the doctrine. With these comparisons in mind, I make broader conclusions regarding the duty to consult and its ability to empower First Nations communities seeking environmental justice before connecting these conclusions back to the literature reviewed.

## CHAPTER 6

## CONCLUSIONS

The main focus of this thesis has been to explore the impacts of the duty to consult on the empowerment of First Nations communities seeking to engage meaningfully in resource development decisions on their own terms. I will first provide a summary of the thesis thus far before comparing my selected case studies and drawing conclusions from them. In chapter one, a discussion on the importance of indigenous participation in resource development decisions in Canada was presented, followed by a discussion on methodology outlining the three case studies to be compared. In an attempt to isolate the duty to consult as the independent variable, the selected case studies – Halfway River, Haida Nation, and Gitanyow – have all taken place in British Columbia and feature forestry as the type of resource development involved. To assess the impacts of the duty to consult on community empowerment, I outlined four key criteria to be used in each case – compensation, reconciliation, meaningful consultation, and the ability of the community to achieve its desired outcomes from the legal proceedings. In chapter two, a review of the relevant literature on sustainable development, environmental justice, just sustainability, the duty to consult, the Honour of the Crown, and the Indigenous Knowledge Framework was presented. This literature review was focused on several key aspects of the available literature, such as the Brundtland Report’s emphasis on the inclusion of indigenous knowledge in resource decisions, the importance of both grassroots activism and legal action within the environmental justice movement, the absence of the duty to consult in mainstream political discourse, the strengths and weaknesses of the Honour of the Crown, and the importance of traditional knowledge among First Nations communities. In chapters three, four, and five, the Halfway River, Haida Nation, and Gitanyow case studies were presented respectively. These cases

demonstrated the impacts of the duty to consult (or lack thereof) on community empowerment by highlighting the political climate, the status of the forestry industry, the Ministry's willingness to incorporate indigenous knowledge in the forestry decisions, and the ensuing conflicts which led to the launching of the judicial review cases. Finally, using the four main criteria stated above, the impacts of the duty to consult on the communities' abilities to engage meaningfully in resource development decisions on their own terms were examined.

### **Halfway River, Haida Nation, and Gitanyow Compared**

There are two important similarities that all three communities share. First, all three communities were able to prove that they had strong Aboriginal rights and title claims to the lands which were intended for development. In *Halfway River* (1997), the Halfway community was able to preserve its Aboriginal right to hunt, trap and gather on the CP 212 lands adjacent to its reserve due to its ability to demonstrate that its ancestors signed Treaty 8 with the Crown in 1900 – which clearly outlines the Halfway community's right to hunt on its reserve and the surrounding areas (para. 3). In *Haida Nation* (2004), the Supreme Court of Canada recognized the strength of the Haida's claim to the Haida Gwaii islands due to Haida traditional art, historical documents, and other artifacts; however, these claims were unproven as they were not outlined by any treaty (para. 6-7). The Supreme Court decided that, in order to avoid detrimentally impacting the Haida's rights during the process of resolving their claims, governments must consult meaningfully with First Nations as anything but would be considered “dishonourable” (para. 27). Finally, in *Gitanyow*, the Gitanyow community was also able to demonstrate a strong *prima facie* claim to the lands intended for logging by the Ministry of Forests. Like the Haida, the Gitanyow community did not have its rights preserved by treaty; instead, the courts found that the



community's claim to the lands was strong due to the historical presence of the Wilp system and various other documents and artifacts that had been presented. Gitanyow had, however, entered into treaty negotiations with the provincial government in 1980, but this process had been at a standstill since 1996 (*Gitanyow* 2008, para. 24).

The second important similarity is that all three communities were able to prove that the proposed resource development posed a significant adverse effect to their Aboriginal rights. For the Halfway River First Nation – a highly impoverished community dependent on hunting and gathering for sustenance – the very survival of its residents was at stake following the Ministry of Forests' decision to approve forestry licenses for CP 212. The community's chief, Bernie Metecheah, successfully proved to the Court that the deforestation of CP 212 would discourage moose and other wildlife from coming to the area; in addition, Metecheah proved that any roads going into CP 212 built by Canfor would increase accessibility for non-Native hunters to the forests, decreasing the amount of game available for members of Halfway to feed their families (*Halfway River* 1999, para. 2). In Haida Nation, the Haida were also able to prove that logging would have detrimental impacts on their community's way of life; for example, the cedar located on Haida Gwaii has been used by the Haida to construct canoes, utensils, totem poles, lodges, and other items for generations (*Haida Nation* 2004, para. 2). The cedar has also remained central to the Haida's economy and conception of themselves – a point which was reinforced by historical evidence presented to the Court dated before 1846 – demonstrating that any deforestation would have severe economic and spiritual impacts (para. 65). Finally, in *Gitanyow*, the community successfully demonstrated that the removal of timber from its traditional lands had already negatively impacted the Wilp system and other traditions, and that the replacement

of the forest licenses would pose additional adverse effects to the community's way of life (*Gitanyow* 2008, para. 143).

The clear adverse effects posed by the logging in *Gitanyow* led to the easy triggering of the duty to consult. Indeed, if the duty to consult had existed during the *Halfway River* and *Haida Nation* disputes, it would have also been easily triggered due to the severity of the potential adverse effects. In cases that are as black-and-white as these, the Court's work is much easier as it is clear that the proposed resource development would have had a significant adverse effect on the communities involved – eliminating any questions regarding whether the Crown owed a duty to consult. In addition, these communities had strong Aboriginal rights claims to the lands in question, meaning that the Crown's duty to consult was (or would have been) accordingly broad. In cases where community members are unable to prove that a potential adverse effect is substantial, or that their claims to the land are strong, the duty to consult will likely not be triggered, potentially resulting in serious problems for First Nations communities seeking environmental justice. The notion of the duty to consult as a spectrum has been widely regarded by scholars as one of the critical pitfalls of the doctrine, as not everything is as black-and-white as the cases of *Halfway River*, *Haida Nation*, and *Gitanyow* – especially in a field as complex as Aboriginal affairs in Canada. One example of a case in which a community's claims to the land have been disputed by the provincial Crown and the potential adverse effects of the project have not yet been proven is the case of the Nunatukavut First Nation, which resides near Lower Churchill, Labrador. The Nunatukavut community is a Métis nation that claims that development for the Muskrat Falls hydroelectric project – located just south of its traditional territory – infringes on its Aboriginal rights and title (“Nalcor granted injunction”, CBC News 2012, para. 5). Until recently, the Nunatukavut were unable to claim ownership of these lands as

Métis were not recognized as status Indians under the *Constitution Act*; however, in January 2013, the Federal Court of Canada overturned section 91(24) of this Act, ruling that Métis – and other non-status Indians – are indeed “Indians” and fall under federal jurisdiction (“Federal Court grants rights”, CBC News 2013, para. 2). The Nunatukavut case – and the questions regarding the impacts of the duty to consult on the empowerment of communities struggling to prove the existence of rights and title and adverse effects – will prove to be important considerations for future researchers in the field of Aboriginal affairs in Canada.

While the outcomes of the legal proceedings in each case were different, the communities’ reactions to the Court’s decisions were relatively similar. In *Halfway River*, much of the community’s petition to the Court was focused on the total preservation of the CP 212 forests, the establishment of a constitutional duty to consult, and the community’s subsequent claim that the Ministry of Forests failed to consult with them (*Petition re: CP 212 and the JRPA* 1998, 2). While the community was able to secure a legal victory in the courtroom, there are two key issues associated with this victory: (1) Canfor would be able to resubmit forest proposals for the CP 212 area in a mere five years, potentially jeopardizing the community’s rights to the land once again (this did not happen thanks to the community’s continued efforts to have its outstanding Treaty Land Entitlement Claim Approved – also, five years from this ruling, the duty to consult was established), and (2) the Court rejected Halfway’s request for a legal duty to consult (*Halfway* 1997, para. 161). This dismissal of the community’s claim for a legal duty to consult suggests that, despite the win (which reversed the Ministry’s approval of the forest licenses for Canfor), a number of issues persisted regarding the empowerment of the community to participate effectively in the decision-making process for determining the futures of the timber resources in CP 212.

In *Haida Nation*, the outcomes of the court case were vastly different from *Halfway River*; however, the community's continued fight for environmental justice suggests that these outcomes do not go far enough in preserving Aboriginal rights and title and fostering good faith relations between the Haida and the provincial government. At the time of the dispute, the desired outcome of the Haida was to preserve all cedar trees on Haida Gwaii from logging and to receive economic accommodation for the trees that had already been lost (*Haida Nation* 2004, para. 69). The Supreme Court ruled in favour of the Haida on both of these counts; in addition, it established a constitutional duty to consult with First Nations that would theoretically change the way governments interact with Aboriginal communities (para. 76). It has since been suggested that the utility of the duty to consult hinges on the willingness of governments to fulfill this duty and to act in accordance with the Honour of the Crown. Just one year after the *Haida Nation* landmark case, the Haida made headlines once again as the community set up blockades around Haida Gwaii to protest Weyerhaeuser's sale of its timber rights to a logging company called Brascan (CBC News 2005, para. 1). The community's leader, Guujaaw, claimed that the logging companies<sup>8</sup> and the provincial Crown were not only ignoring the Supreme Court's 2004 ruling, they were also ignoring the community's concerns regarding the preservation of the Haida Gwaii coastal forests (para. 6). According to Pound (1910), there is a significant divide between the "law in books" and the "law in action" (15). In cases such as the 2005 sale of the Weyerhaeuser rights to Brascan, a similar divide seems to exist between the duty to consult in theory and in practice.

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<sup>8</sup> It is important to note that the Supreme Court's ruling in *Haida Nation* clearly stated that third-party developers do not owe a duty to consult First Nations (*Haida Nation* 2004, para. 15). While this aspect of the duty has been criticized by legal scholars (see Newman 2009, 12-15, 30-31), this does not suggest that third parties can never be held liable to First Nations (*Haida Nation* 2004, para. 56).

In *Gitanyow*, the community achieved the declaratory relief it sought regarding the failure of the Ministry of Forests to consult with them; however, the community's concerns regarding the inclusion of the Wilp system in the replacement schedule of the forest licenses – which was central to the launching of the case – were dismissed (*Wii'litswx v. HMTQ* 2008, para. 40). In addition, the community's request for the forest licenses covering its traditional lands to be quashed was similarly dismissed by the Court (para. 39). The *Gitanyow* case differs from *Halfway River* and *Haida Nation* in that consultations did take place between the Ministry of Forests and Gitanyow and that many of the community's concerns were taken into consideration by the Ministry.

In sum, in comparison to the outcomes of pre-duty to consult cases like *Halfway River*, the *Gitanyow* case – and, to a certain degree, *Haida Nation* – have made positive contributions to the settling of Aboriginal rights and title disputes in Canada. While the establishment of the duty to consult has made slight improvements regarding the level of community empowerment throughout resource development decisions, the lacklustre outcomes of *Halfway River* and *Gitanyow* suggest that these improvements are not enough to truly empower First Nations communities seeking environmental justice. Although the Court's ruling in *Haida Nation* is widely regarded by legal scholars as ground-breaking, the discrepancies that emerged between the duty to consult in theory and in practice have created problems for the Haida community – which has had to continue to fight to determine the futures of the timber resources on Haida Gwaii on its own terms.

The key differences between these three cases lie in the levels of empowerment each community was able to achieve. In the simplest terms, the *Halfway River* community struggled to empower its members throughout its forestry dispute, *Haida Nation* was somewhat

empowered, and Gitanyow was empowered significantly in comparison to the previous two cases, but this level of empowerment was still not enough to fully empower the community to determine the futures of the timber resources on its traditional lands. A comparison of each assessment performed using the four criteria outlined above on community empowerment in each case provides more detail on the differences in levels of empowerment. With regards to the first point – compensation – all three communities were reimbursed for the costs associated with filing a claim as a result of the Court ruling in their favour. Halfway River did not receive economic compensation for the unlawful damage or taking up of resources from their traditional lands as none occurred, while Haida Nation received significant funding from the provincial Crown to compensate for the timber resources that had been harvested unlawfully from Haida Gwaii during the dispute. In Gitanyow, the outcome with regards to compensation was altogether different; while the community did not receive a lump sum from the provincial Crown following the court case, it did enter into an agreement with the Ministry of Forests that would share the economic benefits of extracting lumber from traditional territory with the community. In sum, the duty to consult gave Gitanyow the opportunity to voice its concerns regarding economic compensation and, while its preferred means of revenue sharing was not agreed to by the Ministry, an alternative system of sharing the economic benefits of the forestry activity was eventually negotiated and established by the two parties.

During the forestry disputes in Halfway River and Haida Nation, both communities struggled to reconcile their interests with those of government as the Ministry of Forests consistently refused to consult with the communities regarding the proposed resource development. In Gitanyow, however, the community was more empowered to achieve reconciliation with the Ministry of Forests and to establish good relations with the provincial

Crown moving forward via ongoing consultations and other initiatives. Once again, the duty to consult empowered Gitanyow to establish an open dialogue with Ministry representatives in the spirit of reaching a compromise and establishing good relations.

Despite its limitations, the duty to consult contributed to steps being taken towards meaningful consultation. As stated previously, the terms and conditions of consultation have not been clearly outlined by the courts, by governments, or in the Canadian Constitution, and to date there has been no consensus in the literature with regards to what meaningful consultation should entail. For the purposes of establishing clear criteria by which the impacts of the duty to consult have been assessed, I have determined meaningful consultation to mean both parties genuinely hearing each other and taking into account, understanding, respecting, accepting and accommodating the interests of the other party as reasonably as possible. Halfway River and Haida Nation were unable to participate in truly meaningful consultation, while Gitanyow was empowered to consult with Ministry representatives (though issues persisted with regards to how meaningful this consultation really was). Until governments are willing to go above and beyond mere consultation in an attempt to genuinely consider and accept the concerns of First Nations regarding resource disputes, it is likely that this critical pitfall of the duty to consult will continue to exist.

The duty to consult (or lack thereof) had relatively little effect on the ability of Halfway River and Gitanyow to achieve their desired resource development outcomes from the legal proceedings. In Halfway River, the Court granted the community only one of the requests outlined in its petition to the Court – the request to have the approval of the forest licenses quashed – while all other requests outlined in the community’s petition were denied. While the quashing of the forest licenses was a substantial environmental victory for Halfway, further

action in terms of pressuring the Ministry of Forests to approve its Treaty Land Entitlement Claim was necessary in order to protect CP 212 from Canfor logging as the Court's decision did not prevent Canfor from reapplying to log in CP 212 in the future, demonstrating that there were some mechanisms in place even prior to the duty to consult to help First Nations communities achieve their environmental justice goals. Despite Halfway's victory in causing Canfor to defer from harvesting in CP 212 indefinitely, the difficulties associated with achieving this goal (such as the onus of proof being placed on the community and the lengthy process of reviewing the claim) could have arguably been avoided had there been a legal duty to consult. In Gitanyow, a number of the community's requests – namely those centred on the Ministry's failure to adequately consult Gitanyow and to act in accordance with the Honour of the Crown – were granted, while those centred on the inclusion of the Wilp system were denied. While this victory does signify a certain level of community empowerment, the outcome of the court case still fell short in empowering Gitanyow to achieve all of its environmental justice goals. Conversely, in Haida Nation, the Court granted the community all five of the requests presented in its petition, signalling a landmark victory for the Haida. As previously discussed, the impacts of the duty to consult on the ability of the Haida to achieve their desired outcomes from the legal proceedings cannot be assessed due to the fact that the duty was not established prior to the Court's final ruling in *Haida Nation*. One would have to look at other variables (such as the legality of the claims presented, judges' past experiences or the combination of judges on the Supreme Court bench) to understand the factors contributing to the community's significant legal victory.



### **The Duty to Consult: What Has Been Accomplished?**

By comparing the cases of Halfway River, Haida Nation and Gitanyow, one can conclude that the duty to consult accomplishes three main things. First, it legally requires governments to consult with communities before making resource development decisions that may adversely affect a community's way of life – which prevents departments like the Ministry of Forests from disregarding a community's interests and from denying communities the opportunity to voice their concerns regarding a proposed project (as was the case in Halfway River and Haida Nation). Second, the duty to consult creates a *more* level playing field for First Nations communities seeking to negotiate the terms of a proposed resource development project. Third, the duty to consult empowers communities to, at the very least, make their voices heard to governments and third-party developers regarding resource decisions.

Conversely, the duty to consult fails to accomplish two main things. First, the doctrine does not guarantee that a community's concerns regarding a particular resource development decision will be taken into consideration and/or accommodated by the government. As evidenced by *Gitanyow*, the duty to consult does not equal a duty to agree; indeed, this critical downfall of the duty to consult perpetuates inequalities between First Nations communities and governments engaged in consultations, due to the ability of departments like the Ministry of Forests to dismiss a community's claims as "impractical" without further explanation (*Gitanyow* 2008, para. 247). While the Court did rule this dismissal as dishonourable, the Court was unable to reverse the Ministry's decision to not include the Wilp system for practical reasons. Second, the duty to consult does not guarantee that Aboriginal communities engaged in consultations will not be required to go to court to settle their claims. Indeed, one of the primary goals of the duty to consult is to bring communities and governments together in meaningful consultation to

collectively determine the futures of Canada's natural resources – without having to pursue legal action. This act of bringing communities and governments together to settle disputes through meaningful consultation is highly symbolic, given the historical relationship between First Nations and the Crown. The duty to consult still falls short in empowering First Nations communities seeking environmental justice to determine the futures of Canada's natural resources on their own terms; the failure of governments to fulfill their duty to consult leaves communities little choice but to pursue legal action in order to make their voices heard. The significant geographic and financial barriers standing between many First Nations communities and the courts suggest that pursuing legal action in order to settle resource disputes is a less-than-favourable avenue for First Nations communities seeking environmental justice. Ideally, the duty to consult would foster an inclusive, locally-driven environment for settling resource disputes outside of the courtroom.

### **Beyond the Duty to Consult: Aboriginal Self-Government**

As evidenced by this study, the duty to consult has had positive impacts on community empowerment; however, as the *Gitanyow* case has shown, the doctrine still does not go far in enough in truly empowering First Nations communities to achieve sustainable development on their own terms. Indeed, this study suggests that the duty to consult in practice fails to give First Nations communities an equal voice in the decision-making process and does not guarantee that the community's concerns will be taken into account by governments and developers without having to pursue legal action. One avenue for communities seeking environmental justice that could potentially fill some of the gaps left behind by the duty to consult is Aboriginal self-government. In *Gitanyow*, the community requested that the traditional boundaries of the Wilp

system be recognized in both the Gitanyow Forest Agreement and the replacement schedule for the forest licenses. These requests, which were denied by the Ministry of Forests during consultation, were duly dismissed by Justice Neilson in the BC Supreme Court, who argued that recognition of the Wilp system implied an Aboriginal right of self-government – which has not yet been established (*Gitanyow v. HMTQ* 2008, para. 21). While Justice Neilson did acknowledge in her reasons that the Wilp system is “an integral and defining feature of Gitanyow society”, she concluded that this finding stopped well short of establishing an Aboriginal right of self-government (ibid). In this case, had the right to Aboriginal self-government been established, it is perhaps likely that Gitanyow would have been able to achieve the recognition of the Wilp system that it sought, bringing the community one step closer to having an equal voice in the deciding the futures of the timber resources on its traditional lands.

In the academic literature on Canadian federalism, much has been written about Aboriginal self-government. While there are many debates regarding the specific arrangement of how a system of Aboriginal self-government should look, many scholars agree that negotiations surrounding the establishment of a system of Aboriginal self-government constitute a major piece of unfinished business within the Canadian federation. Abele and Prince (2006) have identified four primary models of Aboriginal self-government that have emerged from the debate, which are: (1) mini-municipalities embedded in the Canadian federation; (2) new sub-national entities in anticipation of an adapted form of federalism; (3) a fully-developed third order of government within the federation, and (4) a nation-to-nation treaty-based alliance between First Nations and the Crown (570-1). Each model embodies a different constitutional arrangement between First Nations and the levels of government in Canada and has seen varying degrees of support from First Nations communities with respect to its fundamental features (583-

4). The Idle No More movement calls on Canadian governments to honour indigenous sovereignty (“The Vision”, Idle No More 2013) by going back to the original relationship of respect, equality, and peaceful co-existence as outlined by the treaties (Vowel 2013, para. 7). For many First Nations communities, this would require the devolution of responsibilities regarding program development, service delivery, economic development, capacity-building, education, infrastructure and management (para. 7-12).

In 2011, the first Aboriginal Self-Government Agreement-In-Principle was negotiated between the federal government of Canada and the Deline First Nation Band – a group of five First Nations communities located in the Northwest Territories. The agreement was the culmination of fourteen years of negotiations between Deline and its government partners, setting out the powers and responsibilities of the Deline government and ultimately restoring the right of the communities encompassed by the band to govern themselves (“Self-Government”, Deline First Nation Band 2013). These powers and responsibilities included: the drafting of a constitution, the establishment of educational, spiritual, and cultural programs, law enforcement, social services, delivery of health care services, economic development, and more (ibid). According to Deline, self-government has given the communities encompassed by the band the power to “make laws to strengthen and preserve [their] language, culture and spiritual practices, customs and traditions ... [without diminishing] the quality or level of services provided to the residents of Deline” (ibid). Regarding resource development, the Deline government has stated that self-government has given community members more control over the decisions that affect them; in addition, Deline claims that more decisions have been made at the local level and that decision-makers have been held more accountable to the community as a result of self-determination (ibid).

The establishment of a system of Aboriginal self-government may also have a positive impact on the abilities of First Nations communities to take new, more sustainable approaches to resource extraction – given the emphasis many First Nations cultures place on sustainability. Within the environmental justice literature, many scholars point to the unfair or disproportionate distribution of the costs associated with environmental degradation among poor minority communities – which arise as a result of environmental racism (US EPA 2013, Cable & Cable 1995; see also Agyeman & Evans 2003). Indeed, a large number of First Nations communities in Canada have been disproportionately affected by the costs of pollution (Hazula-DeLay et al. 2009, 7). Under a system of Aboriginal self-government, it is likely that the distribution of these costs would look much different; even if Aboriginal-owned industries within self-governing communities did not place greater emphasis on ecological sustainability than industries not owned by Aboriginal peoples, it is still likely that the costs of pollution would not fall disproportionately on the community.

Given that settlements of Aboriginal self-government provide communities with political recognition within the Canadian federation, greater autonomy over their own affairs, and more, an important question to ask here is whether or not self-government would render the duty to consult obsolete. In the self-governing Aboriginal communities that currently exist in Canada, it is unclear whether these communities still file duty to consult cases in situations where their interests clash with those of government. Aboriginal self-government encompasses the idea of a duty to consult, while at the same time going well beyond the parameters of the doctrine. Though still important within the field of Aboriginal affairs in Canada, the duty to consult is a less fundamental political achievement for First Nations communities than self-determination.

This study has suggested that the duty to consult alone falls short in empowering First Nations communities to determine the futures of the natural resources located on their traditional lands on their own terms. Given the claims of the Deline First Nation Band with regards to community participation in resource decisions, a future study may examine the impacts of Aboriginal self-government on community empowerment in resource development decisions. Indeed, the impacts of Aboriginal self-government – in conjunction with the duty to consult – on community empowerment in resource decisions could prove to be an important question for future researchers of environmental justice.

### **The Duty to Consult, Environmental Justice, and Indigenous Knowledge**

As stated previously, the Brundtland Report emphasized the importance of the effective participation by local communities in making resource development decisions (UNWCED 1987, 49). More specifically, the report advocated for the empowerment of vulnerable groups – namely indigenous peoples – in determining the futures of the world’s natural resources, as indigenous knowledge and traditions are largely based on the principles of sustainable development as well as the preservation of the environment (82). In their definition of environmental justice, Agyeman and Evans (2003) emphasized the right of all people to live in and enjoy a clean and healthy environment and to be protected from environmental pollution (36). Indeed, Agyeman (2005) advocates for the fundamental right of all people to have a voice in decision-making processes (107), while Draper and Mitchell (2001) have argued that environmental justice is best realized through consultation and negotiation between governments and local communities (96-7).

The meaningful participation of local communities in development decisions – a core principle of the environmental justice literature – has come up frequently throughout this project, as the central aim of my study has been to determine the impacts of the duty to consult on empowering local First Nations communities to have a decisive voice in the decision-making processes regarding resource use on their traditional lands. As evidenced by my study, the duty to consult has been beneficial in empowering First Nations communities as it legally requires governments to consult with First Nations in cases where their Aboriginal rights and title may be infringed upon by resource development or other government decision-making; however, there are still several key elements missing from the doctrine that prevent it from giving Aboriginal communities the power to make resource decisions on their own terms – such as the absence of an Aboriginal veto, the difficulties surrounding what constitutes meaningful consultation, and the possibility that a community’s interests may be recognized but ultimately dismissed by the courts. The geographic, social, and cultural barriers identified in the Brundtland Report that stand between indigenous peoples and their empowerment in resource development decisions continue to exist today, even with the duty to consult – as evidenced by the cases of Halfway River, Haida Nation, and Gitanyow. These communities struggled to empower their members throughout their respective forestry disputes due to factors such as geographic isolation and financial hardship. More importantly, however, there was unwillingness on the part of the British Columbia Ministry of Forests to accept the communities’ demands – even with a duty to consult. In each case study, factors such as social and cultural differences – also outlined in the Brundtland Report – provided the grounds for the Ministry of Forests to deem indigenous knowledge and customs as incompatible with or less important than the government’s economic agenda. Until consultations between governments and First Nations are expanded to include indigenous

knowledge and an Aboriginal veto, local communities will not be afforded the decisive voice in resource decisions that is required in working toward achieving environmental justice.

### **The Importance of This Study**

Despite its shortcomings, the duty to consult still warrants analysis with regards to its impacts on the field of Aboriginal affairs in Canada. As evidenced by the Gitanyow case, the duty to consult has had significant impacts on community empowerment in comparison to pre-duty to consult cases like *Halfway River*; however, this study has also shown that the Gitanyow community still struggled to exercise any real decision-making power throughout consultations with representatives from the Ministry of Forests. By comparing the cases of Halfway River, Haida Nation, and Gitanyow, this study has highlighted the positive contributions of the duty to consult to First Nations empowerment in Canada as well as the shortcomings of the doctrine in affording these communities any real decision-making power in resource development decisions. The duty to consult is a critical aspect of Aboriginal law in Canada that gains little to no attention from the public, the media, mainstream political parties, and the Aboriginal rights movement Idle No More. This study has shed some much-needed light on the duty to consult, connecting this important legal doctrine to the broader principles of sustainable development, environmental justice, and indigenous knowledge. The parallels between environmental justice movements such as the Chester, Pennsylvania movement and the First Nations movement in Canada are striking; indeed, both of these movements have supplemented grassroots tactics with legal action in their pursuit of environmental justice. However, the communities involved in these movements continue to face environmental injustices and struggle to find an equal voice in the decisions regarding resource use in their area. To help remedy this, the Brundtland Report calls for



concrete measures protecting the institutions that promote the responsible use of natural resources as well as a concerted effort by governments and other decision-makers to give local communities a greater role in participating in resource decisions (UNWCED 1987, 49). To improve the level of participation by local Aboriginal communities in Canada in resource development decisions specifically, I have suggested going beyond the duty to consult to a concept that has been the subject of much debate in the field of Canadian Aboriginal affairs – Aboriginal self-government. While the impacts of Aboriginal self-government on community empowerment in resource development decisions is unclear, a study focused on the effects of self-determination – in conjunction with the duty to consult – on the empowerment of First Nations communities seeking environmental justice would prove to be an important extension of the findings of this study. In sum, the duty to consult as it stands today is severely lacking. First Nations communities in Canada must be given a truly equal, decisive voice in the decision-making processes regarding resource development on their traditional lands. Only when the federal and provincial governments of Canada go beyond the minimal requirements of the duty to consult will First Nations communities be truly empowered in resource decisions.

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