The Supreme Court of Canada's Promotion of Aboriginal-Crown Policy Relationships in the Duty to Consult

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Introduction

In Canada, the duty to consult constitutes a constitutional obligation requiring the Crown to consult Aboriginal parties when an action may adversely affect their rights.[1] The Supreme Court of Canada (SCC) has elaborated how the duty to consult fits within Canadian constitutionalism by linking the duty to principles of the Crown's fiduciary duty and the goal of reconciliation. The literature concerning the SCC's conceptualization of reconciliation identifies different visions or understandings of reconciliation over time as Aboriginal law jurisprudence develops. This literature has yet to address how the duty, which aims to facilitate reconciliation, may reveal additional advancements in the SCC's understanding of reconciliation. Moreover, the policy prescriptions offered by the SCC when advising actors how to fulfill the duty also reveals the policy consequences of advancing particular understandings of reconciliation. This paper employs Mark Walters's framework of resignation, consistency, and relationship as categories for the three main visions of reconciliation that the SCC advocates. Then, policy ideas are identified in the duty to consult jurisprudence and categorized based on how they correspond to each vision of reconciliation to illustrate how different understandings of reconciliation also entail different policy consequences for the Crown and Aboriginal peoples. Five crucial cases in the development of duty to consult jurisprudence are chosen to investigate, through manual textual analysis, which vision of reconciliation is advanced by the SCC and the policy consequences of pursuing one vision of reconciliation over others.

I argue that consistency, whereby Aboriginal rights are treated as compatible with Canadian law and Crown authority, is the main vision of reconciliation advanced by the SCC. According to this vision, existing Canadian law and policy processes can adjudicate and protect the rights of Aboriginal peoples. Although the SCC's articulation of the honour of the Crown opens some possibility for Crown representatives to advance a new relationship with Aboriginal peoples, the other policy ideas conforming to consistency and even resignation as reconciliation can ultimately dissuade Crown actors from this goal.

A Summary of the Duty to Consult Jurisprudence

Before assessing the policy ideas found in the duty to consult jurisprudence, is necessary to outline the current state of the duty within Canadian jurisprudence. Firstly, the SCC has situated the duty to consult within existing principles of Canadian constitutionalism. For instance, the SCC states that the duty is a part of the Crown's fiduciary obligation towards Aboriginal peoples, an obligation that can be understood to "temper" the Crown's sovereign power.[2] An extension of this fiduciary obligation is that the Crown must act honourably with the intention of substantially addressing the concerns of Aboriginal peoples whose rights are at stake.[3] Acting honourably includes consulting Aboriginal peoples when Crown actions may adversely impact Aboriginal rights or rights claims. The duty is grounded in the honour of the Crown and good faith dealings

[1] *Haida Nation v. British Columbia (Ministry of Forests)* [2004]: para. 35.
[2] Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation," *UBC Law Review* 39, no. 1 (2006): 145.
[3] *Delgamuukw v. Attorney-General of British Columbia* [1997]: para. 168.

to facilitate the goal of reconciliation between the rights of Aboriginal peoples and the sovereignty of the Crown.[4]

Secondly, the SCC has also steadily articulated the scope and content of the duty. For instance, the adequacy of consultation is determined by a spectrum involving the strength of the rights claim and the potential for infringing rights. Dubious claims with minimal risk of infringement may only involve a duty to give notice of proposed action,[5] while strong rights claims and serious infringements to the rights claims may require more substantive forms of consultation.[6] The Crown proposal under scrutiny only includes specific actions at issue rather than broader projects from which the specific action is a part.[7] In effect, the duty cannot be triggered to address historical grievances. The SCC also clarified that the duty still exists regardless of whether it is explicitly stated in the terms of a modern treaty.[8] Consequently, the duty cannot be bargained away in a modern treaty process because it is a constitutional obligation.

Thirdly, besides the content and scope of the duty, the judiciary also provides guidelines relating to the processes of fulfilling the duty. The SCC states that administrative tribunals can only fulfill the constitutional obligation if they are given an explicit legislative mandate and the necessary resources to provide remedial concessions.[9] However, the judiciary have ruled that tribunals "with the authority to consider questions of law, are likely to have the concomitant jurisdiction to interpret or decide constitutional questions, including those concerning section 35(1)."[10] Therefore, tribunals with specialized experience regarding issues arising from extractive industries are considered to be fit to administer Aboriginal rights.

Although this overview shows the legal parameters of the duty in Canadian law, it is important to understand how and why this particular formulation of the duty to consult has emerged in the case law and the potential consequences of this formulation.

Reconciliation as Understood by the SCC

Since the duty to consult is meant to facilitate reconciliation between the Crown and Aboriginal peoples, how the SCC defines the duty and promotes certain policy measures in the fulfillment of the duty may help reveal the SCC's understanding of what reconciliation entails and how it should be advanced by policy actors. Other scholars have analyzed the SCC's conceptualization of reconciliation to protect and give meaning to s. 35. Over time, the SCC has presented varying understandings of reconciliation, such as emphasizing different characteristics of law and society that should be reconciled between the Crown and Aboriginal peoples. For instance, reconciliation has been treated as a process of curtailing federal powers to be consistent with fiduciary responsibilities to Aboriginal peoples, a means to resolve pre-existing Aboriginal

[4] *Haida Nation v. British Columbia (Ministry of Forests)* [2004]: para. 32.
[5] Ibid., para. 43.
[6] Ibid., para. 44.
[7] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010]: para. 53
[8] *Beckman v. Little Salmon/Carmacks* [2010]: para. 69.
[9] *Carrier Sekani Tribal Council* [2010]: para. 60.
[10] Sari Graben and Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board," *University of Toronto Law Journal* (Fall 2015): 389-90.

claims with the Crown's assertion of sovereignty, and as a principle representing the need to balance Aboriginal and non-Aboriginal societal interests.

Scholars identify reconciliation as a process of curtailing federal powers to respect fiduciary responsibilities to Aboriginal peoples in the *Sparrow* (1990) decision. In this decision, reconciliation is framed as requiring the federal government to exercise its powers in a manner consistent with advancing the rights and interest of Aboriginal peoples, so infringements to Aboriginal rights require justification. This approach to reconciliation attempts to "protect Aboriginal rights from unchecked federal powers"[11] and places the judiciary in a position to re-examine the Crown's sovereign power relative to Aboriginal rights.[12] Therefore, Aboriginal rights are reconciled with the existence of Canadian society and sovereignty in a manner that rejects assimilation and accepts Aboriginal difference.[13]

In some ways, the idea that reconciliation resolves pre-existing Aboriginal claims with the Crown's assertion of sovereignty departs from reconciliation as curtailing federal powers, since the courts are less willing to challenge the existence of Crown sovereignty and its territorial control.[14] Under this conceptualization of reconciliation, Aboriginal rights must be defined within the structures of Crown sovereignty and territorial control,[15] which dismisses how Aboriginal rights flow from distinct legal systems that emerge from Aboriginal peoples' territorial occupation and control of land.[16] This understanding of reconciliation emerged in the *Van der Peet* (1996) decision, but did not wholly displace the previous understanding of reconciliation as curtailing federal powers and the *Sparrow* justification test remains.

Finally, reconciliation can also take the form of balancing Aboriginal and non-Aboriginal interests to advance social harmony. This approach to reconciliation is heavily criticized for severely limiting Aboriginal rights and placing most of the burden of reconciliation on Aboriginal communities to reconcile themselves to status quo Canadian societal interests.[17] As a result, social peace is advanced by the necessity of violating Aboriginal rights, which reflects poorly on Canadian society's attempt to reject colonial and assimilatory practices.[18] This additional understanding of reconciliation is identified in the *Gladstone* (1996) case, thus layering a new dimension to reconciliation in Aboriginal law jurisprudence.

These varying understandings of reconciliation over time reveal that the SCC have presented different aspects of Crown-Aboriginal relations that require reconciliation. Mark Walters has conceptualized different visions of reconciliation, with reconciliation taking on the form of

[11] D'Arcy Vermette, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples," *Windsor Yearbook of Access to Justice* 29 no. 1 (2011): 59.
[12] Michael McCrossan, "Shifting Judicial Conceptions of 'Reconciliation': Geographic Commitments Underpinning Aboriginal Rights Decisions," *Windsor Yearbook of Access to Justice* 31, no. 2 (2013): 161.
[13] Carole Blackburn, "Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada," *Journal of the Royal Anthropological Institute* 13 (2007): 622.
[14] Michael McCrossan, "Shifting Judicial Conceptions of 'Reconciliation,'" 174.
[15] D'Arcy Vermette, "Dizzying Dialogue," 60.
[16] Michael McCrossan, "Shifting Judicial Conceptions of 'Reconciliation,'" 167.
[17] D'Arcy Vermette, "Dizzying Dialogue," 62.
[18] Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin," *Indigenous Law Journal* 2 (2003): 17.

resignation, consistency, or relationship.[19] Under a resignation framework, Aboriginal peoples must be reconciled to absolute Crown authority over Aboriginal peoples and their interests.[20] Reconciliation under consistency involves framing Aboriginal perspectives and rights claims within the terms of Canadian law.[21] Therefore, the authority and legitimacy of the Crown's power and assertion of sovereignty are not challenged, and are considered compatible with protecting Aboriginal rights. Reconciliation as relationship, in contrast, opens the possibility of accepting shared sovereignty under a new relationship between the Crown and Aboriginal peoples. This approach may give Aboriginal peoples jurisdictional authority to practice their laws and customs alongside mainstream Canadian society.

Reconciliation involving the curtailment of federal powers to protect Aboriginal rights is most consistent with the relationship approach to reconciliation. Since the federal government must curtail its powers over Aboriginal peoples to protect Aboriginal rights, this approach may facilitate the inclusion of Aboriginal legal and political practices in Canada's constitutional order. The idea that reconciliation should resolve pre-existing Aboriginal claims within the framework of Crown sovereignty and territorial control is compatible with the consistency approach to reconciliation, as Crown sovereignty is not challenged as a precondition to respecting Aboriginal claims. Reconciliation as balancing Aboriginal and non-Aboriginal interests can resemble resignation, as Aboriginal peoples must be resigned to Crown sovereignty as well as the societal interests of non-Aboriginal peoples, rendering Aboriginal rights as less-deserving of protection than other interests.

This literature demonstrates that the SCC has presented mixed visions of the purpose of reconciliation. However, this literature focuses on earlier cases in Aboriginal law jurisprudence, while only tangentially addressing the implications of more recent cases for the advancement of reconciliation. Since the duty to consult is treated by the SCC as a means of pursuing reconciliation, the duty to consult jurisprudence may reveal more specific policy prescriptions that the SCC presents as necessary to the advancement of reconciliation.

Theoretical Framework and Methodology

I will adopt a theoretical premise that the SCC is an institution whose actions produce politically important consequences. Indeed, as Chief Justice Beverley McLachlin states:

> [t]he Court's decisions have the immediate effect of defining the legitimacy of a particular claim or practice at common law or by Treaty. They carry precedential weight and influence the resolution of other disputes. Finally, they carry symbolic value as morally authoritative statements of the principles that ought to guide the mutual interactions of Aboriginals and non-Aboriginals. In adjudicating disputes, including disputes about Aboriginal claims, the Court gives content to the commitment to live together and respect each

[19] Mark Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada," in *The Politics of Reconciliation in Multinational Societies*, eds. Will Kymlicka and Bashir Bashir (Oxford: University of Oxford Press, 2008): 177.
[20] Ibid., 178.
[21] Ibid., 180.

> other as individuals, as members of historically distinctive groups, and as Canadians - in short, to the rhetoric of reconciliation.[22]

The duty to consult jurisprudence may reveal the specific policy outcomes or goals the SCC believes are worthy to attain when advancing visions of reconciliation. This paper employs Walter's framework of categorizing reconciliation as resignation, consistency and relationship, and considers how policy prescriptions for fulfilling the duty correspond to these different visions of reconciliation.

This paper draws from ideational approaches found in the comparative public policy field to identify the policy prescriptions the SCC attempts to promote. Ideas can be differentiated by both their type and level of abstraction. Specifically, ideas can be either cognitive or normative. Cognitive ideas reveal the cause-and-effect relationships between subjects in the world. Normative ideas are the values and norms that show how subjects in the world ought to be structured or what actors ought to do in order to improve the world. Cognitive and normative ideas can operate on two different levels, referred to as the background and the foreground level. Cognitive and normative ideas in the background are taken-for-granted assumptions that rarely get challenged by actors and operate to narrow the range of policy alternatives actors will consider.[23] In contrast, cognitive and normative ideas in the foreground are used by actors to justify and legitimate everyday policy decisions.[24]

The distinction between cognitive and normative ideas has not yet been explicitly applied to SCC decisions, and is a promising perspective to analyse the content of jurisprudence. However, the background and foreground distinction may be less useful in the case of SCC decisions. The SCC may examine previously considered background cognitive or normative ideas in its decisions, thus pushing those ideas into the foreground as they become articulated and contested in law. Therefore, all ideas in jurisprudence arguably reside at the foreground. At the same time, the different levels of abstraction for key ideas in the Court's jurisprudence can usefully be captured by distinguishing between "meta" and "micro" ideas. Meta ideas represent ideas at a higher level of abstraction, and include the underlying properties or characteristics from which micro ideas rest upon. Conversely, micro ideas are more specific in nature, and build upon the characteristics of meta ideas. These adjustments to the background and foreground distinction emphasizes the different purposes or nature of ideas rather than the frequency with which actors engages with ideas.

Although the literature's definitions of cognitive and normative ideas at the meta and micro levels are useful, more specific definitions for the purposes of employing textual analysis is necessary. Specifying the conditions to classify different ideas may allow replication of the analysis and can account for the specific role of courts as distinct policy actors. The ideational policy literature often assesses ideas presented by actors such as politicians, bureaucrats or other experts. Since the judiciary communicates policy prescriptions differently due to their unique institutional position, it is important to establish specific conditions under which certain ideas can be expected to be presented by the court.

[22] Beverley McLachlin, "Aboriginal Peoples and Reconciliation," *Canterbury Law Review* 9, no. 1 (2003): 245.
[23] John Campbell, "Ideas, Politics and Public Policy," *Annual Review of Sociology* 28 (2002): 22-5.
[24] Ibid., 26-9.

Meta normative policy ideas can legitimate certain policy action by referring to "a deeper core of … principles and norms of public life, whether the newly emerging values of a society or the long-standing ones in the societal repertoire."[25] The SCC may express fundamental principles and norms through the articulation of values or norms that underpin or explain why Crown and Aboriginal peoples should have a distinct relationship at all. These meta normative ideas would then also explain why certain legal doctrines or frameworks ought to be invoked that are specific to Aboriginal peoples and the protection of their rights.

Micro normative ideas show how certain policy actions and initiatives meet standards of appropriateness or society's goals and aspirations.[26] Standards of appropriateness are based on ideas about the rules of appropriateness or exemplary behaviour associated with actors' specific identities.[27] Micro normative ideas may be expressed when the SCC prescribes certain behaviours to actors given their specific identities as either Crown or Aboriginal actors. Moreover, the SCC may prescribe certain goals society should strive to attain when elaborating the purpose of the duty to consult.

Meta cognitive ideas are often used to justify policies and programs by demonstrating how policy action is consistent with established practices of "relevant scientific disciplines or technical practices."[28] Systems of accepted scientific disciplines or technical practices are also referred to as "paradigms". There is some disagreement regarding what constitutes a paradigm, as it is sometimes treated as elaborating the goals of policy,[29] or considered to operate at a further level of abstraction, whereby the paradigm articulates cause-and-effect relationships using specific theoretical principles.[30] This paper will treat the meta cognitive ideas as having more abstract qualities than the articulation of policy goals. Therefore, meta cognitive ideas are the theories, frameworks or disciplines that establish cause-and-effect relationships between subjects. Within specific meta cognitive ideas, policy goals, instruments and settings can then be defined. By resolving legal disputes, the SCC must explicitly state what meta cognitive ideas are used to justify and explain the Court's own assessment of the dispute and how it can be resolved. For instance, the creation of new legal tests or recourse to existing legal tests are examples of the SCC using specific meta cognitive ideas to assess the policy problem and present remedies.

Micro cognitive ideas provide the "recipes, guidelines, and maps for political action" by defining the policy problem, its solution and the methods required to attain the solution.[31] The SCC will articulate their interpretation of the dispute between the Aboriginal and Crown actors. Then, the SCC decides whether a party needs to take responsibility for correcting the conflict and describes how the dispute could be resolved or avoided in the future. Moreover, the court may prescribe how other institutions or processes can play a role in resolving the dispute or prevent future conflicts. Therefore, how the SCC's identifies the parameters of the dispute, presents possible remedies and measures to

[25] Vivien Schmidt, "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse," *Annual Review of Political Science* 11 (2008): 307.
[26] Ibid.
[27] James March and Johan Olsen, *The Logic of Appropriateness,* ARENA Working Paper (2004): 3-4.
[28] Vivien Schmidt, "Discursive Institutionalism," 307.
[29] Peter Hall, "Policy, Paradigms, Social Learning, and the State" *Comparative Politics* 25, no. 3 (1993): 278.
[30] John Campbell, "Ideas, Politics and Public Policy," 22.
[31] Vivien Schmidt, "Discursive Institutionalism," 307.

avoid future conflicts, and prescribes how institutions or processes can aid in the avoidance of conflict represent examples of micro cognitive ideas.

The policy ideas presented in five crucial cases in the duty to consult jurisprudence are categorized as cognitive or normative ideas residing at either the meta or micro levels. These cases include *Haida Nation* (2004), *Taku River* (2004), *Mikisew Cree* (2005), *Carrier Sekani* (2010) and *Little Salmon/Carmacks* (2010). The cases from 2004 to 2005 are often called the *Haida* trilogy, and are considered the foundational cases that articulate the major dimensions of the duty, such as when the duty is triggered and its scope. The later cases in 2010 supplement the *Haida* trilogy by further elaborating the conditions under which the duty is triggered and its scope. The *Haida Nation* (2004) and *Taku River* (2004) cases address how to respect unproven Aboriginal rights. *Mikisew Cree* (2005) and *Little Salmon/Carmacks* (2010) cases involve the interpretation of unspecified treaty provisions. Finally, the *Carrier Sekani* (2010) case addresses concerns regarding how to evaluate the adequacy of consultation.

The definitions of policy ideas outlined above are employed to identify and categorize ideas found in the five crucial SCC cases. For this research, an idea is presented when the SCC elaborates a complete thought that corresponds to the definitions above. Ideas will be counted when they appear in a paragraph of a decision because SCC decisions are cited by paragraph and it may take more than one sentence to fully express a policy idea or concept. The same paragraph can include more than one type of idea so a paragraph may be coded in more than one category. Furthermore, citations from previous cases count as additional mentions of an idea. Finally, policy coherence is higher when all types of ideas, normative and cognitive at the micro and meta levels, are present and can be linked together to conform to a single vision of reconciliation. As a close reading of each case is required, a manual approach to textual analysis is appropriate.

The different sections of a SCC decision provide some indication of the type of ideas the SCC will present.[32] SCC decisions often begin by outlining the context of the specific dispute. This context could allude to values or norms that explain why Crown-Aboriginal relations ought to exist, or articulate societal goals to be achieved through specific Crown-Aboriginal relations, or both. Therefore, the SCC's articulation of the context of a case is often comprised of meta and micro normative ideas. Another important section is the analysis section, where the SCC addresses the specific questions they are expected to answer to resolve the dispute. In these sections, the SCC often explains new or existing legal tests that are used to interpret the dispute, and apply those tests to find the nature of the dispute and present solutions. These ideas are often cognitive, with the articulation of legal tests taking place at the meta level, while more specific articulations of the dispute and its solution are at the micro level. Moreover, some of these solutions may involve prescriptions of behaviour that specific actors are expected to exhibit, which would resemble micro normative ideas. Of course, the SCC may express different ideas in other sections, but the separation of the decision provides guidance regarding what kinds of ideas will be expressed. The ideas presented in these five cases are categorized into Walter's framework of distinguishing between resignation, consistency and relationship as

[32] See: Robert Schertzer, *The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada* (Toronto: University of Toronto Press, 2016): 122-3 analyzes both the *ratio decidendi* and the *obiter dicta* of SCC decisions to uncover how the SCC depicts and understands the federation.

organizing principles for the advancement of reconciliation. See Appendix A for a summary of the definitions used to code the policy ideas.

Analysis

Reconciliation as Resignation

The SCC presents ideas that conform to the vision of reconciliation as resignation, most notably at the meta normative level. For instance, in the *Little Salmon/Carmacks* case, the SCC made a statement that treats certain Aboriginal grievances as characteristics of the past,[33] rather than a real present-day problem grounded in a past legacy of mistreatment by the Crown. Although this statement was only made in one case, it is nevertheless troubling that the SCC in any instance would ignore the ongoing and continuous nature of the relationship between the Crown and Aboriginal peoples: that they have a long legacy of distrust that effects current relations between the two parties. Although the SCC is not directly stating that Aboriginal peoples should be resigned to Crown sovereignty, the Court, in this instance, denies the extent to which the Crown represses Aboriginal peoples. Denying this legacy of repression undermines Aboriginal peoples' own demands to be free from Crown control and jurisdictional authority. Moreover, this denial also represents a distinct narration or account of events that is highly contested by Aboriginal peoples.

A more direct idea that alludes to resignation is how the SCC consistently denies the existence of Aboriginal sovereignty. Although the SCC states in four of the five cases that Aboriginal peoples held prior occupancy of lands before European contact,[34] the political autonomy that accompanies occupancy is not recognized. Only in one instance in the *Haida* case did the SCC use the phrase "Aboriginal sovereignty" to acknowledge pre-existing political autonomy before Crown sovereignty.[35] These allusions to Crown-Aboriginal relations as resignation through the denial of Aboriginal sovereignty are also found when the SCC describes the purpose of reconciliation, which is a micro normative idea. The SCC states the purpose of reconciliation concerns harmonizing and balancing interests, so advancing reconciliation encourages both the Crown and Aboriginal peoples to find compromises to avoid confrontation.[36] All five cases demonstrate that the court believes reconciliation between Crown sovereignty and prior Aboriginal occupancy is best achieved when parties are willing to compromise to find consensus, rather than take hard negotiating positions that can only be resolved through formal adjudication processes. However, if the goal of s. 35 is to recognize and affirm Aboriginal rights, it is problematic that defending Aboriginal rights could be interpreted as taking a hard negotiating position. Therefore, although no overt practices of repressing Aboriginal interests are being proposed, some evidence of colonial values that correspond to resignation are found in the way the SCC frames the purpose of the duty.

The SCC also articulates micro normative ideas that conform to resignation. Reconciliation, which is the goal of the duty, is treated as an event to "move on" from the past rather than an ongoing

[33] *Little Salmon/Carmacks*, para. 10 states "Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past."
[34] *Haida Nation* para. 32; *Taku River* 42; *Mikisew Cree* 47; *Little Salmon/Carmacks* 8.
[35] *Haida Nation* para. 20.
[36] *Haida Nation* para. 14, 45, 49, 50; *Taku River* 2, 42; *Mikisew Cree* 50; *Carrier Sekani* 34, 83; *Little Salmon/Carmacks* 34, 103.

process. For instance, in the decision where the SCC historicizes Aboriginal grievances, it is also alluded that the process of reconciliation is a means to settle "ancient grievances" as "the future is more important than the past".[37] However, "moving on" without first addressing the problematic aspects of the past is not accepted by many Aboriginal peoples. When addressing how Aboriginal peoples should behave in the context of the duty to consult, the SCC states in one case that Aboriginal peoples should not forget that they are also Canadians that need to "fully participate with other Canadians in their collective governance".[38] Therefore, Aboriginal peoples also need to compromise and find consensus with the Crown. Since the Crown and Aboriginal peoples' identities are constructed with the expectation that each will work together to compromise and balance interests, the SCC states in all five cases that Aboriginal peoples cannot expect certain measures of accommodation in the consultative process.[39] Consequently, the SCC has emphasized that Aboriginal peoples have no veto in the consultative process. Instead, policy outcomes should reflect the result of the consensual relationship between the Crown and Aboriginal peoples. Since Aboriginal peoples do not exercise a veto over consultative processes even when their rights may be at stake, this expectation of Aboriginal peoples to remain consensual in the face of possible rights violations corresponds to a resignation approach to reconciliation.

Reconciliation as Consistency

The SCC also expresses visions of reconciliation as consistent with the broader Canadian constitutional framework. Starting at the meta normative level, when the SCC asserts the idea that Aboriginal people held occupancy of lands before the Crown asserted its sovereignty, this prior occupancy is understood to give rise to different rights, such as the duty to consult, that can be exercised and respected *within* Crown sovereignty. Although the SCC presents ideas that are problematic from the standpoint of Aboriginal peoples' claims to political sovereignty, there is the recognition that Aboriginal peoples have a special place in Canada's constitutional order by virtue of their prior occupancy. But the meta normative idea to value Aboriginal rights is constrained by other norms, such as the norm to respect *de facto* Crown sovereignty.

The meta cognitive ideas presented by the SCC, specifically how the adequacy of the duty can be assessed using existing standards of administrative law and policy responsiveness, also reflect a vision of consistency. The duty is treated as an extension of existing Canadian legal principles, most notably procedural rights. The court rejects the possibility that Aboriginal legal traditions should be incorporated. In the *Little Salmon/Carmacks* (2010) case, the Little Salmon/Carmacks First Nation refuted the idea that administrative law can adequately protect Aboriginal rights, but the SCC remained firm that "administrative law is flexible enough to give full weight to the constitutional interests of the First Nation."[40] Therefore, the SCC recognizes that Aboriginal peoples have distinct constitutional rights, but these rights are articulated using concepts found in Canadian law. Indeed, in two decisions,

[37] *Little Salmon/Carmacks*, para. 10.
[38] *Little Salmon* para. 33.
[39] *Haida Nation* para. 42, 48, 49; *Taku River* 2, 22; *Mikisew Cree* 66; *Carrier Sekani* 48, 50; *Little Salmon/Carmacks* 14, 44, 78, 80, 81.
[40] *Little Salmon/Carmacks* para. 47.

the duty to consult is treated as a right to ensure the Crown's procedural obligations to Aboriginal peoples in the same manner as upholding procedural fairness to other actors.[41]

Another important meta cognitive idea is the assertion that the adequacy of consultation can also be assessed using existing policy standards. According to the public policy literature, consultation is implemented at the discretion of decision makers to serve two goals. Firstly, consultation increases information about a policy option; secondly, consultation increases the legitimacy of a decision.[42] However, consultation will not attain more information or legitimacy if the decision maker does not meaningfully address the views and interests of the population. The SCC also takes the position that consultation must be meaningful to Aboriginal parties for the duty to be fulfilled. Particularly in the cases constituting the *Haida* trilogy, the SCC emphasizes that consultation must involve the *possibility* that the Crown will alter its plans to address the views of the affected Aboriginal party; this possibility necessarily entails the Crown seriously considering the views of the consulted. [43] This standard articulated by the SCC is consistent with regular consultative processes and does not consider Aboriginal understandings or practices of consultation.

Micro cognitive ideas reveal the SCC's understanding of the policy problem, its solution, and the means to achieve the solution. The policy problems, solutions and instruments the SCC proposes at the micro cognitive level also reflect a vision of reconciliation as consistency. The specifics of the policy problem that the SCC identifies is different in each legal dispute. Nevertheless, the policy problem is generally interpreted by the SCC as a misunderstanding of when the duty is triggered or what the scope of the duty entails, or both. In the 2010 decisions, the SCC explicitly treats duty to consult disputes as issues of procedural fairness,[44] whereby excluding Aboriginal peoples from decision making is analogous to excluding relevant stakeholders in decision making. Although Aboriginal peoples have a *constitutional* right to consultation, the duty is not meant to alter the negotiating positions of actors in land management issues.[45] In other words, the duty is meant to ensure that the Crown is aware of Aboriginal interests before decision making, rather than ensuring Aboriginal peoples are at the decision making table.[46]

Given this understanding of the policy problem, the SCC often presents policy solutions by clarifying additional standards to determine when the duty is triggered, and what the content of the duty includes given contextual conditions. By *Carrier Sekani* (2010), a three-step process was presented to determine whether the duty was triggered. First, the Crown must have knowledge of the Aboriginal rights claims; secondly, a Crown proposal must be contemplated; thirdly, this proposal must have a potential adverse impact on the Aboriginal rights claim.[47] Clarifying the

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[41] *Mikisew Cree* para. 57; *Little Salmon/Carmacks* 79

[42] See: Helena Catt and Michael Murphy, "What Voice for the People? Categorizing Methods of Public Consultation," *Australian Journal of Political Science* 38, no. 3 (2003): 416-8 and Jon Pierre, "Public Consultation and Citizen Participation: Dilemmas of Policy Advice," in *Taking Stock: Assessing Public Sector Reforms*, eds. Guy Peters and Donald Savoie (Montreal and Kingston: McGill-Queen's University Press and Canadian Centre for Management Development, 1998): 146.

[43] *Haida Nation* para. 46; *Taku River* 25, 32; *Mikisew Cree* 54; *Carrier Sekani* 83.

[44] *Little Salmon/Carmacks* para. 46, 47.

[45] *Carrier Sekani* para. 50.

[46] *Little Salmon/Carmacks* para. 78.

[47] *Carrier Sekani* para. 31, 40-50, 51, 79; *Little Salmon/Carmacks* 108.

guidelines regarding when the duty is triggered is a part of the SCC's act of presenting a policy solution, as these conditions help policy actors navigate resource development projects without resorting to litigation.

The principle of proportionality was created early in the *Haida* trilogy to provide guidelines on the content of the duty when it is triggered. This principle states that the scope of the duty and accommodation will be proportionate to the strength of the Aboriginal rights claims and the potential adverse impact of the Crown proposal.[48] This characteristic of the duty is often considered the spectrum criteria, whereby the scope and content of the duty lies on a spectrum, depending on whether the Aboriginal rights claims are strong or weak, and whether the Crown proposal has high or low levels of adverse impacts. For instance, consultation at the lower end of the spectrum will involve providing Aboriginal parties with timely information, while more extensive consultation may involve the potential to accommodate Aboriginal interests.

The SCC has been less willing to prescribe how the duty should be fulfilled. The court has stated in two cases that the Crown must fulfill the duty and must exercise its powers to create administrative schemes for that purpose.[49] However, the SCC often restricts itself to commenting about policy instruments involved in the specific dispute they must adjudicate. For instance, since the *Carrier Sekani* (2010) case involved a dispute over regulatory review, the SCC addressed the role of tribunals and found that tribunals often cannot engage in consultation themselves, but can assess whether the duty has been fulfilled.[50] The SCC also mentions other measures that should be followed, such as ensuring that Aboriginal peoples represent themselves in consultative forums[51] and to ensure that information and decisions are communicated in a timely manner.[52] Other than these passing remarks, the SCC has remained relatively silent regarding how the Crown can fulfill the duty. In contrast, the court is more willing to articulate policy problems and offer policy solutions by clarifying the scope and content of the duty for policy actors to act with more certainty. The SCC's aversion to articulate the means by which the duty can be fulfilled most likely reflects the Court's own institutional role and limits. The SCC is willing to intervene to clarify disputes or offer remedies in certain disputes, but prefers political actors to create schemes to fulfill the duty.[53]

The SCC has not incorporated Aboriginal legal and political traditions to shape the scope and content of consultation, but has established a set of criteria for identifying when the duty is triggered and the scope of consultation to ensure Aboriginal peoples are a part of the process leading up to the final decision. Moreover, Aboriginal peoples may be encouraged by the SCC to represent their own interests in the policy process, but these measures of inclusion do not challenge the Crown's authority to design the consultative institutions within which Aboriginal peoples are expected to take part. Consequently, Canadian laws and authoritative bodies are believed by the SCC to act legitimately for

[48] *Haida Nation* para. 37, 39, 43, 45; *Taku River* 29, 32.
[49] *Haida Nation* para. 51; *Little Salmon/Carmacks* 61, 71.
[50] *Carrier Sekani* para. 55, 56, 57, 58, 60, 61, 67.
[51] *Mikisew Cree* para. 64-5.
[52] *Mikisew Cree* para. 49; *Little Salmon/Carmacks* 28, 37.
[53] *Haida Nation* para. 14, 38, 51; *Carrier Sekani* 38, 63, 75; *Little Salmon/Carmacks* 93, 103, 203.

Aboriginal and non-Aboriginal peoples. These ideas reflect the consistency approach to advancing reconciliation between the Crown Aboriginal peoples.

Reconciliation as Relationship

Lastly, some of the SCC's policy ideas indicate visions of reconciliation as requiring the need to create a distinct relationship between the Crown and Aboriginal peoples. Micro normative ideas presented by the SCC, such as those that explain the purpose of the duty and the expected behaviour of the Crown in dealings with Aboriginal peoples, reveal elements of a distinct relationship as the defining characteristic of reconciliation. When framing the purpose of the duty, the SCC presents a meta normative idea in *Haida*, that Aboriginal peoples were never conquered.[54] From this position, the SCC elaborates in two other decisions that the duty prevents indifference that has, in the past, undermined attempts at reconciliation.[55] The SCC's mentioning of the duty as a means to prevent Crown indifference can be interpreted as a positioning of reconciliation as a societal goal with real stakes rather than simply a lofty, distant ambition. Indeed, the infringement of unproven Aboriginal rights could be "as destructive of the process reconciliation as some of the larger and more explosive controversies."[56] These two ideas frame the purpose of the duty as a means to facilitate a new relationship between the Crown and Aboriginal peoples, both of which are here to stay.

The SCC also presents other micro normative ideas that are emblematic of a new relationship between Crown and Aboriginal peoples. The SCC's articulation of the honour of the Crown as the standard of expected behaviour for Crown representatives is particularly striking. The duty to consult is grounded in the honour of the Crown which is treated by the SCC as both a normative legal concept[57] and a standard of behaviour to evaluate concrete practices.[58] The Crown in its dealings with Aboriginal peoples must act honourably, and this honour is always at stake.[59] The duty is an expression of this honour, as the Crown must respect Aboriginal rights and engage in consultation and possibly accommodation if rights infringements on unproven rights may occur, or as a guiding framework to follow treaty provisions that may be unclear or unspecified. Although the content of honourable actions differs depending on the context, the SCC is completely clear that the Crown is expected to act honourably towards Aboriginal peoples. Nevertheless, this does not mean that the Crown loses its authority. Rather, acting honourably ensures that the Crown exercises its power legitimately[60] and prevents unilateral actions from being taken against Aboriginal peoples.[61] Furthermore, the SCC also recognizes in the two cases concerning treaty interpretation that the honour of the Crown is a legal requirement that, in some circumstances, comes from Aboriginal peoples' surrender of land.[62] Therefore, a distinct Crown-Aboriginal relationship does not reflect magnanimous actions from the

[54] *Haida Nation* para. 25.
[55] *Mikisew Cree* para. 1; *Little Salmon/Carmacks* 55.
[56] *Mikisew Cree* para. 1.
[57] *Little Salmon/Carmacks* para. 108.
[58] *Haida Nation*, para. 16.
[59] *Haida Nation* para. 16, 17, 18, 19, 20, 25, 26, 27, 32, 33, 38, 41, 45, 53; *Taku River* 24, 42, 46; *Mikisew Cree* 31, 33, 51, 57; *Carrier Sekani* 34, 63, 83, 90, 91; *Little Salmon/Carmacks* 42, 52, 61, 104, 108.
[60] *Haida Nation* para. 27.
[61] *Haida Nation* para. 27; *Mikisew Cree* 49; *Little Salmon/Carmacks* 48, 56, 78, 81, 84, 87, 88.
[62] *Mikisew Cree* para. 52; *Little Salmon/Carmacks* 11, 36.

Crown,[63] but represents an obligation grounded in exchanges and promises made between two parties. Indeed, the SCC states that Aboriginal peoples "pa[id] dearly for their entitlement to honourable conduct on the part of the Crown."[64] This recognition that the duty is an obligation to respect promises between parties reveals how, in these instances, the SCC advocates for a new relationship between the Crown and Aboriginal peoples.

Concluding Remarks

The consistency approach to reconciliation is expressed in policy ideas along normative and cognitive dimensions at both the meta and micro levels. Therefore, although the five duty to consult cases examined I n this paper reveal that all three visions of reconciliation are advanced to some degree, the consistency approach appears to demonstrate the most policy coherence because there are micro and meta normative and cognitive ideas that support this understanding of reconciliation. In contrast, the resignation and relationship understanding of reconciliation is only expressed through normative ideas at the meta and micro levels. The SCC ultimately interprets and resolves Crown-Aboriginal disputes within a consistency framework of reconciliation, revealing an overall preference for respecting the duty within existing structures of Canadian laws and policy practices. Consult Appendix B for a summary of the findings.

Interestingly, the purpose of reconciliation includes ideas that correspond to all three visions: resignation, relationship and consistency. On the one hand, some framing devices allude to Aboriginal peoples being resigned to accept Crown sovereignty, such as the assertion that the goal of reconciliation is to "move on" from the "ancient grievances". Conversely, other frames show the SCC being sympathetic towards the creation of a distinct relationship between Crown and Aboriginal actors such as the recognition of the Crown's role in preventing just reconciliation to occur through Crown indifference. How the SCC frames the purpose of the duty reveals contestation regarding how the Crown and Aboriginal peoples should advance reconciliation. As a result, policy actors are confronted with conflicting visions of what the duty is meant to achieve, as different justifications for the duty correspond to different understandings of reconciliation. These conflicting justifications make it possible for policy actors to have varying understandings of the goals of duty.

There may be important consequences to the SCC's emphasis on consistency to understand reconciliation between the Crown and Aboriginal peoples. For instance, reconciliation under a consistency framework may promote asymmetrical relations between the Crown and Aboriginal peoples, as the Crown's power to structure the terms of Aboriginal participation in consultative settings remains unchallenged. Consequently, policy actors may be ideationally trapped to consider disputes over consultation and decision making in land management issues as problems of procedural fairness within a Canadian legal framework rather than as disputes over how to incorporate Aboriginal understandings of procedural fairness in the policy process. Indeed, Walters states that the resignation and consistency approaches to reconciliation are inadequate, while reconciliation as relationship is the only viable means to advance decolonization.[65] If this is the case, then the duty to consult only leaves space for decolonization at the micro normative level, where the SCC has characterized the honour of

[63] *Little Salmon/Carmacks* para. 105.
[64] *Mikisew Cree*, para. 52.
[65] Mark Walters, "The Jurisprudence of Reconciliation,"189-90.

the Crown and certain aspects of the purpose of the duty in terms that are amenable to establishing a new Crown-Aboriginal relationship. Specifically, the honour of the Crown could encourage the Crown to proactively include Aboriginal perspectives when formulating policy processes, effectively "indigenizing" consultation processes. Since other forms of reconciliation find some expression in duty to consult jurisprudence, policy actors may be given some discretion regarding how to advance reconciliation when practicing the duty. More conflict between policy actors may result as varying interpretations of reconciliation and the duty may collide in the policy process.

Ideational concepts in the public policy literature can be applied Mark Walters's framework of reconciliation to uncover the various policy ideas presented by the SCC in duty to consult jurisprudence and their policy implications for advancing reconciliation between the Crown and Aboriginal peoples. Based on the policy ideas that are presented, the SCC mostly understands the duty to consult as part of the goal of reconciliation in a manner that is consistent (and reconcilable) with the Canadian constitutional framework and Crown sovereignty. In short: the duty to consult can be instated in such a way that Aboriginal interests and rights can be protected and recognized within the terms and practices of Canadian law. There are a few instances, such as the articulation of the honour of the Crown, where the SCC proposes that a new relationship should be advanced between the Crown and Aboriginal peoples. However, some policy ideas also conform to the notion that Aboriginal peoples should resign themselves to Crown sovereignty and authority. All ideas are sites of contestation, but the legal authority of the SCC will influence the ideas policy actors adopt. Therefore, although policy actors have some flexibility to pursue different policy measures that correspond to reconciliation as either resignation, consistency or a new relationship, the SCC emphasises consistency as the appropriate vision of reconciliation to develop Crown-Aboriginal relations.

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Appendix A: Summary of Definitions used for Coding

	Meta	Micro
Normative	• Values or norms explaining why there ought to be a distinct Crown-Aboriginal relationship	• Behaviours Crown and Aboriginal actors are expected to exhibit • The purpose of the duty in achieving a societal goal
Cognitive	• Creation or reference to legal tests	• The policy problem to be solved, its solution, and the means to achieve the solution

Appendix B: Summary of Analysis

	Resignation	Consistency	Relationship
Meta Normative Ideas	• Historicization of Aboriginal grievances • Denying Aboriginal peoples sovereignty or political autonomy when recognizing prior occupancy	• Aboriginal rights flow from their prior occupancy of land that is now Crown land	• Aboriginal peoples were never conquered
Micro Normative Ideas	• Reconciliation as an event rather than a process • Aboriginal peoples cannot demand a form of accommodation and have no veto	• The duty facilitates reconciliation between Aboriginal peoples' prior occupancy with *de facto* Crown sovereignty	• Reconciliation prevents Crown indifference • The Crown must act honourably towards Aboriginal peoples
Meta Cognitive Ideas		• Administrative law principles assess the adequacy of the duty • Standards of policy responsiveness assess the adequacy of the duty	
Micro Cognitive Ideas		• Three Part-Process determines if the duty is triggered • Spectrum criteria determines the scope of the duty	