

Problems Faced by Duty to Consult and the Protection of Aboriginal Peoples in Canada

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Abstract

This paper attempts to analyze the problems faced by the duty to consult doctrine. As an implementation of Section 35 of the Constitution Act of 1982, the duty to consult was first used by the Supreme Court of Canada in the case of Haida Nation in 2004. This doctrine was employed five times by the Supreme Court between 2004 and 2010 to resolve disputes on land and its uses between indigenous people and the Canadian government. In 2018, in the case of Mikisew Cree First Nation v. Canada (Governor General in Council), the Supreme Court determined that this doctrine does not apply to the legislature. While welcomed by indigenous people and those fighting for indigenous people's rights, the duty to consult also raises other problems, namely the application of this doctrine and the legal certainty it creates, especially for businesses related to the use of natural resources.

Keywords: *Duty to Consult, Legislative, Business.*

A. INTRODUCTION

The legalization of the Constitution Act 1982 by Canada established a new page in the state system which marked the separation of legal relations between Canada and England, except for the symbolic role of the monarchy. Apart from containing several significant new things such as the Canadian Charter of Rights and Freedom, for the first time it also explicitly recognized the existence of Canada's Aboriginal people who are referred to as Aboriginal. The term Aboriginal as stated in Section 35 of the Constitution Act 1982 refers to the indigenous people of Canada (Peker, 2019).

Section 35 stipulates several things, namely recognition of the existence and treaty rights (treaties), definition of Aboriginal people, approval of land claims, guarantees of recognition of rights and equality agreements for men and women, as well as commitment of the Government of Canada's to invite the participation of Aboriginal people in constitutional conferences relating to their lives (Kinanti et al., 2023). The recognition of the existence of Aboriginal people in the basic legal rules, the Constitution, became a turning point for Aboriginal people to clarify and demand their rights, especially concerning land issues, resulting in various legal demands regarding their rights. Generally, disputes that are brought to the realm of law will take time to process, especially if one of the parties does not accept the court's decision and makes efforts to appeal at a higher level, which often reaches the level of the Supreme Court (RiverOfLife et al., 2020).

This article observes that one Supreme Court of Canada decision in 2004 in the case of *Haida Nation v. British Columbia (Minister of Forests)* for the first time used the duty to consult doctrine in its decision. The decision stated that "The government's

duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honor of the Crown. The honor of the Crown is always at stake in its dealings with Aboriginal peoples....". This decision provides a breakthrough in the rights of Aboriginal people because it places an obligation on the state to consult with Aboriginal people and accommodate their interests. The duty to consult doctrine itself is an implementation of Section 35 in the form of recognition and affirmation of the rights of Aboriginal people.

In response to the Supreme Court decision regarding the duty to consult, the Canadian Government then created a guideline, namely: "Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfil the Duty to Consult – March 2011. Since the Haida Nation case, the duty to consult doctrine has also been used as a basis for the Supreme Court of Canada to decide several cases related to land and its benefits. Since 2004, the Canadian Government itself recorded five Supreme Court decisions that used this doctrine, namely in the cases of *Haida Nation v British Columbia (Minister of Forests)* in 2004, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* in 2004, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* in 2005, *Beckman v. Little Salmon/Carmacks First Nation* in 2010, and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* in 2010.

B. LITERATURE REVIEW

1. Indigenous Tribe

Indigenous tribes, often referred to as indigenous peoples or native communities, embody a profound connection to their ancestral lands, grounding their identities in a rich tapestry of culture, tradition, and spirituality. These communities, as the original inhabitants of specific geographic regions, exhibit a remarkable diversity in languages, customs, and ways of life, reflecting the breadth of human civilization (Ramírez, 2021). Central to the indigenous experience is the sanctity of the land, viewed not merely as a physical space but as a sacred entity with deep cultural and spiritual significance. This profound connection is interwoven into their daily lives, influencing everything from traditional practices to the collective understanding of their place in the world (Alfian, 2022).

Indigenous societies are characterized by tightly-knit communities where social structures prioritize communal living and cooperation. Decision-making processes often involve community leaders or councils, highlighting a collective ethos that places the well-being of the community above individual pursuits. Sustainability lies at the core of many indigenous practices, as these communities have often developed methods of farming, hunting, and gathering that minimize environmental impact, reflecting a keen awareness of the need for the long-term preservation of their way of life (Sarbaitinil et al., 2023).

Throughout history, indigenous tribes have faced formidable challenges, including colonization, forced displacement, and marginalization. Despite these adversities, many indigenous communities showcase a resilience that enables them to maintain their cultural identities and practices. In recent decades, there has been a

growing global movement advocating for the recognition of indigenous rights, encompassing land rights, self-determination, and the preservation of cultural heritage. This recognition is integral to addressing historical injustices and fostering a more inclusive understanding of humanity (Pukan et al., 2023).

However, numerous threats persist for indigenous peoples, ranging from encroachment on their lands to the loss of cultural heritage and discrimination. Economic development projects, environmental degradation, and the effects of climate change disproportionately impact these communities. Nonetheless, global indigenous movements have emerged, forging networks and alliances to address common challenges, share experiences, and advocate for their rights on the international stage (Begotti & Peres, 2020).

Understanding and respecting the unique qualities of indigenous tribes are imperative for fostering cultural diversity, promoting human rights, and acknowledging the invaluable contributions of indigenous knowledge and perspectives. As societies continue to evolve, it is crucial to prioritize the preservation of indigenous cultures and the protection of their rights, contributing to the creation of a more inclusive and sustainable world (Brockie et al., 2022).

2. Duty to Consult

"Duty to Consult" is a legal concept applied in some jurisdictions, particularly in the context of indigenous and tribal rights. This obligation refers to the responsibility of governments or authorities to consult with indigenous groups or indigenous tribes before taking decisions or actions that may affect the rights, lands, or resources associated with those groups (Nikolakis & Hotte, 2020). The Duty to Consult originates from the principle of recognizing indigenous rights and the rights of indigenous tribes, as well as protecting their culture and traditions. The purpose of this obligation is to ensure that the interests and views of indigenous tribes are recognized, respected and seriously considered in decision-making processes that may impact them (Robinson et al., 2021).

The obligation to consult often involves open and constructive dialogue between the government or authorities and indigenous representatives. These consultations should be conducted "based on mutual respect" to reach a mutual understanding and, where possible, reach an agreement or agreement before certain steps are taken. The application of the Duty to Consult may vary depending on local laws and regulations in a particular country or jurisdiction. These principles can also be found in several international treaties involving indigenous and tribal rights (Brock et al., 2021).

The duty to Consult is an integral part of efforts to recognize and protect indigenous rights and the rights of indigenous tribes. This reflects recognition of the group's right to be involved in decision-making processes that may impact their lives, including rights to land, natural resources, and other aspects of their social and cultural life. Therefore, the obligation to consult is not only a legal formality, but also

an essential step in achieving justice and respecting cultural diversity and traditional knowledge (Bull et al., 2020).

The application of the Duty to Consult is often a focal point in cases where development actions or government policies may have a direct or indirect impact on indigenous territories or communities. Consulting with affected parties, providing adequate information, and understanding cultural perspectives and values are key steps in fulfilling these obligations. In some jurisdictions, failure to comply with the Duty to Consult may result in legal disputes and the annulment of related decisions or actions (Raitio et al., 2020).

Although the Duty to Consult is recognized as a positive step in involving Indigenous tribes in decision-making processes, there are still challenges in implementing it effectively. Some problems include a lack of resources, a lack of clarity in regulations, and a lack of cultural awareness on the part of authorities. Therefore, successful implementation of these obligations requires joint efforts between governments, indigenous tribes, and relevant parties to achieve a fair balance and respect the rights and interests of all parties involved (Hill et al., 2020).

C. METHOD

This research will use qualitative methods to seek an in-depth understanding of a problem through literature research, including studying a doctrine that is used as the basis of a decision, analyzing the application of that doctrine, and evaluating it. As data sources in research, this article will use various references as primary data sources, namely the text of court decisions and official explanations from the Canadian government and the Canadian Parliament. Meanwhile, secondary data sources that will also be used are law reviews, articles from various scientific journals, reviews from legal practitioners as well as academics, news reviews, and other sources (Kusumastuti & Khoiron, 2019).

D. RESULT AND DISCUSSION

1. The Importance of The Duty to Consult

The duty to consult, which is seen as a response to the imbalance of power between the government and Canada's Aboriginal population, has "a proactive dimension" that requires the Canadian government to consult with Aboriginal communities before making government administrative decisions that have the potential to adversely impact the rights or treaty rights of the Aboriginal population. This obligation has subsequently become one of the tools used by Canadian courts to assess the potential of the Canadian government in managing legal uncertainties related to Aboriginal peoples that may adversely impact the rights or property of Aboriginal peoples (Bankes 2020).

For Aboriginal people, the duty to consult doctrine has had a huge impact, particularly in claiming the rights of their ancestor's land and the right to manage its natural resources. Apart from that, after going through several stages, the Canadian government has also ratified UNDRIP and included it as part of the national legal

system. From a formal legal perspective, it shows the seriousness of the Canadian government in responding to the Supreme Court decision regarding the duty to consult doctrine (Domínguez & Luoma, 2020). This was done by creating guidelines for the implementation of the duty to consult at the federal level in 2011, the technical implementation of which was handed over to authorities at the provincial or territorial level, related to the fact that the location of the lands disputed was spread across various provinces and territories. In this regard, the Canadian government's efforts to repair or improve its relations with Aboriginal people are carried out in two ways, namely implementing the duty to consult as a domestic approach, and ratifying UNDRIP and incorporating it within the Canadian law as a response to developments in the international stage.

The scope of consulting duties should be determined on a case-by-case basis. The Supreme Court ruled in the Haida Nation case that weak claims of title, misdemeanor infringement, or limitation of aboriginal rights mean that the Government of Canada's duties may be limited to providing notice, disclosing information, and discussing any issues that arise in response to the notice (Flynn 2020).

In recent decades, the Government of Canada's duty to consult with Aboriginal peoples has grown in importance to a large extent and has changed how legislative activities related to regulation are carried out. The Federal, Provincial, and Territory Governments have taken steps to clarify, develop, and implement a consultative approach to reflect the Government's serious stance. This is a challenge for the Government, which on the one hand must consult, and implement a legal and regulatory regime that guarantees the honor of the Crown, but on the other hand also provides stability, predictability, and transparency to the demands and needs of the Aboriginal people. Conditions like this may continue to enrich the law in Canada in the future.

2. Problems Related to The Duty to Consult and Its Implementation

This article analyses that two causes have the most influence in this case, namely the first is the 2018 Supreme Court of Canada decision in the case of *Mikisew Cree First Nation v. Canada (Governor General in Council)* which links the obligation to consult with the legislative position as a lawmaker, and the second is the implications of the duty to consult doctrine for the business world, in this case, industries related to natural resources.

- a. The decision of the Supreme Court of Canada in the case of *Mikisew Cree First Nation v. Canada (Governor General in Council)* in 2018.

This case is a lawsuit by the Mikisew Cree First Nation against the Governor-General in Council, over a draft bill on the environment and natural resources, which was proposed in 2012 by the Stephen Harper government. The Mikisew Cree, who is a party to Treaty 8, based on the honor of the Crown demanded that the Government of Canada be obliged to consult them on the draft bill because it would harm their hunting and fishing rights, caused by the disruption of conditions fish and wildlife. In 2018, the Supreme Court of Canada decided that according to Canadian law, the role

of law-making is conducted by the legislative. Consequently, there is no obligation to consult, because the obligation to consult only encompasses executive conduct or actions taken on behalf of the executive.

This case was heard by nine judges, with seven of them holding the view that there was no obligation to consult. Judge Andromache Karakatsanis stated that there is no obligation to consult during the lawmaking process. While Parliament does not have to consult Mikisew, that does not mean the Crown is free from responsibility. Crown honors apply to both the executive and Parliament, although the duty to consult only applies to executive power. Two judges, Judge Wagner and Judge Gascon, coincided with Judge Karakatsanis.

Judge Russell Brown had the same position as the three judges above in holding that the Crown's honor only applied to the executive, not Parliament. Therefore, the Parliament has no obligation to consult with Mikisew. Ministers are part of the executive, but in the law-making process, they play a legislative role. Involving the courts in the lawmaking process (through mandatory consultation or other approaches) would violate the separation of powers and parliamentary privilege.

Justice Malcolm Rowe agreed with everything Justice Brown said and added three other reasons. Those are "There were other ways for the Mikisew tribe to assert their rights without interfering with the independence of Parliament, it could make it very complicated for governments to prepare legislation and budgets. It would put courts in the position of supervising dealings between Indigenous groups and legislators, something they are not well suited to do". Two other judges, Judge Moldaver and Judge Côté agreed with Judge Rowe and Judge Brown.

A different position was taken by Justice Rosalie Silberman Abella of the view that Parliament had a duty to uphold the honor of the Crown, including a duty to consult with Aboriginal communities when making laws that might harm them. Judge Abella emphasized the impact of government actions on the rights of Aboriginal people, rather than which branch of government the actions came from. The sovereignty and privileges of Parliament cannot override the honor of the Crown, which is also protected by the Constitution. Judge Martin concurred with Judge Abella.

The Supreme Court of Canada ultimately decided the case on October 11, 2018, holding that the duty to consult with Aboriginal peoples does not apply to the lawmaking process, particularly based on constitutional principles of separation of powers and Parliamentary sovereignty. The obligation to consult is inappropriate for legislative action. Parliamentary sovereignty and separation of powers prevent courts from overseeing the development of legislation.

This decision reflects the fact that all judges agreed regarding the need to uphold the honor of the Crown, both from the executive and legislative institutions. The difference is regarding the obligation to consult. When entering the realm of the law-making process, judges' views are divided based on the differentiation between the executive and the legislative authority. A more in-depth discussion of this will be carried out in the next section.

b. Duty to consult and legislative authority

Ministerial actions in developing laws are legislative, not executive, so they are immune from judicial review. However, two justices disagreed and argued that Crown honor governs the relationship between the entire Canadian government and Indigenous peoples giving rise to a duty to consult and accommodate. Referring to the Supreme Court's decision in this case, the views of Judges Abella and Martin are in the minority with two votes so they lose compared to the views of the other seven judges. Even though this reason was only supported by two judges, which resulted in this opinion not being accepted, this argument shows the existence of Dissenting Opinion among the nine judges of the Supreme Court. From the different positions of the judges, it can be seen that there are different interpretations of the separation of powers in Canada. The Supreme Court decision in this case uses the concept of rigid separation of powers. In fact, what is happening in Canada is not the case, because the constitutional law in Canada does not carry out an absolute separation of powers. This is associated with the close relationship between the legislative function and the executive function. The cabinet (in this case the executive position) are those who come from the legislative body, so the separation of powers should not be absolute. When one person carries out two different functions and has to treat these two functions with separation that seems completely unconnected, this is an inappropriate view. What happens if the two functions being carried out are in conflict with each other? Will the same person have a different position on a particular case? Therefore, one person carrying out two different functions should not carry out both functions separate absolutely.

Highlighting these differences and then deciding that there is no obligation to consult is problematic, because the legislative function cannot be separated from aspects of policy making and program implementation in the executive role (MacDonnell & Hughes, 2021). The position of the majority of judges in this case was strongly influenced by concerns that legal enforcement of the obligation to consult would violate parliamentary sovereignty, parliamentary privilege and the separation of powers. Judge Karakatsanis himself acknowledged that there is no doubt that there is an overlap between executive and legislative functions in Canada.

This decision actually confirms the position that if consultations are carried out on the law-making process, it will be seen as court intervention which is contrary to constitutional principles regarding the separation of powers and parliamentary sovereignty. In addition, the majority of justices feared that legal and legislative chaos would result if the duty to consult were incorporated into the lawmaking process. The roles of the three branches of state, however, are not purely separate. The Crown's obligations should therefore extend to the entire government and not just the executive branch, so that the duty to consult is also inherent in legislative activity (Scott, 2020).

It is worth underlining that the decision in this case seems to refute the Crown's duty to consult because previous decisions only mentioned the Crown without specifying whether it was executive or legislative. Another limitation of the duty to

consult is that there is no obligation for legislative bodies to consult with indigenous groups in developing legislation, even if this has a negative impact on the rights or interests of indigenous populations. The position of the majority of judges was that Crown action did not extend to Parliament, including provincial legislatures, and that expanding the duty to consult in the lawmaking process would be a judicial limitation incompatible with legislative authority. Although the court said there was no obligation to consult during the legislative process, in a seven-to-two decision, the court found there was still a duty on the government to act honorably and maintain the honor of the Crown when drafting laws that could affect the lives of indigenous people. For the record, in Canada executive authority is vested in the Crown and exercised by the Governor in Council, namely the Prime Minister and Cabinet.

In relation to the lawsuit brought by Mikisew Cree First Nation as plaintiff, this article tries to compare two cases with the same plaintiff in different cases, namely the case of Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) in 2005 and the case of Mikisew Cree First Nation v. Canada (Governor General in Council) in 2018. Even though the aim of the lawsuit is about the duty to consult, these two cases have different grounds for filing the lawsuit. In the 2005 case, the lawsuit was directed at the construction of a road that would pass through the Mikisew Reserve, while in the 2018 case the subject of the lawsuit was about the implementation of a draft law regarding the environment. It should be noted that basically this lawsuit is related to Treaty 8. However, the results of the decisions in these two cases are different, where in the 2005 case it was decided that the Crown had a duty to consult, whereas in the 2018 case there was no obligation to consult connected with legislative authority. Argumentatively, it can be analyzed that the subject of the 2005 lawsuit is limited to the implementation of the physical project, and does not contain any legal debate about who is obliged to carry out consultations. Meanwhile in the 2018 case, the subject of the lawsuit was more about constitutional procedures which were then connected to the context of the separation of powers, so that the law-making process that falls under the legislative authority is parliament (not the Crown), which because of its constitutional position has no obligation to consult. If it is related to the business world, this may provide a guarantee to the industrial sector that the process of drafting or amending legislation will not be delayed or canceled due to the government's failure to carry out consultations.

c. Response from the business world and response from Aboriginal peoples

James Anaya, a Special Rapporteur who writes about the rights of Aboriginal peoples, highlights the disparities faced by Canada's Aboriginal peoples who live in dire situations in their traditional territories which are very rich with abundant natural resources. This occurs because these resources are in many cases taken and developed for the benefit of non-aboriginals. Regardless of the potential benefit from the development of these resources, at the same time, they are also prone to health threats, economic jeopardy, and the annihilation of their cultural identity due to the ruin of the surrounding environment. Canada has a long history of projects that disrupt the lives of Aboriginal peoples yet offer few direct benefits to local communities. Even in

the modern era, some mining industries still adopt the way of 19th-century attitude, which actually can lead to ecological disruption to the lands and waters of Aboriginal peoples (Allard & Curran, 2023).

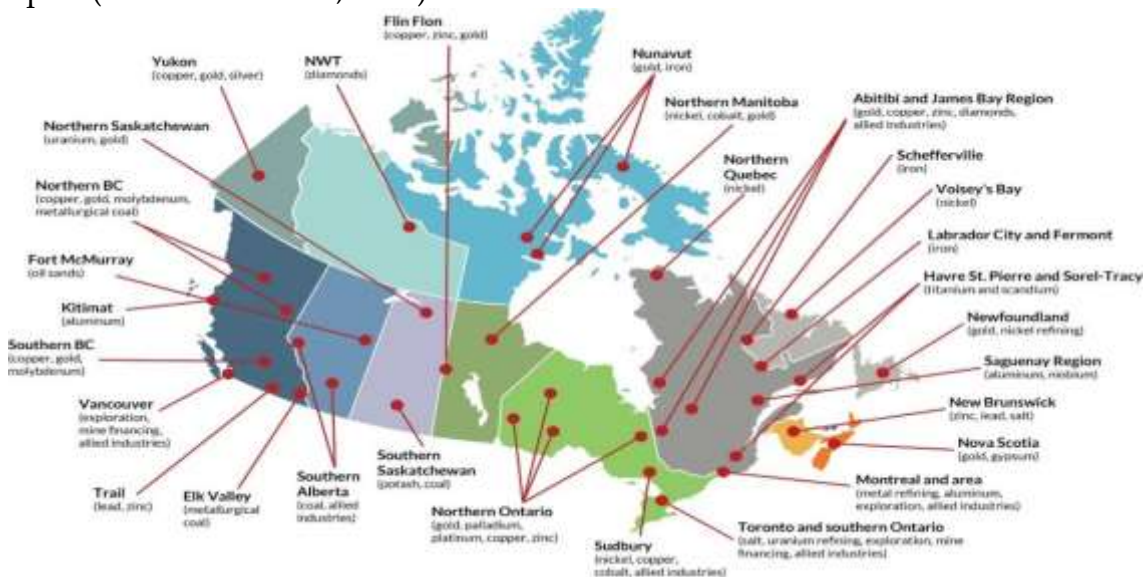


Figure 1: Mining in Canada from Mining Association of Canada

Source: Mining Association of Canada: Facts and Figures (2021)

The duty to consult, which provides the main legal framework for Aboriginal people's claims, is used as the legal tool that is considered the most relevant for dealing with issues regarding natural resource development projects. The obligation to consult uncloze the possibility of delaying or even possibly stopping a project, regardless of the project is supported by a government with a legislative majority. This is well understood by Aboriginal peoples, environmental groups, resource companies, and local governments across the country. The August 2018 Federal Court of Appeals ruling in the case of Tsleil-Waututh v. Canada (Attorney General), the result of which was the cancellation of approval for the expansion of the Trans Mountain pipeline, is seen as an example of how important the obligation to consult is (Eisenberg, 2020). This decision also provides an important meaning that consultation must be meaningful at every step, and substantive consultation must continue until a final decision is reached.

This article sees that the case above reflects the importance of consultation. When referring to the duty to consult, the Crown, in this case the state, can carry out consultations and negotiations to accommodate the interests and rights of Aboriginal people as stated in several Supreme Court decisions related to the duty to consult. What is also important to note is that, as a legal decision that has become jurisprudential, the duty to consult doctrine should be applied in similar cases.

Before the enactment of the Constitution Act in 1982, most of the mining industry paid no or little attention to the rights of Aboriginal peoples. Section 35 of the Constitution Act 1982 and the duty to consult craft the relationship between Aboriginal people and the Canadian government to be more dynamic. However, things like this can give rise to legal uncertainty because consultations are not only

difficult but also time-consuming, especially if it turns out to be the existence of an obligation to accommodate the interest of Aboriginal people, to which its extent is not yet clear.

This vagueness can have an impact on the business climate, particularly on the one of favorite business sectors in Canada, the investment in the mining sector. In the Province of Ontario, for example, the Fraser Institute commented on information found in the 2015 report of the Auditor General of Ontario, which explained that a lack of clarity on the duty to consult with Aboriginal communities slowed down the investment. Factors that play a role in this problem include the granting of authority to do the consultation to private companies, investors' lack of knowledge about what is the consultation, the complexity of consultation, and the length of the process involved. Since the introduction of the duty to consult with Aboriginal peoples, the Province of Ontario has experienced a significant slowdown in the mining sector investment, from \$1.07 billion in 2011 down to \$507 million in 2014.

Concerning the involvement of Aboriginal communities in the mining industry, Aboriginal communities need to benefit from the existence of the mining industry, especially those carried out around their settlements. Aboriginal people should not just be spectators of natural management, especially since they face the potential risk of natural damage that could disrupt their lives, and health and even threaten their livelihoods. These benefits can only be obtained if they are involved in the process of managing these natural resources.

The involvement of Aboriginal communities in mining management activities must be inclusive. The substance of this inclusivity is participating in and obtaining socio-economic benefits from natural resource utilization activities (Urquhart 2019). Inclusivity in this case is not limited to just a procedural process through consultation between the government and First Nations, but must be more substantive, understood as respect for traditional rights and practices that have existed for a long time. This principle is the first and foremost and should not be sacrificed for any reason. The importance of this is that it is not only an implementation of what is stated in Section 35 of the Constitution Act 1982 but also an implementation of the recognition that Aboriginal people in Canada existed long before the country called Canada was formed. However, this kind of inclusivity is unfortunately largely absent from the Canadian political landscape.

The Supreme Court of Canada which uses the duty to consult doctrine has carried out the mandate of Section 35. However, whether this doctrine can guarantee the implementation of inclusiveness still needs to be explored further because the obligation to consult is usually applied to obtain consent from Aboriginal communities for an activity without any the necessity to include them in the activity itself. This is where the important role of accommodating the interests of Aboriginal people is as part of the obligation to consult. This can be seen from several Supreme Court decisions regarding the duty to consult which always include clauses to accommodate matters of concern and the rights of Aboriginal people.

Apart from that, every Supreme Court decision that uses the duty to consult doctrine also includes a reconciliation clause. Reconciliation is the renewal of friendly relations between two parties who were once hostile or had different opinions. This is consistent with what Judge Bennie said in the case of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, that the fundamental aim of modern law on aboriginal and treaty rights is the reconciliation of aboriginal and non-Aboriginal peoples and their respective claims, interests, and desires. Reconciliation is also a way to avoid confrontation. Thus, it can be concluded that although the duty to consult does not directly guarantee inclusiveness, the clauses in the duty to consult decision provide direction regarding what is the aim of all the conflicts and differences that occur, namely reconciliation that will accommodate the interests of the Aboriginal population, including joining become part of the process of managing natural resources through exclusivity. Apart from being a legal obligation, the duty to consult is more procedural. Meanwhile, to achieve the expected results, a more substantive approach is needed which can be carried out through negotiations to achieve reconciliation so that it can accommodate the interests of the Aboriginal population.

It should be noted that the mining industry has a significant contribution to Canada's financial condition and is also a sector in which Aboriginal people work. The Mining Association of Canada notes that approximately 180 producing mines and more than 2,500 exploration properties are located near Aboriginal lands. This provides the prospect for Aboriginal people to access employment opportunities and other benefits from the mining industry. Proportionally, the mining industry is the largest private sector employing Aboriginal people in Canada and the potential for increased employment for Aboriginal people remains strong. The increasing number of Aboriginal people working in the oil and gas industry has closed the wage gap with non-Aboriginal workers. In the energy industry, for example, Aboriginal people can earn up to triples of income of the amount of \$140,400, compared to other industries, which is around \$51,120. At 3.9 percent of Canada's workforce, they account for 6.9 percent of the energy sector. This is in line with the opinion of Heather Exner-Pirot from the Macdonald-Laurier Institute that big oil companies will want to have more Aboriginal workers because they live around the location where many companies operate. Most of them are also young at age. In this way, native people will be more prosperous and more motivated to pursue education. As a country with a large natural resource economy, Canada must embrace responsible, Aboriginal development that will result in a prosperous Canadian economy for everyone.

It is also worth understanding that despite concerns from the resources industry, many industry players are not opposed to the new paradigm of governance, sovereignty, and economic development. Stockwell Day, former energy minister and current Senior Advisor on Pacific Future Energy's advisory board, suggests that there is a willingness among industry advocates to recognize First Nations sovereignty, such as involving them in natural resource use activities.

From an industry point of view, the recognition of Aboriginal sovereignty stems from a desire to expedite project approval. Therefore, negotiating directly with

Aboriginal populations would reduce the uncertainty created by the duty to consult. This move shows a willingness to adapt to new norms in resource management and shift to new governance and governance models. Many in the industry responded positively, seeking to engage Aboriginal people and involve them in projects as early as possible to facilitate the consultation process (Boiral et al., 2020). Cameco, a uranium mining company operating in Northern Saskatchewan is having impact benefit agreements for each of its projects through negotiations with Aboriginal communities. An example of these negotiations is the four-party agreement between uranium companies Cameco and Areva in collaboration with the Kineepik Metis and Pinehouse communities for a 200 million USD project in late 2012. The collaboration embraces a wide range of topics from employment initiatives to dispute resolution, and serves as a platform for the uranium industry to address local problems on an equal basis.

On the other hand, it should also be noted that the native population's attitude to fighting for their interests cannot be interpreted as that they are not interested in economic activity (Jena, 2020). Cheechoo of the Mushkegowuk Council voiced his views on the resource industries' plans to manage the northern part of the province of Ontario, noting that they are not opposed to road construction or economic development in the region. However, Aboriginal people want to be involved and consulted on these development projects so they can understand the impacts of these projects. First Nations Major Projects, which consists of more than 130 Aboriginal communities, seeks to improve the economic well-being of its members, understanding that a strong economy depends on a healthy environment and is supported by a vibrant language and culture. This coalition maintains that economic opportunities must go hand in hand with environmental management. The coalition also decided to unite to advance common interests to gain ownership of major projects taking place in their territory (FMNPC no date). The involvement of Aboriginal people from the start in development projects provides opportunities and space for managing natural resources while maintaining a healthy environment because Aboriginal people who have lived for hundreds of years have the wisdom to balance the use of nature while protecting it. In conjunction with the duty to consult, the negotiation and reconciliation clause is a way for Aboriginal people to be part of economic development.

However, the environmental requirements that Aboriginal people generally demand in development projects are often seen as a cover for greater rewards. This view is disputed by Calvin Helin, a writer who is also the son of a Gitga'at chief in the Tsimshian First Nations. According to Helin, First Nations are not anti-business, nor anti-development. The development is indeed necessary, especially with an unemployment rate in the community has even reached more than 90% in some places. But First Nations want responsible development with the utmost respect for culture, traditions, and the environment. This is proven through the actions of the Lax Kw'alaams Community which permitted the Eagle Spirit pipelines project to proceed to the next step through the signing of an exclusivity agreement. Unfortunately, the

media did not pay much attention to that. The Eagle Spirit Pipelines project is the first project led by a First Nation. The project was supported by 35 First Nations communities and later the Metis tribe also joined. This pipeline project is not explicitly related to the duty to consult doctrine but has the same purpose, namely the involvement of Aboriginal people in managing development projects that have an impact on improving the economy for Aboriginal peoples while preserving the surrounding environment.

E. CONCLUSION

As an implementation of Section 35 of the Constitution Act 1982, the duty to consult is experiencing serious challenges, both in terms of legal interpretation and from the business world. The case of *Mikisew Cree First Nation v. Canada (Governor General in Council)* in 2018 was quite a heavy blow for Aboriginal people in fighting for their rights. However, many business circles involved in the natural resource management sector have recorded significant progress by involving more and more Aboriginal people in various projects starting from the initial stage. In overcoming various difficulties in bridging relations between Aboriginal peoples and the Canadian Government (which sometimes also involves third parties), this article has a view that reconciliation is a goal that also provides the most reasonable solution because efforts will be made to reach an acceptable agreement by all parties. Reconciliation is also mentioned in all Supreme Court of Canada Decisions that use the duty to consult doctrine. With reconciliation, it is hoped that a settlement that will be achieved is going to be put to good use by all parties with less time and cost. And the most important thing is that reaching an agreement through reconciliation, will not only provide benefits for all parties involved but also achieve efforts to protect Aboriginal peoples in Canada, as mandated in the 1982 Constitution Act.

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