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Clyde River and the National Energy Board:

The Prospects for Legal Reconciliation

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Cover Page: Photo of a traffic sign that reads ’Stop’ in English, French and Inuktitut at the ’four corners’ in Iqaluit, Nunavut. Photo taken by Catherine Anne Moriarity

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Abstract

This thesis aims to address uncertainty within the legal regulatory environment of the duty to consult in Canada. It will examine the role of the National Energy Board in conducting consultations with Indigenous peoples when their rights may be adversely impacted by natural resource development projects. In *Clyde River et. al. v. Petroleum Geo-Services Inc., 2017*, the Supreme Court of Canada found the National Energy Board's consultation with Inuit to be inadequate. The findings are based on an in-depth analysis of the Court's decision.

In this research, I discuss the prospect of the duty to consult as a unique mechanism for facilitating dialogue about Aboriginal rights under s.35 of the Canadian Constitution. I also consider the potential for consultative dialogue to further a process of legal reconciliation of the pre-existence of distinct Indigenous societies with the assertion of Crown sovereignty. Lastly, I examine the Supreme Court's ruling in Clyde River that the Crown may rely on the National Energy Board to fulfil its duty to consult.

I argue that the National Energy Board's regulatory process is insufficient to conduct consultations that positively affect the prospect of legal reconciliation. The Board's mandate fails to direct consultative inquiry to address the concerns Indigenous peoples have about potential impacts on their rights. The Board's weak consultation in Clyde River is evidence that its mandate requires modernizing if it is to maintain the honour of the Crown and respect Aboriginal rights.

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1. Introduction

On November 11, 2016, residents from the community of Clyde River, Nunavut took their seats in the public gallery of the Supreme Court of Canada (SCC). For the following seven hours, the Supreme Court justices heard the arguments presented by the appellants and the respondents in *Hamlet of Clyde River, et al. v. Petroleum Geo-Services Inc. (PGS).,* 2017 SCC 40[1]. On appeal was the National Energy Board's (NEB) authorization of a 5-year seismic testing permit for oil and gas resources in Baffin Bay and Davis Strait that threatened to harm the marine animals that Inuit peoples across the eastern coast of Baffin Island depend on for subsistence and livelihood. The project application was submitted by a consortium of three companies.[2] Inuit of Clyde River challenged this approval on the grounds that the NEB did not adequately fulfil the community's right to consultation – a right that is enshrined in Section 35 of the Canadian Constitution Act. On July 27, 2017, just eight months after the case was heard, the Supreme Court held that the appeal should be allowed and the NEB's authorization for the project should be quashed. Yet the Court also ruled that the Crown can discharge the duty to consult to the NEB because the Board's statutory powers enable it to conduct consultations. Following the decision, Inuit celebrations erupted all over social media platforms, highlighting the culmination of their efforts to protect their rights to harvest. The Supreme Court's affirmation that the Crown can rely on regulatory tribunals, like the NEB, to fulfil its duty to consult will impact the future of the relationship between the Crown and Indigenous[3] peoples in Canada.

Section 35 of the Canadian Constitution defines who constitutes Aboriginal peoples under the law in Canada and provides that any "existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed" (*Constitution Act*, 1982, s.35(1)). The specific rights enshrined in s.35 are not, however, expressed in the written text (Newman,

[1] Hereinafter *Clyde River*

[2] The three companies that filed for a NEB project authorization in cooperation were Petroleum Geo-Services Inc. (PGS), Multi Klient Invest AS, and TGS-NOPEC Geophysical Company AS; hereinafter PGS.

[3] In Canada, the term Aboriginal has been historically used to refer to First Nations, Inuit and Métis peoples. It gained momentum when it was included in the defining of s. 35 of the Canadian Constitution 1982 to refer to rights specifically held by Indigenous peoples in Canada. Further, Aboriginal has been widely used in legislation and naming of government departments. However, the term Indigenous is preferred because of its alignment with the international indigenous movement and the political clout that comes with it. In my thesis, I will use the term Aboriginal when referring to rights as they are set out in s.35, and Indigenous when speaking about First Nations, Inuit and Métis communities more broadly.

2009, p. 14). As such, it has been the responsibility of the courts to define the scope of what these rights include and how they can be applied. For each constitutionally defined right there is generally an associated duty that is held by the government to honourably uphold when there is a potential infringement on an existing right or title claim. For instance, the substantive Aboriginal right to consultation imposes a procedural duty to consult upon the Crown whenever Indigenous lands or resources are threatened with interference (Devlin & Murphy, 2005, p. 277).

The focus of my thesis lies at the intersection of the Crown's duty to consult and the regulatory processes of administrative tribunals, as highlighted by the *Clyde River* case. The question of the content and scope of the duty to consult has been brought before the Supreme Court on multiple occasions, whereby the duty has been defined, particularly in regards to government action that engages Aboriginal peoples and their lands[4]. The Court has described actions that determine when the duty arises, and has provided legal criteria for the evaluation of whether consultation has been fulfilled. Through duty to consult jurisprudence, the Supreme Court has ruled that the duty to consult is owed specifically by governments, rather than third-party or corporate stakeholders (Newman, 2009, p. 35). In response, the Crown has often discharged its duty to consult Aboriginal peoples to administrative tribunals for reasons of bureaucratic efficiency. In circumstances that involve natural resource development projects, the Crown has relied on the NEB to fulfil its duty to consult.

Although the duty to consult is required by s.35 of the Constitution, no formal arrangement has been reached between the Government and Indigenous peoples in Canada to define the process of consultation when competing interests arise[5]. As such, while some process of consultation is required when government action infringes or interferes with Aboriginal rights, no clearly defined or pre-determined procedure has yet been developed. The question of whether this is an acceptable and adequate process to uphold Aboriginal rights is the underlying concern of my thesis.

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[4] Dwight Newman refers to these cases as the *Haida Nation* trilogy (Newman, 2009, p. 9). They include: Haida Nation *v*. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73, Taku River Tlingit First Nation *v.* British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550, 2004 SCC 74 and Mikisew Cree First Nation *v.* Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69.

[5] This is in contrast to a country like Norway, where the Norwegian Government and Sami Parliament have signed an official consultation agreement (Government of Norway, 2007).

1.1 Research Questions

The primary questions that guided my research were:

> How has the Supreme Court of Canada's ruling in *Clyde River* contributed to the duty to consult doctrine and the procedural execution (operationalization) of this duty in Canada? What does the decision means for the Court's conception that the duty to consult aims to reconcile the pre-existence of distinct Indigenous societies with the assertion of Crown sovereignty?

To answer these questions, my thesis must include three tasks. First, I will provide contextual background to the case and its ramifications. This will include details of the community of Clyde River and a clear explanation of the duty to consult, as it was developed in seminal Supreme Court cases on Aboriginal rights.

Second, I will analyse the Supreme Court's *Clyde River* decision as related to the role of regulatory tribunals in conducting consultation. The *Clyde River* case presented the court with four questions regarding the constitutional obligation of the Crown to fulfil the duty to consult. These questions were centered on the role that the NEB played in conducting consultations through its mandated regulatory approval process. I will consider the issue of legal reconciliation as developed through Supreme Court jurisprudence to understand the reasoning behind the Court's judgement in *Clyde River*.

Lastly, I will place the Supreme Court's judgement in *Clyde River* within the context of past decisions related to Aboriginal rights and examine whether the NEB's procedural mandate is sufficient to conduct adequate consultations that maintain the honour of the Crown. I aim to identify the implications of the Supreme Court's affirmation that the Crown can rely on regulatory tribunals, such as the NEB, to fulfil its duty to consult and what it could mean for the future of legal reconciliation with Indigenous peoples in Canada.

1.2 Significance of the Research

The Canadian government has often turned to the judiciary to remedy rights violations, and particularly regarding the implementation of Aboriginal rights. The amendment of the Canadian Constitution in 1982 that introduced s.35 represented a long-awaited move to recognize and affirm that Aboriginal peoples are the first peoples of Canada, and by virtue of that fact, possess certain rights (Christie, 2002). Since then, the courts have heard an

increasing number of cases from Indigenous appellants regarding title claims or rights violations. Frustrated by this, the Supreme Court has emphasized the need for a decrease in reliance on litigation because it poses a risk to sustaining and building a respectful relationship between Indigenous peoples and the Crown (*Clyde River*, para: 24).
However, the Crown's observed reliance on regulatory processes, such as the NEB's, to fulfil the duty to consult has caused some uncertainty (Devlin & Murphy, 2001; Popowich, 2007; Newman, 2005, p. 60). Without clearly defined sets of procedures that interact directly with Aboriginal title claims and land rights, navigating the relationships supposedly built on consultation becomes even more challenging. Particularly in the natural resource development sector, governments and industry must play close attention to the constantly changing landscape of law in order to successfully develop respectful relationships with Indigenous groups (Newman, 2009). Uncertainty around what type of action or procedure constitutes consultation creates problems for Indigenous communities (Harman, 2016). A lack of clarity in procedural guidelines can result in Indigenous communities withholding engagement in consultation on the grounds that the duty has not been triggered and any participation may be adversely used against them.

My research on the *Clyde River* case will contribute to the literature on the development of the duty to consult, and more specifically provide insight for Indigenous communities on how to operationalize the Supreme Court's ruling.

1.3 Data and Methods

My research was primarily informed by four sources of information central to the *Clyde River* case:

a. The National Energy Board's collection of correspondence documents starting with PGS' initial project application in 2011 and ending with the final authorization for the seismic testing project in 2014.[6] This includes the Environmental Impact Assessment carried out by the NEB.

b. The Federal Court of Appeal's decision in *Hamlet of Clyde River v. TGS NOPEC Geophysical Company ASA (TGS)*.[7]

[6] A collection of these documents can be found on the NEB's website: https://www.neb-one.gc.ca/nrth/dscvr/2011tgs/index-eng.html
[7] The Federal Court's ruling can be found online: http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/111287/index.do?r=AAAAAQALY2x5ZGUgcml2ZXIB

c. The Memorandum of Fact and Law submitted by the counsel for the Hamlet of Clyde River to the Supreme Court of Canada.[8]

d. The Supreme Court of Canada's judgement in *Hamlet of Clyde River, et al. v. Petroleum Geo-Services Inc. (PGS), et al.*[9]

These documents were central in informing my understanding of the consultation process that occurred between PGS, the community of Clyde River, and the NEB. In order to understand the duty to consult more concretely, I also reviewed previous Canadian Aboriginal case law and associated jurisprudence. In my approach to analysing the literature on these cases, I focused my attention on the concept of reconciliation and its relation to the duty to consult as introduced and articulated by Supreme Court judgements. Consequently, the concept of legal reconciliation informed my theoretical perspectives which are explained in the following chapter.

[8] This document can be retrieved from the Supreme Court's website: http://www.scc-csc.ca/WebDocuments-DocumentsWeb/36692/MM010_Applicants_Hamlet-of-Clyde-River-et-al_Application.pdf

[9] The Supreme Court's ruling can be found online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16743/index.do

2. Theoretical Perspectives

Canada has fashioned a uniquely court-driven and constitutionally focused jurisprudence of reconciliation that is not found in other colonial states (McHugh, 2004, p. 579)[10]. In order to understand the legal concept of reconciliation, I will explain its origins in Canadian jurisprudence. Then, I will present Mark Walter's concept of 'reconciliation as relationship'. Lastly, I will argue that the most useful tool for pursuing legal reconciliation is found in the duty to consult.

2.1 The Legal Reconciliation of Two Sovereignties

Reconciliation is best highlighted by the Supreme Court's ruling in *R. v. Van der Peet,*[11] which states that the basic purpose of s.35 is "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (*Van der Peet*, para: 31). In effect, legal reconciliation, as discussed through the Supreme Court, is one that aims to reconcile the distinct interests and cultures of Indigenous peoples and the assertion of Crown sovereignty. This understanding of reconciliation recognizes that Indigenous peoples existed in distinct societies before the Crown asserted sovereignty over Canada.

2.2.1 'Reconciliation as Relationship'

Mark Walters (2008, p. 167) purports that there are three modes of legal reconciliation. 'Reconciliation as resignation' refers to "a one-sided, asymmetrical process" whereby one side is resigned to a state of affairs that is unfavourable and beyond its control (Walters, 2008, p. 167). According to Walters, 'reconciliation as consistency' refers to a technical process of fitting disparate parts together (Walters, 2008, p.167). This mode of reconciliation is governed by a set of rules that aim to reduce uncertainty. Lastly, Walters defines 'reconciliation as relationship' as a reciprocal process that involves acts of mutual respect that aim to create the foundations for a harmonious relationship (Walters, 2008, p. 168). This form

[10] Reconciliation in Canada has taken many forms, and is not exclusively situated within the legal-constitutional sphere. The Truth and Reconciliation Commission (TRC) was a formal project undertaken by the Canadian government in 2008 to address and provide remedies to the effects of Indian Residential Schools and assimilation policies on Indigenous communities: Canada, 2015. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada.,* Winnipeg. Truth and Reconciliation Commission of Canada.

[11] R. v. Van der Peet, [1996] 2 S.C.R 507, hereinafter *Van der Peet*

of legal reconciliation provides the most appropriate theoretical framework for analysing the Supreme Court's judgement in *Clyde River*.

Several critics see the Canadian jurisprudence of s.35 rights through the lens of reconciliation as relationship. Dale Turner (2006)[12] argues that the assertion of Crown sovereignty in the *Van der Peet* judgement is tied to the idea that the Crown is the highest form of political sovereignty in Canada, and explains that what we are seeing is a continued form of colonialism (Coulthard, 2008, p. 165). In rooting his argument in the *Van der Peet* decision, Turner only views reconciliation that facilitates the subordination of Indigenous territorial claims to Crown sovereignty and the unbridled infringement on Aboriginal rights (Turner, 2006). Yet, the Supreme Court has determined that any mode of 'reconciliation as resignation' cannot adequately address the sovereignties of Indigenous peoples and the Crown (*Sparrow*, 1990; *Van der Peet,* 1996).

John Borrows (2010), on the other hand, supports a place for indigenous customary law within the Canadian constitutional order under some form of legal pluralism. Borrows is optimistic that legal pluralism can create a space for Indigenous legal traditions to be reconciled with an expanded view of Indigenous rights in Canadian law. The accommodation of legal pluralism in the Canadian Constitution resembles Walters' mode of 'reconciliation as consistency'. Although this mode of reconciliation may be satisfactory, it is unlikely as the Constitution is currently unable to accommodate two, separate legal orders.

Reconciliation as relationship provides the most appropriate theoretical framework for analysing the Supreme Court's judgement in *Clyde River*. Melissa Williams' (2005) idea of citizenship as shared fate compliments Walters' reconciliation as relationship. Citizenship as shared fate explains that although there exists a plurality of nations within the fabric of the Canadian state, individuals are inextricably placed within a network of relationships. In this sense, a dialogue about Aboriginal rights is facilitated by an understanding of relationship *and* through varying processes of carrying out legal reconciliation (Tully, 2006). I argue that consultation is the most productive space where dialogue about s.35 rights can happen within

[12] Dale Turner does insist that any process of legal reconciliation must be rooted in dialogue, but views the current constitutional framework as shutting out any possibility for meaningful dialogue. Because the duty to consult is rooted in this constitutional framework, Turner excludes any possibility to speak about the duty as a space that can produce meaningful dialogue. See: Turner, D. (2006). This is Not a Peace Pipe. *University of Toronto Press*. p. 28, 29, 108, 112.

the legal mode of reconciliation as relationship (Stevenson, 2015, p. 373). Importantly, Sakej Youngblood Henderson (2006; 2007; 2009) has encouraged literature on reconciliation to look back on the spirit of the historical treaties signed between Indigenous peoples and the Crown to inform the process of reconciliation today. Varying Indigenous principles and customs informed relations between peoples in reciprocal and respectful ways (Walters, 2008, pp. 170-171). Additionally, the Supreme Court has emphasized the role of treaties as an integral part of reconciling two distinct sovereignties (*Van der Peet*, para: 31; *Haida Nation*, para: 17). This fits within Walter's mode of reconciliation as relationship because it underscores the importance of respectful dialogue in reconciling Indigenous pre-existence with asserted Crown sovereignty through relationship.

2.3 Reconciliation as Relationship and the Duty to Consult

Prior to the development of the duty to consult, the government simply had to provide a legislative objective for the infringement of an Aboriginal right. In *Haida,* the Supreme Court set out a sliding scale for which to evaluate the duty to consult (Newman, 2009, pp. 48-49), which arises when the "Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida Nation*: para 35). Here, there are three elements of the duty: the knowledge element; the strength of the Aboriginal right or claim; and the potential for adverse impact. These three elements are what dictate the depth of consultation required. Importantly, the *Haida* analysis applies a duty to consult even where there is uncertainty about an Aboriginal rights claim or title.

In the *Haida* ruling, the judges determined that "the government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown" (*Haida Nation*, para: 16). The honour of the Crown is born out of the Crown's asserted sovereignty over the state and thereby dictates that the government must act in good faith relationships with Indigenous peoples because they have a competing claim to sovereignty (Sanderson, Buergner, & Jones, 2012). Further, the Court goes on to state that:

> "In all its dealings with Aboriginal peoples, from the assertion of Crown sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (para: 17).

I argue that from the Supreme Court's grounding of the duty to consult in the honour of the Crown, the Court has furthered a check on the potential for unlawful infringement on Aboriginal rights in order to achieve reconciliation as relationship. Unilateral action that is not consistent with Aboriginal rights and the honour of the Crown has effectively been struck down by the Supreme Court, in favour of building relationships through dialogue in consultation. Indeed, Walters states "that the expansion of the duty to consult in recent years is the clearest sign that reconciliation as relationship does form an integral part of the Canadian conception of legality" (Walters, 2008, p. 183). The process of reconciliation as relationship is protected by the Crown's duty of honourable dealing towards Indigenous peoples, which is born out of the Crown's assertion of sovereignty.

2.4 Summary

In this chapter, I have attempted to lay out the theoretical arguments that surround reconciliation in the Canadian constitutional context. I argue that the most ideal mode of reconciliation is that which is observed through relational dialogue under the auspice of the duty to consult. Walter's reconciliation as relationship demands a space for equal and balanced dialogue about Aboriginal rights. In its most ideal form, consultation is a place where normative understandings of Aboriginal rights are discussed from the perspectives of Indigenous peoples and the Crown. The duty to consult acts as a mechanism that restricts state infringement on Aboriginal rights because the Crown is bound to always act honourably. I will apply this argument to my analysis of the Supreme Court's ruling on the role of the NEB in consultation.

3. Background and Context

3.1 Inuit: A (Very) Brief Historical Background

Inuit and their ancestors have lived in the Canadian Arctic from time immemorial. Today, the majority of Inuit live in 53 communities in Inuit Nunangat – the Inuktitut word for land, water and ice (Inuit Tapiriit Kanatami, 2017). Geographically, Inuit Nunangat is comprised of four settlement areas: the Inuvialuit Settlement Region (Northwest Territories), Nunatsiavut (Labrador), Nunvik (Quebec), and Nunavut (Inuit Tapiriit Kanatami, 2017).

3.1.1 Inuit-European Relations

Early contact between Inuit and Europeans began with the arrival of Martin Frobisher to Baffin Island in 1576 on his search for the Northwest Passage as a trade route to India and China (Legare, 2008, p. 100). Inuit relations with European explorers were characterized by scholars as 'harmonious' and unobtrusive (Damas, 1993, p. 5). Gradually, long-term contact with European explorers, whalers and fur traders shifted Inuit focus away from subsistence practices towards commercial practices like trapping. Nomadic livelihoods became less and less important, and many Inuit communities located themselves close to Hudson's Bay Company (HBC) trading posts (Damas, 1993, p. 6).

It was not until well into the 20th century that settler presence began to forcibly alter and drastically change the livelihoods of Inuit people. Regular contact between Canadian society and Inuit culture was motivated by a shift in governance ideologies following the Second World War, which focused on providing welfare (Clancy, 1967). During this period, Inuit settlement territory was under the administration of the Northwest Territories (N.W.T) government, which the federal branch of government maintained significant authority over (Clancy, 1967). The territory's demographic was, and still is, composed of diverse First Nation, Métis and Inuit groups. The federal government's delivery of welfare to Inuit resulted in centralization policies that forced Inuit into settled communities in order to receive health, education and social services (Legare, 2008). This form of intervention by the Canadian government has been labelled as 'internal colonialism', whereby the sedentarization of Inuit in villages resulted in dependency and the degradation of traditional practices central to Inuit

culture (Brody, 1991; Creery, 1993). Inuit were alienated from their lands and traditional ways of life, which permeated into family and kinship relations. Some authors described Inuit as wards of the federal government, a direct result of forced centralization and the newly created villages (Legare, 2008, p. 101).

By the end of the 1960s, Inuit became increasingly resistant to the colonial policies of the federal government, leading to the formation of various Inuit socio-political organizations. Having been a society rooted in a tradition of self-governance, Inuit sought to regain autonomy over their lands and lives (Dickerson, 1992). The work of these organizations, and collective Inuit action, created the foundation for Inuit to negotiate and ultimately secure, a self-government arrangement under their own territory – Nunavut. The creation of the Nunavut territory can be understood within the context of dramatic relocation and assimilation policies of the federal government that took Inuit off the land and placed them into settlements.

3.1.2 The Nunavut Land Claims Agreement – Governance Context

The Nunavut Land Claims Agreement (NLCA) is a negotiated agreement between Nunavut Tunngavik Incorporated (on behalf of Inuit), the Government of Canada and the Government of the Northwest Territories, which transferred land title and governance autonomy to Inuit through the creation of the Nunavut territory. It was formally adopted by the Parliament of Canada in 1993 and came into effect in 1999. The NLCA is a contract in which Inuit exchanged and thereby extinguished Aboriginal title to their traditional lands for the rights and benefits recognized by the agreement (Legare, 2008, p. 102). Several central objectives of the NLCA were evident in many of the drafts presented before Ottawa for negotiation (Purich, 1992). Inuit sought sovereign ownership rights over parts of land, decision-making power over the management of land and resources, financial compensation and royalties from non-renewable resource development in the territory, and the creation of the Government of Nunavut (Legare, 2008). These objectives were achieved and are manifest in the composition of the agreement through the creation of various political institutions and management boards.[13] Moreover, the NLCA clearly sets out and defines special rights for Inuit, particularly related to wildlife harvesting, education, language and governance (White, 2002).

[13] The Nunavut Wildlife Management Board (NWMB) is the main instrument for wildlife management and conservation in Nunavut. It is the main institution for implementing and protecting harvesting rights of Inuit. The Nunavut Impact Review Board (NIRB) contributes to the protection of these rights by carrying out impact

3.2 The Community of Clyde River (in Inuktitut: Kanngiqtugaapik), Nunavut

The Hamlet of Clyde River is a small community of about 1,000 people located on the northeastern coast of Baffin Island, an arm of the Davis Strait. It lies in the Baffin Mountain range, which form part of the Arctic Cordillera mountain range (Municipality of Clyde River, 2016). The community, like many in Nunavut, is isolated and not accessible by road.

The issue of food security is a challenge to many in Clyde River. The high cost of transportation drastically inflates prices of imported "market food" (Forum, 2007). Hunting and harvesting local "country food" is an important part of Clyde River Inuit livelihoods and kinship relations. Marine species such as bearded and ringed seals, narwhals, arctic char, polar bears, caribou and bowhead whales are crucial not only for Inuit subsistence, but equally for commercial purposes (Wenzel, 1985). The small commercial economies related to these species, particularly the polar bear sport hunt, is no less important, especially for Inuit in Clyde River with limited access to wage employment (Wenzel, 2011). As in many Nunavut communities, "up to half the adult men are either unemployed or limited to casual and/or seasonal work" (Wenzel, 2011, p. 459). The modernization of Inuit societies has meant that the tools of harvesting have changed. Traditionally, Inuit hunters used harpoons to kill seals and whales, dog sleds to reach ice floe, and Inuit Quajimajatuqangit (Inuit traditional knowledge - IQ)[14] of the environment to navigate changing conditions. Although IQ is still an integral part of any hunt, Inuit hunters use rifles, snowmobiles and GPS systems to conduct a hunt. As a result of this modernization, hunters now have to cover the cost of maintaining their tools, which is typically expensive.[15] Since the average per capita income for Inuit is CDN$20,000 (Wenzel, 2011, p. 459), paired with high unemployment, it is clear that participation in the mixed economy is necessary for access to income as well as the ability to maintain traditional food activities.

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assessments for project proposals, specifically addressing socio-economic and cultural impacts (*Nunavut Land Claims Agreement Act*, 1993).

[14] For a discussion on the meaning and importance of Inuit Quajimajatuqangit see Wenzel, G. W. (2004). From TEK to IQ: Inuit Quajimajatuqangit and Inuit Cultural Ecology. *Arctic Anthropology*, *41*(2), 238-250.; Tester, F. J., & Irniq, P. (2008) Inuit Quajimajatuqangit: Social History, Politics and the Practice of Resistance. *Arctic*, 48-61.

[15] According to Wenzel (2011, p. 259), a litre of milk can cost as much as $5.25, a kilogram of ground beef up to $10.00 and a box of twenty .30-.60 calibre bullets may be $40.00. CBC reported in January 2017 that diesel prices for a vehicle were 19 cents lower than in 2016, at 1.1668/L (CBC News, 2017).

Shifts in the socio-economic practices of Inuit in Clyde River indicate the adaptability of IQ and traditional livelihoods (Harder & Wenzel, 2012). However, changes in climate and increases in natural resource development projects in the territory can exacerbate the pressure to adapt. Resistance from Inuit in Clyde River to any activity that would further this process exemplifies how important species like the seal and polar bear are for the community. Notwithstanding this, memories from the 1960s and 1970s era of seismic testing using dynamite generated justified bitterness. The communities of Pond Inlet, Arctic Bay and Clyde River witnessed dead seals, disrupted marine mammal migration and floating fish during these years, while knowing the possibility of high-risk drilling could come soon after (Nunatsiaq News, 2014). It is evident, then, why Inuit in Clyde River strongly opposed the seismic testing permit submitted by PGS given their previous experiences, cultural importance of traditional livelihood practices, and the vulnerability of those practices to rapid environmental changes.

Before discussing the facts of the *Clyde River* case and the courts' judgements, it will be helpful to discuss the broader role of the Supreme Court within Canada and the associated signaling it makes to the Canadian government. A look at the historical judgements on s.35 cases involving the duty to consult will provide necessary background for how the Supreme Court has reached its judgement in *Clyde River*. Further, since my thesis will analyse the delegation of responsibility for the duty to consult to the NEB, it calls for a discussion on the statutes and mandates that dictate the regulatory processes involved in deciding on project authorization.

3.3 Supreme Court Jurisprudence on the Duty to Consult

The Supreme Court of Canada is the final court of appeals in the Canadian judicial system. The Court hears appeals from the decisions of the highest provincial and territorial courts, but most often from the Federal Court of Appeal (FCA). However, in order for an appeal to be heard, the Court must grant leave (permission). Leave is usually granted to cases that involve an issue or question that is important for the public. Generally, appeals are submitted when there is believed to be a question of constitutional importance. In such cases, the federal and provincial governments involved must be notified of the constitutional questions and permitted as interveners in the case (Supreme Court of Canada, 2017). This is because constitutional questions usually involve a contemplated government action, or a statute that infringes on a right.

3.3.1 The Supreme Court of Canada, Policymaking and Dialogue

In the 1990s, the relationship between the judicial branch and the legislative branch in Canada received much attention as the subject of constitutional scholarship and political theory (Bakan, 1990; Kelly, 1999; McKay, 2001; Roach, 2001).[16] Particularly, this scholarship has focused on developing different theories of institutional dialogue; between the various courts themselves, and between the courts and the legislature. As an institution charged with remedying social and constitutional injustices, the Supreme Court has been known to signal, or engage in dialogue with the legislature over important public policy matters (Kelly & Murphy, 2005). With the establishment of the *Charter of Rights and Freedoms* 1982 and the Constitution, the Supreme Court has become increasingly prominent in influencing legislation.

This idea of institutional dialogue extends to the adoption of s.35 in the *Constitution Act* 1982, the same year as *Charter* entrenchment. Gordon Christie (2002, p. 41) explains that the constitutionalization of Aboriginal rights created a need for a new legal framework. Although s.35 was born in the political area, the judiciary was left to give substance to these rights. The jurisprudence on the duty to consult should be examined within the broader context of this need for a new legal framework and the expanded role of the Supreme Court. Judicial dialogue is also important for Aboriginal rights, particularly in the jurisprudence on the duty to consult, whereby the Courts have debated the substance of statutes and legislation which interact with the duty, like that of the NEB. Through judicial dialogue, the Supreme Court's ruling in *Clyde River* sends a prescriptive message to the legislature regarding the NEB's mandate under the duty to consult.

[16] This body of literature has often zeroed in on what is called judicial activism, positing that the Court has taken an expanded approach to the theory of institutional dialogue (Elliot, 2004; Manfredi 2004; Waldron, 2006), and placed itself above constitutional supremacy. Constitutional supremacy is a system of government that recognizes that the freedom of Parliament to make laws is constrained or cedes to the requirements of the written Constitution. In Canada, this was affirmed by the Supreme Court's judgement in *Reference re Secession of Quebec* [1998] 2 S.C.R. 217. With the entrenchment of the *Charter of Rights and Freedoms* 1982, judicial activism was heavily criticised, and labelled as potentially damaging for the balance of power under Canadian federalism (Manfredi, 2004; Waldron, 2006).

3.4 The Supreme Court and Aboriginal Rights Cases Under Section 35

3.4.1 Important Cases for the Development of Reconciliation – *Sparrow* (1990) & *Van der Peet* (1996)

At issue in *Sparrow* was the Aboriginal right to fish for subsistence and cultural purposes in view of conservation policy. In its first decision interpreting and applying s.35 of the *Constitution Act* 1982, the Supreme Court ruled in *Sparrow* that, although Aboriginal rights are not absolute and insulated from government action, "federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights" (*Sparrow* 1990: para. 1109). The Court, then, requires that the federal government provide a valid legislative objective for the justification of infringement (McNeil, 2003). In effect, if the Crown infringes upon an Aboriginal right, then it thereby has a duty to provide compelling justification in a way that is consistent with the honour of the Crown.

The *Van der Peet* case involved a woman of the Sto:lo First Nation in British Columbia who was charged with selling fish without a licence (Walters, 2008). She claimed that she had an Aboriginal right to commercial fishing under s.35. Chief Justice Lamer, for the majority of the Supreme Court, stated that Aboriginal rights were affirmed under the Constitution by simple fact that 'they were already here' (*Van der Peet* 1996: para. 30). From this, Lamer C.J. concluded that the content of rights protected by the Constitution are those, which are 'directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown' (*Van der Peet* 1996: para 31). It was held that peoples of the Sto:lo First Nation had no right to sell fish commercially, as the practice was only incidental, not integral, to pre-contact Sto:lo culture (McNeil, 2003, p.4). In effect, the result of Lamer C.J.'s recognition of Aboriginal rights is that s.35 rights can only be applied to pre-contact practices.

Further, at the justification stage of the analysis in *Van der Peet*, reconciliation provided Lamer C.J. with a rationale for expanding the range of government action and legislative objectives on Aboriginal rights (McNeil, 2003, p. 8). Moreover, this judgement suggests that although an Aboriginal right to fish exists, it may be subjected to infringement on the basis of 'balancing' broader Canadian interests towards the successful attainment of reconciliation (McNeil, 2003). It is clear that Lamer C.J. understood that Aboriginal rights, although

protected by the Constitution, might have to concede to the interests of other Canadians to achieve goals like economic and regional fairness.

The dissenting opinion of Justice Beverley McLachlin was deeply critical about the issue of reconciliation in the context of justification of infringement on Aboriginal rights. In contrast to Lamer C.J., McLachlin J. argues that reconciliation should be found in the shared perspectives of Indigenous and Canadian legal cultures, and through negotiated agreements like those of treaties (*Van der Peet* 1996: para. 310). The goal of reconciliation, argued McLachlin J., cannot justify unilateral limitation on an Aboriginal right by the Crown for the purposes of social harmony. This would in fact diminish the substance of the Aboriginal right that s.35 of the Constitution guarantees (*Van der Peet* 1996: para 313).

In the years following the *Sparrow* and *Van der Peet* cases, we see that the Supreme Court has found value in the *Sparrow* conception of reconciliation regarding rights and associated duties. The duty to consult restricts the Crown's power to infringe on rights, as a means to reconcile the competing claims of sovereignty. Now I will turn to the cases that are most significant in the development of the duty to consult.

3.4.2 Important Cases for the Development of the Duty to Consult - *Haida Nation* (2004), *Rio Tinto* (2010)

Each of these cases dealt specifically with the content and scope of the duty to consult. In *Haida,* the Court formulated the three-element test for evaluating consultation, and determining whether the Crown owes the duty to consult (Newman, 2009, p. 24) As mentioned earlier, the three elements of the *Haida* test are the knowledge element of an Aboriginal right or title claim, the strength of the Aboriginal right or title claim itself, and the adverse impact of contemplated action on the Aboriginal right or title claim. What is significant in *Haida* is that the duty to consult is triggered even when there is an unproven or undetermined claim to Aboriginal title or right. The Crown is bound by honour, and it is not conceivably honourable to engage in adverse action upon knowledge that an Aboriginal claim has been made or right already exists under a treaty (*Haida Nation*, para: 32). Additionally, in *Haida*, the Court stated that the Crown may delegate procedural aspects of consultation to industry proponents, but the responsibility of consultation irrevocably rests with the Crown.

The Court in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*[17] also addressed the jurisdiction of administrative tribunals in fulfilling the duty to consult, and assessing the adequacy of Crown obligation (Harman, 2016). It ruled 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" (*Rio Tinto*: para: 55). Further, the Court expanded on *Haida* by ruling that the legislature may delegate the duty to a tribunal and it is up to governments to design the regulatory scheme to address procedural requirements of consultation. (*Rio Tinto,* para: 56). In its judgement, the Supreme Court also made note that consultation is ultimately "concerned with an ethic of ongoing relationships" (Newman, 2009, p. 21). This squarely places the duty to consult within an aim to reconcile the pre-existence of Aboriginal societies with the asserted sovereignty of the Crown.

3.5 The National Energy Board's Regulatory Process

As mentioned above, the *Clyde River* case focused in part on the question of whether the NEB could conduct consultation on behalf of the Crown's obligation under the duty to consult. The NEB is created and enabled by the *National Energy Board Act,* R.S.C. 1985, c N-7. It is an independent federal regulator that has quasi-judicial powers, along with the rights and privileges of a superior court, to evaluate and determine proposed activities related to oil and gas development (Gov. Canada, 2017). This means that NEB decisions are enforceable in law. For any activity that is under the NEB's mandate of regulation, an application must be submitted. Further, the NEB's involvement in a project does not end at approval but continues through the life cycle of the project. The quasi-judicial powers of the NEB consist of the examination of witnesses, the production and inspection of documents presented for project authorization, and the enforcement of its orders (*NEB Act*, 1985).

The *NEB Act* is not the only piece of legislation that governs the NEB's decision-making powers and defines its jurisdiction. The *Canada Oil and Gas Operations Act* (COGOA) prohibits any work or activity related to the exploration of oil or gas in federal waters unless it is authorized under paragraph 5(1)(b) of the Act by the NEB. This means that PGS' seismic exploration survey in Baffin Bay and Davis Strait legally falls under the NEB's regulatory and authorization process. Further, any authorization under COGOA paragraph 5 is also subject to any requirements demanded by the NEB (*COGOA*, 1985).

[17] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650, hereinafter *Rio Tinto*.

In the process of determining whether to grant authorization, the NEB is required to carry out an environmental impact assessment in certain instances. For instance, any geophysical or drilling project north of 60 degrees latitude requires an environmental impact assessment. The proposed location of such a project determines which other environmental assessment processes are used, and which Northern boards and agencies must be included (NEB Act, 1985). The *Canadian Environmental Assessment Act 2012* (CEAA 2012) and the Nunavut Land Claims Agreement (*NLCA*, 1993, (2)) require certain environmental impact assessments be conducted prior to final approval of a project authorization by the NEB. Under subsection 2(1) of both the *CEAA 2012* and its predecessor, *CEAA 1992,* explicit reference is made that environmental assessment must consider the effects of any changes that a project may cause in the environment, "including any change upon the current use of lands and resources for traditional purposes by Aboriginal persons" (CEAA, 1992 2(1)). Although the NEB has the jurisdiction over environmental assessment, project proponents are required to file information explaining the potential adverse impacts a project may create and any potential mitigation efforts to be employed. The NEB often acts as a coordinator in the environmental assessment process, and will determine whether mitigation efforts are sufficient enough for authorization to proceed.

Of major importance in the *Clyde River* case was whether this section of the *NEB Act* enables the NEB to determine, by fact of law, whether the duty to consult has been met by the Crown. During the process of hearing major applications, the NEB holds public hearings where parties may submit evidence into the public record. The NEB holds that decisions must be based on the evidence submitted, and makes a decision that is based on the balancing of public interests. Throughout the *NEB Act*, it is consistently mentioned that the NEB is mandated to consider the public interest in all decision-making matters. How this responsibility interacts with Aboriginal rights claims and title is an issue that residents of Clyde River put to the Supreme Court.

3.6 Hamlet of Clyde River v. Geo-Petroleum Services Inc.

On May 17, 2011, PGS submitted an application for a Geophysical Operations Authorization (GOA) under paragraph 5 of the COGOA to conduct a 2D offshore seismic testing program in Baffin Bay and Davis Strait over five years during the open water season. On June 26, 2014 the NEB authorized PGS to conduct seismic testing in Baffin Bay and Davis Strait pursuant to

COGOA paragraph 5. The proposed testing would involve detonating air guns 100,000 times louder than a jet engine for 24 hours a day, five months per year, for a period of five years (H. of Clyde River, Mem. Fact 2015, para: 3). The purpose of this section is to briefly outline what consultation occurred between the submission of the GOA and its subsequent approval. Importantly, I will describe the role that the NEB played, the role that PGS played and the voiced experiences of Inuit in Clyde River.

3.6.1 The Consultation Process

Throughout the NEB's approval process, the community of Clyde River made it explicitly clear that they were not against all natural resource extraction projects, but that they would only support projects if their traditional food, hunting economy and culture would not be substantially harmed. Inuit in Clyde River felt that a strategic environmental assessment (SEA) ought to be conducted to create a baseline understanding of how seismic testing could impact Inuit harvesting rights (H. of Clyde River, Mem. Fact 2015, para: 17). Clyde River and other Inuit organizations requested that the Federal Government become involved in this process prior to the NEB's approval but their request was declined. Instead, the Government left it to the NEB to facilitate consultation between Clyde River and PGS.

Of highest importance to Inuit in Clyde River were the potential effects seismic testing would have on marine species that they depend on for culture and livelihoods. Clyde River leadership articulated that community meetings were hastily scheduled, not providing enough time for residents to prepare and present their concerns before the NEB and PGS. In 2011, multiple petitions were signed from residents in Clyde River and surrounding communities to oppose the seismic testing. In a letter to the NEB, a representative from the community, Shari Gearheard, outlined key reasons for opposition: the poor process of local 'consultation' and the potential adverse impacts from testing (S. Gearheard correspondence, May 2011)[18]. The NEB and PGS considered local community meetings to be sufficient for consultation. However, Shari Gearheard explained that PGS' presentations were jargon-ridden, not translated into the local language, and inaccessible. Throughout the consultation meetings representatives from representatives for PGS were simply unable or unwilling to show that Inuit rights and interests would be protected or at least considered.

[18] Shari Gearheard's letter is particularly illuminating. It can be found online: https://www.neb-one.gc.ca/nrth/dscvr/2011tgs/cmmnt/2011-05-31shrgrhrd01-eng.pdf

In response to the concerns raised by Clyde River about the 'consultation' process, in 2012 the NEB ordered PGS to conduct an environmental assessment (EA). After PGS had submitted their EA, it was distributed to community organizations for comment. Community meetings continued, but resembled the first round of consultations that occurred the year prior.

In 2013, the NEB concluded that PGS' project authorization application was incomplete and ordered the company to provide certain additional information if their application was to move forward. The NEB required that PGS provide answers to the outstanding questions raised by community members during consultation meetings, an explanation for how IQ would be considered in the project, and details of mitigation measures for potential harm to marine life (NEB correspondence, September 2013). PGS responded with a 3,926 page document addressing these requirements that was only in English. Once having reviewed this report, PGS' application under COGOA paragraph 5 was authorized by the NEB. In granting this authorization, the NEB did not provide any reasons for its decision, nor did it make mention of whether the Crown's duty to consult was discharged (NEB Correspondence, June 2014). Further, in an examination of both the initial EA and the subsequent report there is no mention of Inuit rights under the NLCA or s.35 of the Constitution.

3.6.2 The Federal Court of Appeal's Decision

The Federal Court of Appeal (FCA) ruled to dismiss Clyde River's application for judicial review of the NEB's COGOA authorization and held that consultation in this case was adequate (*Clyde River*, 2015 FCA 179). Additionally, the FCA confirmed that the Crown may delegate the procedural aspect of the duty to consult to a regulatory tribunal. In pinpointing the moment the duty to consult was triggered, the FCA agreed with the Attorney General that it was triggered when Inuit in Clyde River requested to the Cabinet Minister that a baseline strategic environmental assessment be carried out. This means that the duty was triggered not when PGS submitted a proposal or COGOA authorization, but when a clear agent of the Crown was brought into the regulatory process of the NEB. The consequences of this determination are later explored in the Supreme Court's ruling. Further, the Court concluded that the *NEB Act* provides an established process of consultation designed to ensure the gathering of sufficient information about the project's potential impacts on Aboriginal rights.

However, it found no issue with the NEB's lack of reasoning for its authorization and its omission of any reference to Aboriginal rights. It held that the EA provided adequate reasons and responses to Inuit concerns about potential adverse environmental impacts (*Clyde River*, 2015 FCA 179, para: 93).

When the case was heard by the Supreme Court, there was evidently a different outcome. Consultation in *Clyde River* was ruled to be inadequate. However, in delivering its ruling the Court responded to four important questions that were raised by the lawyers representing Clyde River. An analysis of the Court's responses to these questions will be useful for explaining the Supreme Court's decision.

4. Analysis of the Supreme Court's Judgement in *Clyde River*

Prior to *Clyde River*, there has been little clarity around the role that regulatory tribunals play in carrying out consultation (Bankes, 2012; Promislow, 2013). This is in part due to confusion around whether a regulatory board like the NEB can be considered as an agent of the Crown. Specifically, scholars have discussed the ability, or lack thereof, of regulatory tribunals to adhere to the requirements of s.35 in a consultative context (Graben & Sinclair, 2016). The result of this is that regulatory tribunals are often imprudent about their relationship with the Crown in the context of the duty to consult, thereby affecting consultation process. While the Supreme Court has included regulatory tribunals in the task of ensuring that Aboriginal rights are respected and determined that tribunals can use their own methods of evaluation, it remained unclear whether they are required to assess consultation in accordance with any established legal criteria. The *Clyde River* case provides some clarity by confirming that the Crown can rely on the NEB to satisfy the duty to consult, while simultaneously evaluating whether the duty to consult has been satisfied. This is because regulatory tribunals act in accordance with their enabling statute. If the statute provides a mandate to answer questions of law, the Supreme Court has said that this extends to constitutional matters of law, including s.35 (Graben & Sinclair, 2016).

In my analysis, I will first provide an explanation of the precedents and Aboriginal case law the Supreme Court used to consider the questions of law before it. Second, I will examine the four questions presented to the Supreme Court regarding the NEB and its role in executing the duty to consult. In doing so, this examination will provide an understanding of how the *Clyde River* case has relieved some uncertainty around the extent to which regulatory tribunals both act upon the law and are bound by the law in carrying out consultation. Third, I will argue that the Supreme Court's ruling that the NEB can consider Crown consultation before an approval is founded, however the NEB's current mandate is insufficient with regards to addressing and considering Aboriginal rights. Accordingly, I will argue that for the NEB's mandate to become sufficient, a mechanism for addressing Aboriginal rights ought to be built into the regulatory process for when the duty to consult is triggered. Lastly, I will explain why the NEB's mandate is insufficient.

4.1 The Analytical Framework Used by the Supreme Court

The lawyers for Clyde River had argued that the NEB's regulatory process alone could not possibly fulfil the duty to consult because direct Crown involvement is necessary. The Court ruled that, although a regulatory process can be empowered to conduct consultation, it would still always be the responsibility of the Crown to ensure consultation was adequate (*Clyde River*, para: 23). As both the Crown and Inuit are parties to the NLCA, each are bound to act diligently to implement the treaty. As such, the Court ruled that it was appropriate that Inuit requested direct Crown engagement through the baseline strategic environmental assessment. Further, the Crown has a responsibility by the honour of the Crown to provide guidance about the form of consultation so that Indigenous peoples can be fully informed about the process (*Clyde River*, para: 23). This also enables the Indigenous group to raise concerns about the pending consultation process.

The Supreme Court narrowed its attention on the consequences of inadequate consultation, stating that where consultation is inadequate, the decision or authorization should be quashed (*Clyde River*, para: 24). While simultaneously reaffirming that the Crown can rely on regulatory tribunals to carry out consultations, the Court maintained that this process must occur adequately. In this case, the meaning of adequate is linked directly back to the sliding scale outlined in *Haida*.

4.2 The Four Questions

4.2.1 Can the NEB approval process trigger the duty to consult?

Because the duty to consult was triggered by the NEB's COGOA paragraph 5 authorization process, then the required action falls along a spectrum from limited to deep consultation as defined in *Haida*. The Court had to determine where consultation should lie on the spectrum, depending upon the strength of Clyde River's right, and the significance of the potential impact on the right (*Clyde River*, para: 20).

As defined in *Haida*, the duty to consult is triggered when the Crown has knowledge of a potential Aboriginal claim or Aboriginal treaty right that might be adversely impacted by Crown action. In *Clyde River*, the FCA was of the view that only action by a minister of the Crown or a government department, or a Crown corporation can constitute 'Crown conduct' that would trigger the duty (*Clyde River*, para: 26). However, the Supreme Court argued that it was the NEB's approval process specifically that triggered the duty in this case.

The Court defined Crown conduct as any conduct that the Canadian state exercises in the "prerogatives and privileges reserved to it" (*Clyde River*, para: 28). The NEB is neither 'the Crown' nor an agent of the Crown. It operates independently of the Crown's ministers and there is no relationship of control that exists between them (Hogg, Monahan, & Wright, 2011, p. 465). Nevertheless, the NEB's mandated responsibility under COGOA paragraph 5 enables the NEB to act on behalf of the Crown when making a decision on a project application. As such, the Court's ruling dissolves any distinction between the Crown's action and the NEB's action because the NEB exists to exercise executive power as authorized to do so by its enabling legislation. Both the duty to consult and the honour of the Crown do not simply evaporate because a final decision has been made by a tribunal established by Parliament as opposed to Cabinet (*Chippewas of the Thames*, para: 105). The duty is triggered regardless of whether action is by or on behalf of the Crown (*Clyde River*, para: 25).

4.2.2 Can the Crown rely on the NEB's process to fulfil the duty to consult?

This question directs attention to whether the NEB has sufficient procedural powers to enable appropriate consultation. The Court concluded that under COGOA, the NEB has a significant mandate that permits extensive consultation (*Clyde River*, para: 31). The Court justified this by referencing the powers it holds to conduct hearings, elicit information, conduct EAs, and demand preconditions to approvals. However, what the Court found most significant was that the NEB can require accommodation by exercising its discretion to deny an authorization or reserving its decision pending further proceedings (COGOA s.5(1)(b), s.5(5)). Notably, the Court's submitted that the NEB has developed "considerable institutional expertise in conducting consultations and assessing environmental impacts, especially when this overlaps with Indigenous interests" (*Clyde River*, para: 33). In sum, the NEB has the procedural powers necessary to implement consultation and the remedial powers to accommodate affected Aboriginal rights. This means that the Crown can therefore rely on the NEB to completely or partially fulfil the duty to consult.

4.2.3 What is the NEB's role in considering Crown consultation before approval?

Next, the Supreme Court considered whether the NEB could assess if adequate consultation has occurred and that the Crown's duty to consult has been fulfilled. The lawyers for Clyde River argued that the NEB must exercise its decision-making authority in accordance with s.35 of the Constitution by evaluating the adequacy of consultation prior to authorization. The Supreme Court agreed. Unless the authority to decide constitutional issues has been clearly excluded, a regulatory tribunal with the authority to decide questions of law has both the duty

and authority to apply the Constitution. It follows that the NEB has the authority to determine whether the Crown's duty to consult has been fulfilled.

Interestingly, the Court added that when an affected Indigenous group has raised concerns about Crown consultation to the NEB, the NEB must address those concerns by expressing its reasoning (*Clyde River,* para: 41). This would seem to further limit Crown power by imposing obligations on the manner and approach of government in its engagement of its duty to consult. Explicitly, the Supreme Court suggests that written reasons should be provided as a means of showing affected Indigenous groups that their concerns were considered and addressed. Where deep consultation is required by the *Haida* spectrum, the honour of the Crown will usually oblige the NEB to explain how it considered and addressed these concerns. This resembles a process of Walter's concept of 'reconciliation as relationship' that engages the duty to consult to create dialogue and respect about the concerns of each party.

4.2.4 Was the consultation adequate in this case?

Owing to the strength of Clyde River's claim and the significant potential impact on the community's treaty rights, it was unanimous among the Court that deep consultation was required by the *Haida* spectrum (*Clyde River*, para: 43). It was clear that Inuit in Clyde River had established treaty rights under the NLCA to hunt and harvest marine animals. Additionally, the risks posed by the proposed testing were also high.[19]

The Court ruled that what did occur in terms of consultation was not adequate. It went on to list the ways in which consultation fell short in this case. First, the consultative inquiry was misdirected towards environmental impacts, not the impacts on Inuit rights (*Clyde River*, para: 45). The NEB did not address Inuit treaty rights to hunt and harvest marine mammals, but focused the consultation on environmental impacts. Second, while the Crown relies on the processes of the NEB to fulfil the duty to consult, this was not made explicit to Inuit in Clyde River (*Clyde River*, para: 46). Inuit in Clyde River had expressed apprehension to participate in the NEB processes because of the uncertainty around whether participation would amount to Crown consultation. Lastly, the Court felt that the NEB processes simply did not implement the requirements of deep consultation (*Clyde River*, para: 47). In view of the Court, despite the NEB's statutory powers that enable it to conduct deep consultation, limited

[19] The NEB's environmental assessment highlighted the risks posed to marine mammals from seismic testing: increased mortality, permanent hearing damage, and changes in migration routes. These are all concerns Inuit in Clyde River raised prior to the EA.

opportunities for consultation were made available to Inuit in Clyde River. While the NEB did consider the potential impacts of the project on the environment and on resource use, the NEB's report did not acknowledge Inuit treaty rights to harvest wildlife or that deep consultation was required.

4.3 An Insufficient Mandate

The significance of the Court's ruling in *Clyde River* with respect to the role of regulatory tribunals is two-fold. A regulatory tribunal's mandate that not only enables it to assess questions of law permits that tribunal to both carry out consultation on behalf of the Crown through its own regulatory process, but also to simultaneously *evaluate* whether the Crown adequately fulfilled its duty to consult. It might appear paradoxical with respect to the fairness of the law for a regulatory tribunal to both conduct consultation on behalf of the Crown and evaluate whether that consultation adequately fulfils the Crown's duty to consult. However, the Supreme Court provided justification for this. In this case, the *NEB Act* provides the NEB with the authority to consider questions of law, including those that are constitutional, thereby extending its jurisdiction to questions of law on Aboriginal rights. This means that the NEB must make decisions for approval in accordance with the jurisprudence on s.35 rights. Although this decision is legally founded, I argue that in its current form, the NEB's mandate is not sufficient to address and consider Aboriginal rights in a manner that is consistent with the requirements of the duty to consult.

To show this, I will focus my attention on the Supreme Court's first and third reason for concluding that consultation in *Clyde River* was inadequate. To support my argument, I will demonstrate that the NEB has consistently failed, in a characteristic pattern, to meaningfully approach the duty to consult in a way that is consistent with the doctrine itself. *Clyde River* closely resembles this pattern of conduct.[20]

4.3.1 Misdirected Inquiry – Adverse Effects, Not Impacts

The first reason the Supreme Court gave for concluding that consultation was inadequate was that the NEB's inquiry was misdirected. The NEB found that the proposed seismic testing

[20] Because of the scope of my thesis, I cannot conduct my own empirical review of NEB decisions where consultation issues were outstanding, so I have relied on the comprehensive research of Graben, S., & Sinclair, A. (2016). "Administering Consultation at the National Energy Board: Evaluating Tribunal Authority" in P. Macklem, & D. Sanderson, *From Recognition to Reconciliation* (pp. 238-255). Toronto: University of Toronto Press.; Charowsky, Z. (2011). "The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals" *Saskatchewan Law Review*, 213-230.; Lambrecht, K. (2013). *Aboriginal Consultation, Environmental Assessment and Regulatory Review.* Regina: University of Regina Press.

was not likely to cause significant environmental impacts, and that any impacts on traditional resource use could be minimized through mitigation measures. The inquiry should not have been directed at *environmental impacts*, but instead properly directed at the impact on the *Aboriginal right* (*Clyde River*, para: 45). No consideration was given in the NEB's EA to the source – the NLCA – of the Inuit right to harvest marine mammals, nor to the impact of proposed seismic testing on those rights. In their study of the NEB's written decisions for project authorization regarding the duty to consult, Sari Graben and Abbey Sinclair (2016, p. 251) found that often where environmental impacts can be mitigated, the NEB rules that there is no adverse impact on Aboriginal rights. It is clear that the NEB's consideration of Inuit harvesting rights conforms to this general pattern.

It appears that the NEB simply did not understand that what is required of consultation, especially deep consultation, is a consideration of adverse effects on rights. That Aboriginal rights have been enshrined in the Constitution under s.35 and are safeguarded by the duty to consult is not something to overlook. What explains this misdirection is the insufficiency of the *NEB Act* on addressing Aboriginal concerns, wherein no reference to legal criteria for evaluating adverse impacts on rights exists (Graben & Sinclair, 2016, p. 254).[21] The *NEB Act* allows it "to consider any public interest that may be affected" when deciding whether to grant an authorization (*NEB Act*, 1985). Historically, the task of evaluating the public interest meant the balancing of positive and negative effects of a potential project against economic, environmental and social interests (Popowich, 2007). Since the enactment of the *Constitution Act* 1982 and s.35 rights, the task of evaluating public interest must also consider impacts on Aboriginal peoples and their rights. However, the duty to consult affords Aboriginal rights a type of consideration that is independent of the generic public interest analysis, depending on the strength of the right (Popowich, 2007). In looking at the misdirected inquiry of the NEB in *Clyde River*, it seems that its mandate does not dictate legal criteria that its consultative attention should be placed on the potential of adverse impacts on Aboriginal rights.

[21] Graben and Sinclair conducted a study between 2000 and 2014 of 100 NEB project approvals. Of those 100 approvals, they found 42 referenced the duty to consult and that 41 of those 42 were approved. They further analysed the NEB's written decisions for these approvals and found that the NEB relies on three justifications for approving an application where the issue of consultation remained unresolved. These three reasons were: (1) that it lacks jurisdiction to consider the consultation at issue, (2) that it believes outstanding consultation can be addressed through ongoing consultation by the project proponent and/or (3) that the absence of mitigation impacts on Aboriginal rights equated to an absence of adverse impacts on rights. See: Graben, S., & Sinclair, A. (2016), p. 239.

4.3.2 The Hearing Process – Requirements of Deep Consultation

The third reason delivered by the Supreme Court in *Clyde River* for concluding that consultation was inadequate was that the NEB did not take sufficient measures to fulfil the required duty of deep consultation. According to *Haida,* deep consultation would require "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concern were considered" (para: 44). Despite the NEB's authority under COGOA to afford these directives of the Court, only limited options for participation in the hearing process were made available to Inuit. During the NEB's regulatory approval process, there were no formal hearings, only community meetings that served as question and answer forums. Additionally, participant funding was not afforded to representatives in Clyde River, making it difficult to test the evidence presented by PGS in the EA (*Clyde River*, para: 47). Compounded by the NEB's failure to produce clear reasons for its approval and a lack of any mention of Inuit treaty rights in the EA, consultation did not appear to significantly affect its decision to authorize PGS' seismic testing.

This can be explained by the accommodations the NEB recorded in the EA report (NEB correspondence, September 2013). Once PGS had returned with a more robust EA report that included mitigation measures, the NEB noted changes made to the project as a result of consultation. The most important accommodation in this report was the commitment to ongoing consultation, including after the seismic testing had begun, on the part of PGS. It is alarming that the NEB considered a commitment to ongoing consultation as both simultaneously fulfilling consultation and providing some kind of accommodation. This demonstrates the NEB's lack of understanding that adequate consultation must be completed prior to a project's approval, and that the promise of ongoing consultation cannot make up for an insufficient consultation process. Graben and Sinclair (2016, p. 249) have found the acceptance of ongoing consultation to be characteristic of the NEB in justifying a decision for project approval. They argue that the NEB works with the understanding that consultation need not be complete prior to approval. A NEB mandate that does not make it explicit that Aboriginal rights are the focus of inquiry for consultation, as it is required by the jurisprudence on the duty to consult, cannot be argued to be sufficient.

4.4 The Failures of the NEB in *Clyde River*

In addition to possessing the power to consider questions of law, an effective regulatory tribunal must be able to meaningfully address the specific concerns raised by Indigenous peoples about their rights (Graben & Sinclair, 2016; Hodgson, 2016). Taken together, the insufficiency of the NEB in its inquiry and in its hearing process shows that the NEB is limited in its statutory mandate. Currently, it appears that this insufficiency has led the NEB to discount the duty to consult as a determining factor in its regulatory approval process. The reason for this is that the NEB does not evaluate the adequacy of Crown consultation against any visible legal criteria related to rights within their mandate (Graben & Sinclair, 2016). Additionally, the NEB has not concerned itself with applying legal analysis to determine whether the duty to consult was triggered, the scope of the duty and whether it has been fulfilled. The NEB's misdirected inquiry and its weak attempt at facilitating a robust hearing process is evidence of this. Further, this insufficiency has led to a situation where, Graben and Sinclair (2016, p. 238) have argued, the Crown is "permitted to rely on the NEB's findings for approval made in the absence of legal criteria for the purposes of fulfilling its own legal duties."

4.5 Summary

I have argued that the NEB does not have a sufficient mandate to understand what is required of consultation on Aboriginal rights and therefore does not properly consider whether the Crown's duty to consult has been fulfilled. In examining the Supreme Court's judgement in *Clyde River*, evidence of this is found in the NEB's misdirected inquiry and the weak hearing process. In arguing that the NEB does not have a sufficient mandate to conduct adequate consultation, I am not referring to the authorities granted to it under the *NEB Act*. The Supreme Court in *Clyde River* concluded that the NEB has sufficient procedural powers that allow it to conduct consultation, whether consultation falls on the shallow or deep end of the spectrum. Rather, the NEB's mandate does not provide sufficient direction on how to understand its role in the consultative process engaging Aboriginal rights. As a result, the NEB has consistently failed to understand, consider or respond to the critical concerns of Aboriginal rights.

If the NEB merely documents proponents efforts to engage with communities – as it did in *Clyde River* - but it does not evaluate the efforts of consultation on rights, then it effectively does what the Crown may not: play a role in authorizing conduct that infringes rights. If this

is the case, then what does this mean for an understanding of Walter's reconciliation as relationship and the role of the duty to consult within that space? This will be the focus of my second analytical chapter.

5. Returning to Reconciliation and the Duty to Consult

I now return to the topic of legal reconciliation to explain how the outcomes from the Supreme Court's ruling in *Clyde River* might affect the potential to produce Walter's concept of reconciliation as relationship.

Earlier, I argued that the duty to consult creates the most effective means for reconciliation by requiring dialogue. This argument relies on Walter's concept of reconciliation as relationship. Walter's (2008, p. 187) model demands the judiciary to "acknowledge the frailty of law's moral authority in relation to Indigenous peoples" because of the unilateral nature of the Crown's assertion of sovereignty. The Supreme Court has done so, in part, through the articulation of the duty to consult and the dialogue it is to generate.

What, then, does the *Clyde River* case demonstrate about the ability of the duty to consult to further reconciliation as relationship? I have argued that the *Clyde River* case is further evidence that the NEB's mandate is not sufficient to produce a meaningful process of consultation that adequately considers and addresses Aboriginal rights. Although the Supreme Court did not explicitly denounce the insufficiency of the NEB's mandate, it nevertheless implies that changes need to be made. The Supreme Court's ruling does not depart from the idea that the duty to consult is an important space for generating meaningful dialogue about Aboriginal rights. The Court, I will argue, was faced with inherent institutional constraint in prescribing what it sees as a solution. Judicial dialogue, however, is a means for the Supreme Court to overcome the institutional constraints it faces and signal to the legislature any shortcomings it observes of statutes and legislation. I will argue that the Supreme Court's ruling in the *Clyde River* case implicitly expresses similar concerns about the failures of the NEB that I have described above.

5.1 Overcoming Institutional Constraints

In the *Clyde River* case, the Supreme Court could not directly propose legislative changes to the NEB's mandate. The Court can only rule on the legality and constitutionality of statutes and laws but cannot re-write them. Legally, the NEB's mandate enables it to fulfil the Crown's duty to consult and further evaluate the adequacy of consultation. However, the

judgement that Clyde River consultation was inadequate suggests that the Supreme Court may well recognize the insufficiency of the NEB's mandate in its current form. This is best demonstrated in the Court's explanation that "despite the NEB's broad powers under COGOA to afford the advantages of deep consultation, limited opportunities for participation and consultation were made available to Inuit" (*Clyde River,* para: 47). This suggests that the Supreme Court recognizes the constitutionality of the NEB's mandate in fulfilling the duty to consult, but that it also witnesses the insufficiency of the NEB to carry out their mandate in a manner that is consistent with the Court's prescription of meaningful consultation.

Although the Court cannot prescribe what the NEB's mandate should contain to enable it to sufficiently fulfil the duty to consult, it can overcome this constraint in a number of ways. First, it can enact procedural protections that enable meaningful dialogue about Aboriginal rights. Recalling *Haida*, the Court described the *Haida* spectrum on the duty to consult as procedural protections required for meaningful consultation (*Clyde River*, para: 47). Emphasizing that consultative inquiry must be directed at *rights* (rather than environmental effects) was one way in which the Supreme Court in *Clyde River* prescribed the duty to consult as a dialogue mechanism. The Court's dissatisfaction with the NEB's failure to provide reasons for its approval is further evidence of the Court promoting dialogue under the duty to consult. Providing reasons for approval is an important part of dialogue in consultation and a way to uphold the honour of the Crown (*Clyde River*, para: 48).

Although no court can order Walter's reconciliation as relationship, the Court's ruling in *Clyde River* suggests that it can be a normative principle that helps to unify the Crown's and Indigenous peoples' interpretation of legal rights and duties. (Walters, 2008, p. 186). This type of dialogue occurring through consultation is an essential component of reconciliation as relationship.

Another way the Supreme Court can express concerns about practices is through judicial dialogue (Roach, 2001). If the Court rules that a law is unconstitutional, it requires that the government re-write the law or abandon it. In cases where a law is not strictly unconstitutional, it can only imply a need for review on behalf of the government. In *Clyde River*, the Court affirmed the NEB's mandate as legally sufficient to delegate consultation through its regulatory process. Nevertheless, the Court ruled that in consulting Inuit about the seismic testing proposal, the NEB's regulatory process failed considerably. Simply put,

although the NEB has the statutory authority and technical capability to conduct consultations, this does not mean its existing regulatory process is sufficient to produce consultation which gives sufficient respect for Aboriginal rights to meet the requirements of s.35.

In *Clyde River*, the Court explains that procedural protections exist under the doctrine of the duty to consult to ensure meaningful consultation. Further, the Court makes it clear that these protections should "foster reconciliation by promoting an ongoing relationship" (*Clyde River*, para: 47). In articulating this, it is obvious that the Court is emphasizing the importance of relationships built through dialogue. The Supreme Court is signaling to the legislature that relationships are an integral part of reconciling the pre-existence of Indigenous peoples and societies with the assertion of Crown sovereignty. Using the concept of judicial dialogue, the message delivered by the Supreme Court in *Clyde River* becomes clear. The NEB's mandate is constitutionally sufficient for the Crown to delegate the duty to consult, but in its current form, the NEB's regulatory process has proven itself substantially deficient. This means that it is now the discretion of the legislature to respond to the Supreme Court's ruling and legislatively address the NEB's mandate. With this, the issue of consultation moves from the legal realm and into the political realm.

5.2 Summary

The Supreme Court's ruling in *Clyde River* provides evidence that the duty to consult was developed to ensure space for dialogue and an ongoing relationship between two sovereignties. This evidence of the Court's embodiment of reconciliation as relationship. Despite institutional constraints in making decisions regarding law, the Supreme Court is able to signal to the legislature that the NEB's mandate need be revised if it is to properly fulfil the duty to consult on behalf of the Crown. In *Haida, Rio Tinto and Clyde River*, the Supreme Court has emphasized that judicial review should not be used as a substitute for adequate consultation. The *Clyde River* case is an example of where the NEB's mandate failed in facilitating meaningful consultation, and where the Supreme Court saw this as an opportunity to reiterate the importance of the duty to consult in order to respect Aboriginal rights under s.35.

6. Conclusion

In *Haida*, the Supreme Court first established the duty to consult as a s.35 right and created a sliding scale of requirements for consultation. In *Rio Tinto*, the Court confirmed that regulatory tribunals can be delegated the duty to consult if their enabling statute legally allows it. Although the decisions in these two cases provided clarity on the meaning of the duty to consult and the actors allowed to participate in consultation, the Supreme Court is not able to foresee issues before they arise. Leading up to the *Clyde River* case, the precise interaction of regulatory tribunals and their mandates in the duty to consult was legally unclear. This created a situation where governments, Indigenous peoples, and industry proponents were uncertain of the legal rules and normative principles guiding their relationships, particularly when issues around Aboriginal rights arose under the duty to consult (Popowich, 2007; Newman, 2009; Promislow, 2013). The NEB's weak consultation process with the Clyde River community about seismic a seismic testing application is a clear result of this environment of uncertainty. The industry proponents did not understand the importance of responding directly to Inuit concerns about impacts on their ability to harvest marine species. Inuit community members in Clyde River were not made aware that the NEB's regulatory process would fulfil the Crown's duty to consult. And further, the NEB did not fully grasp what it meant for a consultation to consider and address Inuit concerns in a manner consistent with the honour of the Crown.

The Supreme Court's decision confirmed that the NEB's legal powers are sufficient for the Crown to rely, in part or in full, on the board's regulatory process to fulfil the duty to consult and, simultaneously, to evaluate that consultation. In the same judgement, however, the Court ruled that the NEB's regulatory process did not organize the level of deep consultation required.

The decision also reiterated the Supreme Court's decision in *Rio Tinto* about regulatory tribunals, but, it expanded the procedural requirements of the duty to consult when a regulatory tribunal is conferred the authority to conduct consultation.

The significance of the *Clyde River* case lies in the ruling's contribution to resolving some uncertainty around the central role regulatory tribunals play in the duty to consult, and specifically, in considering and addressing Aboriginal rights. The Supreme Court clarified that the duty to consult has a dual purpose: to protect Aboriginal rights and title claims, and to create a space for dialogue about reconciling these rights with Crown sovereignty.

Despite the Court's ruling in *Clyde River*, the NEB's mandate remains insufficient if the duty to consult is meant to affect meaningful dialogue about reconciliation of two sovereignties. Under the NEB, the regulatory process has consistently failed to address potential impacts on Aboriginal *rights*, focussing its attention instead on the *environmental effects*. The result, as the *Clyde River* case demonstrates, is that regulatory approval is often granted without adequate concern for the consequences on Aboriginal rights. In effect, consultation proceeds in the opposite direction as intended under the duty to consult, and damages the honour of the Crown as a result. Further, the trend of delegating procedural aspects of consultation onto the proponent moves the duty to consult further from its source – the honour of the Crown and the aim of legal reconciliation. This has implications for the ability of the duty to consult to affect legal reconciliation – an imperative articulated by the Supreme Court through s.35 jurisprudence.

A detailed prescription for making the NEB's mandate sufficient is outside the scope of this thesis. Morris Popowich (2007, pp. 858-860) has suggested a variety of means to improve the NEB.[22] Any proposed changes to the NEB's mandate need be directed at ensuring that it can appropriately consider and address Indigenous peoples' concerns about their rights under the duty to consult. The Supreme Court has made it clear in the *Clyde River* case that the NEB's mandate and regulatory process can enable it to fulfil the duty to consult. Any agency carrying out consultative functions should be involved in facilitating an ongoing engagement between the Crown, Indigenous peoples and industry proponents in order to enable an approach to reconciliation as relationship. To the extent that the duty to consult is the most appropriate space for this type of legal reconciliation to occur, the NEB's regulatory process must reflect this.

[22] Popowich has proposed that for large-scale natural resource development projects, a separate government agency created for the exclusive purpose of fulfilling the duty to consult may be better suited. Within the quasi-judicial model, Popwich is sceptical of the NEB's capacity to absorb any additional duties, including those flowing from s.35 of the Constitution. See: Popowich, M. (2007). "The National Energy Board as Intermediary Between the Crown, Aboriginal Peoples, and Industry". *Alberta Law Review*, 837-862.

In May 2017, the Liberal Federal Government announced that it would be undertaking a process to modernize the NEB's mandate to more appropriately consider its role in the duty to consult (CBC News, 2017; Goujard, 2017). Notwithstanding that this announcement came prior to the delivery of the Supreme Court's ruling in *Clyde River*, this response from the Federal government will hopefully reform the consultative issues highlighted by the NEB's regulatory failures in this case. Inevitably, the duty to consult will play an integral role not only in properly reconciling the two legal claims to sovereignty, but also in furthering the broader political reconciliation between Indigenous and non-Indigenous peoples in Canada.

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