Throughput Legitimacy and the Duty to Consult: The Promise of Deliberation, the Reality of Indigenous-Crown Negotiations

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Introduction

In Canada, the duty to consult is a constitutional obligation under s. 35 of the *Constitution Act, 1982*. When proposed Crown conduct may adversely affect an Aboriginal right or rights claim, the Crown is required to consult the affected Indigenous party and, if appropriate, detail accommodation measures to address the negative impact on rights or rights claims. This requirement to consult Indigenous parties undoubtedly changes the process of the Crown's decision-making. This purpose of the duty to consult indicates that the Supreme Court of Canada (SCC) values the role of a meaningful process to constructively identify and accommodate rights interests. Furthermore, the SCC has stressed that there is no corresponding duty to agree on a given policy outcome,[1] further emphasizing the process of decision-making as the main vehicle to resolve rights disputes between Indigenous parties and the Crown. Given this purpose of the duty, what is the expectation in terms of Crown activity for meaningful consultation? Based on the criteria chosen, we can further ask how the Crown performs when consulting Indigenous peoples?

In this paper, I suggest that the components of a meaningful process can be identified by using the insights from the network governance literature, which focuses on legitimacy in the decision-making process. In particular, this paper will evaluate whether processes of consultation that trigger the duty uphold "throughput" legitimacy, which is gained when the quality of interactions between actors is inclusive, accountable, transparent and effective.[2] These four indicators of throughput legitimacy can help determine whether the Crown upholds its obligations to construct a meaningful process to identify and accommodate Indigenous interests. Based on an assessment of 131 projects from 2000-2018 that underwent a B.C. Environmental Assessment (BC EA) process, this paper will argue that consultation within the B.C. Environmental Assessment process struggles to maintain throughput legitimacy from the perspective of Indigenous parties. In particular, the principles of accountability, transparency and effectiveness are not upheld consistently in BC EA processes. Furthermore, this paper finds that the challenges faced by the BC EA process to sustain these characteristics of throughput legitimacy can be explained by the ways in which the case law restricts deliberative dynamics between policy actors. The existence of the duty as a legal obligation itself structures incentive structures between the Crown and Indigenous parties in consultation to favour the avoidance of litigation rather than the attainment of new decision-making relationships, and ultimately, reconciliation.

Legitimacy in Decision-Making and the Unique Status of the Duty to Consult

Decision-makers will seek to implement consultations in the policy process for two reasons. The first objective is functional, which is to provide information to decision makers.[3] Providing relevant information to decision makers may result in more responsive policies as

[1] *Haida Nation* 2004 at para 42.
[2] Vivien Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output *and* 'Throughput'," *Political Studies* 61, no. 1 (2013): 6.
[3] See: Helena Catt and Michael Murphy, "What Voice for the People? Categorizing Methods of Public Consultation," *Australian Journal of Political Science* 38, no. 3 (2003): 416-8 and Jon Pierre, "Public Consultation and Citizen Participation: Dilemmas of Policy Advice," in *Taking Stock: Assessing Public Sector Reforms*, eds. Guy Peters and Donald Savoie (Montreal and Kingston: McGill-Queen's University Press and Canadian Centre for Management Development, 1998): 146.

policymaking venues are opened to consider more perspectives.[4] The second objective of consultation is to add legitimacy to policy outcomes.[5] Legitimacy can be gained if decision makers are perceived to be acting in accordance to the demands and interests of the population.

Questions about legitimacy in the policy process particularly arise when traditional government decision making is transformed, such as when the locus of authority is expanded or shifts to include additional actors.[6] Canadian and European governance literature have closely analyzed how networks in different policy sectors can maintain legitimacy. Fritz Scharpf distinguished different types of legitimacy, specifically input and output legitimacy.[7] Input legitimacy is gained when the process of decision making is responsive and attentive to the preferences of those who are governed.[8] In contrast, output legitimacy refers to "when the outputs of governing – public policies and other decisions – meet social standards of acceptability and appropriateness."[9] Since then, many scholars have evaluated whether various governance networks have upheld input and output legitimacy and tested whether there are trade-offs or interaction effects between the two types in Canadian[10] and European contexts[11]. In addition to input and output legitimacy, Vivien Schmidt introduces an additional kind of legitimacy, called throughput legitimacy. According to Schmidt, this type of legitimacy signifies the quality of interactions between actors in the policy process[12] and remarks that evaluating this type of legitimacy requires an opening of the "black box" of governance.[13] Other scholars have adopted similar interests in analyzing the processes of decision-making beyond its participatory quality and

[4] See: Helena Catt and Michael Murphy, "What Voice for the People?" 419 and Lawrence Pratchett, "New Fashions in Public Participation: Towards Greater Democracy?" *Parliamentary Affairs* 52 (1999): 618, 630.
[5] See: Helena Catt and Michael Murphy, "What Voice for the People?" 416-8 and Jon Pierre, "Public Consultation and Citizen Participation: Dilemmas of Policy Advice," 146.
[6] Grace Skogstad, "Who Governs? Who Should Govern?: Political Authority and Legitimacy in Canada in the Twenty-Frist Century," *Canadian Journal of Political Science* 36, no. 5 (December 2003): 955-6.
[7] Scharpf, Fritz, *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press, 1999.
[8] Grace Skogstad, "Who Governs? Who Should Govern?: Political Authority and Legitimacy in Canada in the Twenty-Frist Century," 956; original concept expressed by Fritz Scharpf, *Governing in Europe: effective and democratic?* (Oxford: Oxford University Press, 1999): 2.
[9] *Ibid* at 956; original concept expressed by Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999): 2.
[10] See: Neil Bradford, "Place Matters and Multi-level Governance: Perspectives on a new Urban Policy Paradigm," *Policy Options* 25, no. 2 (2004): 39-44, Arthur Benz, "Multilevel Parliaments in Canada and Europe," *International Journal* 66 (2010): 109; Rachel Laforest, "Shifting Scales of Governance and Civil Society Participation in Canada and the European Union," *Canadian Public Administration* 56, no. 2 (2013): 235-51, Heather Millar, "Comparing Accountability Relationships between Governments and Non-state Actors in Canadian and European International Development Policy," *Canadian Public Administration* 56, no. 2 (2013): 252-69, Eric Monpetit, "Policy Design for Legitimacy: Expert Knowledge, Citizens, Time and Inclusion in the United Kingdom's Biotechnology Sector," *Public Administration* 86, no. 1 (2008): 259-77, Amy Verdun and Donna Wood, "Governing the Social Dimension in Canadian Federalism and European Integration," *Canadian Public Administration* 56, no. 2 (2013): 173-84.
[11] Barbara Finke, "Civil Society Participation in EU Governance," *Living Reviews in European Governance* 2 (2007), Justin Greenwood, "Organized Civil Society and Democratic Legitimacy in the European Union," *British Journal of Political Science* 37 (2007): 333-57, Beate Kohler-Koch, "How to Put Matters Right? Assessing the Role of Civil Society in EU Accountability," *West European Politics* 33, no. 5 (2010): 1117-41.
[12] Vivien Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output *and* 'Throughput'," *Political Studies* 61, no. 1 (2013): 6.
[13] *Ibid* at 5.

its output,[14] with some refining and operationalizing Schmidt's concept[15] or remarking on its normative implications on the study of governance.[16]

The network governance literature is somewhat divorced from questions concerning the role and quality of participatory mechanisms.[17] This oversight is surprising given that participatory instruments like consultation are directly related to the objective of obtaining more legitimacy in the decision-making process. The scholarship examining participatory instruments suggests that consultative processes can best attain legitimacy and improve policy outputs when consultees are representative of their group,[18] there are equal participation opportunities including the provision of adequate resources,[19] and transparent rules and expectations are established at the outset.[20] The process-related criteria for effective consultative practices in particular are relevant for the attainment of throughput legitimacy. Moreover, the potential for consultative measures to produce legitimacy and responsive policies also depends on the interaction dynamics between participants. For instance, it is suggested that principles of deliberation, such as communicative rationality, are ideal[21] in order to increase the likelihood of consultation facilitating both legitimacy and policy responsiveness. Settings that facilitate deliberative dynamics are also identified as an important

[14] Michael Howlett, "Managing the 'hollow state': Procedural policy instruments in modern governance," *Canadian Public Administration* 43, no. 4 (2000): 412-31, Justin Greenwood, "Organized Civil Society and Democratic Legitimacy in the European Union," *British Journal of Political Science* 37 (2007): 333-57, Ingi Iusmen and John Boswell, "The dilemmas of pursuing 'throughput legitimacy' through participatory mechanisms," West European Politics 40, no. 2 (2017): 459-78, Mario Levesque, "Mapping a way forward: Interest group selection and roles performed in engagement processes," *Canadian Public Administration* 55, no. 4 (2012): 531-52, Ingmar van Meerkerk, Edelenbos and Klijn, "Connective management and governance network performance: The mediating role of throughput legitimacy. Findings from survey research on complex water projects in the Netherlands," *Environment and Planning C: Government and Policy* 32 (2017).

[15] Carey Doberstein and Heather Millar, "Balancing a House of Cards: Throughput Legitimacy in Canadian Governance Networks," *Canadian Journal of Political Science* 47, no. 2 (2014): 259-80.

[16] Jens Steffek, "The limits of proceduralism: Critical remarks on the rise of throughput legitimacy," *Public Administration* (2018): 1-13.

[17] Ingmar van Meerkerk, Edelenbos and Klijn, "Connective management and governance network performance: The mediating role of throughput legitimacy. Findings from survey research on complex water projects in the Netherlands," *Environment and Planning C: Government and Policy* 32 (2017): 460.

[18] See: Helena Catt and Michael Murphy, "What Voice for the People?" 408-9; Jon Pierre, "Public Consultation and Citizen Participation: Dilemmas of Policy Advice," 150; Lawrence Pratchett, "New Fashions in Public Participation," 630-1; and Gene Rowe and Lyn Frewer, "Public Participation Methods: A Framework for Evaluation," *Science, Technology and Human Values* 25, no. 1 (2000): 12-3.

[19] See: Margot Hulbert, "Evaluating Public Consultation in Nuclear Energy: The Importance of Problem Structuring and Scale," *International Journal of Energy Sector Management* 8, no. 1 (2014): 60, Laurie Skuba Jackson, "Contemporary Public Involvement: Toward a Strategic Approach," *Local Environment* 6, no. 2 (2001): 145-6, Steve Patten, "Democratizing the Institutions of Policy-Making: Democratic Consultation and Participatory Administration," *Journal of Canadian Studies* 35, no. 4 (Winter 2001): 237, Lawrence Pratchett, "New Fashions in Public Participation," 629, and Gene Rowe and Lyn Frewer, "Public Participation Methods: A Framework for Evaluation," *Science, Technology and Human Values* 25, no. 1 (2000): 15-7.

[20] Steve Patten, "Democratizing the Institutions of Policy-Making: Democratic Consultation and Participatory Administration," *Journal of Canadian Studies* 35, no. 4 (Winter 2001): 237, and Gene Rowe and Lyn Frewer, "Public Participation Methods: A Framework for Evaluation," *Science, Technology and Human Values* 25, no. 1 (2000): 15-7.

[21] Robert Ratner, "Communicative Rationality in the Citizens' Assembly and Referendum Processes," in *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, eds. Mark Warren and Hilary Pearse (Cambridge: Cambridge University Press, 2008): 148 and Lawrence Pratchett, "New Fashions in Public Participation," 629.

quality to produce throughput legitimacy.[22] Although deliberation between participants is ideal, it is acknowledged that consultation may also resemble utility maximizing negotiations or guided by established rules and organizational templates that are not amenable to learning or change.[23] As such, existing frameworks to evaluate consultation in the policy process can contribute to operationalizing and measuring throughput legitimacy.

The duty to consult mandates the Crown to consult with affected Indigenous parties of a proposed Crown action. One objective of the duty to consult is a fact-finding purpose, which is to identify the relevant Aboriginal rights interests that may be negatively affected by a Crown action.[24] This goal can be attained by implementing a process for Indigenous peoples to express their rights interests to Crown decision-makers. Under the duty, the Crown has a duty to act honourably during the process given the identification of Aboriginal rights interests at stake. The requirement to demonstrate honourable dealings with affected Indigenous groups makes the duty distinctly deliberative in nature, as the authority of decision-makers is not based on the expertise of the decision-maker.[25] Only honourable actions from the Crown, such as meaningfully trying to address Indigenous peoples' concerns, are viewed by the Court as legitimate.[26] However, the SCC does not clearly define standards by which to evaluate the Crown's legitimacy with regards to interactions with Indigenous peoples. Therefore, evaluating the duty's capacity to facilitate a meaningful process that could lead to acceptable accommodation measures that mitigate or compensate for adverse impacts to Aboriginal rights further demonstrates the importance of evaluating the duty's ability to produce throughput legitimacy.

Unlike consultations between decision-makers and citizens or relevant stakeholders, the duty to consult engages throughput legitimacy in unique ways due to its status as a constitutional right and its purpose to protect Aboriginal rights interests. For instance, in the context of the duty, state authority is not outright challenged but it is tempered and constrained by the expectation of the Crown's honourable conduct to protect Aboriginal rights interests when a proposed Crown action may have adverse impacts on the exercise of Aboriginal rights. Attaining legitimacy throughout the process of consultation will help advance reconciliation between Crown sovereignty and Aboriginal rights. Therefore, the way in which the Crown addresses and accommodates Aboriginal rights interests encompasses concerns with state legitimacy vis-à-vis Indigenous peoples because of the expectation that the Crown act honourably towards Indigenous peoples. The state loses legitimacy if it fails to protect constitutionally-protected rights and fails to uphold constitutional obligations. The Court has the authority to determine whether the Crown has upheld its constitutional obligations, but Indigenous peoples' dissatisfaction may lead to litigation to bring these issues to the attention of the judiciary if they perceive consultation to be unfair.

[22] Carey Doberstein and Heather Millar, "Balancing a House of Cards: Throughput Legitimacy in Canadian Governance Networks," 266.
[23] Eric Montpetit, "Public Consultations in Policy Network Environments: The Case of Assisted Reproductive Technology Policy in Canada," *Canadian Public Policy* 29, no. 1 (2003): 98.
[24] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para 156.
[25] Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment," *Osgoode Hall Law Journal* 53 (2016): 672.
[26] Ryan Beaton, "*De Facto* and *de jure* Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada," 26 Const. F. 25 (2017-2018): 31.

Consequently, the duty as a constitutional obligation is meant to help enforce honourable dealings between the Crown and Indigenous peoples.

Methodology

This paper will evaluate the throughput legitimacy of duty to consult processes by analyzing the BC EA process. Any major project in BC that may have significant "environmental, economic, social, heritage and health effects"[27] undergoes this assessment. As stated by the SCC, the Crown has discretion to devise regulatory schemes or processes to fulfill their legal obligations to Indigenous peoples. [28] Therefore, EAs are a key forum in which the duty to consult is fulfilled by the Crown when major projects are proposed. Moreover, EA proceedings are more formally documented, thus increasing the likelihood that a written record of consultation and outcomes are publicly available for analysis. Finally, specifically analyzing B.C.'s EA process is important because most Indigenous nations in this province have not signed any historic treaties with the Crown. The Crown understands these Aboriginal rights and title claims as unproven. The duty was first articulated to address this very context of unproven claims, so it is useful to analyze the duty in a province where this situation frequently arises.

There is a significant existing body of scholarship that analyzes Indigenous peoples' experiences and participation in the EA process. Much of this scholarship addresses the common challenges Indigenous peoples face throughout the EA process and details best practices or recommendations to address these challenges.[29] In addition to detailing common issues and recommendations, other works also focus on specific EA jurisdictions, most notably the north[30] and the west,[31] or specific instruments found in the EA process, such as the role of traditional

[27] B.C. EAO Website. https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/environmental-assessments

[28] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 56, [2010] 2 SCR 650 [*Carrier Sekani*].

[29] See: Annie Booth and Norm Skelton, "Improving first nations' participation in environmental assessment process. Recommendations from the field. Impact Assess," *Project Appraisal* 29, no. 1 (2011): 49–58, Denis Kirchoff, Holly Gardner, Leonard Tsuji, "The Canadian Environmental Assessment Act 2012 and associated policy: implications for Aboriginal peoples," *Int. Indigenous Policy* J. 4, no. 3 (2013): 1–16, Joel Krupta, Lindsay Galbraith, and Sarah Burch, "Participatory and multi-level governance: applications to Aboriginal renewable energy projects," *Local Environment* 20, no. 1 (2015): 81–101, Kirk Lambrech, *Aboriginal Consultation, Environmental Assessment and Regulatory Review in Canada* (Regina: University of Regina Press, 2013), Bram Noble and Aniekan Udofia, *Protectors of the Land: Toward an EA Process that Works for Aboriginal Communities and Developers* (Ottawa, MacDonald-Laurier Institute: 2015), Ciarian O'Faircheallaigh, "Environmental agreements, EIA followup and Aboriginal participation in environmental management: the Canadian experience," *Environmental Impact Assessment Review*, 27 (2007): 319–342.

[30] See: Derek Armitage, "Collaborative environmental assessment in the Northwest Territories, Canada," *Environmental Impact Assessment Review* 25, no. 3 (2005): 239–258, Lindsay Galbraith, Ben Bradshaw, Murray Rutherford, "Towards a new supraregulatory approach to environmental assessment in Northern Canada," *Impact Assessment Project Appraisal* 25, no. 1 (2007): 27–41, Bram Noble, Skye Ketilson, Alec Aitken, Greg Poelzer, "Strategic environmental assessment opportunities and risks for Arctic offshore energy planning and development," *Marine Policy* 39 (2013): 296–302, Bram Noble and Kevin Hanna, "Environmental assessment in the Arctic: a gap analysis and research agenda," *Arctic* 68, no. 3 (2015): 341–355, Kevin O'Rielly, "Diamond mining and the demise of environmental assessment in the north," *Northern Perspectives* 24 (1996): 1–4.

[31] See: Douglas Baker and James McLelland, "Evaluating the effectiveness of British Columbia's environmental assessment process for first nations' participation in mining development," *Environmental Impact Assessment*

knowledge[32] or private agreements.[33] This research helps identify the parts of the EA process that are most likely to be challenged by Indigenous participants. Although this literature is expansive, the vast majority is characterized by a small-N case studies and is framed to benefit practitioners. The EA process has yet to be analyzed as a forum for governance where issues of legitimacy are a concern, given the duty's goals to facilitate reconciliation and foster more positive relationships between the Crown and Indigenous peoples. Moreover, this literature has not systematically accounted for how the legal parameters of the duty influence the way in which actors behave in the EA process. Finally, the findings of this literature generally are not directed at measuring the variation of Indigenous peoples' experiences across projects; although common challenges and issues are identified, it is difficult to assess the level of variation of these issues over time and across various types of projects.

As such, there is utility in expanding the scope of analysis to examine projects undergoing an EA over time to assess the potential of the EA process to be a forum for improved governance between the Crown and Indigenous peoples. Specifically, this paper will analyze BC EA reports and recommendations from 2000-2018 for a total of 131 EA assessments. These 131 assessments out of a total of 309 were chosen as they had a record of Indigenous peoples' participation, such as email correspondence between Indigenous parties and other actors, evidence of Indigenous peoples' input in reports throughout each decision point of the EA process, tracking tables with Indigenous parties' participation, working group meeting minutes with Indigenous parties' participation, and submissions made separately by Indigenous groups. The analysis will also only analyze the application review phase, as there are insufficient records of the pre-application phase over time. Although EAs include written documentation of the consultative proceedings between the Crown and affected Indigenous parties, there are many instances when information and meetings are simply not disclosed. Therefore, the analysis is supplemented with findings from 28 semi-structured interviews with key policy actors. These actors include political representatives, officials, consultants and lawyers representing the Crown and Indigenous parties. The majority of the interviews are from the perspective of Indigenous parties as it was difficult to access Crown actors. As a result, only four interviews were conducted that involved individuals who worked for

Review 23, no. 5 (2003): 581–603, Annie Booth and Norm Skelton, "Industry and government perspectives on first nations' participation in the British Columbia environmental assessment process," Environmental Impact Assessment Review 31 (2011): 216–225.

[32] See: Stephen Ellis, "Meaning consideration? A review of traditional knowledge in environmental decision making," *Arctic* 58, no. 1 (2005): 66–77, Einar Eyporsson, and Alma Elizabeth Thuestad, "Incorporating traditional knowledge in environmental impact assessment: how can it be done?" *Arctic Review on Law and Politics* 6, no. 2 (2015): 132–150, Chris Paci, Ann Tobin, Peter Robb, "Reconsidering the Canadian environmental impact assessment act: a place for traditional environmental knowledge," *Environmental Impact Assessment Review* 22 (2002): 111–127, Peter Usher, "Traditional knowledge in environmental assessment and management," *Arctic* 53, no. 2 (2000), 183–193, Chris Tollefson, C and K. Wipond, "Cumulative environmental impacts and Aboriginal rights," *Environmental Impact Assessment Review* 18, no. 4 (1998): 371–390.

[33] See: Bram Noble and Courtney Fidler, "Advancing indigenous-community corporate agreements: lessons from practice in the Canadian mining sector," *Oil Gas & Energy Law* 9, no. 4 (2011): 1–30, Cirian O'Faircheallaigh and Tony Corbett, "Indigenous participation in environmental management of mining projects: the role of negotiated agreements," *Environmental Politics* 14, no. 5 (2005): 629–647.

the Crown side. All interviews were conducted to protect the anonymity and confidentiality of its participants.

Building off Schmidt's conceptualization of throughput legitimacy, the following indicators will be used to determine whether duty to consult processes uphold throughput legitimacy. Inclusiveness or openness in the consultative process will include the following criteria.[34] First, it will be assessed whether Indigenous consultees were treated as constitutional rights holders throughout consultation. Ensuring that Indigenous parties' status as rights-holders is recognized upholds inclusiveness because Aboriginal rights holders have different participatory expectations and privileges than other stakeholders, like recreational users or private landowners, that needs to be respected. Another aspect of inclusiveness is that relevant participants are present and meeting in a timely fashion. Apart from inclusiveness, transparency is also a main guiding principle of throughput legitimacy identified by Schmidt. In order to uphold transparency, the Crown and proponent should accurately identify and document the interests and concerns of Indigenous parties throughout the EA process. Another factor of transparency is to ensure that the methodologies used for assessing both the scope of rights interests among affected Indigenous parties and the project's potential impacts on those rights interests are clearly explained. Accountability is sustained when the Environmental Assessment Office (EAO) ensures that that each actor in the process has clearly defined responsibilities and Indigenous people's feedback during both information gathering exercises to identify the scope of Aboriginal rights and the project's impacts on those rights and during negotiations regarding how best to mitigate those negative impacts are included throughout the process. Finally, effectiveness is achieved when the process is viewed by Indigenous parties as being meaningful. Meaningfulness includes feeling like participation had an impact on the final decision. Although the duty does not mandate a specific outcome,[35] it is imperative that Indigenous parties believe their participation has the potential to change the Crown's decision.

[34] For the purposes of this paper, the principles of openness will be subsumed into the principle of inclusiveness. Although Schmidt differentiates these two principles, operationalizing openness is not distinct from the other principles outlined.

[35] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 41, [2010] 3 SCR 103 [*Little Salmon/Carmacks*].

Fig. 1: Indicators to Evaluate Throughput Legitimacy

Inclusiveness	Transparency	Accountability	Effectiveness
Agreement on Status of Indigenous Consultees Relevant Actors are Present during Meetings	Accurate Identification and Documentation of Indigenous Concerns Clear Rationale or Explanation regarding the Methodology to Assess Scope of Rights Interests and Impacts on Rights	Indigenous Knowledge and Feedback are Included Each Participant has Clear Roles and Responsibilities regarding the Duty to Consult	Participation feels Meaningful

Each project is assessed using the identified indicators of inclusiveness, transparency, accountability and effectiveness by analyzing the application review phase. A project was counted if at least one Indigenous nation participating explicitly expressed their dissatisfaction with a part of the EA process that corresponds with one of the indicators of throughput legitimacy. As such, challenges to throughput legitimacy were coded in a binary fashion, as either exhibiting an issue or not. One assessment can be counted multiple times if an assessment exhibits different challenges across the indicators of throughput legitimacy. Unless otherwise stated, only outstanding issues during the project assessment process are counted as a challenge with throughput legitimacy. Therefore, information was cross-referenced to compare issues that were brought up throughout consultation and whether challenges were addressed by the end of the EA process. In addition to this, the reasons why Indigenous peoples expressed their dissatisfaction with an aspect of throughput legitimacy was also noted. Although 131 assessments were analyzed, 23 assessments were either terminated or withdrawn, so a total of 108 assessments demonstrate the entire consultation and accommodation processes. The results found are likely a conservative estimate of the grievances expressed by Indigenous parties as the documentation likely does not catalogue all the interactions between policy actors.

Background: The EA Process

Determining what projects require an EA certificate depends on the type of activity being proposed and whether a project meets a designated threshold. Not all activities are subject to an EA, most notably forestry practices and exploratory drilling or mining. Furthermore, only projects that meet a specified threshold are also reviewable. These thresholds broadly correspond to the scope of the project and their intended output such as production levels or capacity. Projects that are reviewable include: industrial projects, mining projects, energy projects, water management projects, waste disposal projects, food processing projects, transportation projects and tourist destination resort projects.

After a project is deemed reviewable under the EA Act, the executive director of the EA has the discretion to determine “the scope of the required assessment” and “the procedures and

methods for conducting the assessment, including for conducting a review of the proponent's application".[36] This discretionary power is significant because the EA director determines the facilities of the project that will be reviewed, the effects that will be assessed, such as cumulative effects, the types of information required from the proponent, and the persons or organizations that need to be consulted by the proponent or the EAO during the assessment.[37] The EA director may invite Indigenous parties, public stakeholders, and other government agencies to help determine the scope of the review but the EA director makes the final decision. This phase is called the pre-application phase, and the result of initial consultation culminates in the creation of the Application Information Requirements (AIR). The AIR determines the scope and content of the proponent's application for an EA certificate. For instance, a list of issues related to the reviewable project is identified, which contributes to the identification of Valued Components (VCs). VCs are "components of the natural or human environment that are considered by the proponent, public, Indigenous groups, scientists and other technical specialists and government agencies involved in the assessment process to have scientific, ecological, economic, social, cultural, archeological, historical or other importance."[38] Once the VCs are chosen through a consultative process, the required studies and information that will assess the impacts of the project on the identified VCs are outlined. The proponent is also expected to create a consultation plan or protocol with input from relevant Indigenous groups. This plan acts as a guide to structure consultation procedures during the application review stage.

After the AIR is approved by the EAO, the proponent must submit their application for review by the EAO, relevant stakeholders, government agencies and Indigenous groups. The proponent's application is under review for 180 days. During this review period, the proponent is expected to consult with Indigenous groups using their consultation plan as a guide, identify the rights interests of Indigenous groups, and address any concerns or issues regarding the project's potential adverse impacts on those rights interests. Indigenous parties are expected to raise concerns regarding potential adverse impacts on asserted and claimed rights. During the end of this review period, the EA director makes a recommendation to provincial ministers regarding whether the project should be approved for an EA certificate. The provincial ministers have forty-five days to decide; the ministerial decision-maker can approve the project, ask for further assessments, or reject the project.

The duty to consult is ideally fulfilled throughout the entire EA process, although the focus of this paper is to assess consultation and accommodation in the application review phase. During this phase, affected Indigenous parties are expected to participate in proportion to the both the strength of their rights claims and the severity of the potential adverse impacts from the proposed project. The affected Indigenous parties' participation includes asking proponents any questions about the project they have and communicating their rights interests or concerns to Crown decision makers. The duty may also involve accommodation measures to mitigate or address potential negative impacts to rights. Finally, when the EA director makes a recommendation to the relevant

[36] *Environmental Assessment Act* [SBC 2002] Chapter 43, s. 11(1).
[37] Ibid, s. 11(2).
[38] Environmental Assessment Office, *Guideline for the Selection of Valued Components and Assessment of Potential Effects*, approved by Doug Caul, Associate Deputy Minister (Sept 9, 2013): 4.

provincial ministers, Indigenous parties may also make submissions that detail their own positions regarding the proposed project. These submissions may be an important tool for Indigenous parties to communicate whether they believe the duty has been adequately fulfilled and whether their rights interests have been appropriately accommodated.

Throughput Legitimacy in the BC EA Process

Inclusiveness

Once the AIR is approved by the EAO, the proponent submits their application for an EA certificate and the application undergoes review for 180 days. During this time, the project's effects on the VCs and Indigenous rights are assessed, and mitigation measures to address the potential negative effects of the project are negotiated. The first indicator to help measure inclusiveness includes assessing whether Indigenous parties were treated according to the status of Indigenous consultees as constitutional rights holders. There are only nine instances where Indigenous parties explicitly stated their concern that their status as rights holders was not being respected. This issue is more prevalent before 2010. In these instances, Indigenous groups stressed that they were not to be considered as other interest groups or members of the general public. There was also one instance where an Indigenous party voiced the concern that other users may have disproportionate influence in the EA process in comparison to primary land users like Indigenous nations. Other than these cases, it appears that Indigenous peoples are treated as having distinct status in the EA process.

Another indicator for inclusiveness is ensuring that all the relevant parties, including the proponent and Crown actors, are available to both exchange information and negotiate accommodation measures. Based on the EAO reports, Indigenous parties were concerned with the level of inclusiveness of actors in 22 projects of the 108 projects that underwent a full assessment. This is not a high number of cases, revealing that the EAO largely upholds its responsibility to facilitate discussions with relevant actors throughout the EA process. The main concern expressed by Indigenous parties is that relevant provincial or federal representatives from agencies and departments are not always present, even though they are better positioned than the EAO and proponent to negotiate meaningful accommodation measures. This problem is especially the case for federal government representatives.[39] For instance, provincial and federal representatives may be able to change legislation or practices in response to Indigenous peoples' objections beyond a specific project. A related issue is the concern that the Crown actors that are present in the EA process do not have the mandate to negotiate responsive accommodation measures.[40] The Federal Court of Appeal objected to the "note-taker" approach to consultation in *Tsleil-Waututh Nation v. Canada (Attorney General)* stating that, "Canada [is] obliged to do more than passively hear and receive the real concerns of the Indigenous applicants."[41] Regardless of this rejection by the courts,

[39] Anonymous legal representative for Indigenous nations, December 10, 2018.
[40] This observation is corroborated by interview data: Anonymous legal representative for Indigenous nations, December 21, 2017, Anonymous Indigenous political representative, April 24, 2018, Anonymous legal representative for Indigenous nations December 10, 2018.
[41] *Tsleil-Waututh v. Canada (Attorney General)* 2017 para. 603.

interviewees recount that the Crown often sends passive notetakers.[42] Apart from the Crown, proponents were also identified as sometimes demonstrating an unwillingness to directly meet with relevant Indigenous leadership or officials on their own terms, revealing a lack of knowledge and sensitivity to the nation-status of Indigenous groups. It is widely known by Indigenous policy actors and representatives that proponents outside of Canada especially do not know how to interact with Indigenous nations in a respectful manner.[43]

Transparency

In addition to having the relevant parties present and interacting with one another, it is also important that the proponent and EAO are reliably and accurately documenting the positions and concerns of Indigenous parties. If this aspect of transparency is not met, the degree to which other aspects of throughput legitimacy is attained, like accountability, is also affected. There are only 12 instances where Indigenous parties noted that there were issues with accurate record keeping of Indigenous peoples' comments. This low number indicates that the proponent and EAO are quite successful at documenting the positions of Indigenous groups. Nevertheless, the 9 instances of the 12 cases where Indigenous groups were dissatisfied with the record-keeping were the same projects where Indigenous groups also expressed concern with the level of information being included in the assessment of the project. This demonstrates an important interaction effect between the transparency involved with accurate documentation and ensuring that as many relevant perspectives on the project are obtained.

Once information regarding the project and Indigenous peoples' interests are gathered, assessing the potential effects occurs next. A way to avoid disagreements regarding the assessment of potential negative impacts on Aboriginal rights interests is to ensure that there is transparency with regards to the methodology to assess both Indigenous groups' strength of claim and the significance of impacts on Indigenous peoples' rights interests. The scope of Aboriginal rights interests is ideally assessed before the project's impacts are evaluated to ensure that the assessment of impacts is relevant to the rights interests of affected Indigenous nations. The EAO makes a preliminary determination of the scope of consultation owed to various Indigenous parties with different strengths of claim in the drafting of the AIR. The EAO may change this preliminary assessment if additional information is brought forward to demonstrate an Indigenous nation has a strong strength of claim to rights or title and/or the project's potential impacts are more severe than anticipated.

There are 14 instances out of the completed 108 assessments where Indigenous parties explicitly took issue with the EAO's strength of claim analysis. This is expected to be a significant underestimation, as it is likely that sensitive evidence to support Indigenous peoples' rights and title claims would not be documented for confidentiality reasons. Thus, disagreements may have been communicated to the EAO and other government actors in private discussions. Moreover, interviews from lawyers, officials and consultants representing Indigenous nations expressed frustration regarding how the Crown's strength of claim assessment was determined without a

[42] Anonymous Indigenous political representative, April 6, 2018, Anonymous Indigenous official, October 18, 2018.
[43] Anonymous Indigenous political representative, April 6, 2018, Anonymous consultant for Indigenous nations, December 12, 2018.

clear rationale.[44] In particular, there is the concern that the Crown's information to assess the strength of claim analysis is highly incomplete or rudimentary,[45] and the Crown places the onus on Indigenous parties to conduct studies to prove the validity of their rights claims.[46] This burden creates a perverse effect whereby nations that suffer most from the effects of colonialism are also the least well-positioned to have the resources and evidence to present adequate proof to substantiate rights claims.[47] From the identified 14 cases, the main issue expressed by Aboriginal parties was that the EAO relied on inaccurate ethnographic, archeological and historical data to determine the strength of claim. For instance, the use of Statement of Intent maps from the BC Treaty Process is highly disputed, as Indigenous parties claim that these maps are not supported by evidentiary material and yet are relied upon to determine the scope of consultation for various Indigenous groups. A reason for this perception of inaccuracy is due to the largely western sources and literature that the government uses, which prioritizes written accounts of Indigenous land use patterns and activities.[48]

Furthermore, the EAO also bases its assessment of rights and title on legal tests established by SCC decisions such as *Van der Peet* and *Delgamuukw*. These tests have been critiqued for characterizing rights, land use and occupation from a Eurocentric perspective.[49] For instance, Aboriginal rights are arbitrarily limited as requiring to be distinctive and integral to the culture of the Indigenous group at the time of first contact with Europeans,[50] and title claims must demonstrate exclusive occupation.[51] The more recent *Tsilhqot'in* case changed how title claims should be assessed, as the SCC granted the Tsilhqot'in Nation title over land that did not have permanent settlements.[52] Nevertheless, the Tsilhqot'in Nation could demonstrate their exclusive use of the land, which may not be applicable to all Indigenous peoples' land use patterns. After this pivotal 2014 title case, more uncertainty was introduced regarding how the EAO should assess Indigenous claimant's title claims.

Given the speculative nature of the EAO's identification of Indigenous groups' strength of claim, representatives of the EAO has stated that the office is willing to conduct deeper and more extensive consultation than is legally required.[53] This caution demonstrates that avoiding and minimizing legal risks is a top priority for the EAO; no agency wants to be accused of failing to ensure the Crown's duty has been legally discharged.[54] In contrast, legal representatives and consultants for Indigenous nations have suggested that it may be a tactic for the EAO to assert that

[44] Anonymous Indigenous official, October 23, 2018.
[45] Anonymous Indigenous political representative, April 6, 2018, Anonymous Crown official, April 25, 2018, Anonymous Indigenous official, October 18, 2018.
[46] Anonymous consultant for Indigenous nations and the Crown, October 2, 2018, Anonymous consultant for Indigenous nations, October 17, 2018.
[47] Anonymous Indigenous political representative, April 6, 2018.
[48] Anonymous Indigenous official, April 17, 2018, Anonymous consultant for Indigenous nations, October 17, 2018, Anonymous consultant for Indigenous nations, December 12, 2018.
[49] Anonymous legal representative for Indigenous nations, January 24, 2018.
[50] *Van der Peet* 1996 at para 191.
[51] *Delagamuukw* 1997 at para 155.
[52] *Tsilhqot'in*. 2014 at para 66.
[53] Anonymous BC EAO officials, January 9, 2019 and March 1, 2019.
[54] Anonymous BC EAO official, March 1, 2019.

consultation was beyond legal requirements while not fundamentally altering the process.[55] In *Little Salmon/Carmacks*, the SCC states that the Crown does not have to correctly characterize the Aboriginal right in order to fulfill the duty.[56] Since no duty to consult court case has been won by an Indigenous party based on an incorrect strength of claim assessment made by the Crown,[57] the strength of claim assessment, on its own, is the not a central issue that determines whether the duty is fulfilled. Instead, the Crown's strength of claim assessment affects the scope of accommodation measures owed to Indigenous peoples[58] and the relationship-building purpose of the duty. For example, EAO officials have stated that it is often unproductive to begin relations with Indigenous nations by asserting which nation has strong rights and title claims and which do not.[59] BC's EA process is currently undergoing reform, and one of proposed changes includes a de-emphasis on anchoring the scope of consultation on the strength of claim assessment.[60] It remains to be seen how this change impacts Indigenous peoples' participation.

Apart from the strength of claim assessment, Indigenous parties expressed concerns and frustration with how the EAO assessed impacts to their rights interests. There is a total of 57 reported instances out of 108 completed assessments where at least one Indigenous party took issue with either the scope or rationale of the impact assessment. These instances are also spread out over time, indicating that this issue has persisted regardless of changes in the duty to consult case law. In particular, some recurring issues with the impact assessment methodology include: the scope of the assessment, such that past infringements and cumulative effects are not adequately considered; and a general lack of explanation between the data on the project's potential impacts and the rationale regarding whether the impacts are serious or not.

An issue with the cumulative effects assessment is that the case law is somewhat vague regarding how past infringements to Aboriginal rights and title should be considered during consultation.[61] In *Carrier Sekani*, the SCC states that the duty is forward looking, so it cannot be invoked to address past infringements to rights; other remedies like compensation are more suited to this objective.[62] Seven years later in *Chippewas of the Thames*, the SCC then asserted that project impacts cannot be fully understood without considering the larger context, such as ongoing projects and the historical context.[63] In the EAO reports, the EAO reiterates that the EA process is not amenable to compensating for past infringements due to the scope of the EA to only consider a current proposed project's impacts on rights interests. Due to the vague expectations of the case law, the EAO has discretion to decide the scope of the cumulative effects assessment. The EAO mostly assesses the area where the project will be developed and the area where the project's impacts are likely to occur. In contrast, Indigenous peoples consider the overall patterns of

[55] Anonymous legal representative for Indigenous nations, September 19, 2018, Anonymous consultant for Indigenous nations and the Crown, October 2, 2018.
[56] *Little Salmon/Carmacks*.
[57] Anonymous legal representative for Indigenous nations, December 10, 2018.
[58] Anonymous Indigenous official, April 27, 2018.
[59] Anonymous BC EAO officials, January 9, 2019 and March 1, 2019.
[60] BC EAO "Intention Paper," 9.
[61] This issue is also corroborated by the interview data: Anonymous legal representative for Indigenous nations, February 27, 2018.
[62] *Carrier Sekani* at para 83.
[63] *Chippewas of the Thames* para 42.

development in the region as well as fact that the exercise of rights have already been degraded or taken away to be relevant in a cumulative effects assessment,[64] factors which are often stated as outside the EAO's scope; as a result, issues related to regional planning would have to resolved outside of the EA process with the relevant government entities. The frustration with the scope of the EA process is reflected in sentiments by Indigenous officials and those working with Indigenous nations that the proponents can even strategically pick the scale of their projects or territory in order to manipulate the impacts assessment.[65] This is another area of the EA process that has been identified as requiring reform. The new EA process will now include the possibility of a regional assessment. The conditions under which a Minister would mandate such a regional assessment remains unclear and appears to be driven by the Minister's discretion, which does not appear to address the transparency issue.

Another persistent problem is the disagreement shared by Indigenous parties regarding how the EAO classifies impacts to Aboriginal rights interests given the data presented regarding the project's potential impacts. The EAO distinguishes between negligible, minor, moderate and serious impacts. The perceived lack of explanation between the data regarding the project's impacts on rights interests and the EAO's assessment that the impacts are not serious creates conflict. The Indigenous party often reaches different conclusions from the EAO based on the data presented and are not convinced by the EAO's classification of impacts. In terms of fulfilling the duty, this lack of transparency is problematic as the Court has stated that the Crown, as part of honourable dealing, must provide "written reasons to show that Indigenous concerns were considered and to reveal the impact they had on their decision."[66] Explaining the rationale between the data regarding the project's effects and the determination of the seriousness of the impact is a key area where the Crown should show how Indigenous concerns were considered. The lack of transparency regarding the EAO's rationale in determining impacts to Aboriginal rights is a major area of contention for Indigenous peoples in the EA process.

The competing expectations between Indigenous parties and the EAO regarding how to assess potential impacts on Aboriginal rights interests, coupled with the lack of transparency regarding how the EAO explains the relationship between the data regarding the project's impacts and the Aboriginal rights interests at stake undermines throughput legitimacy. Since Indigenous parties and the EAO have different understandings of what constitutes a serious impact on the exercise of rights, one crucial way to facilitate deliberation to reach a mutual understanding of the issues is to act transparently by giving clear reasons to explain each actor's position during the assessment. However, the EAO is given a measure of latitude to have their explanation accepted as fulfilling the duty if written reasons are provided to show that Aboriginal rights interests were considered. The Court has not extensively commented on the content of the Crown's written reasons and what they should entail. In *Chippewas of the Thames*, the SCC appeared to defer to

[64] Anonymous legal representative for Indigenous nations, December 21, 2017, Anonymous consultant for Indigenous nations, October 17, 2018, Anonymous Indigenous official, October 18, 2018, Anonymous consultant for Indigenous nations, December 21, 2018.
[65] Anonymous legal representative for Indigenous nations, February 27, 2018, Anonymous Indigenous political representative, May 30, 2018, Anonymous consultant for Indigenous nations, December 12, 2018.
[66] *Haida*, *supra note* 17, para 44.

tribunals' expertise regarding how they assess impacts to Aboriginal rights interests. The Court only stated that the National Energy Board (NEB), "assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal."[67] There was no further comment on the substance of the NEB's conclusions. Although it may not be legally required for the EAO to provide a more fulsome explanation regarding their interpretation of the data and the assessment of potential impacts to rights, this lack of transparency in this part of the assessment process decreases the overall perception of throughput legitimacy.

Accountability

The next main principle of throughput legitimacy is accountability. In the context of the EA process, accountability involves incorporating feedback from Indigenous participants, such as traditional knowledge and input regarding the technical aspects of the proposed project. Out of the completed 108 assessments, 62 of those assessments revealed that Indigenous parties remarked on the lack of information or the adequacy of information being provided by the proponent. Common issues include omissions of important information; issues with the quality of the data being used, such as its accuracy, whether it is up-to-date and its credibility;[68] the interpretation of the data; and the timing of when information is collected and analyzed. A persistent issue concerning the omission of data lies in how the proponent and EAO incorporate Aboriginal traditional knowledge and perspectives. Indigenous parties are troubled that their knowledge is not systematically used throughout the assessment, beyond studies that outline specific Aboriginal rights interests, like Traditional Use Studies.[69] With regards to the timing of the collection of data, Indigenous parties expressed a concern that the collection of relevant missing data should not be a project condition after the EA certification is granted as data needs to be collected beforehand to assess the project's impacts.[70] Otherwise, the collected information cannot be effectively used to change the project to limit or avoid negative impacts. Moreover, information that is collected beyond the timeframes set out in the EA process may be unfairly dismissed or overlooked due to the preference of the proponent to complete the EA process in a timely fashion.[71]

Another issue related to accountability involves the roles and responsibilities of each party to fulfill the duty. The case law states that the Crown can delegate procedural aspects of the duty to proponents,[72] but Indigenous parties remain confused regarding the responsibilities of the proponent and Crown in the consultation process. Interview data suggests that the Crown exhibits an overreliance on proponents to reach agreements with Indigenous groups so that the duty can be more easily discharged due to the Indigenous nations' support for the project.[73] This indicates that proponents are fulfilling more than simply the procedural elements of consultation, thus challenging the goal of the duty as a mechanism to foster reconciliation between the Crown and

[67] *Chippewas of the Thames* para 64.
[68] This position is also corroborated by interviews: Anonymous Indigenous political representative, April 6, 2018.
[69] This position is also corroborated by interviews: Anonymous Indigenous political representative, April 24, 2018.
[70] This position is also corroborated by interviews: Anonymous Indigenous legal representative, December 21, 2017.
[71] This issue is corroborated by interview findings: Anonymous legal representative for Indigenous nations, April 19, 2019.
[72] *Haida*, *supra note* 17, para 53.
[73] Anonymous legal representative for Indigenous nations, December 11, 2017, Anonymous legal representative for Indigenous nations, February 27, 2018, Anonymous consultant for Indigenous nations, December 21, 2018.

Indigenous nations.[74] Representatives from the BC EAO dispute this charge, as they state that one of the Crown's top priorities is to avoid a legal challenge, so the EAO has a strong incentive to ensure that the proponent fulfills their part of consultation.[75] Overall, Indigenous parties did not explicitly express concerns with accountability in many instances across the assessments, as only five instances out of 108 completed assessments contained this issue.

Effectiveness

The final principle of throughput legitimacy is effectiveness. Effectiveness refers to whether the Indigenous parties perceive consultation and the process of negotiating accommodate measures as meaningful. Without a sense of meaningfulness, the act of consultation becomes hollow and simply a "an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along."[76] As such, evaluating the perception of meaningfulness is a good representation of whether Indigenous parties perceive consultation as effectively meeting the objectives of identifying and seeking to address Aboriginal rights interests. Indigenous parties were explicitly dissatisfied with the meaningfulness of consultation 43 times. This number is higher than the number of projects where Indigenous parties opposed a project, indicating that this concern also extends to assessments where Indigenous parties were supportive of the proposed project. Even when Indigenous parties achieve a result that addresses their interests, the dissatisfaction with the meaningfulness of the process and the participants erodes the confidence of Indigenous peoples in using the EA as a means to protect their rights interests.

Some recurring issues with meaningfulness include the concern that outcomes were pre-determined, the Crown places more emphasis on the procedural aspects of consultation rather than the negotiation of adequate accommodation measures, and the overall poor experiences when interacting with either the proponent, the Crown, or both. The perception that outcomes were pre-determined, and that consultation was simply a measure of tokenism is antithetical to the Court's prescriptions in *Mikisew Cree*. This aspect of meaningfulness is closely related to the lack of transparency, as the EAO's lack of explanation regarding how Indigenous interests were taken into account and influenced the assessment of impact to rights also contributes to a sense that the process is not meaningful.

Analysis

Based on the 131 assessments, the EA process appears to be susceptible to a lack of transparency, accountability and effectiveness. During the application review phase, there is also the perception of a lack of transparency regarding the rationale used to explain the methodology to assess Indigenous peoples' strength of claim and the project's impacts to Aboriginal rights interests. Finally, Indigenous parties perceive the EA process to lack effectiveness and meaningfulness. This sentiment is expressed either throughout the review process or in Indigenous peoples' own separate submissions to the Minister.

[74] Anonymous legal representative for Indigenous nations, January 24, 2018, Anonymous consultant for Indigenous nations, October 23, 2018.
[75] Anonymous BC EAO officials, January 9, 2019 and March 1, 2019.
[76] *Mikisew Cree* at para 54.

It is claimed in the literature that throughput legitimacy is best facilitated by deliberative dynamics,[77] including a willingness to learn from other policy actors and change policy preferences in light of new information and perspectives. One set of factors that prevent the EA process from exhibiting deliberative dynamics lies with the constraints imposed by the existing case law. With regards to the task of upholding transparency in the decision-making process, Indigenous parties particularly take issue with the Crown's rationale underpinning the strength of claim assessment. Although the duty to consult emerged as an area of law to protect pending Aboriginal rights claims, the Crown places the onus on Indigenous peoples to provide evidence that supports a Eurocentric understanding of rights and title. Otherwise, the Crown will rely on its own information that privileges written accounts from Western anthropologists or historians.[78] Therefore, the Crown is not open to deliberating about the nature and scope of Aboriginal rights throughout the fulfilment of the duty, as the Crown does not want to set an unfavourable precedent and assesses rights and title claims based on the legal framework set out by *Van der Peet* and *Delgamuukw*.[79] Apart from the Eurocentric understanding of rights and title, the Court has also asserted in *Little Salmon/Carmacks* that the Crown does not have to correctly determine the scope of the claimed Aboriginal right or title in order to discharge the duty. However, the scope of consultation is determined by a consideration of both the strength of claim and an assessment of the potential impacts on the asserted Aboriginal rights.[80] Rather than begin a process of deliberation to attempt to sort out the competing information regarding Indigenous nations' rights claims, the issue is instead ignored in favour of moving the consultation process to focus on potential impacts and possible accommodation.[81]

Another constraint to throughput legitimacy created by the case law lies in the lack of deliberation regarding the assessment of the project's impacts on Aboriginal rights interests. Indigenous parties and the Crown treat the issue of cumulative effects differently, which is partly a function of the case law. Although the *Carrier Sekani* case stresses that the duty cannot be used to address past infringements, the Court also asserts that the historical context matters when determining impacts to rights.[82] Due to the Court's lack of clarity regarding the scope of cumulative effects assessment in consultation, Indigenous and Crown actors continue to come to different conclusions regarding the degree to which past actions should be considered in the assessment of impacts to rights interests. However, these differences are not addressed as the EAO can simply assert that the concerns of Indigenous nations fall outside of the scope of the EA assessment. Furthermore, Indigenous parties are also concerned with the EAO's lack of transparency regarding how the EAO interprets data on impacts to rights to often conclude that rights will not be significantly impacted. The case law makes clear that the courts will defer to the

[77] Carey Doberstein and Heather Millar, "Balancing a House of Cards: Throughput Legitimacy in Canadian Governance Networks," *Canadian Journal of Political Science* 47, no. 2 (2014): 259-80.
[78] This issue is also corroborated by interview data: Anonymous legal representative for Indigenous nations, December 21, 2017.
[79] Anonymous legal representative for Indigenous nations, February 27, 2018, Anonymous consultant for Indigenous nations and the Crown, October 2, 2018.
[80] *Haida Nation* at para 39.
[81] Anonymous legal representative for Indigenous nations and the Crown, January 24, 2018, Anonymous Indigenous official, April 27, 2018, Anonymous consultant for Indigenous nations, December 12, 2018.
[82] *Chippewas of the Thames* at para 42.

expertise of tribunals and regulatory bodies to assess these questions that have a clear technical aspect and will not require boards to give a full *Haida* analysis in their decision-making,[83] providing the EAO wide latitude to make recommendations without a full disclosure of their rationale. Without providing clear reasons, and the fact that these reasons are communicated at the end of the review process,[84] may prevent Indigenous participants from deliberating to resolve competing interpretations of the data with Crown actors.

A final constraint of the law is not related to the content of the Aboriginal law jurisprudence but how the Crown understands its legal obligations to Indigenous peoples. The Crown's primary interest is to uphold its legal obligations towards Indigenous peoples to avoid litigation. This is corroborated by the interview data and other studies.[85] Given this understanding of the law, Crown actors are not likely to use the duty as an opportunity to change their policy preferences or create new relationships with Indigenous peoples. Although Crown representatives contend that the risk of litigation ensures that the Crown does its due diligence to uphold the law, there is the concern that the potential of the duty to foster a new relationship with Indigenous peoples is lost when the Crown emphasizes the avoidance of litigation rather than the opportunity to change decision-making processes.[86] Indeed, the Crown closely following the law to avoid litigation while Indigenous parties build their own record for a possible legal challenge creates an adversarial environment that does not facilitate the negotiation of accommodation agreements or collaborative decision-making.[87]

Nevertheless, there is also the opinion that the threat of litigation can be an effective way to gain leverage over the Crown, with the result that Indigenous parties can negotiate more favourable accommodation measures.[88] The threat of litigation can be effective under certain circumstances to force the Crown to change its position to change the process to accommodate for Indigenous peoples' demands. However, this threat itself does not improve any of the qualities of throughput legitimacy in the long-term. If the Crown waits for legal challenges to arise before acting more transparently or more accountably during one project assessment, throughput legitimacy is still undermined as Indigenous peoples may still feel dissatisfied that the process is flawed to the point where threatening litigation is the primary way to change Crown behaviour. This flaw is also significant given the fact that the SCC itself conceived of the duty as a way to

[83] *Chippewas of the Thames* at para 63, Sari Graben and Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board," *University of Toronto Law Journal* 65, no. 4 (2015): 382-433.
[84] This issue was also corroborated by interview data: Anonymous legal representative for Indigenous nations, September 9, 2018.
[85] See: Brenden Boyd and Sophie Lorefice, "Understanding Consultation and Engagement of Indigenous Peoples in Resource Development: A Policy Framing Approach," *Canadian Public Administration* 61, no. 4 (2018): 572-95.
[86] Anonymous legal representative for Indigenous nations, December 11, 2017, Anonymous legal representative for Indigenous nations, December 21, 2017, and Anonymous legal representative for Indigenous nations, February 27, 2018.
[87] Anonymous consultant for Indigenous nations, December 21, 2018.
[88] Two Anonymous Indigenous political representatives, April 6, 2018, Anonymous Indigenous official, April 17, 2018, Anonymous Indigenous political representative, April 24, 2018, and Anonymous Indigenous consultant, April 17, 2019.

avoid litigation in favour of political negotiations as a more productive way to advance reconciliation.[89]

Ironically, although the duty to consult mandates a meaningful process to manage Crown-Indigenous relations in order to advance reconciliation, the operationalization of this process has not resulted in Indigenous peoples feeling like they are consistently in a fair process because of the content and presence of the law itself. The duty to consult jurisprudence has stymied deliberative dynamics within the EA process and gives the EAO discretion to only selectively include Indigenous participants' insights and perspectives. As a result, the EA process lacks throughout legitimacy, particularly in the areas of accountability, transparency and effectiveness. The lack of throughput legitimacy also enhances the perception among Indigenous parties and their representatives that the EAO, although it presents itself as an impartial body,[90] represents the Crown's interests in advancing certain projects forward.[91] If the EAO is perceived to be acting in the interests of the Crown, then the whole EA process is also discredited as being disadvantageous towards Indigenous participants with constitutional rights at stake.

[89] *Haida Nation* at para 14.

[90] For a discussion on the relationship between tribunals and impartiality see: Rowland Harrison, "The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What does Regulatory 'Independence' Mean? Should We Pursue It?" *Alberta Law Review* 50, no. 4 (2013): 757-82 and Laverne Jacobs, "Caught Between Judicial Paradigms and the Administrative Stat's Pastiche: 'Tribunal' Independence, Impartiality, and Bias," in *Administrative Law in Context* eds. Colleen Flood and Lorne Sossin (Toronto: Emond Montgomery Publications, 2013): 233-78.

[91] Anonymous Indigenous political representative, May 30, 2018, Anonymous Indigenous and Crown consultant, October 2, 2018.