In this study, the authors present evidence that the National Energy Board (NEB) does not evaluate whether the duty to consult has been met by applicants or the Crown for the purposes of regulatory approval. While NEB panels do draw conclusions about the sufficiency of consultation, they are not premised on the legal requirements established by the Supreme Court of Canada or subsequent case law. On the contrary, the authors discover that the NEB has approved nearly 100 per cent of the applications in which consultation remains an issue but it relies on three types of justifications for still recommending approval: (i) that it lacks the jurisdiction to consider the consultation at issue; (ii) that outstanding consultation can be addressed through ongoing consultation; and/or (iii) that there are no impacts on rights. Based on these findings, the authors argue that courts should attend to differences over legality and institutional rationality in guiding tribunal authority. In doing so, courts will be in a better position to identify the effect of these differences on tribunal findings, to understand how courts and governments already rely on these findings irrespective of their quality, and to compel transparency for their generation and use.

Keywords: duty to consult, National Energy Board, Aboriginal law, administrative law, tribunals

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Numerous tribunals exist in Canada to regulate resource development. While generally tasked with reviewing the technical aspects of proposed projects, tribunals are also called upon to identify the impacts of resource development on Aboriginal and treaty rights and, by extension, evaluate the effects of consultation. In support of this authority, the Supreme Court of Canada affirmed the authority of administrative tribunals to evaluate the adequacy of Crown consultation in *Haida Nation v British Columbia (Minister of Forests)*¹ and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director).*² Moreover, the Supreme Court has directed both the Crown and Aboriginal communities to engage in consultation through regulatory proceedings. Nonetheless, controversial applications and related litigation have highlighted that there is a dissonance between judicial conceptualizations of tribunal authority and tribunal practice.³

Scholarship on the topic of administrative authority and the duty to consult has addressed the requirements for establishing tribunal authority,⁴ considered how it can be correlated with related regulatory processes,⁵ and identified institutional roadblocks.⁶ However, there is still weak evidence of whether tribunals do, in fact, comply with judicial directives to evaluate consultation and, if not, why that is the case. With these questions in mind, the authors undertook an empirical study of decisions made by one of the most important energy regulators in Canada, the National Energy Board (NEB).

In this article, the authors present evidence that the NEB does not evaluate whether the duty to consult has been met by applicants or the Crown for the purposes of regulatory approval. While the NEB makes findings about the sufficiency of applicant engagement and its impact on Aboriginal rights, they are not premised on any known legal standards.

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¹ 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].
² 2004 SCC 74, [2004] 3 SCR 550 [*Taku*].
⁴ Charowsky, ibid.
⁵ Lambrecht, supra note 3.
⁶ Promislow, supra note 3.
The authors argue that an approval rate of almost 100 per cent and the reasons provided by the NEB for avoiding a *Haida* analysis raise questions about whether tribunal practice can be reconciled with tribunal authority as conceived by the Supreme Court. If the NEB does not evaluate the effect of consultation on rights, then it effectively does what the Crown may not: it plays a role in authorizing conduct that infringes rights. This article clarifies why this occurs and calls for legal change that compels transparency in the production and use of tribunal findings.

The article proceeds in five parts. **Part II** provides an overview of the jurisprudence on the duty to consult and the role of tribunals in administering section 35 rights. This section shows that the Supreme Court has established the criteria for tribunal authority. Nonetheless, the decision of the Federal Court of Appeal in *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc* has seemingly released tribunals from undertaking evaluations in accordance with *Haida* prior to regulatory approval and created confusion as to how tribunal authority should be exercised.

In **Parts III and IV** the authors use a case study of the NEB to examine the effects of the jurisprudence on tribunal authority. The authors discuss the authority of the NEB to evaluate the duty to consult and analyse decisions issued between 2000 and 2014 that involve Aboriginal peoples. Based on these decisions, the authors present evidence that consultation was unresolved in 71 per cent of the applications studied but that project proponents experienced an almost 100 per cent approval rate. While NEB panels do make findings about the sufficiency of applicant engagement for mitigating impacts to rights, the authors have found that panels have relied on the following three types of justification for approval where the legal adequacy of consultation remains outstanding:

(i) that the board lacks the jurisdiction to consider the claims at issue;
(ii) that outstanding consultation can be addressed through ongoing consultation; and/or
(iii) that the absence or mitigation of impacts equates to the absence of adverse effects on Aboriginal rights.

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7 These statistics are based on an analysis of the approximately 100 applications heard by the NEB, either individually or as part of a joint panel, between 2000 and June 2014 for which it issued written ‘Reasons for Decisions.’

8 2009 FCA 308, (QL) at paras 27–34, 40–4 *[Standing Buffalo]*, leave to appeal refused.

9 The NEB denied approval in one case: *Sumas Energy 2, Inc (Re)*, 2004 LNCNEB 1, no EH-1-2000 (March 2004), Reasons for Decision (QL) at para 344 *[Sumas Energy 2]*, but this was based on the public interest and not due to consultation concerns raised by the affected First Nations.
In PART V, the authors trace the source of the discrepancy between the authorization to evaluate consultation and the absence of tribunal evaluation to fundamental differences in legality and institutional rationalities between the courts and the NEB. The authors argue that differences in legality are derived from recognizing that courts judge the sufficiency of consultation against the standard developed in *Haida*, while the NEB makes findings in the absence of any pre-determined standard established in law or policy. They further argue that differences in rationalities are derived from identifying the distinct objectives of courts and the NEB in dealing with Aboriginal rights as well as their institutional capacities to address governmental practices. The central objective of the courts has been to use its role as an independent arbiter of justice to promote reconciliation through the negotiation of proprietary and managerial authority over land and resources. In contrast, the central objective and responsibility of the NEB has been to use its role to regulate one of Canada’s main industries ‘in the public interest’;¹⁰ that is, to address majoritarian interests. Taken together, these differences influence the method by which consultation is evaluated and the type of logistical issues that arise from tribunal authority to evaluate the duty to consult.

What do these arguments mean for the future of tribunal practice? Differences between the two institutions suggest that courts should not assume that administrative tribunals are using their own methods to achieve consultation or that they are well suited to do so. Consequently, in PARTS VI and VII the authors make recommendations for recognizing these assumptions as problematic. The authors advocate for a legal process that identifies the uses to which industry, the Crown, and the courts put tribunal findings and makes tribunals accountable. In short, if tribunals’ findings are used to draw conclusions about the relative importance or unimportance of Aboriginal rights in any given case (which they are), then, the authors argue, those findings must be consistent with the constitutional standards upon which Aboriginal peoples rely. This means reconsidering the approach adopted in *Standing Buffalo*, which has permitted tribunals to avoid undertaking a *Haida* analysis while also permitting the Crown to rely on tribunal findings. More importantly, it means looking to how the courts can assist tribunals in using the administrative tools they have to protect rights.

A THE DUTY TO CONSULT AND ACCOMMODATE

The duty to consult and accommodate Aboriginal peoples is a legal duty that arises from the protection of Aboriginal and treaty rights recognized in section 35(1) of the Constitution Act 1982 and rests with the federal and/or provincial Crown. In the landmark cases of Haida and Taku, the Supreme Court grounded this duty in the honour of the Crown and shifted section 35(1) rights from a focus on static constitutional rights to one of proceduralism. This shift theoretically created the potential for the Crown to recognize and protect asserted Aboriginal rights and interests even before those rights have been proven or recognized.

The test for the duty has three elements: (i) knowledge of the right or duty, (ii) potential adverse effect on right, and (iii) contemplated Crown conduct. As the Supreme Court noted in Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, past wrongs, ‘speculative impacts,’ and/or an underlying or continuing breach will not trigger the duty. On the other hand, some historical impacts may be considered when considering the cumulative environmental impacts, which must be given attention within the consultation process. The adverse effect must be on

12 Haida, supra note 1 at para 53.
14 Haida, supra note 1 at paras 35, 76; Taku, supra note 2 at para 25; In Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 SCR 650 at para 44 [Rio Tinto] the Supreme Court also noted that examples of ‘strategic, higher level decisions’ have included the approval of a multi-year forest management plan for a large geographic area in Klahoose First Nation v Sunshine Coast Forest District (District Manager), 2008 BCSC 1642, [2009] 1 CNLR 110; the establishment of a review process for a major gas pipeline in Dene Tha’ First Nation v Canada (Minister of Environment), 2006 FC 1354, [2007] 1 CNLR 1, aff’d 2008 FCA 20, 35 CELR (3d) 1; and the conduct of a comprehensive inquiry to determine a province’s infrastructure and capacity needs for electricity transmission as in An Inquiry into British Columbia’s Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re, 2009 CarswellBC 3637 (BCUC). Another example of a strategic decision included a policy to develop legislation as in Tsuu T’ina Nation v Alberta (Environment), 2010 ABCA 137 at para 55.
15 Rio Tinto, ibid at paras 45–8.
the future exercise of the right itself\textsuperscript{17} and the right claimed must be on behalf of the Aboriginal group that holds such rights\textsuperscript{18}.

The scope of the duty is proportionate and the content of the duty varies with the circumstances and must be determined on a case-by-case basis along a spectrum. At the low end of the spectrum – ‘where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor’ – the Crown is expected ‘to give notice, disclose information, and discuss any issues raised in response to the notice.’\textsuperscript{19} At the high end of the spectrum – ‘where a strong \textit{prima facie} case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high’ – the Crown is expected to find ‘a satisfactory interim solution,’ provide an ‘opportunity to make submissions for consideration,’ allow for ‘participation in the decision-making process and . . . [provide] written reasons.’\textsuperscript{20}

The test requires that a preliminary assessment of the strength of the claim supporting the existence of the Aboriginal right or title and the seriousness of the potentially adverse effect on the right or title claimed be made at the outset of the consultation process to determine the duty owed.\textsuperscript{21} The duty is triggered at the earliest possible planning stages for a project and/or decision, as disagreements over the nature and scope of treaty rights can change the consultation obligations owed in the circumstances.\textsuperscript{22} As explained in \textit{Sambaa K’e Dene Band v Duncan},\textsuperscript{23} ‘[o]nce the important preliminary decisions have been made there may well be “a clear momentum” to move forward with a particular course of action.’\textsuperscript{24} Late in the decision-making process it may be difficult and/or impossible to provide any kind of accommodation.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{17} \textit{Rio Tinto}, supra note 14 at para 46.
\item \textsuperscript{18} \textit{Behn v Mouton Contracting Ltd}, 2013 SCC 26, [2013] 2 SCR 227 at para 30.
\item \textsuperscript{19} \textit{Haida}, supra note 1 at para 43.
\item \textsuperscript{20} Ibid at para 44.
\item \textsuperscript{21} Ibid at para 39.
\item \textsuperscript{22} Ibid at para 76.
\item \textsuperscript{23} 2012 FC 204, [2012] FCJ no 216 (QL).
\item \textsuperscript{24} Ibid at para 165. See also \textit{Kwikwetlem First Nation et al v British Columbia (Utilities Commission)}, 2009 BCCA 68, 308 DLR (4th) 285 [\textit{Kwikwetlem}], where the British Columbia Court of Appeal found that the British Columbia Utilities Commission had to determine the adequacy of consultation when considering an application for the necessary approvals for an electricity transmission project, despite the existence of subsequent decision-making processes (i.e., the environmental assessment) which would make specific provisions for the consideration of Aboriginal consultation and accommodation.
\end{itemize}
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Strictly speaking, the Supreme Court in *Haida* clarified that the ‘honour of the Crown cannot be delegated’ and that the Crown is legally responsible for consultation, and where necessary, accommodation.\(^{25}\) The Crown retains responsibility for the substantive aspects of consultation such as determining the scope of the consultation required or evaluating the adequacy of the consultation and accommodation.\(^{26}\) This means that ‘[t]hird parties cannot be held liable for failing to discharge the Crown’s duty to consult and accommodate.’\(^{27}\) However, project proponents and members of industry can and do play an important role in the consultation process.

At the very minimum, the Crown regularly relies on project proponents to carry out the day-to-day consultation activities such as providing notices and information materials on projects, organizing information sessions, attending meetings with affected Aboriginal groups, and revising projects to address impacts. Moreover, the Supreme Court has noted that procedural aspects of consultation may be delegated to a third party where the Crown provides an undertaking related to the development, such as the decision to grant a permit or other permission related to a project.\(^{28}\) While explicit delegation through guidelines, policies, and agreements is preferable, implied delegation of consultation may also happen as a result of regulatory processes that requires applicants and/or project proponents to demonstrate evidence of consultation with communities and stakeholders concerning the proposed project.\(^{29}\)

**B. AUTHORIZING BOARDS AND TRIBUNALS**

Details about the authority and responsibility of tribunals to evaluate consultation have largely developed under the umbrella of delegated authority. Authority is determined by three factors – whether the tribunal has the authority to determine questions of law, whether its statutory mandate permits it, and whether it possesses sufficient remedial powers. In *Haida*, the Supreme Court clarified that it is ‘open to governments to set up regulatory schemes to address the procedural requirements

\(^{25}\) *Haida*, supra note 1 at para 53.

\(^{26}\) For a further discussion on this topic, see Peter Landmann, ‘Crown Delegation of Consultation Responsibilities’ (December 2012), online: Ontario Bar Association <http://www.oba.org/en/pdf/sec_news_abo_dec12_con_lan.pdf>.

\(^{27}\) *Haida*, supra note 1 at para 53. See also *West Moberly*, supra note 16 at paras 100–8, where the British Columbia Court of Appeal considered whether the Crown can delegate its duty to consult and accommodate to parties that do not have the decision-making power to deal with the impacts on First Nations.

\(^{28}\) See e.g. *Haida*, supra note 1 at para 53.

\(^{29}\) See ibid, where the Supreme Court gives the example of environmental assessment processes.
appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.30 Pointing to the role of tribunals in determining the scope and content of the duty, the Supreme Court noted that if parties cannot agree, tribunals and courts could assist in assigning content to the duty.31

While tribunal authority is often sourced to *Haida*, the rationalization of tribunal authority over Aboriginal rights actually originated one year earlier in the companion cases of *Paul v British Columbia (Forest Appeals Commission)*32 and *Nova Scotia (Workers’ Compensation Board) v Martin*.33 The issue before the Supreme Court in both decisions was whether the particular provincial tribunals had the authority to consider and apply the Constitution to a disputed provision in their enabling statutes while carrying out their statutory mandates. Of special interest to Aboriginal rights, *Paul* raised the question as to whether the province could constitutionally confer on the Forest Appeals Commission the power to determine questions of Aboriginal rights and titles as they arose in the course of the tribunals’ duties.34 Central to the Supreme Court’s analysis was whether the empowering legislation implicitly or explicitly granted the tribunal the jurisdiction to interpret or decide any question of law, including section 35(1) questions. Focusing on the decision-making characteristics of administrative bodies, the Supreme Court reasoned that ‘the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim.’35 This line of reasoning was based upon the line of thought in the Court’s earlier *Cuddy Chicks* trilogy cases,36 which concluded that specialized tribunals with both the expertise and the authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates.37 The decision in *Paul* has subsequently come to stand for the proposition that tribunals with the authority to consider questions of law are likely to have

30 *Haida*, supra note 1 at para 51.
31 Ibid at para 37.
32 2003 SCC 55, [2003] 2 SCR 585 [*Paul*].
33 2003 SCC 54, [2003] 2 SCR 504 [*Martin*].
34 *Paul*, supra note 32 at para 2.
35 Ibid at para 36.
37 See *R v Conway*, 2010 SCC 22 at para 6, [2010] 1 SCR 765 [*Conway*], discussing this principle and the legacy of the conclusion reached in the *Cuddy Chicks* trilogy on subsequent cases, including *Paul*, supra note 32 and *Martin*, supra note 33.
the concomitant jurisdiction to interpret or decide constitutional questions, including those concerning section 35(1).  

More tellingly, in these two decisions, the Supreme Court articulated four underlying rationales for administrative authority to consider section 35(1) questions: (i) that Aboriginal rights are the same as other constitutional rights; (ii) that affected parties should be able to obtain relief of rights as early as possible; (iii) that administrative tribunals are part of the larger unitary system of justice; and finally (iv) that the flexible nature of administrative tribunals makes them well suited to the balancing of interests required by the duty to consult. Together, these four rationales mandate a role for tribunals in the ongoing process of administering Aboriginal rights.

The Supreme Court further refined the test for administrative authority pertaining to consultation in *Rio Tinto*, raising new requirements. The Court ultimately affirmed the test set out in *Paul* and *Martin*, maintaining that absent a clear demonstration that the legislation intended to exclude the jurisdiction from the tribunal’s power, a tribunal will have the explicit or implicit jurisdiction to interpret and apply the Constitution. The Crown’s delegation can be express or implied but stressed that ‘the duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal.’ The mandate of a particular tribunal depends on the duties and powers the legislation has conferred on it as well as the overall purpose and scheme of the enabling statute.

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38 See Conway, ibid at para 81; *Rio Tinto*, supra note 14 at para 69.  
39 In *Paul*, supra note 32 at para 36, Justice Bastarache noted that ‘there is no persuasive basis for distinguishing the power to determine section 35 questions from the power to determine other constitutional questions.’  
40 In ibid, at para 32, Justice Bastarache reiterated the importance of convenience in the context of Aboriginal rights noting that ‘it would be most convenient for aboriginal persons to seek the relief afforded by their constitutionally protected rights as early as possible within the mechanisms of the administrative and judicial apparatus’; and in *Martin*, supra note 33 at para 29, Justice Gonthier noted that Canadians should be entitled to assert their rights and freedoms ‘in the most accessible forum available.’  
41 In *Paul*, supra note 32 at para 22, the Court found that the system of justice, viewed properly, encompasses both courts and administrative tribunals.  
42 This rationale was implied by the Court’s statements in *Paul*, supra note 32 at para 36 and *Martin*, supra note 33 at para 30. In *Paul*, the Court described how the functions and flexible evidentiary rules of tribunals made them well suited to hearing and deciding section 35 rights falling within their statutory mandates. Similarly in *Martin*, the Court highlighted that disputes do not take place in a vacuum, suggesting the necessity of understanding and balancing the various interests involved.  
43 *Rio Tinto*, supra note 14 at para 69.  
44 Ibid at para 55 [emphasis added].  
45 Ibid.
test for authority beyond establishing bare authority to consider questions of law and creates the requirement to establish mandate.

Lastly, drawing from its previous reasoning in *Conway*, the Supreme Court noted in *Rio Tinto* that a tribunal’s remedial powers are also a relevant consideration in determining the scope of its jurisdiction. The tribunal must have the statutory authority to grant the *particular* remedy sought. In the Aboriginal context, this means that a tribunal must be able to meaningfully address the specific concerns raised by the Aboriginal group. Where a tribunal does not have the powers necessary to remedy inadequate consultation, the Supreme Court’s jurisprudence contemplates the possibility that a tribunal would not be authorized to assess the adequacy of consultation. On the other hand, where the tribunal has the power to consider the adequacy of consultation, it should exercise its powers to ‘provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute.’ In short, if a tribunal has the statutory authority to assess and remedy inadequate consultation, it must do so.

C IMPLEMENTING AUTHORITY

In accordance with this case law, courts have directed the Crown and Aboriginal participants to engage in consultation through regulatory proceedings, and have cautioned those refusing to participate that there may be negative consequences when litigating disputes. Nonetheless, the jurisprudence has made it clear that First Nation, Métis, and Inuit groups have a reciprocal duty to participate in reasonable processes and Crown efforts to consult and accommodate them. See e.g. *Haida*, supra note 1 at para 42; *R v Douglas et al*, 2007 BCCA 265, 278 DLR (4th) 653 [*Douglas*]; *Louis v BC (Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070, [2012] BCWLD 267; *Chartrand v The District Manager*, 2013 BCSC 1068, [2013] BCWLD 5284. This includes an obligation to clearly outline any asserted rights to facilitate consultation processes; see *Haida*, supra note 1 at para 36.

In *Douglas*, ibid at para 45, the British Columbia Court of Appeal quoting *R v Sparrow*, [1990] 1 SCR 1075 [1990] 3 CNLR 160 at para 73 [*Sparrow*], noted that a First Nation’s failure to engage in its reciprocal duty to consult would have ‘direct implications on the assertion [that] the consultation efforts of government are flawed.’

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46 *Conway*, supra note 37. In this case, the Supreme Court determined that the capability of the Ontario Review Board to grant remedies under section 24(1) of the Charter depends on its mandate, structure, and function.

47 *Rio Tinto*, supra note 14 at para 58.


49 *Rio Tinto*, supra note 14 at para 61; and more generally, ibid at paras 58–61.

50 The jurisprudence has made it clear that First Nation, Métis, and Inuit groups have a reciprocal duty to participate in reasonable processes and Crown efforts to consult and accommodate them. See e.g. *Haida*, supra note 1 at para 42; *R v Douglas et al*, 2007 BCCA 265, 278 DLR (4th) 653 [*Douglas*]; *Louis v BC (Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070, [2012] BCWLD 267; *Chartrand v The District Manager*, 2013 BCSC 1068, [2013] BCWLD 5284. This includes an obligation to clearly outline any asserted rights to facilitate consultation processes; see *Haida*, supra note 1 at para 36.

51 In *Douglas*, ibid at para 45, the British Columbia Court of Appeal quoting *R v Sparrow*, [1990] 1 SCR 1075 [1990] 3 CNLR 160 at para 73 [*Sparrow*], noted that a First Nation’s failure to engage in its reciprocal duty to consult would have ‘direct implications on the assertion [that] the consultation efforts of government are flawed.’
there is a sense that tribunals have adopted a conflicting approach to authority. Rather than evaluate whether the Crown has met its duty to consult in accordance with *Haida* and to use its powers to address deficiencies, tribunals have excluded the duty to consult from their purview.52 Where the Crown is not a party to the application at issue, tribunals have avoided evaluations as to whether the Crown or the applicant has fulfilled the Crown’s constitutional duty to Aboriginal people, leaving it to the courts and/or the Crown to determine.53

Dissimilarities in approaches reflect differing views from the courts about how tribunals must operationalize their authority and about the effect of that authority on Crown duties. The Supreme Court of Canada jurisprudence discussed above has been interpreted and applied by lower courts, with mixed results on preliminary questions about whether tribunals are authorized by their constitutive statutes to undertake consultation, whether tribunals should be required to subject Crown and/or the applicant’s consultation to a *Haida* analysis, and if so, when in the proceedings analysis should be undertaken. For example, the Federal Court in *Brokenhead Ojibway Nation et al v Attorney General of Canada (National Energy Board) et al*54 reaffirmed the principle that regulatory processes may satisfy the Crown’s duty to consult, finding that the Crown had fulfilled its duty to consult with the Treaty One First Nations of Manitoba concerning three pipeline projects by relying on the regulatory processes of the NEB.55 At the same time, courts have interpreted and applied the Supreme Court’s jurisprudence on administrative authority restrictively. In considering how tribunals are to analyse consultation issues, the Federal Court of Appeal in *Standing Buffalo* suggested that tribunals are not necessarily required to undertake a *Haida* analysis in order to exercise their statutory powers in a manner that is consistent with section 35(1) of the *Constitution Act, 1982*.56 The Court agreed with the NEB’s position that it need not determine whether the Crown has a duty to consult and/or whether any such duty has been discharged in order to render a decision.57

52 Promislow, supra note 3 at 70.
54 2009 FC 484, [2009] FCJ no 608 [*Brokenhead Ojibway*].
55 *Brokenhead Ojibway*, ibid at paras 25–6.
56 *Standing Buffalo*, supra note 8 at paras 27–34, 40–4.
57 Ibid.
The deciding courts in *Ka’a’Gee Tu First Nation v Canada (Minister of Indian and Northern Affairs)*\(^{58}\) and *Yellowknives Dene First Nation v Canada (Attorney General)*\(^{59}\) adopted a similar approach. Building on its previous reasoning in *Ka’a’Gee*, the Federal Court in *Yellowknives* held that a federal board must act in accordance with section 35(1) of the Constitution and must take concerns of Aboriginal peoples into account when exercising its powers. It found that a decision as to whether the Crown’s duty to consult is being discharged is ‘legally necessary’ but went on to clarify that it was not suggesting that the board in question would dictate to the Crown the terms of consultation. Rather, the court reasoned that the tribunal might decide differently and/or conduct its own process differently if it knew all of the facts surrounding the consultation at issue.\(^{60}\) Therefore, the Federal Court reasoned that questions of adequate consultation are for the courts to determine.

Differences in these decisions reflect concerns with how much authority tribunals should be granted to decide, even on a preliminary basis, the factual and legal matters essential to the *Haida* test.\(^{61}\) Tribunals tasked with evaluating consultation must make findings about the scope of the duty to consult, which in accordance with *Haida* requires preliminary findings about the Aboriginal right, starting with whether it is a proven or unproven right. This represents a major change in the law, a change courts are understandably reluctant to undertake lightly.

Differences over tribunal jurisdiction also operate in the context of questions of whether tribunals have the capacity to make governments accountable through evaluation. The issue of capacity can arise as a technical question about whether a tribunal is able to evaluate the Crown (who is often not an applicant) or the applicant (who has no duty) as well as questions about how tribunals can be asked to generate remedies they are not able to monitor in the future. Capacity also arises as a question about tribunal independence. Although administrative tribunals are generally independent of the political process and are bound by the duty of procedural fairness to hear and decide the matter before them impartially and independently, they remain, in many fundamental ways, accountable to the executive.\(^{62}\) This is particularly true where the executive has the authority to appoint members to the tribunal and/or the tenure of the

\(^{58}\) 2007 FC 764, [2008] 2 FCR 473 [*Ka’a’Gee*].

\(^{59}\) 2010 FC 1139, [2010] FCJ no 1412 (QL) [*Yellowknives*].

\(^{60}\) Ibid at para 83.

\(^{61}\) Promislow, supra note 3 at 69–73.

members is at the discretion of the executive. What then complicates the conferral of power to evaluate the duty to consult is how courts characterize and address the potential relationship of tribunals to the executive.

Lastly, aside from technical questions about tribunal jurisdiction and pragmatic questions about independence, there is a finer question about whether tribunals will use *Haida* to affect the fundamental project of reconciliation in the same manner as the judiciary purports to do. A procedural application of *Haida* can be ungenerous to Aboriginal peoples.63 This is especially true where rights are unproven or treaty-based or impacts are construed as biophysical.65 It is conceivable that, even should tribunals be tasked with applying *Haida*, they could do so in a way that conditioned low levels of consultation and accommodation. To the degree that the courts also sometimes do this, perhaps it is to be expected. However, as is discussed below, there is also an undercurrent in the jurisprudence, one that uses the uncertainty that is inherent in consultation to move parties to negotiate a settlement rather than achieve it through declaratory relief. How much this manner of affecting reconciliation can be undertaken by tribunals is unclear.

As the case study of the NEB will illustrate, the unresolved nature of tribunal authority is reflected in the struggle to define its role in ensuring that administrative approvals are consistent with the constitutional rights of Aboriginal peoples. Although there are no easy solutions to the questions raised by tribunal jurisdiction, there is a need to identify whether there is a dissonance between judicial expectations and tribunal practice and its causes. Answers to these questions should structure how closely the judiciary directs tribunals in the future.

### III Administrative authority of the NEB: A case study

#### A TRIBUNAL WITH THE AUTHORITY TO ASSESS CONSULTATION

The NEB was established by Parliament in 1959 as an independent federal regulator. It was created with the aim of depoliticizing and insulating the decision-making process concerning one of Canada’s key resources from unbridled market competition and top-down bureaucratic control.66 The NEB was given a mandate to regulate aspects of the

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64 Ibid; also Promislow, supra note 3.
energy industry under federal jurisdiction and to inform the government and public about energy matters.\textsuperscript{67} Its statutory responsibilities under the \textit{National Energy Board Act} (‘NEB Act’)\textsuperscript{68} and other legislation\textsuperscript{69} are both advisory and regulatory.

In its advisory role, the NEB collects statistics, conducts studies, and researches energy matters.\textsuperscript{70} It also holds inquiries where appropriate, issues reports to the public on specific energy issues, and monitors current and future supplies of Canada’s major energy commodities. The tribunal’s knowledge and expertise is used to report to and advise the federal Minister of Natural Resources on energy issues.\textsuperscript{71} This part of the NEB’s mandate is premised on a close relationship with government.\textsuperscript{72}

The NEB’s regulatory function is distinct from its advisory role. This function includes the review and oversight of international and interprovincial aspects of pipelines and transmission lines, tolls and tariffs on pipelines within its jurisdiction, imports and exports, frontier oil and gas development north of 60° (in the Northwest Territories, Nunavut, and Hudson Bay), and technical and administrative assistance to the Northern Pipeline Agency. Recently, the NEB has been given the added responsibility for environmental assessments (EA) during its review of applications for facilities and activities under its jurisdiction.\textsuperscript{73} Accordingly, where the construction and operation of pipelines and power lines are involved, the NEB conducts an EA and regulatory review process for all projects.

In carrying out its regulatory responsibilities, the NEB consistently refers to its role as quasi-judicial.\textsuperscript{74} Typically, three board members are assigned to hear a specific application. A panel operates as a court of record, with the powers, rights, and privileges of a superior court. It can


\textsuperscript{68} \textit{National Energy Board Act}, RSC 1985, c N-6 s 1 at ss 11, 12 [\textit{NEB Act}].


\textsuperscript{70} Part II of the \textit{NEB Act}, supra note 68, outlines the tribunal’s advisory functions.


\textsuperscript{72} Popowich, supra note 66 at 848.

\textsuperscript{73} \textit{Canadian Environmental Assessment Act}, SC 2012, c 19, s 52 [\textit{CEAA}];

\textsuperscript{74} See e.g. National Energy Board, ‘National Energy Board Fact Sheet,’ online: NEB <http://www.neb-one.gc.ca/bts/whwr/nbfcshbl-eng.pdf> [NEB Fact Sheet]: ‘The NEB has quasi-judicial powers, with the rights and privileges of a superior court.’ For judicial recognition, see \textit{Standing Buffalo}, supra note 8 at para 34.
compel attendance at hearings, examine witnesses under oath, inspect documents, and enforce its orders. The NEB also has broad authority to compel and consider a wide range of evidence, including impacts on Aboriginal peoples, when making its decisions. At the end of the process, the NEB typically releases written decisions referred to as ‘Reasons for Decisions.’ Where the decision involves the construction and operation of a pipeline or power line, the NEB’s Reasons for Decision concerning major projects are only advisory. The Governor in Council has the sole responsibility for approving or denying the Certificate of Public Convenience and Necessity (‘Certificate’) required under section 52 to construct a pipeline and/or section 58.15 of the NEB Act for a transmission project.

The NEB Act is silent with respect to the duty to consult. However, section 12(2) of the Act gives the board ‘full jurisdiction to hear and determine all matters, whether of law or of fact’ and the NEB exercises authority over socio-economic and environmental assessments under the CEAA. The NEB implements its authority to consider Aboriginal rights through its decision-making activities, filing requirements, and several policy memoranda. While there have been some changes between policies, the NEB has consistently maintained that it cannot directly engage in consultation but it will consider potential impacts on Aboriginal rights and treaty rights as part of its decision-making process. This has been articulated in various memoranda and directives including:

- The Memorandum of Guidance on Consultation with Aboriginal People, 2002
- The Memorandum on the Implications of Supreme Court of Canada Decisions on the NEB’s Memorandum of Guidance on Consultation with Aboriginal People, 2005

75 NEB Fact Sheet, ibid.
76 NEB Act, supra note 68.
77 CEAA, supra note 73, s 15(b).
79 ‘Consultation with Aboriginal People,’ Memorandum from Michel L Mantha, Secretary, National Energy Board, to Companies Subject to the Jurisdiction of the National Energy Board, Federal and Provincial Government Departments and Agencies and Representatives of Aboriginal Peoples (4 March 2002), 230-A000-16 (retracted) at 3, online: NEB <https://docs.neb-one.gc.ca/l-eng/llisapi.dll/‘fetch’/2000/90465/522930/523056/Memorandum_Of_Guidance_%28A0C8Q3%29.pdf?nodeid=522841&vernum=2>: the NEB ‘has a responsibility to determine whether there has been adequate Crown consultation before rendering its decision in cases where the effect of the decision may interfere with an aboriginal right or Treaty right.’
80 ‘Implications of Supreme Court of Canada Decisions on the National Energy Board’s Memorandum of Guidance on Consultation with Aboriginal People,’ Memorandum
The Memorandum on the Consideration of Aboriginal Concerns in National Energy Board Decisions, 2011

The NEB has also issued policy directives on the procedural responsibilities of applicants for consultation. As part of the filing requirements for an application, the NEB requires the applicant to provide information on its Aboriginal engagement activities including: (i) the Aboriginal communities that may be affected by the project; (ii) when and how the group or community were contacted and who was contacted; (iii) evidence that the applicant has provided potentially affected people with details of the project; (iv) documents and summaries of any meetings; (v) information regarding the concerns raised; and finally (vi) an analysis of the potential impacts of the project on the exercise of traditional practices such as hunting, fishing, trapping, and gathering. Applicants are also advised to consider integrating local and traditional knowledge, where appropriate, into the design of the project. Conversely, where the company does not carry out consultation activities with respect to a proposed project, applicants are expected to provide justifications as to why consultation was unnecessary. This information forms the basis of the NEB’s evaluation of the applicant’s Aboriginal engagement activities. The powers of the NEB to evaluate impacts on Aboriginal peoples and anything that would mitigate those impacts has also been explicitly defined in mandates provided to particular panels.
As part of its outreach, the NEB sends letters to each Aboriginal community or organization on the list to inform them of the project and the NEB’s role. The NEB also provides information concerning the hearing process and attempts to encourage Aboriginal participation in its processes through its Enhanced Aboriginal Engagement (EAE) initiative and Participant Funding Program (PFP), which aims to assist participation in NEB proceedings. Aboriginal peoples can always participate by filing a letter of comment. However, if they are ‘directly affected’ or have relevant information or expertise,86 groups can register as intervenors or interested parties. This enables groups to make oral statements, submit written evidence or oral testimony, cross-examine parties, and make final arguments before the board, which the board will consider in its decision making.87

The NEB possesses several key powers when exercising its regulatory responsibilities in project development. It has the power to refuse to approve or recommend the approval of applications, impose conditions on applications,88 and impose monetary fines for non-compliance with its orders.89 Of these, the imposition of conditions is the most common. The NEB possesses relatively broad authority to impose conditions when making recommendations as to whether a Certificate should or should not be issued for all or part of a pipeline or transmission project. Under the NEB Act90 and the CEAA,91 the NEB has the authority to set conditions directly related to the project, including conditions aimed at mitigating the risks and effects posed by the project, and to require that the project is designed, constructed, and operated in a manner that is consistent with concerns raised by interested and/or affected parties. This can include conditions like requiring the applicant to demonstrate ongoing participation and/or consultation with an Aboriginal group. If the
project is approved, the NEB becomes responsible for verifying and enforcing the compliance of the condition attached to the project.

Based on all of the jurisprudential indicators, the NEB is a tribunal with the authority to consider constitutional questions related to section 35 and is authorized to evaluate whether the duty to consult Aboriginal peoples has been met. It can consider questions of law, has a mandate to evaluate impacts to rights including the effects of consultation, and has remedial powers that could be used to ensure consultation is achieved. While this conclusion may not be easy to reconcile with its close relationship with government, it does meet the indicators set out in Paul, Martin, and Rio Tinto. More tellingly, the NEB has exercised an evaluative function in relation to Aboriginal rights for some time now. Whether it has done so as envisioned by the Supreme Court is the question to be determined.

B METHODOLOGY

In order to obtain a representative sample of decisions, the authors obtained a comprehensive list of written decisions issued by the NEB since 2000 from the NEB’s web site and by contacting the NEB library. The cut-off year for inclusion was set at 2000 in order to capture and differentiate trends in decision making both before and after the Supreme Court issued its landmark decisions on the duty to consult in Haida and Taku in 2004. This inclusion date assumed that the NEB would have been cognizant of changes in the case law and that any obligations to consider consultation would have been incorporated into their decisions.

Passing references to the case law in NEB decisions and policy statements before and after Haida supported the hypothesis that the NEB was cognizant of the changing law. Nevertheless, analysis of the decisions reveals that Haida appears to have had relatively little impact on how the NEB addressed questions regarding consultation in the course of its decision-making processes. Panel decisions made prior to and after Haida do not appear different in procedure, standards, or outcome. Moreover, comparison proved challenging, due to the relatively few instances in which the NEB provided a comprehensive discussion on consultation or comparison of applicant engagement in consultation, as defined in law at any given time. When pressed as to its role, the NEB has consistently maintained that it considers potential impacts of applications on section 35(1) rights but does not directly engage in consultation, due to its quasi-judicial character.

92 See e.g. GSX Canada Limited Partnership (Re), 2003 LNCNEB 13, GH-4-2001 (November 2003), Reasons for Decision (QL) [GSX Canada]; Sumas Energy 2, supra note 9;
The authors searched the written Reasons for Decisions for all applications\textsuperscript{93} using the terms ‘Aboriginal’ and/or ‘First Nations’ in an effort to capture as many cases as possible in which consultation or any other type of engagement with Aboriginal peoples arose. The names of these applications are listed in Table 1. All relevant decisions were then categorized into one of two primary categories: those in which First Nations agreed that consultation was satisfied and those in which there is an indication that they disagreed that consultation was satisfied (Table 1).\textsuperscript{94}

Consultation was deemed satisfied in those cases where the NEB made express statements that First Nations agreed that consultation was satisfied in its Reasons for Decision or expressly stated that First Nations did not raise any concerns. Included in this category were all decisions where the board detailed the parties affected by the decision and indicated their express approval or that no concerns were raised by them. For example, in \textit{Emera Brunswick Pipeline}, the board noted that both the Union of New Brunswick Indians and the MAWIW Council of First Nations reached agreement with the applicant and indicated their support for the timely approval of the Project.\textsuperscript{95} These decisions provided a clear statement on Aboriginal perspectives on consultation.

All other decisions were categorized as cases in which there was no agreement that consultation was satisfied. This group is mostly constituted by those decisions where the panel expressly notes that one or more Aboriginal intervenors or groups does not agree that consultation was sufficient or the panel made express comments that it believed

\textit{TransCanada Keystone Pipeline GP Ltd (Re),} 2007 LNCNEB 9 OH-I-2007 (September 2007), Reasons for Decision (QL) [\textit{TransCanada Keystone}]  

\textsuperscript{93} This included applications for construction, operation, and maintenance of pipelines and power lines (often referred to as ‘facilities’ applications); traffic, tolls, and tariffs; exports and imports; and interprovincial oil and gas trade – although the study indicates that the majority of questions as to the adequacy of consultation arose in the context of applications concerning the construction, operation, and maintenance of pipelines and power lines.

\textsuperscript{94} Although the NEB claims to not evaluate the adequacy of Crown consultation, it declares consultation to be an issue and uses the language of ‘Aboriginal Consultation’ in its written Reasons for Decisions. The authors of the present article do not in any way purport to evaluate the validity of Aboriginal and/or First Nation claims in these cases nor do they evaluate the correctness of the NEB’s conclusions about whether consultation or engagement was sufficient. Evaluation of each decision on the merits is beyond the scope of this article. Moreover, the NEB does not evaluate the strength of those claims, thereby providing no evidentiary record by which to analyse its relevance.

\textsuperscript{95} \textit{Emera Brunswick Pipeline Company Ltd (Re),} 2007 LNCNEB 3, no GH-I-2006 (May 2007), Reasons for Decision (QL) at para 185 [\textit{Emera Brunswick Pipeline}].
Table 1: National Energy Board Reasons for Decisions – January 2000 to June 2014

<table>
<thead>
<tr>
<th>Application Name (where adequacy of consultation with Aboriginal peoples noted by the NEB)</th>
<th>Consultation Satisfied / No Concerns (CS); Not Satisfied, Incomplete, ongoing (CNS)</th>
<th>NEB lacks jurisdiction</th>
<th>s 35 rights issues can / will be addressed through ongoing consultation</th>
<th>Absence or mitigation of impacts</th>
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<tr>
<td>1 Ricks Nova Scotia Co (GH-3-2000)</td>
<td>CS</td>
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<td>2 Murphy Oil Co (GH-1-2001)</td>
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<td>3 Enbridge Pipelines Inc (OH-1-2000)</td>
<td>CNS</td>
<td>X</td>
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<tr>
<td>4 Maritimes &amp; Northeast Pipeline Management Ltd (RH-3-2001)</td>
<td>CNS</td>
<td>X</td>
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<tr>
<td>5 Westcoast Energy Inc (GH-2-2002)</td>
<td>CS</td>
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<tr>
<td>6 New Brunswick Power Corp (EH-2 2002)</td>
<td>CNS</td>
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<tr>
<td>7 Westcoast Energy Inc (GH-1-2002)</td>
<td>CNS</td>
<td>X</td>
<td>X</td>
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<tr>
<td>8 Maritimes &amp; Northeast Pipeline Management Ltd (GH-3-2002)</td>
<td>CNS</td>
<td>X</td>
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<tr>
<td>9 George Strait Crossing Pipeline Limited (GH-4-2001)</td>
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<td>X</td>
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<td>10 Trans Northern Pipeline Inc (OH-1-2003)</td>
<td>CS</td>
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<td>11 EnCana Ekwan Pipeline Inc (GH-1-2003)</td>
<td>CNS*</td>
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<td>X</td>
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<tr>
<td>13 Sumas Energy 2 Inc (EH-1-2000)</td>
<td>CNS**</td>
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<td>X</td>
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<td>14 Imperial Oil Resources Ventures Limited (GH-1-2004)</td>
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<tr>
<td>15 Terasen Pipelines (TransMountain) Inc (OH-1-2006)</td>
<td>CNS</td>
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<tr>
<td>16 Emera Brunswick Pipeline Company Ltd (GH-1-2006)</td>
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<td>17 Encana Corp (GH-2-2006)</td>
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<tr>
<td>19 TransCanada Keystone Pipeline GP Ltd (OH-1-2007)</td>
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<td>20 Enbridge Southern Lights GP (OH-3-2007)</td>
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<td>21 Enbridge Pipelines Inc (OH-4-2007)</td>
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<tr>
<td>22 Enbridge Pipelines Inc (OH-5-2007)</td>
<td>CS</td>
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<tr>
<td>23 Westcoast Energy Inc (cob Spectra Energy Transmission) (GH-3-2008)</td>
<td>CNS</td>
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<td>24 SemCAMS Redwillow ULC (GH-2-2008)</td>
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<td>26 NOVA Gas Transmission Ltd (GH-1-2009)</td>
<td>CNS</td>
<td></td>
<td>X</td>
<td>X</td>
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<tr>
<td>27 TransCanada Keystone Pipeline GP Ltd (OH-1-2009)</td>
<td>CNS</td>
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<td>X</td>
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<tr>
<td>28 Westcoast Energy Inc (GH-1-2010)</td>
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<td>X</td>
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<td>29 NOVA Gas Transmission Ltd (GH-2-2010)</td>
<td>CS</td>
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<tr>
<td>30 Westcoast Energy Inc (GH-3-2010)</td>
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<td>(where adequacy of consultation with Aboriginal peoples noted by the NEB)</td>
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<td>31 KM LNG 32 Operating General Partnership (GH-1-2011)</td>
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<td>32 NOVA Gas Transmission Ltd (GH-2-2011)</td>
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<td>33 BC LNG Export Cooperative LLC (GH-003-2011)</td>
<td>CS</td>
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<td>34 NOVA Gas Transmission Ltd (GH-004-2011)</td>
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<td>36 Enbridge Bakken Pipeline Co (OH-1-2011)</td>
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<td>37 Provident Energy Pipeline Inc (OH-2-2011)</td>
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<td>38 Vantage Pipeline Canada ULC (OH-3-2011)</td>
<td>CNS**</td>
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<td>39 Northern Gateway Pipelines Inc (Enbridge) (OH-4-2011)</td>
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<td>41 Nova Gas Transmission Ltd (GH-001-2012)</td>
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<td>42 Enbridge Pipelines Ltd (OH-001-2013)</td>
<td>CNS*</td>
<td>X</td>
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<tr>
<td><strong>TOTALS</strong></td>
<td>CS = 12 / CNS = 10</td>
<td>21</td>
<td>20</td>
<td>30</td>
</tr>
</tbody>
</table>

*Indicates instances where there is distinct treatment for different Aboriginal claimants in the decision. In these applications, consultation was deemed satisfied by some but not all Aboriginal groups.

**Application denied but on other grounds (i.e., not consultation).
consultation was incomplete or ongoing. The group also includes three decisions in which the authors inferred that First Nations would have concerns about consultation. In these three decisions, the panel lists First Nations that are impacted and concludes that their concerns will be addressed by the applicant but does not make any reference to the views of the affected First Nations.

Of the decisions categorized as ‘consultation not satisfied’, the authors parsed each decision for one or more rationales provided in support of the NEB’s treatment of consultation. Each rationale was identified and recorded in order to determine which rationales were most commonly relied upon. In many cases, the authors noted that multiple rationales were used. Each rationale provided in a decision was recorded (Figure 1Q1). Through this exercise, the authors expected to obtain a quantitative understanding of which rationales have had the strongest persuasive value for the NEB to date. By linking the frequency of reliance on these rationales to the outcome of the decisions, the authors identified how these rationales relate to the NEB’s responsibilities to evaluate consultation.

C FINDINGS

Based on these parameters, the authors identified that out of the approximately 100 applications decided by the NEB between January 2000 and June 2014, Aboriginal consultation was raised as an issue and/or consideration in forty-two applications. The NEB issued approvals with conditions in forty-one of the forty-two decisions, giving it an approval rate of almost 100 per cent. Relying entirely on NEB’s statements in the final decisions, the authors identified that consultation was...
not raised as an issue or was deemed satisfied by the Aboriginal group(s) in twelve of the forty-two cases. In these twelve cases, the Aboriginal group(s) had either withdrawn as intervenor, submitted a letter of support, failed to raise any concerns, and/or was noted by the NEB to support the project. In the remaining thirty decisions, the authors found that there was some indication that the Aboriginal group(s) perceived that consultation remained either partially or completely outstanding. Nonetheless, these projects also received regulatory approval.

Given that Standing Buffalo stands for the proposition that tribunals are not required to ensure that consultation is satisfied prior to approval, consultation could remain outstanding. Consultation is a long and complex process, which is adapted as new real knowledge about environmental effects and impacts on Aboriginal rights become apparent. Regulatory processes aimed at the investigation and analysis of technical methods that will mitigate effects and impacts are expected to arise during the regulatory review but may not be fully resolved until the Crown undertakes further research. The creation of the Major Projects Management Office (MPMO) in 2007 has also affected oversight of Crown consultation efforts for major resource projects, making NEB findings contingent. Based on this functional understanding of NEB and federal regulatory processes, one might not expect that consultation would be settled in all applications. However, if tribunals are vested with the authority to evaluate consultation as part of the regulatory process and purport to have done this evaluation through written reasons that itemize and account for applicant engagement, the authors question whether an almost 100 per cent approval rate is a significant indicator that the duty to consult is extraneous to regulatory approval.

IV Justifications for avoiding evaluation

The reasons provided by the NEB, in the thirty cases where the adequacy of consultation was outstanding, indicate that the NEB does not evaluate the legal adequacy of applicant or Crown consultation as part of its regulatory approval process, rendering consultation extraneous to regulatory approval. Instead, the NEB generally provided one of three justifications for its decision to recommend regulatory approval irrespective of consultation; namely that (i) it lacks the jurisdiction to consider the consultation matter at issue; (ii) outstanding consultation can be addressed

99 ‘Partially outstanding’ means that consultation was not resolved on all issues and/or deemed unsatisfied by all or some potentially impacted Aboriginal groups.

through ongoing consultation; and (iii) the absence or mitigation of impact(s) on Aboriginal rights equates to an absence of ‘adverse effects’ on Aboriginal rights. These justifications indicate discord between the allocation of tribunal authority articulated by the Supreme Court jurisprudence and the willingness and/or capacity of the NEB to address the duty to consult.

A LACK OF JURISDICTION
In 10 out of 30 cases, the NEB cited lack of jurisdiction as a justification for approving projects with outstanding consultation. Like all administrative tribunals, the NEB operates in accordance with the powers expressly or implicitly conferred by its enabling statute. Cautious not to overextend its jurisdiction, the NEB has interpreted the scope of the application and its implied jurisdiction to consider consultation narrowly. This has been particularly true where (a) the NEB shared approval authority with other regulatory bodies; (b) the consultation involved larger overarching rights, such as land and treaty claims; and/or (c) where the issues raised pertained to private relations between the parties. In each case, the NEB found the consultation questions to be outside its jurisdiction and therefore concluded that it could not consider them.

1 Shared regulatory authority
In circumstances where the NEB is tasked with evaluating a portion of a project, it has indicated an unwillingness to consider the indirect and cumulative impacts on Aboriginal and treaty rights. The NEB’s decision in *Sumas Energy 2* provides an apt illustration of the board’s reliance on shared jurisdiction to find a lack of authority. In this case pre-dating *Haida*, a private company made an application for leave to construct and operate the Canadian portion of an international power line. The Stó:lō Nation argued that although the applicant company had contacted them to discuss the specific environmental and archaeological impact assessments for the project, their broader concerns about the environmental impacts of the project on their Aboriginal rights and title had not been adequately or meaningfully addressed. Specifically, concerns regarding the potential environmental impacts of the project on air

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101 See Table 1 for a complete list of decisions where the board cited lack of jurisdiction as a justification.
102 *Sumas Energy 2*, supra note 9.
103 Ibid, s 7.2.4.
quality, water quality, and aquatic resources, and the resulting effect on the health of the Stó:lō Nation community.

The NEB ultimately denied the company’s application. However, in regards to consultation requirements arising from the construction and operation of the power plant, the NEB determined that it lacked the jurisdiction to consider them. Despite the dependent nature of the two projects, the NEB drew a jurisdictional line separating the potential impacts on rights arising from the international power line and those arising from the US power plant, which had already received US approval.

The approach described here is indicative of the NEB’s view that, in a shared regulatory environment, each administrative body only possesses the authority to consider the portion of the project before it. In this case, it separated the effect of the power line from the effect of the power plant. However, the approach is also indicative of a concern, expressed by the Supreme Court in *Rio Tinto*, that where the ‘power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with particular government actions, the government might effectively be able to avoid its duty to consult.’ In such circumstances, the indirect and cumulative impacts on Aboriginal and treaty rights are not considered and review of Crown action is avoided.

2 Overarching consultation: Land and treaty claims

The NEB has also found a lack of jurisdiction when consultation related to Aboriginal title or treaty claims that the NEB reasoned that it was unable to remedy. The NEB’s reasons in the related pipeline cases of *TransCanada Keystone*, *Enbridge Southern Lights GP*, and *Enbridge Alberta Clipper Expansion*, which were appealed to and upheld by the Federal Court in *Brokenhead Ojibway*, are illustrative. In these cases,
post-dating *Haida*, seven Treaty One First Nations claimed the projects would adversely affect their treaty rights in a broad expanse of southern Manitoba and that the Crown had failed to fulfil its duty to consult. Their arguments were unsuccessful.

The NEB held that, since the root of the consultation issues related to the Treaty One First Nations’ outstanding land claims, they were matters outside its jurisdiction. In its Reasons for Decision on the *TransCanada Keystone* application, the NEB found that

[i]t is not within the jurisdiction of the board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it was of limited probative value to the consideration of the application before the board.112

In *Standing Buffalo*, the Federal Court of Appeal affirmed that the NEB is not required to determine whether the Crown is subject to a *Haida* duty prior to considering the merits of an application.113 Moreover, the Court in *Brokenhead Ojibway* determined that while the NEB process can be used to fulfil the Crown’s duty to consult and that the tribunal appeared ‘well-suited to address mitigation, avoidance and environmental issues that are site or project specific,’114 the tribunal’s regulatory process was ‘not . . . designed . . . to address the larger issue of unresolved land claims.’115

Concerns about the NEB’s authority to rule on land- and treaty-related consultation matters were intimately tied to the perception of the tribunal’s limited remedial powers. Even if the NEB had the authority to declare rights, which it does not, the Federal Court in *Brokenhead Ojibway* failed to see how consultation issues raised in the applications could be within the remedial jurisdiction of the NEB.116 It reasoned that the land- and treaty-claim-related issues could not be easily addressed by the NEB’s mandate for impact assessment.117 In comparing the purpose of impact assessment with the purpose of land claim settlement, the Federal Court appears to have established a standard that the NEB must have the ability to remedy overall impacts rather than just site-specific

112 *TransCanada Keystone*, supra note 92 at 52.
113 *Standing Buffalo*, supra note 8 at para 30.
114 *Brokenhead Ojibway*, supra note 54 at paras 25–6. The Court noted that the record established that the specific project concerns of the Aboriginal groups consulted by the applicants ‘were well received and largely resolved’; ibid at para 26.
115 Ibid at para 27.
116 *Brokenhead Ojibway*, supra note 54 at para 27.
117 Ibid at para 28.
impacts on rights in order to evaluate whether the duty to consult has been met. This remedial authority required in order to address impacts has since been clarified in *Rio Tinto*. The tribunal must have the remedial powers to address the *particular* concerns or impacts raised, not necessarily the remedial powers to address overall impacts.118 The jurisprudence to date has not dealt with whether administrative authority extends to the declaration of rights.

3 Private relations

Finally, the NEB has found a lack of jurisdiction where the consultation issues pertain to the relationship of the parties rather than the project. In *Re Maritimes & Northeast Pipeline Management Ltd.*,119 the Union of New Brunswick Indians (UNBI) argued that the applicant had failed to conduct good faith consultations with its people and that it had misrepresented its consultation process and long-term agreement with the UNBI.120 Rejecting the UNBI’s requests for conditional approval, the NEB found that consultation issues related to the implementation of an impact benefit agreement between the applicant and an affected First Nations group were outside the scope of the application, despite the fact that it was related to the proposed project. The NEB has stated that ‘it is not within its purview to resolve disputes over the interpretation of private contractual agreements and that should the parties have such concerns they should seek an alternative and more appropriate forum or court of competent jurisdiction.’121

A similar approach was applied when considering an agreement between the applicant and Aboriginal groups in *Enbridge Pipelines Inc.*122 In that case, the panel commented that extensive consultation had taken place between Enbridge, the Battlefords Tribal Council (BTC), and the Federation of Saskatchewan Indian Nations, as evidenced by an agreement summarized in a letter of commitments from Enbridge to BTC, outlining the First Nations participation in the project, providing funding for capacity building initiatives, and addressing concerns regarding traditional use sites. The NEB noted that, ‘while the parties may later choose to enter into a more formal agreement,’ ‘the Board is of the view that the commitments that are directly related to the construction and

118 *Rio Tinto*, supra note 14 at para 58; *Conway*, supra note 37 at para 22.
120 Ibid, s 5.3 at 40.
121 Ibid at 30.
operation of the applied-for facilities are clear and unambiguous. However, the panel went on to note that, "the resolution of any dispute that may arise... would fall within the purview of a court of competent jurisdiction."

Thus, despite the widespread use of impact benefit agreements to address issues that arise during project negotiations and consultation with Aboriginal peoples and despite the NEB’s consideration of these agreements as evidence of consultation, disputes as to their content or application are deemed beyond its jurisdiction. The negotiation and implementation of these agreements are viewed as private contractual arrangements between the parties, which the NEB lacks the authority to remedy.

Given its jurisdiction to consider the application before it, the NEB is likely not the correct forum to be mediating or arbitrating contractual disputes related to a project. On the other hand, the nature of the relationship between the parties, including the lack of agreement as to key terms of a project, may speak to the feasibility or viability of the project. In this context, the contractual relationship of the parties may be relevant. Moreover, the relative flexibility afforded to the NEB by section 52 of the NEB Act when deciding what factors to consider in determining whether to recommend a Certificate suggest that the context surrounding an impact benefit agreement could be considered when determining whether to recommend that a project proceed. Arguably, this could be interpreted to extend to an agreement that provides job guarantees and/or revenue sharing.

B ONGOING CONSULTATION IS SUFFICIENT

Even more than lack of jurisdiction, the NEB relies on the justification that consultation issues can be resolved through ongoing consultation. In twenty-one out of the thirty cases where consultation was raised, the NEB determined that ongoing consultations between the company and affected Aboriginal groups would address any outstanding consultation issues. The NEB has adopted the position that consultation with

123 Ibid, s 3.3.1 at 21.
124 Ibid.
126 NEB Act, supra note 68, s 52(2): 'the Board shall have regard to all considerations that appear to it to be directly related to the pipeline,' including 'the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline'; ibid, s 52(2)(d).
127 See Table 1 for a list of decisions where the NEB relied on the justification that outstanding consultation issues could be addressed by ongoing consultation.
affected Aboriginal communities need not take place before the approval of the project. Rather, it tends to find that evidence of a commitment to ongoing consultation and/or applicant efforts to mitigate the project’s impact on Aboriginal rights is sufficient.128

The NEB’s reliance on evidence of a commitment to ongoing consultation is often rationalized by the notion that consultation is an iterative process that does not terminate upon the receipt of regulatory approval. Consequently, the continuing obligations of applicants following approval and evaluations of consultation by other regulatory decision makers have precluded a final evaluation of consultation. For example, in the Enbridge Southern Lights case, the NEB rejected Standing Buffalo First Nation’s argument that it must consider the strength of Aboriginal claims and assess the adequacy of Crown consultation before assessing the substantive merits of an application.129 The NEB explained that, while it is has the sole authority ‘to impose conditions on a certificate’ to construct a project, ‘other government authorities have their own regulatory responsibilities pertaining to specific aspects of a federal pipeline.’130 Given that ‘the process for these approvals and permits may be carried out parallel to, or independently of the NEB process,’ it determined that they are often irrelevant to the NEB’s decision-making process.131 Consultation activities associated with these approvals may also be carried out parallel to, or independently, of the NEB’s process. Therefore the NEB determined that it was not required to wait for the consultation process to be completed for a project before issuing its own regulatory approvals.

In EnCana Corp, the Native Council of Nova Scotia (NCNS) and the Assembly of Nova Scotia Mi’kmaw Chiefs (Assembly) the NCNS presented evidence that EnCana’s Aboriginal consultation program was practically non-existent. It requested the imposition of a condition on the approval of a pipeline and offshore processing unit that required:

(i) EnCana enter into a consultation protocol and formal consultation process with NCNS;

128 See e.g. EnCana Corp (Re), 2007 LNCNEB 8, no GH-2-2006 (September 2007), Reasons for Decision (QL) [EnCana], where the NEB found that meaningful consultation need not take place before operations commence; NB Power, supra note 97; EnCana Ekwan Pipeline Inc (Re), 2003 LNCNEB 7, no GH-I-2003 (September 2003), Reasons for Decision (QL) [EnCana Ekwan]; SemCAMS Redwillow ULC (Re), 2009 LNCNEB 3, no GH-2-2008 (March 2009), Reasons for Decision (QL) [SemCAMS]; and Vantage, supra note 87.
129 Enbridge Southern Lights, supra note 109, s 2.2.
130 Ibid at s 2.2.2.
131 Ibid.
(ii) EnCana develop a direct communication plan with Aboriginal people for communal commercial fisheries; and
(iii) EnCana invite comments from Aboriginal people on environmental effects monitoring, mitigation plans and the environmental protection plan.132

The Assembly further submitted that the Project should be subject to a condition requiring meaningful consultation and a formal agreement prior to operations of the pipeline.133 However, the NEB refused to impose conditions on approval, preferring a recommendation that EnCana file with the board an update on its Current and Traditional Use Review and an update of any outstanding issues arising from its Aboriginal consultation.134 These standard filing requirements illustrate the NEB’s concern with the process of consultation rather than the content or impacts on rights.

Trends in the cases suggest that the NEB typically reserves conditional approvals requiring evidence of further and/or more extensive consultation for cases where the evidence of prior consultations is lacking or entirely absent.135 For example, in Emera Brunswick Pipeline,136 the NEB granted a conditional approval of the Brunswick Pipeline Project despite the failure to consult with one potentially impacted Aboriginal group, the Passamaquoddy First Nations Peoples of New Brunswick.137 The NEB determined that the project could proceed on the condition that Emera file with the board, for approval, an updated public consultation and provided evidence of ongoing consultation with stakeholders. The NEB also stated that it ‘expect[ed] that EBPC [Emera] would continue consulting with potentially affected stakeholders prior to, during and after construction of the pipeline, and over the lifetime of the Project,’ assuming that such actions would remedy any concerns.138

The one exception to the trend toward approval on the basis of ongoing consultation is the decision in GSX Canada,139 a decision that

132 EnCana, supra note 128, s 4.2 at 31.
133 Ibid.
134 Ibid at 32–3.
135 In Enbridge Pipelines Inc.(Re), 2001 LNCNEB 22, no OH-1-2000 (May 2001), Reasons for Decision (QL) at 20; and Maritimes & Northeast, supra note 119 at 42, the NEB explained that when determining whether to impose a condition on an approval the board must consider the ‘clarity, certainty and direct relation of the proposed condition to the applied-for project.’
136 Emera Brunswick Pipeline, supra note 95, s 5.2.
137 Ibid at 59–60. The failure was largely due to the fact that the Passamaquoddy is not a federally or a provincially recognized organization.
138 Emera Brunswick Pipeline, supra note 95, s 5.2 at 149.
139 Supra note 92 at 39–40.
predates *Haida*. It appears to be the only case in which the NEB refused to schedule an oral hearing until it was satisfied that adequate consultation had taken place. Over an eight-month period, the NEB engaged in a number of creative tactics to encourage the applicant and both levels of government to initiate and carry out proper consultative processes with affected First Nations groups. It proceeded with approving the project only once some of the First Nations had expressed satisfaction with it. Following this accord, the NEB was confident that all outstanding consultation issues had or would be addressed and approved the application.

C AN ABSENCE OF ‘IMPACT’ EQUATES TO AN ABSENCE OF ‘ADVERSE EFFECTS’

Finally, in twenty of the thirty cases studied, the NEB reasoned that, if there is no impact on Aboriginal rights or the impact can be mitigated, then consultative processes are either unnecessary or are satisfied. Like most tribunals, the NEB is directed by its enabling statute, guidelines, and policies to consider the ‘harm’ or ‘impact’ of a proposed project. The NEB Act allows the board to consider ‘any public interest that may be affected’ when deciding whether to grant or refuse permission for a project in the form of a Certificate. The NEB determines whether a given project is in the public interest by balancing the economic, environmental, and social interests and then weighing the positive and negative impacts of a project. This includes Aboriginal interests. Furthermore, pursuant to its authority to apply the CEAA, the NEB must now consider any environmental effects on the physical and cultural heritage or current use of lands and resources for traditional purposes by Aboriginal persons.

The NEB has found that there can be an impact on historical, archaeological, and sacred sites, as well as on traditional land use that triggers a need for consultation. However, it rarely exercises its authority to determine whether an Aboriginal claimant possesses an Aboriginal or treaty right, or to pronounce on the content of those rights when they

140 Ibid at para 127.
141 For example, the NEB issued multiple Information Requests to the federal and provincial Crown intervenors and the applicant inquiring about the activities undertaken to meet any duty the Crown may have to consult.
142 *GSX Canada*, supra note 92, s 3.3.2 at 55, where the Panel discussed its satisfaction that the Applicant had reached agreement with several of the impacted First Nations.
143 See Table 1 for the complete list of decisions where the NEB determined that the absence and/or mitigation of adverse effects on rights.
144 *NEB Act*, supra note 68, s 51.
are disputed. It does not undertake a *Haida* analysis to determine the scope of consultation nor to evaluate whether applicant engagement has met that standard. Instead, the tribunal will generally list the claims made by Aboriginal participants, list the procedural and substantive actions that the applicant has taken, determine whether the applicant’s actions have, or have not, mitigated any biophysical impacts, and draw a conclusion about whether consultation is satisfied.

The NEB tends to find little or no ‘impact’ on land where it has been previously disturbed in some way, suggesting that the duty to consult is not triggered in these circumstances. For instance, in *Enbridge Pipelines (Westspur) Inc*, the NEB found that the project would have little-to-no impact, given that it was located on an existing right-of-way, based on the finding that, ‘during the fifty years of operation of the pipeline over the existing [right of way], it has never been aware of any Aboriginal claim, interest of uses on or along the said [right of way].’ Similarly in the *Enbridge Bakken Pipeline Co* application, the NEB noted that 98.5 per cent of the Bakken Pipeline would be on privately held lands currently used for agriculture and ranching and that the Treaty Four Council of Chiefs had not provided any evidence about exercising such rights. On the basis of past use, the NEB found no impacts to rights and declined requests that Enbridge Bakken be required to fund a Traditional Land Use Study and an impact benefit agreement.

Where biophysical environmental impacts exist but they can or will be mitigated, the NEB also tends to find that there are no adverse effects. This is illustrated in the recent *NOVA Gas Transmission Ltd* decision of the NEB and the *Northern Gateway* decision of the Joint Review Panel.

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146 For example, in the decision of *Westcoast Energy Inc as amended for the Adsett Pipeline Project*, no GH-6-90 (June 1991), Reasons for Decisions, online: NEB <http://publications.gc.ca/collections/Collections/NE22-1-1991-10E.pdf>, the NEB applied the Supreme Court’s justification test in *Sparrow*, supra note 51, for the first and only time in assessing a proponent’s application.

147 See e.g. *SemCAMS*, supra note 128 at 42, where the NEB noted that ‘[t]he Board is of the view that all potentially affected Aboriginal communities were provided with sufficient details about the Project and given the opportunity to make their views known to *SemCAMS* and the Board in a timely manner so they could be factored into the decision-making process.’


149 Ibid, s 4.2 at 13.

150 2011 LNCNEB 6, no GH-1-2009 (December 2011), Reasons for Decision (QL). [*Enbridge Bakken*].

151 Ibid, s 8.4 at 50.

152 Ibid.

153 2010 LNCONE 1, no GH-2-2010 (March 2010), Reasons for Decision (QL) [*NOVA Gas*].
where it was determined that based on the site-specific mitigation strategies and procedures proposed by the applicant, the project’s impacts on lands and resources used for traditional purposes would be effectively mitigated. In NOVA Gas, the NEB found that a commitment to consult regarding the construction schedule, water withdrawals, watercourse crossing, Aboriginal monitoring, and engagement of local business entirely mitigated the effects of a gas pipeline on the use of lands and resources for traditional purposes.

Discussion: Recognizing and addressing dissonance

The qualitative assessment of the thirty decisions confirms that the NEB considers whether the applicant has engaged with Aboriginal communities but does not evaluate the adequacy of Aboriginal consultation based on legal standards developed in Haida or subsequent case law. With the possible exception of the GSX Canada case, the NEB has not undertaken a Haida analysis to determine whether a duty to consult has been triggered, what the scope of the duty requires, or whether it has been fulfilled. Rather than evaluate the content of consultation, the NEB lists the procedural steps of applicant engagement, often notes that it is satisfied with engagement and then rationalizes why it was precluded from evaluating whether the duty to consult has been satisfied. In short, the NEB has adopted an approach that is fundamentally at odds with a culture of legality promoted by the courts in the last thirty years of jurisprudence.

A DISSONANCE IN LEGALITY

Much of the difference between judicial and tribunal approaches to consultation can be traced to a dissonance in the law that governs tribunal duties regarding the administration of Aboriginal rights. The Haida test was initially developed to address the fact that the executive was undertaking decision making on resource development without regard to the impacts on Aboriginal rights. Beginning in and around the year 2000, the common law shifted dealings with Aboriginal peoples from being a matter of executive discretion to being a matter of dealing with holders of legal rights. In order to justifiably infringe those rights, Crown consultation and the parties responsible for carrying out the activities must identify those impacts to rights in cooperation with Aboriginal governments and must

154 Northern Gateway Report, supra note 96.
155 Ibid, s 4.7.
156 NOVA Gas, supra note 153, s 6.4 at 46.
generate mitigation or compensatory measures to address them. Any tribunal charged with assessing whether consultation has been fulfilled is arguably bound by the standards established in the jurisprudence on section 35(1).

However, there is confusion in the case law as to whether tribunals are required to undertake a full Haida analysis. As stated earlier, the Federal Court of Appeal held in Standing Buffalo157 that the NEB is not required to apply a Haida analysis to assess Crown consultation prior to regulatory approval. Subsequent courts and tribunals have followed the Federal Court of Appeal’s reasoning to narrow tribunal jurisdiction in relation to the duty to consult, particularly where the enabling statute of the administrative body at issue does not explicitly require it to engage in consultation.158 Also, other tribunals have adopted methods similar to those of the NEB to avoid evaluation. As Janna Promislow has suggested, courts have distinguished the process of consultation from other constitutional procedural rights, which has, in turn, allowed tribunals like the Alberta Energy Resources Conservation Board to interpret their statutory mandates narrowly so as to exclude the consideration of the adequacy of consultation.159

If, however, the reasoning in Standing Buffalo has authorized tribunals to avoid assessing the adequacy of consultation, critics of the decision have noted that the reasoning in the case is difficult to reconcile with the existing Supreme Court jurisprudence.160 The notion that a tribunal, with the statutory authority to consider questions of law is not obligated to consider consultation because the legislation does not explicitly require it, conflicts with the Supreme Court’s line of reasoning on the administrative authority to consider constitutional questions.161 Failure to use Haida to determine whether the Crown’s duty has been triggered and fulfilled also makes it unlikely that legally consistent assessments of impacts on Aboriginal and treaty rights are undertaken prior to regulatory approval. Most importantly, if the NEB merely documents an applicant’s efforts to engage with communities but does not evaluate the effect of consultation on rights, then it effectively does what the Crown may not – it authorizes or recommends the authorization of conduct that may infringe rights.

157 Standing Buffalo, supra note 8.
158 See e.g. Fond du Lac Denesuline First Nation v Canada (Attorney General), 2010 FC 948, [2010] FCJ no 1182 (QL); Yellowknives, supra note 59; and Union Gas Ltd (Re), 2011 LNONOEB 201, nos EB-2011-0040, EB-2011-0041, EB-2011-0042 (July 2011), Decision with Respect to Preliminary Questions and Final Decision and Orders (QL).
159 Promislow, supra note 3.
160 For discussion, see supra note 3.
161 Ibid.
For example, the NEB has assumed jurisdiction to assess biophysical impacts to rights, pursuant to the *Canadian Environmental Assessment Act*, and uses that authority to draw conclusions about whether applicant consultation has addressed impacts. However, in using its authority over environmental assessment, rather than constitutional questions, the NEB has substituted considerations of ‘impacts’ for ‘adverse effects’ and thereby overlooked conduct that triggers the duty to consult. As Zena Charowsky explains, the difficulty with the NEB reasoning is that the meaning of ‘adverse effect’ in *Haida* and the meaning of ‘harm’ or ‘impact’ used by the NEB represent very different standards when considering whether the duty has been triggered and whether it has been accommodated.

First, the meaning of ‘adverse effect’ as articulated in *Haida* is a much broader test than that of ‘impact’ and ‘harm’ used by the NEB. Unlike the ‘impact’ or ‘harm’ tests, the ‘adverse effects’ test does not need to have an immediate or tangible impact on lands and resources. It can flow from abstract Crown conduct such as high-level managerial, organizational, or policy changes that have the potential to limit the Crown’s power to ensure that development takes place in a way that respects Aboriginal rights. For example, contrary to the NEB, which disregards claims where there was a previous disturbance, the Supreme Court in *Rio Tinto* noted that a ‘previous disturbance’ does not necessarily preclude consultation. In that case, a duty to consult was found to exist despite the fact that the Crown was renewing or transferring an existing licence. Thus the application of a narrow ‘impact’ test can lead to different outcomes in determining what Crown conduct may trigger a duty to consult.

Second, a biophysical approach to rights may overlook the extent of damage experienced by Aboriginal peoples. For example, where development poses a risk to sacred sites, Aboriginal peoples have been vocal in their critique that assessment processes fail to account for Aboriginal valuation and therefore fail to account for Aboriginal welfare. Put into the statutory language of environmental assessment, Aboriginal peoples have raised concerns that the determination of impact significance engages highly subjective perspectives on what is the value of the loss.

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162 *CEAA*, supra note 73, s 52.
163 Charowsky, supra note 3 at 226.
164 *Rio Tinto*, supra note 14 at para 44.
165 Ibid at para 87.
166 In *Rio Tinto*, supra note 14 at para 49, the Supreme Court noted that ‘[p]rior and continuing breaches, including prior failures to consult, . . .[may] trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.’
167 Graben, supra note 65 at 83.
and what trade-offs are acceptable for development.\footnote{Ibid.} Where loss is not easily quantified for the purposes of compensation, it can be overlooked.

A recent example of this practice arose in \textit{Northern Gateway}.\footnote{Enbridge Northern Gateway Project Joint Review Panel, ‘Panel Session Results and Decision,’ no A27962 (19 January 2011), s 2.1.5, online: NGPJRP <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/620327/624909/662325/A22%2D3_2D_Panel_Session_Results_and_Decision_A1X2L8.pdf?nodeid=662117&vernum=-2>}. In this application, a number of First Nations in British Columbia raised concerns that the pipeline would infringe their claims to Aboriginal title. Titleholders would potentially suffer financial losses from the lost opportunity to use the land now dedicated to the pipeline as well as any land surrounding it. However, First Nations might also suffer from the opportunity to include it as settlement lands in claims negotiations and determine the future use of the land. The NEB was obligated under the CEAA to consider any effect of a change in the environment on physical and cultural heritage or use of lands and resources by Aboriginal persons\footnote{CEAA, supra note 73, s 2(1) ‘Environmental Effects.’} and obligated under the JRP Agreement to make recommendations for appropriate measures to avoid or mitigate potential adverse impacts or infringements on Aboriginal rights.\footnote{Enbridge Northern Gateway Project Joint Review Panel, ‘Agreement between the National Energy Board and the Minister of the Environment Concerning the Joint Review of the Northern Gateway Pipeline Project,’ no A24186 (15 January 2010), s 8.0, online: NGPJRP <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/384008/591959/A1R4D5_-_Joint_Review_Panel_Agreement.pdf?nodeid=591960&vernum=-2>}. In its Report, the Panel in Northern Gateway noted that these claims and the fact that the applicant did not respond to these claims during consultation but then omitted the claims from the discussion of the views of the board.\footnote{Northern Gateway Report, supra note 96, s 4.7.} Rather than decide that impacts on title had not been addressed through applicant consultation or Crown consultation, the Panel omitted it from consideration. The omission permitted the Panel to consider a narrower range of public interests that were favourable to approval.

**B DISSONANCE IN RATIONALITY**

In addition to dissonance between jurisprudential tests for engagement with Aboriginal peoples and that of the NEB, the findings in the present study also point to a dissonance between the objectives of courts in adjudicating Aboriginal rights and those of tribunals. The central objective of the Supreme Court has been to use its role as an independent arbiter
of justice to promote reconciliation between the Crown and Aboriginal peoples consistent with the objectives of section 35. This has rationalized decisions crafted to use law to encourage the negotiation of proprietary and managerial authority over land use. In contrast, the central objective of the NEB is to regulate energy in the public interest. This means approving or recommending the approval of projects that address market, environmental, and social requirements. In effect, the ‘public interest’ test provides the NEB with the authority to weigh majoritarian preferences in the absence of or against minority rights. The discussion that follows expands upon these differences and how they manifest themselves in the differential treatment of consultation.

1 *jurisprudential objectives*

In the three decades since the rights of Aboriginal peoples were formally recognized in section 35(1) of the *Constitution Act, 1982*, litigation over its scope and meaning has been generated by competing claims to the ownership, use, and governance of resources to which those rights apply. On the one hand, judicial decisions have addressed the technical requirements of rights and have recognized a notion of Aboriginal rights as generative, flexible, and future-oriented and thus capable of being reconciled through law with Crown sovereignty. Dwight G Newman has argued that, through its jurisprudence, the Supreme Court has purposefully crafted decisions that encourage negotiation of that legality. The Court has also become what Larry Chartrand dubs an agent of reconciliation and has developed what Mark Walters calls ‘the jurisprudence of reconciliation’. These authors argue that in adjudicating Aboriginal rights the courts have become engaged in a project of aligning reconciliation with legality. While the project is pragmatic and flexible, it is fortified by a view that the courts are independent arbiters of justice.


engaged in the business of facilitating the negotiation of competing claims to ownership, use, and governance.\textsuperscript{178}

This characterization of the courts’ rationality does not mean to paint an uncritical picture of judicial activity. Authors like Gordon Christie have convincingly argued that the approach of courts in elucidating and applying the duty to consult is underpinned by assimilationist tendencies within the doctrine of Aboriginal rights and title.\textsuperscript{179} Christie argues that this is because the duties to consult and accommodate do not operate to merge or reconcile Aboriginal visions of land use with Crown visions of land use.\textsuperscript{180} The Crown works within and through its vision to accommodate only some of the interests the Aboriginal group expresses. The Aboriginal group, by contrast, must acknowledge its lack of alternative recourse when seeking to trigger the duty to consult. In addition, he highlights the differential treatment of courts toward established and non-established claims and the two separate spectrums along which obligations befall to the Crown.

However, in justifying tribunal authority, the Supreme Court has seemingly assigned its own goal of effecting reconciliation to tribunals tasked with evaluating consultation.\textsuperscript{181} The four rationales for tribunal authority identified in \textit{Paul} and \textit{Martin} situate tribunals as part of a larger institutional system capable of administering the justice necessary for reconciliation. Recognizing tribunals as part of a unitary system of justice,\textsuperscript{182} the Supreme Court traced tribunal authority to the requirement that every government action, legislative enactment, and regulatory process be consistent with the Constitution.\textsuperscript{183} It also looked to the possibility that tribunals could provide early and accessible relief for Aboriginal


\textsuperscript{180} Ibid at 180–1.

\textsuperscript{181} For support for this approach, see Lambrecht, supra note 3.

\textsuperscript{182} \textit{Paul}, supra note 32. The Supreme Court reasoned that the process of judicial review, derived from section 96 of the \textit{Constitutional Act, 1867} (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, integrates administrative tribunals into the unitary system of justice.

\textsuperscript{183} In \textit{Martin}, supra note 33 at para 28. The Court explained that the first rationale is that tribunal authority is founded on section 52(1) of the \textit{Constitution Act, 1982}, and in \textit{Paul} supra note 32 at para 36, Justice Bastarache found that Aboriginal rights are like other constitutional rights, quoting Moen J in \textit{Ermineskin Cree Nation v Canada} (2001), 297 AR 226, 2001 ABQB 760 at para 31, ‘[t]here is no principled basis for distinguishing \textit{Charter} questions from s. 35 questions in the context of the Tribunal’s jurisdiction to consider constitutional questions.’
parties. The fact-finding and record-compiling functions of administrative tribunals, along with their ability to compel evidence, hear witness testimony, and issue legally enforceable decisions are seen as essential to the task of assessing rights. Justice Bastarache even went so far as to reason that these characteristics paired with the specialized expertise and relaxed rules of procedure may make tribunals better placed to address Aboriginal right issues than courts of first instance. In short, the Court has looked to capitalize on the flexibility and participatory nature of administrative decision-making to address potentially affected Aboriginal groups’ concerns as early in the process as possible, thereby increasing the possibility of accommodating concerns at the planning or project design phase and minimizing harm.

While technical capacities are essential to the task of reconciliation, the Supreme Court’s focus on the ability of tribunals to balance competing interests most clearly reflects its normative goals for tribunals. In *Martin*, the Court highlighted the fact that constitutional disputes do not take place in a vacuum. Rather, they necessitate an understanding and balancing of the various interests involved. The Supreme Court reasoned that a tribunal is suited to considering constitutional questions precisely because these issues ‘require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies.’ Consequently, the Courts do not expect tribunals will operate against a background of clear legal entitlement. Rather, they are to use their technical capacities to undertake the balancing needed for reconciliation. Balancing interests in this context is not, however, a mere balancing of preferences. It is constitutional balancing, which involves the kind of balancing required for the duty to consult. Thus, much as the Court attempts to ensure that competing interests are balanced through consultation, it has arguably identified a similar task for tribunals.

184 Martin, ibid at para 28–9; Paul, ibid at para 32.
185 Martin, supra note 33 at para 52–3.
186 Paul, supra note 32 at para 38.
187 *Beckman v Little Salmon Carmacks First Nation* 2010 SCC 53, [2010] 3 SCR 103 at para 103; Justice Deschamps highlighted that the importance of remedying rights as early as possible, stating that one of the objectives of the constitutional duty in the short term is ‘to provide “interim” or “interlocutory” protection for the constitutional rights of those peoples.’
188 Martin, supra note 33 at para 30.
189 Ibid [emphasis added].
190 Newman, *Duty to Consult*, supra note 175 at 64.
2 NEB objectives

Though tribunals are necessarily implicated in a unitary system, the reasons provided by the NEB indicate that it does not view itself as an arbiter of justice. Rather, its stated purpose is to regulate pipelines, energy development, and trade in the Canadian public interest.\(^{191}\) The meaning of ‘public interest’ is not expressly defined in the enabling statute. Nonetheless, the NEB’s tendency to majoritarian preferences can be derived from its repeated statement that it considers the public interest to be ‘inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that changes as society’s values and preferences evolve over time.’\(^{192}\) In *Emera Brunswick Pipeline*, the board clarified that individual or local interests are to be weighed against the greater public interest and that the greater public interest has priority over specific interests.\(^{193}\) This use has translated into a benefit/burden approach which balances specific public interests against those of the general public.\(^{194}\)

While constitutional protection of Aboriginal rights should shield them from majoritarian preferences or at least subject the infringement of those rights to legal justification, the practice of the NEB is to consider Aboriginal ‘interests’ as part of the broader public interest. For example, in the *Enbridge Alberta Clipper* decision, the NEB stated that

> [t]he Board weighs the overall public good a project may create against its potential negative aspects, *including any negative impacts on Aboriginal interests*, and makes its decisions in accordance with the public interest. As part of the decision-making process, it takes into consideration the potential environmental and social impacts and the potential for mitigation of those impacts [emphasis added].\(^{195}\)

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191 At the bottom of every news release, NEB states this as its corporate purpose; see e.g. National Energy Board, News Release, ‘Board Hearing Process Provides opportunity for Meaningful Participation’ (1 April 2015), online: NEB <https://www.neb-one.gc.ca/bts/nws/nr/2015/nr15-eng.html>. The mandate derives from section 12 of the *NEB Act*, supra note 68. Section 12(1) states that, ‘[t]he Board has full and exclusive jurisdiction to inquire into, hear and determine any matter . . . where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give’; ibid, s 12(1) (b). In addition, section 52 of the NEB Act incorporates a number of specific economic factors to be considered for this determination as well as ‘any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application’; *NEB Act*, supra note 68, s 52(e).


193 *Emera Brunswick Pipeline*, supra note 95 at para 42.


195 *Enbridge Alberta Clipper*, supra note 110 at 10 [emphasis added].
The NEB further clarified its approach to Aboriginal rights in the context of its public interest analysis by noting that it ‘weighs and analyzes the nature of the Aboriginal concerns and the impacts a proposed project might have on those interests as part of its overall assessment of whether or not the Project is in the public interest.’ These statements suggest that negative impacts on Aboriginal rights, which could otherwise be characterized as ‘infringements’ or ‘adverse impacts,’ are one factor among many when determining whether a project is in the public interest. Moreover, it assumes that the NEB has the authority to weigh majoritarian preferences against minority rights.

The difficulty with a public-interest-based approach is that it can obfuscate the constitutional protections afforded to section 35 rights. Past jurisprudence expressly rejected a ‘public interest’ justification for infringement, but courts have arguably still grappled with the balancing of Aboriginal rights against public gains and losses. The courts regularly determine adverse effects, impairment, compensation, and consultation in order to weigh them against majoritarian gains. Furthermore, in the recent case of Tsilhqot’in Nation v British Columbia, the SCC recognized that ‘Aboriginal title confers ... the exclusive right to ... benefit from [land] uses’ but that non-consensual incursions by the government must be undertaken ‘in accordance with the Crown’s procedural duty to consult and must be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown’s fiduciary duty to the Aboriginal group.’ While it is still unclear whether the Court is articulating an ability to expropriate title lands like that of federal and provincial entitlements vis-à-vis private owners or pointing to some lesser right, that ability is still disciplined by a legal determination of Aboriginal rights and at least purports to conform to standards necessary for infringement. In contrast, the board does not engage in the determination of rights nor assess whether they have been impacted as against any known legal standard. As a result, a project may be deemed by the board to be in the broader public interest but still constitute an unjustifiable infringement of section 35 or a breach of the Crown’s duty to consult.

196 Ibid.
198 Sparrow, supra note 51 at para 72. The Supreme Court rejected it on the basis that it was ‘to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.’
199 Graben, supra note 65 at 72–6.
Lastly, it is also not a coincidence that NEB findings of public interest coordinate so consistently with the policy positions of the government of the day. While the NEB may derive its regulatory powers and quasi-judicial independence from statute, its daily existence is constantly negotiated in relationship to the government in power. As Howling has recently noted, regulatory independence of the NEB has long been an issue. The board does not possess judicial independence analogous to that enjoyed by the courts and it does not give directions to the federal government. On the contrary, its provision of specialized expertise in developing policy, issuing reports, and providing advice to government decision makers raises questions about whether its activities conflict with the adjudication of governmental activity. The result, as Morris Popowich contends, is that the NEB tends to move along with the ideological and regulatory currents expressed through the electoral system.

If this has long been a complaint levied against the NEB, recent amendments to the NEB Act seem to further undermine what independence the board has had to date. Rowland Harrison argues that its changed role from a body that decided on projects to one that makes recommendations to Cabinet will further affect the independence of the NEB. Similarly, the recent imposition of time limits and the discretionary authority of the chairperson to intervene in the process of an individual panel will likely affect the independence of panel members. Members of NEB are appointed by the Governor in Council for a seven-year term and can be removed at any time. Taken together, these considerations reflect concerns about the ability of the NEB to depart from the policy positions of the government of the day on Aboriginal policy, as this would likely lead to a much more antagonistic relationship with the government and could overtly politicize energy regulation.

201 Popowich, supra note 66 at 848.
203 See e.g. Bell Canada v Canadian Telephone Employees Association 2003 SCC 36 at para 22, [2003] 1 SCR 884, discussing the factors considered when determining a tribunal’s independence.
204 Popwich, supra note 66 at paras 38, 49.
205 Harrison, supra note 202, explaining that previous decisions to issue a certificate for a project were subject to the approval of the Governor in Council (GIC) but decisions to deny a certificate were final and not subject to further approval. The GIC now has the ultimate responsibility for approving or denying the certificate.
207 NEB Act, supra note 68, s 3(2).
208 Popowich, supra note 66 at 850.
That there are differences in independence between courts and administrative tribunals is well recognized in legal scholarship and jurisprudence.\(^{209}\) Although administrative tribunals are generally independent of the political process and are bound by the duty of procedural fairness to hear and decide the matter before them impartially and independently, they are still products of the executive arm of government and remain, in many fundamental ways, accountable to it.\(^{210}\) Interestingly, the Court’s approach to determining authority, as laid out in *Paul* and *Rio Tinto*, seems to overlook determinations of independence, as discussed in *Ocean Port*, to determining the authority. However, dependency still requires answering whether a particular tribunal is suited to the type of oversight the evaluation of consultation requires. Determinations of constitutionality can potentially apply against the interests of a particular government and that can run contrary to expectations of policy alignment. Thus, while dependency does not legally preclude a tribunal from evaluating the duty to consult, it does undermine assumptions that tribunals can adopt the same objectives as courts. It also has to be accounted for when conceptualizing how authority will be implemented.\(^{211}\)

The preceding discussion of objectives illustrates that the conferral of power to evaluate the duty to consult is substantiated by how courts have characterized the relationship of tribunals to the executive. The four rationales provided in *Paul* for tribunal jurisdiction over section 35(1) (constitutionality, early relief, unitary justice, and flexibility) conceptualize tribunals as part of a unitary system of justice that presumes the capacity to mediate between Aboriginal governments and the Crown or project proponent but provides few tools which can be used to analyse that presumption. This is not uncommon. Scholars have previously noted that, notwithstanding the significant ways in which administrative bodies are dependent upon government, they are routinely declared by courts to be independent or quasi-judicial bodies as a matter of law.\(^{212}\) This may reflect the language of their constituting statutes as well as a traditional view of tribunals as removed from partisan politics.\(^{213}\)

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\(^{210}\) Sossin, ‘Independence,’ supra note 62 at 8.


\(^{212}\) Sossin, ‘Independence,’ supra note 62 at 3.

\(^{213}\) For a change in tradition, see ibid.
However, as it relates to determining jurisdiction to evaluate the duty to consult, it is clear that the relevance of independence has not been sufficiently analysed.

VI Going forward

What do the differences outlined here mean for the future of tribunal practice? It is clear that differences between the two institutions indicate that courts should not assume that administrative tribunals are using their own methods to assess consultation or that they are well suited to do so. What then must be changed? One obvious solution is for the Court to retreat from recognizing tribunal jurisdiction. The Court could interpret tribunal jurisdiction to evaluate consultation strictly, by either limiting the number and type of tribunals capable of undertaking evaluation or by limiting the scope of that evaluation and the purposes to which the findings will be put. In this scenario, the Crown and reviewing courts might be able to rely on findings of a tribunal on biophysical impacts but could not use them to address impacts on rights. Instead, disputes over rights would be raised, documented, and assessed in an alternative legal space, such as the courts. This correlates with the suggestion of the Supreme Court in *Rio Tinto*, which recommended parties access the court when a tribunal is denied the power to consider consultation.214

Nevertheless, if tribunals’ findings are used to draw conclusions about the relative importance or unimportance of Aboriginal rights in any given case (which they are), then we argue unequivocally that those findings must be consistent with the constitutional standards upon which Aboriginal peoples rely. This means rejecting the approach adopted in *Standing Buffalo*, which has permitted tribunals to create arbitrary standards and permitted the Crown to use those findings as determinative. More importantly, it means looking to how the courts can assist tribunals to use the tools they have to protect rights.

Adopting this approach does not absolve the Crown from its duty to evaluate its consultative duties as well as those of the applicant. There is little question that the Crown must still determine whether consultation has taken place and parties are free to challenge this decision before the courts. Equally, the Crown’s continuing authority does not absolve tribunals of their responsibility to evaluate the constitutionality of the application before them as it pertains to consultation. The fact that the NEB is not the final decision maker in all cases and that the majority of

214 See *Rio Tinto*, supra note 14 at para 63.
applicants are private applicants who do not owe a constitutional duty to consult does not vitiate its role in generating findings and either approving or recommending approval based on those findings.

In fact, it is because the Crown retains responsibility for consultation that the methodological rigour of the NEB’s evaluations is relevant. While it is often a private proponent that makes an application to the NEB, there is no question that the detailed requirements of applicant engagement are a direct consequence of the Crown’s specific duties. Irrespective of whether the Crown has formally delegated its consultative tasks to the applicant or the applicant undertakes them as a condition of regulatory approval, it does so because of the Crown’s duty. More to the point, the Crown relies on applicant engagement to fulfil its legal duties to Aboriginal peoples and therefore relies on NEB findings about the applicant’s activities to determine the level of consultation and accommodation required, what duties have been met, and what remains outstanding following regulatory review. For example, should assessment indicate that social impacts on a community have been mitigated, the Crown is likely to rely on that finding to conclude that no adverse effects on rights will be caused. Reports on applicant engagement are, therefore, expressly used by the Crown to give substance to the duty and allow it to evaluate whether it has been met through such engagement. Clearly, reliance on board findings is problematic if those findings are based on facile evaluations.

The federal government’s actions in Northern Gateway illustrate the method and effect of this approach. In accordance with its Northern Gateway Consultation Framework, the government undertook to ensure that Aboriginal groups were informed about processes but relied entirely on the regulatory review as the primary means of affecting consultation before and during the JRP process. The government refused to meet with Aboriginal peoples to discuss the substantive role of the JRP, the impacts on Aboriginal peoples, any actions it would undertake to address those impacts, or any specific actions that the applicant would be required to take. It refused to consult with First Nations regarding other project-related decisions, such as the federal interdepartmental review of marine safety factors relevant to the project, known as the TERMPOL Review. It also denied requests for information relating to Crown

215 Northern Gateway Consultation Framework, supra note 53.
216 Ibid at 4.
217 Ibid at 3.
assessments of Aboriginal rights and its consultative duties.\(^{219}\) Moreover, it denied requests for information for all correspondence and records exchanged between Northern Gateway and the government relating to consultation as well as the government’s own assessments of strength of claim assessments.\(^{220}\) Ultimately, the Crown denied any responsibility to independently engage until the JRP process was complete.

While the Crown relied on the JRP process to affect consultation, the JRP paradoxically relied on the Crown for the same. In accordance with the government’s framework, the JRP denied requests early in the process that ‘Adequacy of Crown Consultation’ be added to the list of issues to be considered by the JRP, focusing entirely on applicant consultation.\(^{221}\) However, it failed to provide any discussion of what duty it was measuring applicant activities against or why these activities mitigated impacts on Aboriginal rights. Instead, it evaluated proponent consultation completely unmoored from the legal duty to consult and offered ‘no views in relation to the consultation activities undertaken by the Government of Canada to date, or any future consultation that it will undertake, with Aboriginal groups.’\(^{222}\) The JRP ultimately recommended approval subject to 209 conditions, which the government accepted without any further change. While a number of the conditions required the applicant to undertake and document further consultation, the JRP provided the applicant with no substantive requirements and now, neither has the Crown. The legal duty to consult, as defined by law, was avoided entirely.

If avoidance of consultation based on the potential for future consultations or the absence of jurisdiction may be consistent with the Federal Court of Appeal’s reasoning in *Standing Buffalo*, it still raises practical concerns. Practically speaking, it is less likely that Aboriginal concerns can, or will, be accommodated once the planning and project design phases of the project have been completed. Absent any conditions imposed by the NEB, a project proponent has no legal obligation or duty to maintain ongoing consultations with affected Aboriginal groups. While the Crown may continue to have a duty for ongoing consultation following approval that it might pass on to the applicant, it is not clear

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220 Northern Gateway Report, supra note 96.


222 Northern Gateway Report, supra note 96, s 4.7.
what would preclude poor consultations in the future. With necessary approvals granted, there is no statutory instrument that prevents an applicant from moving forward. Moreover, the NEB has no powers to monitor or oversee Crown consultation following its recommendation for approval.

Lastly, the NEB’s evaluation of consultation already plays a key role in determinations of section 35 rights before courts. Judicial review requires the court to rely on the accuracy and completeness of expert tribunals’ findings concerning consultation, especially where a tribunal purports to undertake an evaluation of the sufficiency of the consultation conducted. If the tribunal’s record is incomplete and/or silent on whether the duty has been triggered and fulfilled, the court’s assessment of the adequacy of Crown consultation may be equally lacking.

What future guidance can the courts provide for tribunal practice? It seems likely that, as the NEB becomes more practised in evaluating consultation, it should be required to adopt guidelines that are consistent with the *Haida* test. It is inconceivable that the Court would require boards to make their decisions consistent with statute and the common law in all respects but those pertaining to Aboriginal rights. If every governmental decision maker at both the federal and provincial level can generate and follow policy on how to undertake consultation consistent with *Haida*, there is no reason why the NEB cannot evaluate applicant engagement against that standard and draw conclusions as to whether it has been met.

Moreover, courts should encourage the NEB to use its regulatory powers over approvals, compensation, and pricing to promote the negotiation necessary for constitutional reconciliation. For example, rather than use the NEB as a clearinghouse for data about consultation, the courts could support its ability to create policies that make Aboriginal peoples the beneficiaries of resource development. Much like debates over the use of tribunal remedies to address Charter rights,223 tribunals can use their remedial powers to achieve the constitutional objectives of section 35. For example, Cristie Ford advocates recognizing how administrative tribunals that seek to effect Charter change use their powers creatively.224 The Court could express its inclination to see the same from the NEB. The important question raised by the decision in *Rio Tinto* is whether the Court intended to prevent a tribunal from evaluating the duty to consult where it does not have the same remedial powers as courts to order consultation, provide declaratory relief, compensation,

223 Fox-Decent & Pless, supra note 48.
224 Cristie Ford, ‘Remedies: Dogs and Tails’ in Flood & Sossin, supra note 48, 85.
or damages. If a tribunal is not prevented, the court should issue clearer directions on the creative use of remedial powers.

The NEB’s powers are still generally restricted to orders for payment, licensing, interim remedies, and disciplinary orders. However, administrative authority to impose conditions for consultation as well as delay and deny orders, licences, and certificates could have powerful remedial affects. Used creatively, these powers have the potential to effectively address inadequate consultation. Previous uses illustrate this power. For example, in GSX Canada, the panel issued Information Requests to the federal and provincial Crown intervenors and GSX PL on three occasions, inquiring about the activities they had undertaken to meet any duty the Crown might have to consult; requesting comments from all parties on the status of consultation activities and the readiness of the application to be set down for a hearing; and delaying hearings until consultation was fulfilled via interim orders pursuant to section 19(2) of the NEB Act.

In other situations, the board imposed conditions to undertake further consultations with affected parties. For example, the NEB imposed conditions requiring the company to submit written protocols or enter into negotiations, where consultation with Aboriginal people was not carried out in a timely manner and/or where affected First Nations and a company had disagreed on a number of significant matters. The board has also imposed conditions requiring a company to monitor the success of its commitments to First Nations and Métis where participation in the project by those groups was considered by the board to be important and where memoranda of understanding had not been

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225 See e.g. Roach, supra note 125.
226 NEB Act, supra note 68, s 39.
227 Ibid, s 21. Section 21 of the NEB Act also gives the NEB the power to review, vary, or rescind any decision or order for a certificate, licence, or permit.
228 Ibid, s 19(2). Section 19(2) of the Act allows the NEB to make an interim order and reserve its decision pending further proceedings on any matter.
229 Sara Blake, Administrative Law in Canada, 5th ed (Markham: LexisNexis Canada, 2011) at 126. NEB Act, supra note 68, s 17(1): ‘any decision or order made by the NEB, may for the purposes of enforcement, be made a rule, order or decree of the Federal Court or of a superior court . . . and enforced in a like manner’.
230 NEB Act, supra note 68, s 19(1). The NEB has authority to impose conditions on any portion of an order, licence, or certificate to address a variety of environmental and socio-economic concerns, including potential impacts on Aboriginal rights.
231 GSX Canada, supra note 92 at paras 123, 129, 131.
232 Ibid at para 132.
233 The Sable Offshore Energy Project and the Maritimes & Northeast Pipeline Project, no GH-6-96 (December 1997), Reasons for Decision at 18 and 28.
234 Maritimes & Northeast, supra note 119.
completed with all Aboriginal persons along the project route.Lastly, as a result of recent amendments to the NEB Act, the NEB is able to impose Administrative Monetary Penalties (AMPS) on companies or individuals for non-compliance with its decisions, permits, orders, licences, or certificate conditions.

If these are the tools available to address differences in legality, what can be done to address differences in rationalities? In the absence of independence and shared mandates, it may be problematic to expect tribunals to fulfil their role as arbiters of justice. Naturally, this is not a problem that is confined to the NEB or to issues of consultation. Differing degrees of independence reflect a political choice of the legislature to limit the capacity of administrative bodies. Courts must regularly ensure that tribunals can affect their mandate in accordance with the law but prevent themselves from interfering with structural choices made by the legislature.

Nevertheless, if the Crown, courts, and stakeholders want to continue to rely on tribunal findings regarding applicant consultation, there are various means by which independence can be supported. The judiciary can address systemic limitations by confining the scope of tribunal decision making and ensuring transparency. Tribunals can also use internal guidelines to structure what Bryden calls ‘adjudicative independence.’

In addition, reviewing courts could better ensure tribunals use their authority to affect constitutional values by generating clear substantive conditions when tribunals would be precluded from recommending approvals. Creating legal strictures within which tribunals would be required to identify rights claims and whether they have been addressed through consultation could potentially insulate members from rendering decisions that align with governmental policy so consistently. Developing a more structured legal framework that requires tribunals to at least document the issues more clearly would also be a first step to ensuring tribunal transparency. Similarly, adopting a low level of deference on judicial review on legal determinations of the standard and scope of the duty to be affected would provide some reassurance that courts recognize the effect of institutional limitations.

235 Alliance Pipeline Ltd on behalf of Alliance Pipeline Limited Partnership, no GH-3–97, (19 November 1998), Reasons for Decision at 21.
VII Conclusion

The Supreme Court of Canada has identified the authority and responsibility of tribunals to evaluate consultation. This study of NEB decisions reveals that the NEB has the jurisdiction to evaluate whether the duty to consult has been met and does evaluate applicant consultation but avoids its jurisdiction to assess whether it meets constitutional standards. Instead of applying *Haida* to evaluate the consultation undertaken by the applicant or the Crown, it has argued that it lacks the jurisdiction to consider whether the duty to consult has been met, that outstanding consultation can be addressed through ongoing consultation, and that consultation is not required where biophysical impacts have been addressed. In sum, the NEB has not measured applicant engagement against any known legal standard nor treated constitutional obligations to consult as relevant to approval.

However, it is because the NEB has the jurisdiction to evaluate consultation and does, in fact, provide an evaluation of applicant consultation which other actors rely on, that we have argued that it is appropriate for the NEB to broaden its interpretation of jurisdiction in line with *Rio Tinto*. We therefore advocate that the Court provide clear direction that the Crown can be evaluated or that applicants will be evaluated to the same consultation standard required of the Crown, where it has been tasked with evaluating consultation. To allow otherwise would be to permit the Crown to direct industry applicants to affect Crown duties (formally or informally) but prevent its evaluation. Moreover, we have argued that, in exercising its jurisdiction, the NEB must apply the *Haida* framework in order to make evaluations consistent with established legal standards.

Procedurally, the consideration of duty should arise early on in the approval process, with one of the board’s first tasks be to determine the scope and content of the duty in the particular case. This would allow parties to seek judicial review if necessary and set parties’ expectations. Naturally, courts also retain their independent jurisdiction to hear any matters related to consultation arising from Crown or Aboriginal government actions. Moreover, we have argued, if consultation is to be realized as a tool of reconciliation, courts should consider what institutional characteristics can block its achievement and whether the jurisprudence can be used to address those impediments. This requires engaging in complex questions about whether regulatory findings can be used to ensure political reconciliation between the Crown and Aboriginal peoples and

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239 See *Kwikwetlem*, supra note 24 at para 65.
what focus the court must put on disciplining administrative decision making.

If it is possible and desirable that tribunals facilitate reconciliation, then courts should consider whether institutional rationalities permit the promotion of negotiation. To this end, we recommend that the courts develop jurisprudence that guides tribunals in how to give presumptive weight to Aboriginal rights, especially where they are weighed as part of or against the public interest. Tribunals should interpret ‘impact’ in a manner that is more consistent with the legal standard of ‘adverse effect’ as established in *Haida*. Most importantly, if Aboriginal peoples are mandated by the Court to participate in consultation through regulatory proceedings, then tribunals should exercise their remedial powers more robustly where parties are non-compliant or negotiation needs to be encouraged. This would include exercising powers to refuse applications, impose conditions, and impose fines. Lastly, courts can begin to think more realistically about whether tribunals will exercise their authority in ways that conflict with the government in power and apply a standard of correctness to findings of fact and law regarding consultation. Courts can then begin to develop case law that will discipline tribunal review of consultation and create baseline protections of rights.

It is obvious but necessary to conclude with the recognition that these recommendations will not be a panacea for the conflict that arises over the development of lands that are claimed as the traditional territories of Aboriginal peoples. Opposing positions on the scope and content of rights and where they locate ownership and decision-making authority will continue to plague tribunal decision making. Moreover, it is realistic to expect that institutional rationalities and the political setting within which public tribunals operate will continue to influence their propensity for project approval. The settlement of Aboriginal claims would offer the most efficient and equitable solution to these problems and would create more clarity for tribunals. However, until such time that settlement is reached, it is imperative that the common law recognize the effects of these factors on consultation, recognize how courts and governments already rely on these findings irrespective of their quality, and compel transparency for their generation and use.

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240 For discussion of the lack of clarity in the law on the balancing of Aboriginal rights against public interest, see Graben, supra note 65 at 73–6.