# *The Inhabitants of an Imagined Body: The Crown's Duty to Consult and Accommodate Indigenous Communities in the Arctic Adversely Affected by Climate Change*

**Tyler Paquette***

*Indigenous communities in the Arctic are facing some of the most severe consequences of the world's inaction on climate change. Although these communities are often portrayed as the faces of climate change, their voices are rarely heard in climate-related decision-making. This article examines how Indigenous communities in the Canadian Arctic can ensure their inclusion in climate change related governance.*

*In particular, this article analyzes whether the Crown owes a duty to consult and accommodate to Indigenous communities in the Arctic, whose rights recognized and protected under section 35 of the Constitution Act, 1982 are adversely affected by the impacts of climate change, when contemplating action that would increase greenhouse gas (GHG) emissions and thus further contribute to global climate change.*

*This article concludes that the duty to consult and accommodate could likely be triggered in this context, though there are certainly obstacles. Triggering the duty to consult and accommodate in the context of climate change is largely dependent on identifying Crown "conduct." The author puts forward three potential ways to satisfy the Crown "conduct" prong of the Haida Nation test, namely: (i) a single contemplated action/decision that will increase GHG emissions; (ii) a constellation of decisions/actions that will increase GHG emissions and; (iii) regulations or executive policies that will increase GHG emissions.*

*In sum, as climate litigation has emerged around the world, and recently in Canada, this article seeks to engage in a larger discussion as to whether Canadian law has the capacity to advance climate justice.*

*Les communautés autochtones de l'Arctique font face à certaines des conséquences les plus graves de l'inaction du monde face aux changements climatiques. Bien que ces communautés soient souvent présentées comme les visages du changement climatique, leurs voix sont rarement entendues dans les prises de décisions liées au climat. Cet article examine comment les communautés autochtones de l'Arctique canadien peuvent assurer leur inclusion dans la gouvernance liée aux changements climatiques.*

*En particulier, cet article analyse si la Couronne a l'obligation de consulter et d'accommoder les communautés autochtones de l'Arctique, dont les droits reconnus et protégés en vertu de l'article 35 de la Loi constitutionnelle de 1982 sont affectés par les effets des changements climatiques, lorsqu'elle envisage une action qui augmenterait les émissions de gaz à effet de serre (GES) et contribuerait ainsi davantage au changement climatique mondial.*

*Cet article conclut que l'obligation de consulter et d'accommoder pourrait vraisemblablement être déclenchée dans ce contexte, bien qu'il y ait certainement des obstacles. Le déclenchement de l'obligation de consulter et d'accommoder dans le contexte des changements climatiques dépend en grande partie de l'identification de la « conduite » de la Couronne. L'auteur propose trois façons possibles de satisfaire au volet « conduite » de la Couronne du critère de la nation haïda, à savoir: (i) une seule action / décision envisagée qui augmentera les émissions de GES; (ii) une constellation de décisions / actions qui augmenteront les émissions de GES et; (iii) des réglementations ou des politiques exécutives qui augmenteront les émissions de GES.*

*En résumé, alors que les litiges climatiques sont apparus dans le monde entier et récemment au Canada, cet article cherche à engager une discussion plus large sur la question de savoir si le droit canadien a la capacité de faire progresser la justice climatique.*

Titre en français: *Les habitants d'un territoire imaginé: l'obligation de la Couronne de consulter et d'accommoder les communautés autochtones de l'Arctique affectées par le changement climatique.*

* Tyler Paquette, JD, University of Ottawa (2018), BSocSc, University of Ottawa (2018). The author wishes to acknowledge and thank Nathalie Chalifour, Alexandre Lillo, Patricia Lawrence, Kerry Young, and Maxime Pagé for their helpful comments, support, and advice. The author also wishes to thank the peer reviewers and the editorial board for their insightful and constructive comments. Any errors are the author's responsibility.

## 1. INTRODUCTION

Over the past few years, climate-based litigation has emerged throughout the world. Noteworthy cases like *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and Environment),*[1] *Leghari v Pakistan,*[2] and *Juliana v The United States of America*[3] have sought to force government action on climate change as its effects on the world's most vulnerable communities becomes more evident. As Canada's greenhouse gas (GHG) emissions have significantly increased over the past decades,[4] it is not surprising that legal scholars and practitioners have begun to explore whether Canadian law could support a similar challenge to Canada's failure to mitigate GHG emissions in line with what is necessary to avoid dangerous levels of climate change.[5]

---

1 *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and Environment)*, [2015] ICJ Rep (District Court of the Hague), Doc C/09/456689/HA ZA (English translation), online: < uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196> [*Urgenda*].

2 *Asghar Leghari v Federation of Pakistan* (2015), WP No 25501/2015, Lahore High Court Green Bench, (Pakistan), online: <www.climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/?cn-reloaded=1> [*Leghari*].

3 *Kelly Cascade Rose Juliana et al v United States,* Doc 6:15-cv-01517-TC (10 November 2016), online: <static1.squarespace.com/static/571d109b04426270152febe0/t/5824e85e6a49638292ddd1c9/1478813795912/Order+MTD.Aiken.pdf> [*Juliana*]. It is important to note that a federal appeals court in the United States of America just dismissed the case for justiciability concerns. See *Juliana et al v The United States of America,* No 6:15-cv-01517-AA (9th Cir 17), January 2020, online (pdf): <cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf>.

4 Environment and Climate Change Canada, *Canadian Environmental Sustainability Indicator: Greenhouse Gas Emissions* (Gatineau: ECCC, 2019) at 5, online (pdf): <www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/ghg-emissions/2019/national-GHG-emissions-en.pdf>.

5 See Andrew Gage, "Climate Change Litigation and the Public Rights to a Healthy Atmosphere" (2014) 24:1 J Envtl L & Prac 257; Andrew Stobo Sniderman & Adam Shedletzky, "Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy" (2014) 4:2 Western J Leg Studies 1; Nathalie J Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42:1 Vt L Rev 689; Dustin W Klaudt, "Can Canada's

Although there is still limited research on this topic to date, legal scholars have mostly focused their research on whether the right to life, liberty, and security of the person constitutionalized at section 7 of the *Canadian Charter of Rights and Freedoms*[6] could support a climate-based challenge against the Canadian government or against its provincial counterparts.[7] This has even led to lawsuits by several Canadian youth groups seeking government action on climate change, based on their constitutional rights protected under the *Charter*. The first group to do so was ENvironnement JEUnesse, which sought a declaration that the Canadian government infringed the section 7 and section 15 *Charter* rights of Québec residents under the age of 35 by failing to take adequate action to prevent climate change.[8] Moreover, a group of youth applicants from Ontario has recently filed a challenge to Ontario's 2030 GHG emissions reduction target under subsection 3(1) of the *Cap and Trade Cancellation Act*, *2018*, claiming that the target "will lead to climate catastrophe and thus will violate [their] rights under section 7 of the *Charter.*"[9] Similarly, a group of fifteen children and youths have brought suit against the Government of Canada claiming that its inadequate action on climate change has violated, and will continue to violate, their section 7 and section 15 *Charter* rights.[10]

Legal scholarship appears to acknowledge that Indigenous peoples in Canada are facing particular and disproportionate harms related to climate change.[11] However, the ability of Indigenous communities to challenge government decision-making on climate change with their inherent rights "recognized and affirmed" at section 35 of the *Constitution Act, 1982*[12]

---

'Living Tree' Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?" (2018) 31:3 J Envtl L & Prac 185.

6 *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, s 7, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

7 See *supra* note 5.

8 ENvironnement JEUnesse, "ENvironnement JEUnesse will continue to fight for climate justice" (July 12, 2019), online: *Newswire* <www.newswire.ca/news-releases/environnement-jeunesse-will-continue-to-fight-for-climate-justice-806210050.html>. The group was refused authorization to institute a class action on behalf of all young Québec residents 35 years old and under against the Government of Canada by the Superior Court of Québec. In a decision penned by Morrison J, the Court refused to grant authorization to the class action given the group's choice of 35 as being the maximum age of eligible members. See *Evironnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885 [*Environnement Jeunesse c Procureur général du Canada*]. The group has since filed an appeal to the Court of Appeal of Québec. See ENvironnement JEUnesse, "Youth vs Canada", online: <enjeu.qc.ca/justice-eng/>.

9 *Mathur, et al v Her Majesty the Queen in Right of Ontario*, (2019) CV-19–00631627 [Notice of Application], at para 7, online: <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191125_CV-19-00631627_complaint.pdf> [*Mathur, et al*].

10 *La Rose et al v Her Majesty the Queen*, (2019) T-1750-19 [Statement of Claim to the Defendants], online: < blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf> [*La Rose et al*].

11 See Gage, *supra* note 5 at 262; Sniderman & Shedletzky, *supra* note 5; Chalifour & Earle, *supra* note 5 at 696 & 700; Klaudt, *supra* note 5 at 221–224 & 235; Flora da Silva Côrtes Stevenson, "The Duty to Consult the Inuit in Canada's Black Carbon Policy Inaction" (2017) 30:2 JELP 139.

12 *Constitution Act, 1982,* s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

remains largely unexplored.[13] What is more, there is a gap in legal scholarship as to how the duty to consult and accommodate could apply in the context of climate change and how it could ensure that Indigenous communities have a voice in climate-related decision-making by the Crown.

This article seeks to address this gap by analyzing whether the Crown owes a duty to consult and accommodate Indigenous communities, whose rights under section 35 of the *Constitution Act, 1982* are adversely affected by the impacts of climate change, when contemplating action that would increase GHG emissions and thus further contribute to global climate change. More specifically, this article has chosen to primarily focus on whether Indigenous communities in the Arctic[14] could trigger the duty to consult and accommodate in the context of climate change, as the heightened effects of climate change in the Arctic are well documented and there is arguably no greater example of the disproportionate relationship between the cause of climate change and its effects.

In fact, scientific consensus shows that the Arctic is warming at nearly three times the pace of mid-latitude regions[15] despite the fact that its inhabitants contribute very little to current GHG emission levels.[16] It is well established that the significant impacts resulting from this rapid climate change have already begun to threaten the livelihoods, food security, and individual and cultural survival of the Indigenous peoples who have inhabited the region for millennia.[17] This has prompted many, including Sheila Watt-Cloutier, an Inuk from Kuujjuaq, Nunavik (Québec) and former International Chair for the Inuit Circumpolar Council, to state that the Inuit in the Arctic are "being asked to pay the price for the unsustainable choices most of the world continues to want to maintain."[18]

---

13 Note that only Sniderman & Shedletzky, *supra* note 5 and Stevenson, *supra* note 11 analyze in detail the potential of section 35 rights in the context of climate litigation. However, Sniderman & Shedletzky's analysis of section 35 is largely focused on an infringement claim rather than a duty to consult and accommodate claim (though the latter is briefly mentioned at 13–14). As for Stevenson's article, the author offers an excellent detailed analysis as to how Canada's inaction on black carbon could trigger the duty to consult and accommodate. This article, however, will focus on whether the duty to consult and accommodate can be triggered in relation to climate change as a result of positive Crown conduct.

14 The author is using the geographic definition of the Arctic region as articulated by the Arctic Monitoring and Assessment Programme. Arctic Monitoring and Assessment Programme, "Snow, Water, Ice and Permafrost in the Arctic — Summary for Policy Makers" (2017) at 3, online (pdf): *AMAP Secretariat* <www.amap.no/documents/download/2888/inline>.

15 IPCC, *Special Report: Global Warming of 1.5ºc – Summary for Policymakers* (Geneva: IPCC, 2018) at 6, online: <www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf>.

16 For instance, in 2017, Nunavut, Yukon, and the Northwest Territories emitted a combined 2.4 megatonnes of carbon dioxide while the world emitted approximately 32,580 megatonnes of carbon dioxide (32.58 gigatonnes). See *supra* note 4 at 23. See also International Energy Association, "Global Energy and CO2 Status Report" (2019), online: <www.iea.org/reports/global-energy-co2-status-report-2019/emissions>.

17 See e.g. Inuit Tapiriit Kanatami's strategy report outlining the many climate change-related challenges faced by Inuit in Canada. Inuit Tapiriit Kanatami, "National Inuit Climate Change Strategy" (Ottawa: ITK, 2019), at 4–5, 9–10, 13–15 & 22 online: <www.itk.ca/wp-content/uploads/2019/06/ITK_Climate-Change-Strategy_English_lowres.pdf>.

18 DW English, "Climate change threatens Inuit way of life" (7 December 2015), online: YouTube <www.youtube.com/watch?v=YHjXSE0adnQ>.

This article begins by laying out the science behind climate change, followed by an overview of the impacts of climate change on Indigenous communities in the Canadian Arctic. Following an overview of the required contextual knowledge, this article then provides a summary of the current state of section 35 jurisprudence and explores the basic notions of the duty to consult and accommodate. From there, this article goes on to analyze how this duty could be triggered and practically applied in the context of the impacts of climate change on Indigenous communities in the Canadian Arctic. In short, this article concludes that the duty to consult and accommodate could be triggered in this context, though there are certainly obstacles.

Beyond the article's objective to contribute to emerging climate litigation scholarship in Canada, it also seeks to generally explore how section 35, and more specifically the duty to consult and accommodate, can be used to address systemic infringements of rights across Canada following the Supreme Court of Canada's (SCC) decision in *Mikisew Cree First Nation v Canada (Governor General in Council)*.[19] As jurisprudence to date has largely been focused on the application of the duty to consult and accommodate to specific projects and their potential direct impact on Indigenous communities, this analysis aims to study whether the duty to consult and accommodate could be used to address indirect potential infringements of section 35 rights that result from multiple actions across different levels of government throughout an extended period of time. As the barriers to decolonization are largely systemic, this analysis could prove useful in ensuring a voice for Indigenous communities in decision-making relating to a variety of subjects that indirectly infringe their rights in a systemic fashion.

## 2. CLIMATE CHANGE AND THE IMPACTS ON INDIGENOUS COMMUNITIES IN THE CANADIAN ARCTIC

As climate change continues to increase at a rate incompatible with preventing dangerous interference with the planet's climate system, scientific research and Indigenous knowledge clearly demonstrate that climate change is provoking important consequences on the Arctic, and notably on the Indigenous communities who inhabit the region. This section therefore aims to establish the factual context in which the duty to consult and accommodate will be analyzed in this article.

The Intergovernmental Panel on Climate Change (IPCC), which brings together members from 195 countries to produce policy-neutral reports on the state of scientific knowledge on climate change drawing from the peer-reviewed works of thousands of scientists throughout the globe,[20] concludes that since the pre-industrial era, a 1 °C increase in the planet's average atmospheric temperature has been observed,[21] and we are currently on a path to attain an increase of 4.8 °C by 2100.[22] This projected increase is far beyond the threshold for preventing dangerous interference with the planet's climate system, which requires at least avoiding

19 *Mikisew Cree First Nation v Canada (Governor General in Council)* 2018 SCC 40, [2018] 2 SCR 40 [*Mikisew Cree (2018)*].

20 IPCC, "Organization", online: *Intergovernmental Panel on Climate Change* <www.ipcc.ch/organization/organization.shtml>.

21 *Supra* note 15 at 6.

22 IPCC, "Climate Change 2014: Synthesis Report Summary for Policymakers" (2014) at 24, online (pdf): *IPCC* <www.ipcc.ch/pdf/assessment report/ar5/syr/AR5_SYR_FINAL_SPM.pdf>.

average warming of more than 2 °C above pre-industrial levels.[23] Though the internationally agreed upon target is 1.5 °C, the IPCC has concluded that "there is no definitive way to limit global temperature rise to 1.5 °C above pre-industrial levels."[24]

As noted by the IPCC, this change of the planet's climate is attributed to the unprecedented and sharp increase of GHGs in the atmosphere emitted by human activity "since the pre-industrial era."[25] GHGs are emitted in the course of many anthropogenic activities such as: fossil fuel-based electricity and heat production, agriculture, forestry, industrial activity reliant on fossil fuels, chemical, metallurgical and mineral transformation processes, and fossil fuel reliant transportation.[26] However, GHG emissions have a global effect, and accordingly, do not simply affect the local environment where they are emitted.[27]

Between 1990 and 2017, Canada's GHG emissions have increased by 18.9%, which also represents a 2% decrease in GHG emissions since 2005.[28] This is notably incompatible with Canada's target under the *Kyoto Protocol*, which sought to reduce Canada's GHG emissions to 6% below 1990 levels by 2012[29] as well as Canada's target under the *Copenhagen Accord*, which sought to reduce Canada's emissions by 17% below 2005 levels by 2020.[30] Under the 2015 *Paris Agreement*, Canada pledged to reduce GHG emissions by 30% below 2005 levels by 2030.[31] However, not only is Canada's current national plan to meet this pledge projected to result in a GHG emissions gap of 77 Mt,[32] but its pledge is also not even compatible

---

23 *Ibid* at 8.

24 IPCC, "Special Report on Global Warming of 1.5 °C: Frequently Asked Questions" (2018) at 6, online (pdf): *Intergovernmental Panel on Climate Change* <report.ipcc.ch/sr15/pdf/sr15_faq.pdf>.

25 *Supra* note 22 at 4.

26 See EPA, "Sources of Greenhouse Gas Emissions" (2017), online: *United States Environmental Protection Agency* <19january2017snapshot.epa.gov/ghgemissions/sources-greenhouse-gas-emissions_.html>.

27 See Environment and Climate Change Canada, "Canadian Environmental Sustainability Indicators: Global greenhouse gas emissions" (2019) at 5, online (pdf): *Environment and Climate Change Canada* <www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/global-ghg-emissions/2019/global-GHG-emissions-en.pdf>.

28 *Supra* note 4 at 5.

29 *Kyoto Protocol to the United Nations Framework on Climate Change*, 10 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) [*Kyoto Protocol*]; Commissioner of the Environment and Sustainable Development to the Parliament of Canada, "Report 1—Progress on Reducing Greenhouse Gas Emissions—Environment and Climate Change Canada" (2017), at exhibit 1.4, online: *Office of the Auditor General of Canada* <www.oag-bvg.gc.ca/internet/English/parl_cesd_201710_01_e_42489.html>.

30 United Nations Framework Convention on Climate Change, *Copenhagen Accord,* COP, 2009, 15 Decision 2/CP.15, UN Doc FCCC/CP/2009/11/Add.1 [*Copenhagen Accord*]; Commissioner of the Environment and Sustainable Development to the Parliament of Canada, *ibid*.

31 Environment and Climate Change Canada, "Progress Towards Canada's Greenhouse Gas Emissions Reduction Target: Canadian Environmental Sustainability Indicators" (2019) at 6, online (pdf): *ECCC* <www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/progress-towards-canada-greenhouse-gas-reduction-target/2020/progress-ghg-emissions-reduction-target.pdf>.

32 *Ibid* at 7.

with limiting climate change to a 2 °C increase in the average global temperature above pre-industrial levels.[33]

Yet, there is arguably no place more vulnerable to the harms of climate change than the Canadian Arctic, where change is occurring at nearly three times the rate as compared to mid-latitude regions.[34] In fact, studies have recently documented months in the Arctic where the average temperature was 5 °C to 6 °C warmer than the average temperature for the region between 1981–2010, as well as extreme warm periods in some areas that are substantially increasing in length.[35] Scientists have noted a 65% decrease in sea ice thickness in the central Arctic Ocean between 1975–2012, a decline of days with sea ice cover at a rate of 10 to 20 days per decade between 1979–2013, a decline of days with snow cover at a rate of 2 to 4 days per decade, and about 50% less snow than values observed before 2000.[36] In addition, studies show that permafrost warming continues at an alarming rate, as near-surface permafrost in the High Arctic has "warmed by more than 0.5 °C since 2007–2009."[37] The melting of land-based ice has accelerated in recent decades, as areas such as the Queen Elizabeth Islands (Canada's northernmost cluster of Arctic islands) have seen the "surface melt on its ice caps and glaciers accelerate by 900 percent over the course of a decade."[38] As such, the accelerated melting of land-based ice has increased the volume of freshwater in the upper layer of the Arctic Ocean by more than 11% (equal to the "combined annual discharge of the Amazon and Ganges rivers").[39] In total, these changes have had a serious effect on the Arctic's ecosystem, notably affecting biodiversity, changing the ranges of both Arctic marine and terrestrial species, altering animal diets, modifying predator-prey relationships, modifying animal habitats, and changing precipitation patterns.[40]

What is important to note is that these studies reflect the climate change impacts already observed in the Arctic. Scientists expect that these trends will not only continue but will also accelerate as it is expected that autumn and winter temperatures will increase to 4 °C to 5°C above late 20th century average temperatures before 2050.[41]

---

33 Climate Analytics & New Climate Institute, "Canada" (2019), online: *Climate Action Tracker* < climateactiontracker.org/countries/canada/>.

34 *Supra* note 15 at 6.

35 *Supra* note 14 at 3.

36 *Ibid* at 4.

37 *Ibid*.

38 Eric Sorensen, "Canada's Arctic glaciers now a major contributor to sea-level rise" (15 February 2017), online: *Global News* <globalnews.ca/news/3252577/canada-glaciers-sea-level-rise/>.

39 *Supra* note 14 at 4–5.

40 *Ibid*.

41 *Ibid*. Note that this is in relation to the late 20th century and not pre-industrial levels. A major factor leading to the acceleration of warming in the Arctic is the loss of the sea ice. As ice is white and very reflective, in contrast to the dark ocean surface, it plays a major role in keeping the planet cool by reflecting sunlight back into space. For instance, the albedo (the measure of how much light a surface reflects without being absorbed) of ice is 0.5-0.7 while the albedo of the ocean is approximately 0.06. This means that sea ice reflects 50-70% of light while the ocean only reflects 6%. The rest is absorbed. As sea ice in the Arctic continues to melt and ice-cover periods continue to become shorter, sunlight is increasingly being absorbed by the ocean rather than reflected into space by the ice. The warming of the ocean waters creates a vicious cycle that increases ice melt thereby accelerating the warming process. This

The impact of these changes is evident when hearing the testimony of several Indigenous elders and community leaders in the Canadian Arctic as to how their ancestral lands and waters have been affected. The Nunavut Climate Change Centre, which has been conducting interviews with Inuit community elders and leaders in Nunavut, notes several recurring observations relating to climate change found in *Qaujimajatuqangit* (system of Inuit knowledge and social values), such as:

> Sea ice conditions have changed; the ice is thinner, freezes up later and melts earlier. Similar observations have been made for lake ice. Aniuvat (permanent snow patches) are decreasing in size. There is more rain, and the snow and ice form later in the year and melt earlier. The weather is unpredictable. It changes faster than it used to with storms blowing up unexpectedly. Water levels have gone down, making it hard or impossible to travel by boat in certain areas. Temperatures are warmer throughout the year. New species have been observed. The land has been observed to be drier, and the stability of the permafrost is changing. The length and timing of the traditional Inuit seasons have changed. [42]

Accordingly, as climate change has already brought on significant changes to the lands and waters of Indigenous communities in the Arctic, the testimony of these community members demonstrate that these changes have had an adverse effect on their customs, practices, and traditions. For instance, Hugh Tulurialik, an Inuk from Baker Lake, Nunavut, notes that "now you go down there to hunt looking for healthy caribou and they are not as healthy as they used to be."[43] Jacapoosie Pete from Iqaluit states that "the month of April is one where [he] can cite an example of the changes, perhaps by many other Inuit. The month is generally used for the Toonik Time spring festivities."[44] Moreover, Mosesee Tiglik from Iqaluit notes "most of the areas that [they] use for [their] travel are not as usable and due to the lack of snow, they are not really navigable. It has really affected some of the hunters as the lack of snow is hindering the harvesters."[45] An elder from Umiujaq, Québec, also states that "the saltwater is a lot warmer and the fish go deeper" making fishing more difficult and less abounding.[46] Furthermore, a gendered analysis of climate change impacts in the Arctic reveals that practices traditionally

---

is a positive feedback loop known as the ice albedo feedback and has been identified by NASA as a climate tipping point. See National Aeronautics and Space Administration," The Study of Earth as an Integrated System" (26 June 2019), online: *Global Climate Change* <climate.nasa.gov/nasa_science/science/>.

42 Nunavut Climate Change Centre, "Voices From the Land", online: < climatechangenunavut.ca/en/knowledge/voices-land>.

43 See Nunavut Climate Change Centre, "Hugh Tulurialik" (2019), online: <climatechangenunavut.ca/en/iq/hugh-tulurialik>.

44 See Nunavut Climate Change Centre, "Jacapoosie Pete" (2019), online: <www.climatechangenunavut.ca/en/iq/jacapoosie-pete>; Toonik Tyme, "About" (2019), online: Toonik Tyme <www.tooniktyme.ca/about> (note that Toonik Tyme is an annual Inuit celebration of the return of spring. It is often celebrated with traditional games, feasts, and music).

45 See Nunavut Climate Change Centre, "Mosesee Tiglik" (2019), online: Nunavut Climate Change Centre <www.climatechangenunavut.ca/en/iq/mosesee-tiglik>.

46 See AFP News Agency, "Climate Change: Inuit culture on thin ice" (6 October 2015), online: YouTube <www.youtube.com/watch?v=eShMq6_aXIM>.

exercised by Inuit women, such as berry picking and sealskin sewing, are being threatened by climate change as well as the general relationship between women and their lands.[47]

In sum, it is clear via scientific research as well as Indigenous knowledge that climate change has fundamentally altered lands and waters occupied by Indigenous Arctic communities for thousands of years.[48] Testimony from Indigenous communities in the Arctic specifically demonstrates that climate change has negatively impacted distinctive and historical customs, practices and traditions such as hunting, fishing, whaling, trapping and gathering, cultural practices and ceremonies, and distinctive transportation practises. The impacts of climate change have also denied Indigenous communities their preferred means of exercising these activities and have imposed obstacles when doing so, as many of these activities have become dangerous (and even impossible) given the drastic impacts of climate change in the Arctic.[49] However, the impacts of climate change on Indigenous communities must be understood beyond the environmental consequences on their lands and waters and on the exercise of their customs, practices, and traditions. The impacts, noted in the testimony and research cited above, have serious documented consequences on mental health, food security, financial security, and physical health, as well as the broader ability for communities to self-determine.[50] This is to be expected when the consequences of climate change infringe the close relationship these communities have with the environment that forms the basis of their distinctive identity and has provided for their physical and spiritual subsistence for millennia. Moreover, as the truth of Canada's colonial history continues to be exposed in an attempt to achieve truth and reconciliation,[51] it is clear that the social, economic, and political impact of colonialism has led

---

47 See Anna Bunce et al, "Vulnerability and adaptive capacity of Inuit women to climate change: A case study from Iqaluit, Nunavut" (2016) 83:3 Natural Hazards 1419 (in this article, the authors interviewed 42 Inuit women from Iqaluit regarding how climate change was affecting the exercise of their customs, practices, and traditions).

48 See generally Nunavut Climate Change Centre, *supra* note 42. See also Arctic Monitoring and Assessment Program, *supra* note 3; Inuit Tapiriit Kanatami, "Inuit History and Heritage" (2016), online (pdf): *Inuit Tapiriit Kanatami* <www.itk.ca/wp-content/uploads/2016/07/5000YearHeritage_0.pdf>.

49 See generally *supra* note 42.

50 See David Fawcett et al, "Inuit adaptability to changing environmental conditions over an 11-year period in Ulukhaktok, Northwest Territories" (2018) 54:1 Polar Record 119; see also Anna Bunce et al, *supra* note 47 at 1431; See Maude C Beaumier, James Ford & Shirley Tagalik, "The food security of Inuit women in Arviat, Nunavut: The role of socio-economic factors and climate change" (2015) 51:5 Polar Record 550 at 556; Joanna Petrasek MacDonald et al, "Protective factors for mental health and well-being in a changing climate: Perspectives from Inuit youth in Nunatsiavut, Labrador" (2015) 141 Soc Science & Medicine 133.

51 See generally Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future" (TRC, 2015), online (pdf): *TRC* <nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf> (for a better understanding of Canada's colonial history and its impacts today); National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place" (2019), online: < mmiwg-ffada.ca/final-report/>; Emma Battell Lowman & Adam Baker, *Settler: identity and colonialism in 21st century Canada* (Halifax: Fernwood Publishing, 2015).

to the disproportionate financial insecurity,[52] food insecurity,[53] and health challenges[54] faced by Indigenous peoples in Canada. The impacts of climate change will only exacerbate these inequities resulting from centuries of colonialism and marginalization.[55]

## 3. SECTION 35 AND THE DUTY TO CONSULT AND ACCOMMODATE

Before analyzing how the duty to consult and accommodate can be triggered in the context canvassed above, it is essential to conduct a brief overview of the law concerning the constitutional rights "recognized and affirmed" at section 35 of the *Constitution Act, 1982* and how the duty to consult and accommodate seeks to protect these rights when they are at risk of being adversely affected by the Crown.

### 3.1. Introduction to Section 35

Subsection 35(1) of the *Constitution Act, 1982* provides that "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."[56] As such, section 35 does not create new rights[57] but rather elevates existing inherent Aboriginal[58] rights recognized in common law by giving them "constitutional status."[59] Therefore, all rights that have not been extinguished prior to receiving constitutional status on April 17, 1982, can no longer be "unilaterally abrogated by the government," and can no longer be infringed except for "justifiable reasons, in the pursuit of substantial and compelling public objectives."[60]

---

52 See Jeffrey J Schiffer, "Understanding and addressing intergenerational trauma" (2016) online: *Here to Help* <www.heretohelp.bc.ca/visions/indigenous-people-vol11/why-aboriginal-peoples-cant-just-get-over-it>; Pamela D Palmater, "Stretched Beyond Human Limits: Death By Poverty in First Nations" (2011) 66:1 Can Rev Social Policy 112.

53 See Beaumier, Ford & Tagalik, *supra* note 50 at 554–556; Karlah Rae Rudolph & Stephanie M McLachlan, "Seeking Indigenous food sovereignty: origins of and responses to the food crisis in northern Manitoba, Canada" (2013) 18:9 Intl J Justice & Sustainability 1079 at 1080–1083.

54 See Mary Mcnarlly & Debbie Martin, "First Nations, Inuit and Métis health: Considerations for Canadian health leaders in the wake of the Truth and Reconciliation Commission of Canada report" (2017) 30:2 Healthcare Management Forum 117; Allison Crawford, "The trauma experienced by generations past having an effect in their descendants: Narrative and historical trauma among Inuit in Nunavut, Canada" (2013) 51:3 Transcultural Psychiatry 339.

55 See also Ella Belfer, James D Ford, & Michelle Maillet, "Representation of Indigenous peoples in climate change reporting" (2017) 145 Climatic Change 57 at 62–63 & 66–67.

56 *Supra* note 12 at s 35(1).

57 See *R v Van der Peet,* [1996] 2 SCR 507 at paras 26–43, 23 BCLR (3d) 1 [*Van der Peet*].

58 The word "Aboriginal" is used in this article when referring to rights at section 35 of the *Constitution Act, 1982*. This is the legal term used in the Constitution and subsequent jurisprudence when referring to these rights. The term "Indigenous" is used in this article when referring globally to First Nations, Inuit and Métis peoples and communities in Canada. Where possible, the author has attempted to use precise terminology when discussing specific communities rather than using broader political terminology.

59 *Mitchell v Minister of National Revenue,* 2001 SCC 33 at para 11, [2001] 1 SCR 911 [*Mitchell*].

60 *Ibid* at para 11; see also *R v Gladstone,* [1996] 2 SCR 723 at paras 71–73, 23 BCLR (3d) 155; *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at para 161, 220 NR 161 [*Delgamuukw*].

Subsection 35(1) protects both "Aboriginal and treaty rights."[61] First, treaty rights are those provided for by treaties and agreements between "Aboriginal peoples" (defined by subsection 35(2) as including First Nations, Inuit, and Métis peoples in Canada) and the Crown.[62] Pursuant to subsection 35(3), treaty rights include "rights that now exist by way of land claims agreements or may be so acquired."[63] Treaties are legal mechanisms that formally outline the relationship between specific Indigenous communities and the Crown. They are nation-to-nation partnerships that include mutual legal obligations and benefits.[64] Depending on the content of a particular treaty, the Indigenous community in question could hold a number of treaty rights, including rights to certain lands and waters,[65] rights to hunt,[66] fish,[67] trap and gather in specific areas, and even recognition of inherent rights to govern.[68] Nevertheless, it is important to note that these rights are context specific and therefore vary from one treaty to the next.[69]

Second, Aboriginal rights protected at subsection 35(1) are rights held by "[A]boriginal peoples" that relate to elements that are considered to be "integral to the distinctive culture of the [A]boriginal group claiming the right."[70] The content of these rights varies along a spectrum based on an Indigenous community's degree of connection to particular lands and waters.[71] As such, on one end, the strongest connection to lands or waters will lead to a right known as Aboriginal title, which conveys a right to "exclusive use and occupation of [land or water] held pursuant to that title for a variety of purposes."[72] On the other hand, a weaker connection to particular lands and waters will lead to an activity-based right where

---

61 *Supra* note 12 at s 35(1).

62 See generally "The Crown in Canada" (3 January 2020), online: *Canadian Heritage* <www.canada.ca/en/canadian-heritage/services/crown-canada.html> (for more information regarding the Crown in Canada).

63 *Supra* note 12 at s 35(3).

64 Thomas Isaac, *Aboriginal Law,* 5ed (Toronto: Thomson Reuters, 2016) at 110; John Borrows, "Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada" in Peter Oliver, Patrick Macklem, & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 11 & 12.

65 *Brokenhead Ojibway Nation v Canada (Attorney General),* 2009 FC 484 at paras 1–14, 44 CELR (3d) 1.

66 See *R v Noel,* [1995] 4 CNLR 78 at 10–14, [1996] NWTR 68.

67 See *R v Marshall*, [1999] 3 SCR 456 at paras 53-56, 246 NR 83.

68 For instance, see the Tlicho Land Claims and Self-Government Agreement, a modern treaty that includes recognition of governance rights (*Tlicho Land Claims and Self-Government Agreement*, SC 2005, c 1). See also Crown-Indigenous Relations and Northern Affairs Canada, "Self-government" (2019), online: *CIRNAC* <www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314> (in this latter source, it is noted the following: "Canada recognizes that Indigenous peoples have an inherent right of self-government guaranteed in section 35 of the *Constitution Act, 1982*").

69 Thomas Isaac, *supra* note 64 at 124.

70 *Van der Peet, supra* note 57 at para 46.

71 *Delgamuukw, supra* note 60 at para 138 (it is important to note that some Indigenous groups challenge the understanding of section 35 rights based on connection to lands and waters. This is particularly true in cases where historic communities were distinctively mobile and were not tied to specific lands or waters).

72 *Ibid* at para 117. See generally *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 at paras 69–76, [2014] 2 SCR 257 [*Tsilhqot'in Nation*] (for an overview of the nature of Aboriginal title and what it confers).

Indigenous communities in question possess a recognized right to exercise a certain custom, practice, or tradition over a specific area.[73] These activity-based Aboriginal rights have included rights to hunt,[74] fish,[75] trap and gather, as well as broader rights to self-govern.[76] Moreover, Aboriginal rights have been found to protect the historically preferred means for exercising these activities[77] as well as accessory rights such as the use of an incidental cabin or firearm.[78] However, it is important to note that these rights are not held individually but are rather held by an Indigenous community as a whole.[79] Furthermore, they are context-specific and depend on the traditional and distinctive practices of the Indigenous community in question.[80]

Nevertheless, despite the constitutional status of these rights, the SCC has found that they can be infringed by the Crown if the infringement is justified by a two-part test set out in *Sparrow.* As per the *Sparrow* test, the Crown can justify a *prima facie* infringement if it can point to a "valid legislative objective"[81] and demonstrate that the infringement is consistent with the "honour of the Crown in dealings with [A]boriginal peoples."[82]

### 3.2. The Duty to Consult and Accommodate

The duty to consult and, where appropriate, accommodate, emanates from the principle of the honour of the Crown; a principle requiring the Crown to act honourably in "all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties" in order to achieve "the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown."[83]

Originally, the duty to consult was first discussed in the context of justifying an infringement of an existing Aboriginal or treaty right, as seen in *Sparrow* and *Badger*.[84] However, with the "aim

---

73 *Delgamuukw, supra* note 60 at para 138.

74 See e.g. *R v Powley,* 2003 SCC 43 at paras 19–20 & 53, [2003] 2 SCR 207.

75 See e.g. *R v Adams,* [1996] 3 SCR 101 at paras 25 & 67, 202 NR 89; *R v Nikal,* [1996] 1 SCR 1013 at para XXV, 196 NR 1.

76 See Justice Canada, "Principles respecting the Government of Canada's relationship with Indigenous peoples" (2018), online: <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>, which states that "this principle affirms the inherent right of self-government as an existing Aboriginal right within section 35." This has also been assumed (but not confirmed) by the SCC in *R v Pamajewon,* [1996] 2 SCR 821 at para 24, 27 OR (3d) 95.

77 See *R v Sparrow,* [1990] 1 SCR 1075 at 1112, 111 NR 241 [*Sparrow*].

78 *R v Côté,* [1996] 3 SCR 139 at paras 56–57 & 82–83, 202 NR 161 [*Côté*]; *R v Sundown,* [1999] 1 SCR 393, 236 NR 251.

79 *Van der Peet, supra* note 57 at para 274; *Tsilhqot'in Nation, supra* note 72 at para 74.

80 *Van der Peet, supra* note 57 at paras 55–59.

81 *Sparrow, supra* note 77 at 1114.

82 *Ibid.*

83 *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 17, [2004] 3 SCR 511 [*Haida Nation*] citing *Delgamuukw*, *supra* note 60 at para 186 quoting *Van der Peet, supra* note 57 at para 31.

84 See *Sparrow, supra* note 77 at 1119; *Delgamuukw, supra* note 60 at para 168; *R v Badger*, [1996] 1 SCR 771 at para 97, 195 NR 1.

of reconciliation at the heart of Crown-Aboriginal relations,"[85] the SCC confirmed in *Haida Nation* that the Crown has a duty to consult and, where appropriate accommodate, 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."[86] In other words, the section 35 right need not be proven to trigger the duty to consult and accommodate. Instead, the Crown must: (1) have actual or constructive knowledge of a recognized or potential claimed right; (2) contemplate conduct, and; (3) the Crown conduct must have the potential to adversely affect a potential or claimed Aboriginal right or treaty right.[87]

With regard to the first element, as noted in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council,*[88] the Crown is not required to have "actual knowledge" of a recognized or claimed right, but rather "constructive knowledge."[89] This points to a low-threshold, as "constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated."[90] In these cases, a claim must simply be "credible" and must be asserted by the Indigenous community in question to satisfy this first element.

As for the second element, Crown "conduct" has been found to not only include government exercise of statutory authority or government decisions and actions "with an immediate impact on lands and resources," but also to include strategic high-level government decisions[91] such as establishing a review process for a pipeline,[92] the act of transferring tree licences that could lead to deforestation,[93] or the approval of a multi-year forest management plan for a large area.[94] However, since *Mikisew Cree (2018),* the notion of the Crown regarding the duty to consult and accommodate has been restricted to mean the Crown when it acts in its executive capacity or when actions are taken on behalf of its executive.[95] As such, the SCC concluded that the duty to consult and accommodate is not applicable to the law-making process. Nevertheless, the concurring reasons by Justice Karakatsanis (signed onto by Chief Justice Wagner and Justice Gascon ) confirm that enacting "subordinate legislation," such as rules and regulations, is considered to be Crown conduct capable of triggering the duty to consult and accommodate, given that "subordinate legislation" inherently requires Parliament's express authority for the executive to enact, thus not infringing the principles of parliamentary sovereignty, the separation of powers, and parliamentary privilege.[96]

---

85 *Haida Nation, supra* note 83 at para 14.

86 *Ibid* at para 35.

87 *Ibid*.

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

89 *Ibid* at para 40.

90 *Ibid*.

91 *Ibid* at para 44.

92 *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354 at paras 1–6, 303 FTR 106.

93 See *Haida Nation, supra* note 83 at paras 1–11.

94 *Klahoose First Nation v Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 (CanLII) at paras 9–16 & 60–70.

95 *Supra* note 19 at para 50.

96 *Ibid* at para 51.

With regard to the third element, the duty to consult and accommodate is triggered by potential adverse effects.[97] The courts have noted that the "adverse effect" must not be "speculative"[98] nor an "underlying or continuing breach."[99] Instead, the duty to consult and accommodate is triggered when there is an adverse effect on the future exercise of a recognized or potential section 35 right. As for the word "might" articulated by the SCC in *Haida Nation*,[100] the courts have found that this results in a low causation threshold. Nonetheless, there must be at least some degree of connection between the Crown conduct at hand and the adverse effect claimed.[101] The Federal Court of Appeal has noted that "an impact that is, at best, indirect, that may or may not happen at all (such that we cannot estimate any sort of probability), and that can be fully addressed later is one that falls on the speculative side of the line, the side that does not trigger the duty to consult."[102]

Finally, though this article is focused on whether the duty to consult and accommodate can be triggered in the context of climate change, rather than on the scope of the duty should it be triggered, it is nevertheless important to note that once triggered, the content of the duty to consult and accommodate is based on the circumstances at hand. As the SCC has pointed out in *Rio Tinto,* the duty to consult and accommodate exists on a spectrum as "the richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right."[103]

## 4. TRIGGERING THE DUTY TO CONSULT AND ACCOMMODATE IN THE CONTEXT OF CLIMATE CHANGE IN THE ARCTIC

Applying the three-part test to trigger the duty to consult and accommodate, as laid out in *Haida Nation,* this section will examine whether the impacts of climate change on Indigenous communities in the Arctic can trigger the duty to consult and accommodate. As the subsequent analysis will demonstrate, this is largely dependent on identifying Crown "conduct" capable of triggering the duty. Finally, this section will discuss some of the practical concerns in applying the duty to consult and accommodate in the context of climate change and propose certain solutions to address these issues.

Although this article focuses on how certain Crown actions could potentially trigger the duty to consult and accommodate, it is important to note that in her article titled "The Duty to Consult the Inuit in Canada's Black Carbon Policy Inaction",[104] Flora da Silva Côrtes Stevenson analyses whether Crown inaction on black carbon emissions in Canada (i.e. the absence of a comprehensive strategy to reduce black carbon emissions) could trigger this duty. Although

---

97 See *Haida Nation, supra* note 83 at para 35.

98 *Rio Tinto, supra* note 88 at para 46.

99 *Ibid* at para 48.

100 *Haida Nation, supra* note 83 at para 35.

101 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 55, [2005] 3 SCR 388 [*Mikisew (2005)*];

102 *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada),* 2015 FCA 4 at para 102, [2015] FCJ No 4 (QL) [*Hupacasath*].

103 *Rio Tinto, supra* note 88 at para 33.

104 Stevenson, *supra* note 11.

Stevenson certainly puts forward a compelling argument, this article has chosen to focus on whether active conduct by the Crown could trigger the duty to consult and accommodate in the context of climate change, as courts in Canada have generally been reticent to recognize positive constitutional obligations.[105]

### 4.1. Actual or Constructive Knowledge of a Recognized or Potential Claimed Right

The first step in triggering the duty to consult and accommodate is identifying a recognized or potential claimed section 35 right, of which the Crown has actual or constructive knowledge. In the case of climate change in the Arctic, it is clear that the impacts of climate change affect recognized and potential section 35 rights (both treaty and Aboriginal). These include rights to exclusively use and occupy ancestral lands and waters (Aboriginal title), several activity-based rights such as hunting, fishing, trapping and gathering (including the historically preferred means for exercising these activities as well as accessory rights), and broader self-governance rights (notably governance rights linked to environmental stewardship).

As a matter of fact, the testimony noted above in section 2 of this article largely consists of people belonging to communities who are parties to constitutionally protected agreements such as the Nunavut Land Claims Agreement, the James Bay and Northern Québec Agreement, and the Northeastern Québec Agreement.[106] Moreover, other treaties and modern agreements involving Arctic communities in Canada include Treaty No. 11, the Inuvialuit Final Agreement/Western Arctic Claim, the Labrador Inuit Claims Agreement, the Nunavik Land Claims Agreement, the Tlicho Agreement, the Sahtu Dene and Métis Comprehensive Land Claim, the Gwich'in Comprehensive Land Claim Agreement, and the First Nation of Nacho Nyak Dun Final Agreement, to name a few.[107] These treaties and agreements, which the Crown has actual knowledge of, offer a variety of different section 35 treaty rights to numerous Indigenous communities across the Arctic. What is more, there are numerous ongoing Aboriginal rights claims in the Arctic involving a variety of potential land and activity-

---

105 See e.g. the jurisprudential overview in Lawrence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23:1 Constitutional Forum 39; and the discussion on the difficulty of recognizing positive constitutional obligations on government, particularly in the context of section 7 and section 15 of the Charter in Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights Under the Charter: Closing the Divide to Advance Equality" 30:1 Windsor Rev Legal & Soc (2011) 37 at 42–46. See also *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at paras 81–83, 4 SCR 429; *Baier v Alberta*, 2007 SCC 31 at para 20, 2 SCR 673. See e.g. Martha Jackman & Bruce Porter, "Social and Economic Rights" in Oliver, Macklem & Des Rosiers, *supra* note 64 (moreover, courts might have practical concerns about requiring the Crown to consult regarding their failure to act. Nevertheless, many have made persuasive arguments concerning the recognition of positive constitutional rights in Canada and have mounted rigorous critiques of the negative-right-positive-right dichotomy).

106 Crown-Indigenous Relations and Northern Affairs Canada, "Modern Treaties and Self-Government Agreements" (14 May 2019), online (pdf): *Aboriginal Affairs and Northern Development Canada* <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_pdf_modrn-treaty_1383144351646_eng.pdf>.

107 *Ibid*; Indigenous and Northern Affairs Canada, "Pre-1975 Treaties" (July 2016), online: *Aboriginal Affairs and Northern Development Canada* <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_treaties_th-ht_canada_1371839430039_eng.pdf>.

based rights, of which the Crown has actual or constructive knowledge.[108] In sum, the first element of the test to trigger the duty to consult and accommodate is easily met in the case of climate change in the Arctic.

### 4.2. Crown Conduct That Potentially Has Adverse Effects

As climate change is the result of millions of actions, big and small, throughout the globe, there is no one specific action or decision to which we can assign exclusive responsibility. Further, as the effects of GHG emissions on climate change are rarely, if ever, localized but rather occur on a global scale, there is a spatial distance between a certain action or decision and its effect of climate change. This spatial distance is further complicated by a temporal disconnect given the fact that many GHG emissions do not have an impact on climate change until several years later.[109] As such, for those looking to mount climate change based cases in any circumstance, identifying a specific action or decision to challenge is a significant obstacle as parties can "escape responsibility […] by pointing to the limited impact of that one decision."[110] This is certainly a formidable challenge to triggering a climate change based duty to consult and accommodate.

Indeed, to date, the relatively new body of duty to consult and accommodate jurisprudence has mostly been concerned with Crown conduct that has a more direct and immediate impact on recognized or potential section 35 rights. For instance, it is much easier to identify Crown conduct with potential adverse effects in cases where a pipeline crosses a lake where Indigenous communities claim, or hold recognized, section 35 rights than in the case of a liquefied natural gas operation emitting GHGs, which contributes to global climate change, adversely affecting Indigenous communities thousands of kilometres away potentially decades later. Nevertheless, as noted in the *Rio Tinto* decision penned by former Chief Justice McLachlin, Crown conduct that engages a recognized or potential Aboriginal right must be interpreted in accordance "with the generous, purposive approach that must be brought to the duty to consult."[111]

With these considerations in mind, this article proposes three potential ways to satisfy the Crown "conduct" prong of the *Haida Nation* test, namely: (i) a single contemplated action/decision that will increase GHG emissions; (ii) a constellation of decisions/actions that will increase GHG emissions and; (iii) regulations or executive policies that will increase GHG emissions. Though it is certainly possible to imagine a climate change case based on Crown

---

108 For instance, the Liard First Nation and the Ross River Dena Council in Yukon. See Philippe Morin, "Kaska Dena Council asking federal gov't for $1.5B land claim payout" (15 June 2017), online: *CBC News* <www.cbc.ca/news/canada/north/kaska-dena-council-land-claim-1.4160268>.

109 Katharine L Ricke & Ken Caldeira, "Maximum warming occurs about one decade after a carbon dioxide emission" (2014) 9 Environmental Research Letters 1 (note that the authors conclude that: "While the maximum warming effect of a CO2 emission may manifest itself in only one decade, other impact-relevant effects, such as sea-level rise, will quite clearly not reach their maximum until after the first century" at 6).

110 Chalifour & Earle, *supra* note 5 at 730.

111 *Rio Tinto, supra* note 88 at para 43. See also discussion regarding the need for a generous interpretation of the honour of the Crown in *Haida Nation, supra* note 83 at para 17 and *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 68-72, [2013] 1 SCR 623.

inaction as Canada has consistently failed to meet its GHG emissions reduction targets,[112] similar to the approach suggested by Stevenson concerning black carbon emissions,[113] this article chooses to focus on three potential challenges based on positive Crown conduct.

#### *4.2.1. A Single Contemplated Action or Decision That Will Increase GHG Emissions*

First, an Indigenous community could point to a single contemplated Crown action or decision that will increase GHG emissions. For instance, this could include the approval of a liquefied natural gas operation that will emit a considerable amount of GHG emissions, the approval of a major pipeline by the Governor in Council, the purchase of the Trans Mountain pipeline by the federal order of government,[114] or even a decision that would lead to the destruction of a carbon sink, such as a decision to clear-cut an old-growth forest or a decision to approve the commercial development of a wetland.

By targeting a single action or decision, claimants would be taking a conventional approach since the duty to consult and accommodate, thus far, has only successfully been applied in cases that target individual Crown actions or decisions.[115] In doing so, the Indigenous community in question would be shaping their climate change based duty to consult and accommodate challenge in a way that courts are familiar with and in a way that has ample precedent to support.

However, challenging a specific action or decision that will increase GHG emissions poses several obstacles. This is primarily because no single Crown action or decision causes climate change. Instead, it is the result of millions of actions and decisions worldwide, spread out across multiple decades. Therefore, to look at a specific Crown action or decision in isolation ignores the greater picture. As such, the conduct's impact on climate change, considered in isolation, could be considered negligible or so vague that it would risk being found to fall "on the speculative side of the line"[116] as there would be no "obvious and immediate physical impact."[117]

The difficulty in triggering the duty to consult and accommodate with regard to the impacts of climate change on Indigenous communities is only heightened by the fact that the

---

112 Climate Action Tracker, *supra* note 33. As noted above, Canada has failed to meet its target under the *Kyoto Protocol*, which required a 6% emissions reduction below 1990 levels by 2012 and has failed to meet its target under the *Copenhagen Accord*, which mandated a 17% emissions reduction below 2005 levels by 2020. In fact, Canada's GHG emissions have increased by 18.9% between 1990 and 2017. See also Chalifour & Earle, *supra* note 5 at 704-710, which outlines in great detail Canada's history in dealing with climate change.

113 Stevenson, *supra* note 11.

114 Canada Energy Regulator, "Trans Mountain Share and Unit Purchase Agreement" (8 January 2020), online: *Canada Energy Regulator* <www.cer-rec.gc.ca/pplctnflng/mjrpp/trnsmntnxpnsn/prchssnpsht-eng.html>.

115 See e.g. *Haida Nation, supra* note 83 at paras 1–11; *Mikisew (2005)*, *supra* note 101 at para 8; *Clyde River (Hamlet) v Petroleum Geo-Services Inc,* 2017 SCC 40 at paras 7–15 & 27, [2017] 1 SCR 1069 [*Clyde River*].

116 *Hupacasath, supra* note 102 at para 102.

117 *Buffalo River Dene Nation v Saskatchewan (Energy and Resources),* 2015 SKCA 31 at para 83.

SCC has noted multiple times that the duty to consult and accommodate "is not a vehicle to address historical grievances"[118] and is "not triggered by historical impacts."[119] Instead, the SCC notes that the "subject of the consultation is the impact on the claimed rights of the current decision under consideration."[120] To put another way, in these statements, the SCC proposes to look at each drop of water according to its individual impact regardless of whether it is the first drop in a glass or the one that makes the glass overflow.

This no doubt poses a significant obstacle to a duty to consult and accommodate challenge based on the impacts of climate change in the Arctic. In order to fully understand the impact of the GHG emissions generated from one Crown action or decision on the section 35 rights of Arctic Indigenous communities in Canada, a court must consider the already alarming state of the Arctic due to the impacts of climate change and the actions and decisions that have led to this situation. Consequently, without taking into account the cumulative effects of GHG emissions and the current state of climate change in the Arctic, the impacts of a single Crown action or decision (such as a pipeline approval) may be viewed as being negligible and speculative and thus not able to trigger the duty to consult and accommodate.

That being said, the courts have stated multiple times that context matters when considering the impact of a Crown action or decision. Indeed, in the *Chippewas of the Thames* decision, the SCC stated that "it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context."[121] The Court went on to note that "cumulative effects"[122] and the "historical context"[123] must be taken into account. Citing the British Columbia Court of Appeal in *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*,[124] the SCC reconciled its seemingly contrasting statements by noting that this is not an attempt to redress "past wrongs." Rather, it is simply recognizing "an existing state of affairs and to address the consequences of what may result from" a Crown action or decision.[125] This has also been confirmed and further elaborated by the courts in two recent cases. In *Tsleil-Waututh Nation v Canada (Attorney General),* the Federal Court of Appeal made clear that when "consulting on a project's potential impacts the Crown must consider existing limitations on Indigenous rights. Therefore, the cumulative effects and historical context may inform the scope of the duty to consult."[126] Moreover, in *West Moberly First Nations v British Columbia* (2018), the British Columbia Supreme Court specified that cumulative effects are

---

118 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc,* 2017 SCC 41 at para 41, [2017] 1 SCR 1099 [*Chippewas of the Thames*].

119 *Ibid*.

120 *Rio Tinto, supra* note 88 at para 53.

121 *Chippewas of the Thames, supra* note 118 at para 42.

122 *Ibid*.

123 *Ibid*.

124 *West Moberly First Nations v British Columbia (Chief Inspector of Mines),* 2011 BCCA 247 at paras 117–119 [*West Moberly First Nations 2011*].

125 *Ibid* at para 119; *Chippewas of the Thames*, *supra* note 118 at para 42.

126 *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153 at para 505, [2019] 2 FCR 3 [*Tsleil-Waututh Nation*].

especially relevant in relation to site-specific rights with a special status for Indigenous groups, such as sacred sites.[127]

Even if the courts deem the historical context and the impact of cumulative effects relating to climate change in the Arctic irrelevant, an Indigenous community could potentially bolster the weight of an action or decision beyond the "negligible" threshold by arguing for a comprehensive consideration of indirect GHG emissions. This includes both the upstream and downstream GHG emissions of a Crown conduct (also known as life-cycle emissions) as well as its path dependency consequences.

The inclusion of the upstream and downstream GHG emissions[128] associated with an action or decision may be enough to overcome a court's concerns as to the "speculative" or "negligible" impact of a Crown action or decision on climate change in the Arctic. The addition of these indirect GHG emissions to the analysis broadens the understanding of the impact of an action or decision on global climate change. In fact, those who advocate in favour of taking this comprehensive approach to assessing GHG emissions, which has recently been adopted by the federal order of government in relation to inter-provincial pipelines,[129] argue that this allows for a more comprehensive understanding of the impact of a project on climate change.[130] For instance, a consideration of upstream and downstream GHG emissions in the context of pipelines must include the GHG emissions "that will be generated from the exploration, extraction, production, and processing of fossil fuels that will be transported through the pipeline" as well as the GHG emissions that "result when the fossil fuel that travels through a pipeline is ultimately combusted by the consumer."[131] Applying this approach to the Trans Mountain pipeline project, for example, which would transport 890,000 barrels of crude oil per day,[132] could provide a corpus of GHG emissions with a sufficient impact on climate change in the Canadian Arctic to trigger a duty to consult and accommodate the Indigenous communities who inhabit the region.

Similarly, an Indigenous community in the Arctic could also seek to overcome concerns related to the "negligible" impact of one action or decision that will increase GHG emissions by pointing to the future consequences of a current action or decision resulting from the path dependency it creates.[133] It is well established that certain important actions or decisions make the economy and society more dependent on GHG emitting industries and energy

---

127 *West Moberly First Nations v British Columbia*, 2018 BCSC 1835 at para 257.

128 Upstream emissions are those that are generated from operation and production while downstream emissions are those generated from the transportation and end use of the commodity produced. See Nathalie J Chalifour, "Drawing Lines in the Sand: Parliament's Jurisdiction to Consider Upstream and Downstream Greenhouse Gas (GHG) Emissions in Interprovincial Pipeline Project Reviews" (2018) 23:1 Rev Const Stud 129 at 143.

129 Letter from Sheri Young to Energy East Pipeline Ltd and TransCanada PipeLines Limited, all interested parties (23 August 2017) National Energy Board at 3, online: < apps.neb-one.gc.ca/REGDOCS/File/Download/3320560>.

130 Chalifour, *supra* note 128 at 143.

131 *Ibid*.

132 "Expansion Project" (2019), online: *Trans Mountain* <www.transmountain.com/project-overview>.

133 I am grateful to Nathalie Chalifour for this argument. See upcoming publications of Nathalie J Chalifour, online: <commonlaw.uottawa.ca/en/people/chalifour-nathalie>.

sources, which consequently locks in carbon dependency and creates an economic and social structure that requires actions that will increase GHG emissions to function.[134] For instance, in the Canadian context, climate researchers have identified new pipeline projects as one of the major obstacles to meeting Canada's GHG emissions targets under the Paris Agreement.[135] Using path dependency arguments, researchers note that "if pipelines are constructed, they will transport oil and gas even if the price drops, fostering carbon lock-in."[136] As such, if the courts were to consider the future GHG emissions that will result from the path dependency created by an action or decision (like a nationally significant pipeline) when evaluating the impact of a particular Crown action, concerns regarding the negligible impact of one action or decision could be overcome.

Still, the consideration of indirect GHG emissions would need to surmount valid concerns that their inclusion in the analysis of the impact of Crown conduct falls on the "speculative side"[137] and therefore does not trigger the duty to consult and accommodate. Though these approaches to environmental assessment are well established in academia,[138] and have been accepted by several foreign courts in climate litigation cases,[139] it is difficult to predict how a court would consider these indirect GHG emissions in the context of the duty to consult and accommodate. That being said, the inclusion of indirect GHG emissions is not inconsistent with what the SCC has articulated with regard to the impacts that trigger the duty to consult as these emissions can be said to "flow" from the implementation of the specific Crown conduct at issue.[140] Indeed, in *Tsleil-Waututh Nation*, the Federal Court of Appeal found that the Crown did not meaningfully consult and accommodate several First Nations regarding outstanding concerns about the indirect "project-related" impacts of the Trans Mountain pipeline, such

---

134 See Karen C Seto et al, "Carbon Lock-In: Types, Causes, and Policy Implications" (2016) 41:1 Annual Rev Environment & Resources 425; Kevin Marechal & Nathalie Lazaric, "Overcoming inertia: insights from evolutionary economics into improved energy and climate policies" (2010) 10:1 J Climate Policy 103; Linus Mattauch et al, "Avoiding carbon lock-in: Policy options for advancing structural change" (2015) 50:1 Economic Modelling 49; Gregory C Unruh, "Escaping carbon lock-in" (2002) 30:1 Energy Policy 317; Kelly Levin et al, "Overcoming the Tragedy of Super Wicked Problems: Constraining our Future Selves to Ameliorate Global Climate Change" (2012) 45:2 Policy Sciences 123.

135 See Steven Bernstein & Matthew Hoffmann, "Pipelines, Paris, and Decarbonization: The Future of Canadian Energy and Climate Policy" (Delivered at the Environmental Governance Lab at the Munk School of Global Affairs, 3 March 2017) at 5–9, online (pdf): <munkschool.utoronto.ca/egl/files/2019/01/Pipelines_Paris_Decarbonization_EGL_Report_2017-3.pdf>.

136 See *ibid,* at 6.

137 *Hupacasath, supra* note 102 at para 102.

138 See e.g. L Reijnders, "Life Cycle Assessment of Greenhouse Gas Emissions" (2016) in Wei-Yin Chen et al, *Handbook of Climate Change Mitigation and Adaptation* (New York: Springer, 2017) 61; Jeremy Moorhouse, Danielle Droitsch & Dan Woynillowicz, *Life cycle assessments of oilsands greenhouse gas emissions* (Winkler: Pembina, 2011), online: <www.pembina.org/reports/pembina-lca-checklist.pdf>; Ralph Torrie, "Same Greenhouse Gas 3 Different Stories" (2013) 39:1 Alt J 35; Y Chen & S Thomas Ng, "Integrate an Embodied GHG Emissions Assessment Model into Building Environmental Assessment Tools" (2015) 118 Procedia Engineering 318 (see references to life cycle emissions as opposed to upstream and downstream emissions); Anjuman Shahriar, Rehan Sadiq & Solomon Tesfamariam, "Life cycle greenhouse gas footprint of shale gas: A probabilistic approach" (2014) 28 Stochastic Environnmental Research & Risk Assessment 2185.

139 Klaudt*, supra* note 5 at 239-240.

140 *Chippewas of the Thames, supra* note 118 at paras 2 & 41; *Rio Tinto, supra* note 88 at para 53.

as increased marine traffic.[141] Moreover, the economic modelling at the basis of forecasting indirect GHG emissions is in line with the social science expertise relied on by the SCC over the past few decades in the context of constitutional rights.[142]

In sum, though a challenge to a single Crown action or decision would be in accord with the conventional approach taken in past duty to consult and accommodate cases, if a court were to analyze a single Crown action or decision that would increase GHG emissions in isolation, without taking into account indirect GHG emissions, it is unlikely that the duty to consult and accommodate would be triggered. If so, the scope of the duty would be, at best, minimal given the negligible impact of a single action or decision. However, if a court were to inform its analysis with the "cumulative effect[s]" of GHG emissions, the "existing state of affairs" in the Arctic as a result of the impacts of global climate change, and the indirect GHG emissions resulting from the action or decision in question, this approach could result in triggering the duty to consult and accommodate.

#### *4.2.2. A Constellation of Decisions and Actions That Will Increase GHG Emissions*

Alternatively, to avoid the difficulties or limitations associated with triggering the duty to consult and accommodate with a single Crown action or decision that will increase GHG emissions, Indigenous communities in the Arctic could seek to mount a test case targeting a constellation of actions and decisions that have increased GHG emissions or will do so.[143] This strategic approach to changing the state of the law in order to ensure Indigenous communities impacted by climate change are consulted and accommodated in the future avoids having to convince a court to consider indirect GHG emissions in its analysis of the impacts of the Crown conduct and avoids having to convince a court to take into account the impact of "cumulative effects,"[144] the "historical context" of GHG emissions,[145] or "the existing state of affairs"[146] in the Arctic as a result of the impacts of global climate change. Whereas the adverse

---

141 *Tsleil-Waututh, supra* note 126 at paras 560, 650, 658–660 & 760.

142 For instance, see SCC decisions such as *Carter v Canada (Attorney General),* 2015 SCC 5 at paras 22–33, [2015] 1 SCR 331; *Canada (Attorney General) v Bedford,* 2013 SCC 72 at paras 48–56 & 126, [2013] 3 SCR 1101. See also Jula Hughes & Vanessa McDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32:1 NJCL 23.

143 See Chalifour & Earle, *supra* note 5 at 736–738, which discusses the viability of challenging a constellation of decisions under s. 7 of the *Charter*. In this analysis, the authors note that: "Although most *Charter* cases deal with a single provision or decision, there are examples of plaintiffs framing their claims using an integrative approach. For instance, the SCC in *Chaoulli* considered whether a prohibition on health insurance created by the combined application of two legislative provisions violated section 7. In *R v Smith*, the SCC considered whether the blanket prohibition on medical access to marijuana created by the combined effect of the Controlled Drugs and Substances Act and related regulations created an infringement. In two separate cases, British Columbia courts examined the combined effect of a collection of bylaws on the section 7 rights of homeless plaintiffs." The authors also note that: "If litigants were to frame a climate *Charter* challenge on a network of decisions, they would want to emphasize that substance, not form, should govern *Charter* analysis; otherwise, governments could avoid accountability for *Charter* infringements due to a narrow, technical approach."

144 *Chippewas of the Thames, supra* note 118 at para 42.

145 *Ibid*.

146 *Ibid; West Moberly First Nations 2011, supra* note 124 at para 119.

impacts of a single Crown action or decision that will increase GHG emissions on Indigenous communities in the Arctic could be considered negligible or speculative, providing a court with a larger sample allows it to see the bigger picture, being the impact that cumulative actions and decisions increasing GHG emissions have on recognized or potential section 35 rights in the Arctic. For instance, it is much harder to categorize the collective impact of GHG emissions from 100 coal-fired power plants as negligible or speculative as opposed to the GHG emissions from an individual coal-fired power plant considered in isolation 100 separate times.

In practical terms, in seeking to ensure a legally recognized duty to consult and accommodate in the context of climate change, Indigenous communities in the Canadian Arctic could bundle together a collection of Crown pipeline approvals that will each increase GHG emissions, Crown authorizations for various major fossil fuel extraction projects, and numerous deforestation permits. Together, this collection of Crown actions and decisions is certain to substantially increase GHG emissions, and accordingly, it is difficult to characterize their combined impact on climate change as negligible or speculative.

The most evident obstacle to this constellation approach is that targeting multiple Crown actions or decisions to trigger the duty to consult and accommodate (as opposed to a single Crown conduct) is not in accordance with the conventional approach taken in duty to consult and accommodate cases thus far. In fact, the duty has only successfully been applied in cases that target a single Crown action or decision.

Beyond that, the duty to consult and accommodate has a temporal limit, which complicates the ability to put together a sufficient constellation of Crown decisions and actions.[147] Indeed, the SCC has noted that, with regard to the duty to consult and accommodate, where an Indigenous party perceives a "process to be deficient, it should […] request such direct Crown engagement in a timely manner (since parties to treaties are obliged to act diligently to advance their respective interests)."[148] What is more, the Alberta Court of Appeal even categorized the duty to consult and accommodate as a "perishable right,"[149] though the logic behind this categorization seems to be at odds with subsequent SCC jurisprudence.[150] Consequently, this may limit the Crown actions and decisions that could be included in the constellation of Crown conduct to "current" actions and decisions contemplated by the Crown that will increase GHG emissions as opposed to "prior and continuing breaches, including prior failures to consult."[151]

---

147 *Rio Tinto, supra* note 88 at para 49.

148 *Clyde River, supra* note 115 at para 24.

149 *R v Lefthand,* 2007 ABCA 206 at para 49, 77 Alta LR (4th) 203.

150 For instance, see *Clyde River, supra* note 115 at para 24 where the SCC noted that: "Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation before project approval is always preferable to after-the-fact judicial remonstration following an adversarial process."

151 *Rio Tinto, supra* note 88 at para 49.

Moreover, it is likely that the Crown would argue that a constellation approach would be unmanageable or impossible to litigate given the potential overwhelming scope of the litigation and the potential size of the evidentiary pool.

Nonetheless, there is evidence that a constellation approach could work in the context of a climate-based duty to consult and accommodate case. As a matter of fact, the concerns noted immediately above were all addressed by the Court of Appeal of Alberta in *Lameman v Alberta,*[152] a 2013 motion to strike case. In this case, the Beaver Lake Cree Nation alleges a "breach of their Treaty Rights, breach of the honour of the Crown [including the duty to consult and accommodate], [and] breach of a fiduciary duty in relation to the cumulative effects"[153] of over 19,000 decisions that authorized extensive non-Indigenous uses of land in its core territory.[154] Despite the fact that both Alberta and Canada argued that a section 35 challenge based on a constellation of decisions would be "unmanageable, impossible to litigate in a reasonable fashion and abusive,"[155] inconsistent with the "perishable" nature of the duty to consult and accommodate,[156] and that it takes into account historical grievances, the Court permitted the case to advance to trial holding that it is "not plain and obvious" that the claims are "doomed to failure."[157] In the nearly eight years since this decision was made, the case has yet to receive a trial date primarily due to financial constraints.[158] The Court of Appeal of Alberta recently overturned an award of $300,000 in advance costs per year to allow this case to move forward.[159]

Although a successful defence of a motion to strike should not be read as a resounding endorsement of a constellation-based approach, the *Lameman* decision suggests that this approach could trigger the duty to consult and accommodate in the context of climate change. What is more, the *Lameman* decision suggests that this constellation would not be limited to current Crown actions and decisions but could include past Crown conduct as well,[160] so long as revocation of past authorizations is not sought.[161] However, as noted by the Court in *Lameman,* this does not exclude the possibility of seeking additional remedies for these historical failures to consult.[162] It is also worth mentioning that Chalifour and Earle agree that *Lameman* signals that a constellation approach in the context of climate litigation could

---

152 *Lameman v Alberta,* 2013 ABCA 148, 553 AR 44 [*Lameman (2013)*].

153 *Lameman v Alberta,* 2012 ABQB 195 at para 9, 537 AR 357 [*Lameman (2012)*].

154 See *ibid* at para 21.

155 See *ibid* at para 15.

156 See *ibid* at para 16.

157 See *ibid* at para 79.

158 Roberta Bell, "Beaver Lake Cree Nation running out of money to conclude 10-year legal battle" (27 April 2018), online: *CBC News* <www.cbc.ca/news/canada/edmonton/beaver-lake-advanced-costs-1.4636881>.

159 See *Anderson v Alberta (Attorney General)*, 2019 ABQB 746. However, see also *Anderson v Alberta (Attorney General*, 2020 ABCA 238 where the ABCA overturned the lower court's decision to award advanced costs.

160 See *Lameman (2013), supra* note 152 at para 44, where the ABCA acknowledges that the plaintiff's statement of claim is only for "past and future damages [arising] only from those actions already taken by the Crown."

161 *Lameman (2012), supra* note 153 at paras 59-67.

162 *Ibid* at para 71.

succeed, notably with regard to mounting a section 7 *Charter* challenge to government inaction on climate change.[163] In essence, the application of the duty to consult and accommodate to past Crown conduct may be viable, although the remedies available might be restricted.

In sum, it appears that Indigenous communities in the Canadian Arctic could mount a duty to consult and accommodate challenge to the impacts of climate change on their recognized or potential rights, based on a constellation of Crown decisions and actions that have, or would, increase GHG emissions. However, the success of this approach is dependent on the courts taking the "generous, purposive approach that must be brought to the duty to consult"[164] as it is not directly in line with the approach taken in duty to consult and accommodate cases thus far. If such an approach is taken, the question remains whether past Crown actions and decisions could be included in this constellation. The *Lameman* decision suggests that including past actions and decisions could be possible, though revoking the Crown's authorization to emit GHGs for failure to consult in the past would not be a possible remedy. In any case, it would be harder for a court to consider the impact of a constellation of decisions increasing GHG emissions to be negligible, regardless of whether this constellation only includes currently contemplated conduct or extends to past conduct as well.

#### *4.2.3. Regulations or Executive Policies That Will Increase Greenhouse Gas Emissions*

Finally, Indigenous communities in the Arctic whose recognized or potential section 35 rights are adversely affected by the impacts of climate change could seek to trigger the duty to consult and accommodate by pointing to regulations[165] or executive policy[166] that will increase GHG emissions.

The SCC's decision in *Mikisew Cree (2018)* helps shed a light on the potential and the limits of triggering the duty to consult and accommodate in the context of high-level Crown conduct. In this case, the Mikisew Cree First Nation brought an application for judicial review challenging the Crown's failure to consult on the development of two pieces of omnibus

---

163 Chalifour & Earle, *supra* note 5 at 738.

164 *Rio Tinto, supra* note 88 at para 43.

165 "Regulations, also known as secondary or subordinate legislation, are made by ministers or specialist bodies under legislative powers delegated to them by Acts of Parliament. Like primary legislation, regulations have the full force of law. Historically, the power to make regulations was delegated to the Governor in Council (effectively the federal cabinet) where particulars needed to be filled in to complete a legislative package. The main benefit was that regulations could be made and updated quickly by the executive through an Order in Council as opposed to the more cumbersome parliamentary process." See Lorne Neudorf, "Rule by Regulation: Revitalizing Parliament's Supervisory Role in the Making of Subordinate Legislation" (2016) 39:1 Can Parliamentary Review 29 at 29.

166 It is important to specify that executive policy, in this case, signifies policy that establishes "a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority." *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component,* 2009 SCC 31 at para 64, [2009] 2 SCR 295. However, the majority in *Mikisew Cree (2018)*, *supra* note 19 at para 32 makes it clear that policy choices by the executive branch made in the law-making process "does not trigger the duty to consult." This is because the majority found that "the separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action."

legislation introduced into Parliament with significant effects on Canada's environmental protection.[167] Though the Court unanimously agreed on the technical point that the Federal Court did not have the jurisdiction under sections 17, 18, and 18.1 of the *Federal Courts Act* to conduct a judicial review of legislative action,[168] the Court was split as to whether legislative action, including the development of legislation by ministers, triggered the duty to consult and accommodate. In four separate reasons, all judges agreed that the honour of the Crown applies to the legislative branch; however, seven judges generally agreed that the duty cannot be triggered by legislative action[169] while two judges (Abella and Martin JJ.) found that it could be triggered by legislative action.[170] In essence, the majority of the Court found that the separation of powers, parliamentary sovereignty, and parliamentary privilege precluded the Court from interfering in the law-making process to mandate consultation and accommodation.[171] On the contrary, Justices Abella and Martin found that the duty to consult and accommodate is more than just a means to uphold the honour of the Crown and applies to all exercises of Crown power, including legislative action, since it arises based on the potential effects on a claimed right rather than the source of the government action.[172] Furthermore, it is also worth mentioning that the reasons set out by Justice Karakatsanis (signed onto by Chief Justice Wagner and Justice Gascon) go on to mention that other doctrines may be developed to ensure that the honour of the Crown protects potential but unrecognized section 35 rights throughout the legislative process.[173] Justices Moldaver, Côté, Brown, and Rowe explicitly disagree with this idea,[174] though Dwight Newman speculates that "there is every reason to think [Justices Abella and Martin] might be on board with whatever Justice Karakatsanis thinks the court might dream up in future."[175] For the purposes of this analysis, it is important to retain that an overall reading of the sets of reasons in *Mikisew Cree (2018)* indicates that the duty to consult and accommodate is not triggered by legislative action, but rather by executive action.

Accordingly, a careful analysis of the SCC's decision,[176] particularly when read together with *Rio Tinto,* confirms that regulations and executive policy is considered Crown conduct

---

167 *Supra* note 19 at paras 6–9.

168 *Ibid* at paras 17–19, 54, 106–115 & 148.

169 *Ibid* at paras 30–41, 116–133 & 150–170.

170 *Ibid* at paras 55–98.

171 *Ibid* at paras 17–19, 54, 106–115 & 148.

172 *Ibid* at paras 55–98.

173 *Ibid* at paras 42–53.

174 *Ibid* at paras 103–105, 136–143 & 160–165.

175 Dwight Newman, "The Supreme Court's duty to consult ruling will create immense uncertainty" (15 October 2018), online: *The Globe and Mail* <www.theglobeandmail.com/opinion/article-the-supreme-courts-duty-to-consult-ruling-will-create-immense/>.

176 *Mikisew Cree (2018), supra* note 19 at para 51 & 157. See also *Rio Tinto, supra* note 88 at para 87. Though the majority in *Mikisew Cree (2018)* found (in three separate sets of reasons) that the duty to consult and accommodate did not apply to the law-making process, it is important to note that Abella and Martin JJ's reasons conclude that the duty to consult and accommodate does indeed apply to the law-making process. Moreover, the reasons set out by Karakatsanis J (Wagner CJ and Gascon J concurring) acknowledges that the honour of the Crown applies to the law-making process though eventually concludes that the duty to consult and accommodate does not apply as it is "ill-suited to the law-making process" (paras 32 & 44). Given the importance of this legal question and the uncertainty

that triggers the duty to consult and accommodate. For instance, the reasons set out by Justice Karakatsanis (signed onto by Chief Justice Wagner and Justice Gascon) explicitly state that their conclusions with regard to the application of the duty to consult and accommodate to legislation "do not apply to the process by which subordinate legislation (such as regulations or rules) is adopted, as such conduct is clearly executive rather than parliamentary."[177] Justice Karakatsanis cites Nigel Bankes in support of this statement, whose analysis of the Federal Court of Appeal's decision in *Mikisew (2018)* notes that "there is little if anything in this judgment to support the view that delegated legislative decisions do not attract the duty to consult. Such decisions cannot benefit from arguments of parliamentary privilege and such decisions are in principle subject to judicial review in the ordinary course."[178] It can also be presumed that this position was supported by Justices Abella and Martin who argued that "the honour of the Crown infuses the entirety of the government's relationship with Indigenous peoples, [and therefore] the duty to consult must apply to all exercises of authority which are subject to scrutiny under section 35."[179] This view is consistent with *Rio Tinto*, which clearly establishes that the duty to consult and accommodate goes beyond "government exercise of statutory powers" and extends to "strategic, higher-level decisions"[180] in accordance with the "generous, purposive approach that must be brought to the duty to consult."[181] To summarize, the application of the duty to consult and accommodate to subordinate legislation and executive policy is entirely consistent with all sets of reasons in *Mikisew (2018)* as well as the current body of SCC jurisprudence on the duty to consult and accommodate.

By challenging a single set of regulations or an executive policy, Indigenous communities in the Arctic seeking to trigger the duty to consult and accommodate could combine the strengths of challenging a single contemplated action or decision with the advantages of challenging a constellation of actions and decisions. On the one hand, it conforms to the conventional approach to the duty to consult and accommodate thus far, which has been only successfully applied in cases targeting a single Crown action or decision. However, on the other hand, it could include the constellation of decisions that will emanate from a certain set of regulations or an executive policy, therefore, allowing the court to see the bigger picture.

On a practical level, an Indigenous community in the Arctic whose recognized or potential section 35 rights have been adversely affected by the impacts of climate change could put forward, for instance, that the duty to consult and accommodate is triggered by New Brunswick's planned amendments to regulations allowing shale gas development.

---

resulting from four different sets of reasons, it is possible that this question may be revisited by the SCC in the future.

177 *Ibid* at para 51. Note that this conclusion does not seem to be opposed by any other sets of reasons in the decision. In fact, it is logical to at least assume that the reasons by Abella J (signed onto by Martin J), which found that the duty to consult and accommodate applied to the enactment of legislation, would agree with the statement at para 51.

178 Nigel Bankes, "The Duty to Consult and the Legislative Process: But What About Reconciliation?" (21 December 2016), online (blog): *The University of Calgary Faculty of Law Blog* < ablawg.ca/2016/12/21/the-duty-to-consult-and-the-legislative-process-but-what-about-reconciliation/>.

179 *Mikisew Cree (2018), supra* note 19 at para 63.

180 *Rio Tinto, supra* note 88 at para 44.

181 *Ibid* at para 43.

Indeed, though this is procedurally one Crown action, the court would have to consider the multiple single Crown actions or decisions that will "flow" from it and that will increase GHG emissions;[182] this approach allows for the court to view the bigger picture, making it difficult to deem the conduct negligible or speculative, all the while still being in line with convention.

What is more, an Indigenous community in the Arctic could also seek to trigger the duty to consult and accommodate with regard to executive policies or regulations setting out Canada's climate change strategy, its GHG emissions mitigation targets, or a carbon pricing scheme. For example, Canada's output-based pricing system regulations under the *Greenhouse Gas Pollution Pricing Act*[183] could potentially trigger the duty to consult.[184] The *GGPPA,* which received royal assent in 2018, requires provinces to implement a minimum price on carbon via a carbon levy or a cap and trade scheme. The law includes a backstop that implements a federal carbon levy in provinces that refuse to implement the minimum price on carbon required by the legislation.[185] The output-based pricing system regulations outline certain measures to provide large emitters (particularly ones exposed to competitiveness issues) with relief from the added costs emanating from carbon pricing in provinces where the "backstop" is being applied.[186] This high-level regulation directly relating to climate change and GHG emissions in Canada surely has an impact on GHG emissions, as it plays a large role in determining whether GHG emissions will increase or decrease, and at what rate. In fact, the regulations return, via subsidies, the carbon price paid by larger emitters on 80% of the sector's weighted average GHG emissions (90% and 95% for high-risk sectors).[187] In essence, this means that the average large Canadian GHG emitting facility only pays a carbon price on 20% (10% and 5% for high-risk sectors) of their emissions. Given that these regulations on large emitters are likely not stringent enough to be compatible with what is required to avoid dangerous levels of climate change (avoiding an increase of average global temperatures of more than 2 °C),[188] it could be argued that the duty to consult would be triggered in this circumstance. In fact, the applicants in *Mathur, et al* are taking a similar approach by challenging Ontario's 2030 GHG reduction target under subsection 3(1) of the *Cap and Trade Cancellation Act*, *2018*[189] claiming that the target "will lead to climate catastrophe and thus will violate [their] rights under section 7 of the *Charter*."[190]

---

182 Kevin Bissett, "N.B. Tories survive throne speech vote, plan to amend ban on fracking" (30 November 2018), online: *The Canadian Press* <nationalpost.com/pmn/news-pmn/canada-news-pmn/n-b-tories-survive-throne-speech-vote-plan-to-end-ban-on-fracking>.

183 *Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12 [*GGPPA*].

184 Environment and Climate Change Canada, *Output-Based Pricing System* (Gatineau: ECCC, 2019), online: <www.canada.ca/content/dam/eccc/documents/pdf/obps/Document-A-EN.pdf >.

185 See list of provinces where the federal backstop is applied: *GGPPA, supra* note 183 at Schedule 1.

186 *Supra* note 184 at 1–2.

187 *Ibid* at 11 & 31.

188 See e.g. Climate Action Tracker, *supra* note 33. This analysis of Canada's current climate policies states that the projected results of Canada's climate policies are "highly insufficient" as they are in line with a 3–4°C increase in the world average temperature as compared to the 1.5 °C agreed upon in the Paris Agreement.

189 *Cap and Trade Cancellation Act, 2018*, SO 2018, c 13, s 3(1).

190 *Mathur, et al, supra* note 9 at para 7.

In sum, a duty to consult challenge to regulations or executive policies could represent the most viable and effective option to give Indigenous communities in the Arctic, whose section 35 rights are impacted by climate change, a voice "in the decision making about Canada's actions in relation to climate change."[191] This approach addresses the primary issue, as articulated by Dwight Newman, with a permit-by-permit approach to the duty to consult and accommodate, which infringes section 35 rights in a "death by a thousand cuts" manner given its inability to address meaningfully the cumulative effects of the totality of Crown actions on section 35 rights.[192] It is also consistent with Sniderman and Shedletzky's suggestion that the duty to consult and accommodate could be used to challenge "higher level decisions with respect to carbon emissions, such as those relating to oil sands development or withdrawal from the *Kyoto Protocol*."[193]

### 4.3. The Potential to Adversely Affect an Aboriginal Right or Claimed Right

Though it is clear that the recognized and potential section 35 rights of Indigenous communities in the Arctic are being adversely affected by climate change, it is the demonstration of causation between a specific Crown conduct (or a constellation of Crown actions) and the potential adverse effect claimed that is less obvious. Causation has always been one of the main obstacles in environmental litigation cases, be it simple cases of local pollution harm or climate change litigation cases.[194] As Chalifour and Earle note, this causation challenge is due to the fact that "invisibility and disconnection between cause and effect are often trademarks of environmental harm, which makes it exceptionally difficult for claimants to prove that the negative effects they experience are attributable to government action."[195] The challenge of causation is particularly evident in the case of climate change. Climate change is caused by no single action or decision but is rather the result of millions of actions and decisions taken over the course of several decades. Not to mention that, as GHG emissions generally have a global effect on climate change that can take decades to have an impact, it is nearly impossible to connect a specific GHG emission to a specific climate change impact.

However, the SCC has imposed a low causation threshold in the context of the duty to consult and accommodate. Indeed, as noted by the *Haida Nation* decision, Crown conduct that "might adversely affect" recognized or potential section 35 rights triggers the duty to consult and accommodate.[196] Thomas Isaac also states that in order to satisfy the causation aspect of the third prong of the test to trigger the duty to consult and accommodate, there must be "some degree of connection between the government action or decisions at issue and the potential for an adverse effect on the Aboriginal people's rights at issue."[197] This is characterized as a

---

191 Sima Sahar Zerehi, "Yes to Paris Agreement, no to carbon tax, say Nunavut leaders" (7 October 2016), online: *CBC News* <www.cbc.ca/news/canada/north/paris-agreement-carbon-tax-northern-leaders-1.3794803>.

192 Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) at 54 [Newman, *Revisiting the Duty to Consult Aboriginal Peoples*].

193 Sniderman & Shedletzky, *supra* note 5 at 14.

194 See e.g. David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) at 212–215.

195 Chalifour & Earle, *supra* note 5 at 745–746.

196 *Haida Nation, supra* note 83 at para 35.

197 Thomas Isaac, *supra* note 64 at 373.

"low threshold"[198] though "mere speculative impacts" will not suffice in triggering the duty to consult and accommodate.[199] Compared to the "sufficient causal connection" standard set out in *Bedford* to demonstrate a *Charter* right violation,[200] the causation threshold in the context of the duty to consult and accommodate is easier to meet as the word "might" indicates that a claimant need only demonstrate the reasonable possibility of adversely affecting a recognized or potential section 35 right rather than having to satisfy the balance of probabilities. This is consistent with the nature of the duty to consult and accommodate, which aims to cautiously prevent the infringement and extinguishment of section 35 rights via dialogue and negotiation.[201] As such, evidentiary difficulties are often taken into account when analyzing the scope of the duty rather than in the determination of whether the duty itself was triggered.[202] For this reason, Sniderman & Shedletzky state:

> The duty to consult may prove useful as a legal tool to challenge climate change policy. A duty-to-consult claim has a relatively lower causality threshold than that required for a finding of a section 7 or section 35 rights violation. The impact on rights need only be possible—not concretely proven. As such, an argument involving climate change policy and impacts is most likely to succeed in the context of a duty to consult.[203]

Therefore, for Indigenous claimants seeking to challenge the government's failure to mitigate climate change, the duty to consult and accommodate is comparatively a more strategic choice due to this lower causation threshold.

In the context of climate change litigation, litigants around the world have relied on the findings of the IPCC to satisfy the causation burden. For instance, in the 2015 *Urgenda*[204] decision, the Dutch court relied on IPCC reports when it held that the Dutch government has a legal duty to reduce its GHG emissions in order to avoid dangerous levels of climate change. As noted above, the IPCC reports are policy-neutral accounts on the state of scientific knowledge on climate change drawing from the works of thousands of scientists throughout the globe. They are "robust evidentiary records"[205] that outline with near certainty that climate change is the result of anthropogenic GHG emissions and that this phenomenon is having negative impacts on the planet's ecosystems and its inhabitants, particularly in the Arctic. Therefore, if an Indigenous community in the Arctic were to base their case on the works of the IPCC, this "robust evidentiary record" should be sufficient to satisfy the low causation threshold and rise above being considered as "speculative." What is more, the IPCC's findings are recognized and endorsed by the federal order of government, which has even explicitly noted that "Indigenous Peoples, northern and coastal regions and communities in Canada

198 *Ibid*.

199 *Rio Tinto, supra* note 88 at para 46.

200 Which requires proof of a reasonable connection between a government action and harm drawn on a balance of probabilities. See *Bedford, supra* note 142 at paras 74-78.

201 See *Haida Nation, supra* note 83 at paras 26–38.

202 *Ibid* ("Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty" at para 37).

203 Sniderman & Shedletzky, *supra* note 5 at 14.

204 *Supra* note 1.

205 Chalifour & Earle, *supra* note 5 at 749.

are particularly vulnerable and disproportionately affected"[206] by climate change. In addition to the IPCC's works, there are countless reputable studies confirming the causation between GHG emissions and climate change in the Arctic and recently, studies have been able to link particular extreme weather events to climate change via weather attribution science.[207] As stated by Sophie Marjanac and Lindene Patton:

> "[a]s attribution science develops, the foreseeability of an event increases, which affects the analysis for multiple areas of law, particularly the legal duties of those with the power to influence outcomes, or legal duties to manage and mitigate risks and harm[.] […] Improvements in attribution science may therefore increase the likelihood that courts will be willing to issue both traditional and novel and far-reaching injunctive relief restraining action."[208]

To summarize, there is no shortage of credible scientific evidence permitting a claimant to link GHG emissions to the effects of climate change in the Arctic, thus permitting to overcome the lower causality threshold applicable to the duty to consult.

In Canadian courts, the decisions of the Saskatchewan Court of Appeal and the Court of Appeal for Ontario in their respective *GGPPA* reference cases[209] demonstrate that a Canadian court, in the context of a climate based duty to consult challenge, is likely to be satisfied with the current body of scientific evidence linking GHG emissions to the effects of climate change on the recognized or potential section 35 rights of Indigenous peoples in the Canadian Arctic. Indeed, both Courts illustrated a sound understanding of the science of climate change,[210] basing themselves largely on the very same evidence used by foreign courts in successful climate litigation cases,[211] and acknowledged the importance of reducing GHG emissions in

---

206 Government of Canada, *Pan Canadian Framework on Clean Growth and Climate Change: Canada's Plan to Address Climate Change and Grow the Economy* (2016) at 1, online (pdf): < publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf>.

207 See e.g. Nicola Jones, "Wild Weather and Climate Change: Scientists Are Unraveling the Links" (2017) online: *Yale Environment 360* <e360.yale.edu/features/pinning-wild-weather-on-climate-change-scientists-are-upping-their-game>; Sarah H Kew et al, "The Exceptional Summer Heat Wave in Southern Europe 2017" (2018) online (pdf): *Bulletin of the American Meteorological Society* <www.ametsoc.net/eee/2017a/ch11_EEEof2017_Kew.pdf >; Friederike E L Otto et al, "Anthropogenic influence on the drivers of the Western Cape drought 2015–2017" (2018) 13:12 Environmental Research Letters 124010, online: <iopscience.iop.org/article/10.1088/1748-9326/aae9f9/pdf>; Luke J Harrington & Friederike E L Otto, "Attributable damage liability in a non-linear climate" (2019) 153:1 Climatic Change, online: <link.springer.com/article/10.1007%2Fs10584-019-02379-9>; Paul Griffin, "CDP Carbon Majors Report 2017", online (pdf): *The Carbon Majors Database* <b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf>.

208 Sophie Marjanac & Lindene Patton, "Extreme weather event attribution science and climate change litigation: An essential step in the causal chain?" (2018) 36:3 J Energy & Natural Resources L 265 at 297.

209 *Reference re: Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40, [2019] 9 WWR 377 [*Reference re: GGPPA SKCA*]; *Reference re: Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, 146 OR (3d) 65 [*Reference re: GGPPA ONCA*].

210 *Reference re: GGPPA SKCA, ibid* at paras 1-33; *Reference re: GGPPA ONCA, ibid* at paras 1-32.

211 Much of the factual record in these cases is contained within the Affidavit of John Moffet (Associate Assistant Deputy Minister at Environment and Climate Change Canada) filed by Canada. Exhibits

order to limit the effects of climate change (particularly in the Arctic).[212] Moreover, the Court of Appeal for Ontario even explicitly recognized the particular effect climate change is having on Indigenous communities, noting that the "impact is greater in these communities because of the traditionally close relationship between Indigenous peoples and the land and waters on which they live."[213] In addition, the ENvironnement JEUnesse, *Mathur, et al*, and the *La Rose et al* cases are all largely relying on the findings of the IPCC in their attempts to challenge government inaction on climate change.[214]

Finally, claimants could also rely on the precautionary principle to overcome causation challenges with linking Canada's GHG emissions to the adverse effects of climate change in the Arctic. The precautionary principle, as set out in the *Bergen Ministerial Declaration on Sustainable Development,* is a principle stating that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[215] The principle was recognized and applied by the SCC in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*.[216]

In sum, though climate change litigation is often tasked with overcoming difficult causation challenges, the availability of "robust evidentiary records," such as the IPCC reports, the constant evolution of the precision of climate change science, the precautionary principle, and the low causation threshold to trigger the duty to consult and accommodate, make this task much easier. Accordingly, there is a good chance that the third element required to trigger the duty to consult and accommodate could be met in the context of the adverse effects of climate change on recognized or potential section 35 rights in the Arctic.

### 4.4. Practical Application of the Duty to Consult and Accommodate

Although, in theory, it appears that the duty to consult and accommodate could be triggered by Crown conduct that increases GHG emissions, the practical difficulties in applying such a finding is certainly an obstacle with which a court would struggle. In fact, practicality appeared to be an important concern for some members of the SCC in *Mikisew Cree (2018)*. For instance, this is most evident in the reasons delivered by Justice Rowe (signed onto by Justices Moldaver and Côté) where emphasis was put on the "highly disruptive" effect of applying the duty to consult and accommodate to the legislative process.[217]

---

to this Affidavit include several IPCC reports, notably reports relied on by foreign courts in climate litigation cases.

212 *Reference re: GGPPA SKCA, supra* note 209 at para 17; *Reference re: GGPPA ONCA, supra* note 209 at paras 10, 13 & 55.

213 *Reference re: GGPPA ONCA, ibid* at para 12.

214 *Environnement Jeunesse c Procureur général du Canada, supra* note 8; *Mathur, et al, supra* note 9; *La Rose et al, supra* note 10.

215 United Nations, General Assembly, Preparatory Committee for the United Nations Conference on Environment and Development, "Report of the Economic Commission for Europe on the Bergen Conference", Annex I, Bergen Ministerial Declaration on Sustainable Developments, A/CONF.151/PC/10, August 6, 1990, at para 7.

216 *14957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 31, [2001] 2 SCR 241.

217 *Mikisew Cree (2018), supra* note 19 at para 149.

That being said, given the important role the duty to consult and accommodate plays in upholding the honour of the Crown and given the devastating effect climate change would have on section 35 rights,[218] the duty to consult and accommodate could prove to be flexible enough to overcome these practicality issues. In fact, Peter Hogg and Laura Doudan characterize the honour of the Crown, the principle animating the duty to consult and accommodate, as a concept that "requires the courts to be creative in reshaping the law to forward the goal of reconciliation by insisting that the Crown be respectful of Aboriginal people[s] in all the settings where their rights or interests are implicated."[219] However, in the context of climate change, a court would have to turn its mind to practical concerns regarding: (1) the scope of Crown conduct that could lead to an increase in GHG emissions and (2) the number of Indigenous communities whose section 35 rights are adversely affected by climate change in Canada.

First**,** seeing as GHG emissions touch nearly every aspect of our lives, the list of potential Crown conduct that could increase GHG emissions is long. The fact that GHG emissions are intertwined with nearly every aspect of our society was certainly a concern for the Court of Appeal for Ontario and the Saskatchewan Court of Appeal in their respective decisions on the constitutionality of the *GGPPA*.[220] Although the test established by the SCC to determine whether the duty to consult and accommodate has been triggered requires a sufficient causal link, which would significantly shorten this list,[221] it is conceivable that the Crown is still left with a significant range of conduct for which it would owe a duty to consult and accommodate.

In his work titled "Revisiting the Duty to Consult Aboriginal Peoples," Dwight Newman turns his attention to this sort of practicality issue. In response, Newman emphasizes the role that early meaningful consultation can play in managing instances where numerous "permit by permit" consultation challenges could arise.[222] Indeed, he notes that in some circumstances, "it may be appropriate for the government to consult on a general strategy such that the duty to consult would not then be engaged by every decision along the way."[223] He argues that it would allow projects and decisions flowing from larger high-level Crown conduct that adversely affects section 35 rights to proceed with less delay and "disruption" as it would limit the number of instances where the duty to consult and accommodate would be triggered going forward. Moreover, from the perspective of Indigenous rights-bearing communities, he holds that early general consultation at the outset of large projects or strategic decisions would not only allow communities to respond to the overall effect of these projects or strategic plans on their section 35 rights at an early stage, but would also help prevent the "death by a thousand

---

218 See e.g. *Haida Nation, supra* note 83 at paras 32–34.

219 Peter Hogg & Laura Dougan, "The Honour of the Crown: Reshaping Canada's Constitutional Law" (2016), 72 SCLR (2d) 291 at 291.

220 *Reference re: GGPPA SKCA, supra* note 209 at para 456; *Reference re: GGPPA ONCA, supra* note 209 at paras 233-237.

221 See *Haida Nation, supra* note 83 at para 35; *Rio Tinto, supra* note 88 at paras 46–48.

222 *Supra* note 192 at 54.

223 *Ibid* at 55.

cuts" effect of the "permit by permit" approach.[224] This is certainly consistent with the SCC's finding in *Rio Tinto* that the duty to consult applies to "strategic, higher-level decisions."[225]

In applying Newman's comments to the duty to consult and accommodate in the context of climate change, governments could take steps to limit the number of instances it would be required to consult by conducting meaningful consultation early on and at a very high-level. This would mean beginning consultation at the very early stages of considering a large project like a pipeline or when designing a regulatory scheme or decision-making process that would subsequently frame any future decisions that could increase GHG emissions. This is not to say that the duty to consult and accommodate would not require ongoing consultation, notably when circumstances change,[226] however the meaningful involvement of Indigenous rights-bearing communities from the beginning would certainly limit challenges to every decision deriving from a high-level Crown decision or strategic choice.

Second**,** given the far-reaching effects of climate change, it is certainly plausible that every rights-bearing Indigenous community in Canada could hold a right to be consulted and accommodated with regard to a certain Crown conduct that would significantly raise GHG emissions. Therefore, it is important to consider whether the duty to consult and accommodate is flexible enough to resolve practical difficulties arising from the need to meaningfully consult and accommodate a high number of Indigenous rights-bearing communities affected by certain high-level strategic decisions or projects.

On this issue, Newman proposes that an ideal solution to this problem "might be consultation with a body delegated for such consultations by individual rights-bearing communities."[227] Of course, given that courts have clearly stated that the Crown owes its duty to consult and accommodate to the section 35 rights-bearing communities themselves, and not the political organizations created to represent them (unless these communities expressly delegate these rights to the organization in question),[228] an unwillingness from certain communities to allow larger political organizations to be consulted on their behalf would hinder this approach. As such, Newman also argues that "some kind of public consultation with a special place for Aboriginal participation and/or some kind of Aboriginal participation within the decision-making body itself" could alleviate this concern.[229] However, as this does not necessarily align with the current state of jurisprudence, Newman argues that the "duty to consult doctrine should leave room for this kind of modified approach in the context of genuinely challenging problems of consultation at the strategic state of larger decisions."[230]

Newman's suggestion that a flexible readjustment of the duty to consult and accommodate in cases of high-level consultation regarding large issues, like climate change, would certainly

---

224 *Ibid* at 54.

225 *Rio Tinto, supra* note 88 at para 44.

226 See *Haida Nation, supra* note 83 at para 45.

227 *Supra* note 192 at 60.

228 See e.g. *Newfoundland and Labrador v Labrador Métis Nation*, 2007 NLCA 75 at paras 46–49, 272 Nfld & PEIR 178.

229 *Supra* note 192 at 60.

230 *Ibid*.

alleviate many practicality concerns. Indeed, organizations like the Assembly of First Nations,[231] the Métis National Council,[232] Inuit Tapiriit Kanatami,[233] and others have long advocated on behalf of the many Indigenous rights-bearing communities they represent. However, given the rich diversity of Indigenous voices in Canada and the heterogeneous impacts of climate change on section 35 rights across 9,984,670 km2 of land,[234] this is certainly easier said than done.

In sum, as this flexible readjustment of the duty to consult and accommodate would likely be undertaken when determining the scope of the consultation owed, the proposed solutions in this section to the identified practicality issues seek to serve as a building block for future research on the scope of this potential duty seeing as this article's focus is primarily on triggering the duty to consult and accommodate. For the time being, it is simply important to note that the duty to consult and accommodate could be flexible enough to address practicality concerns should it successfully be triggered in the context of climate change in the Arctic.

## 5. CONCLUSION

In sum, although it is clear that unsustainable levels of GHG emissions are having disproportionate impacts on the Arctic's climate, and that this is having direct impacts on the section 35 rights of many Indigenous communities who inhabit the Arctic, a legal mechanism to address this problem has yet to emerge in Canadian law. As seen above, the duty to consult and accommodate may very well provide Indigenous communities in the Arctic with the legal mechanism to ensure that their voices are heard in climate change decision-making in Canada and to ensure potential accommodation to help them adapt to the ever-increasing adverse impacts of climate change. Given the widespread recognition of section 35 rights in the Arctic and the low-causation threshold associated with the duty to consult and accommodate, the ability to trigger the duty to consult and accommodate in these circumstances largely depends on identifying Crown conduct with potential adverse effects that could surmount attempts to qualify the conduct's adverse effects as "negligible" or "speculative." As this article puts forward, there are at least three potential ways to satisfy the Crown "conduct" prong of the *Haida Nation* test, namely: (i) a single contemplated action/decision that will increase GHG emissions; (ii) a constellation of decisions/actions that will increase GHG emissions and; (iii) regulations or executive policies that will increase GHG emissions, the latter likely being the

---

231 The Assembly of First Nations represents 634 First Nation communities across Canada. See Assembly of First Nations, "About" (2018), online: <www.afn.ca/about-afn/>.

232 The Métis National Council represents many Métis communities from Ontario westward. See Métis National Council, "Governments" (2019), online: <www.metisnation.ca/index.php/who-are-the-metis/governments>. Of course, it is important to note that Métis identity in Canada is the subject of great debate at the moment and many communities who identify as Métis are not represented by the Métis National Council. See Brett Bundale, "The controversial rise of the eastern Metis: 'Where were these people all this time?'" (27 May 2018), online: *CBC News* <www.cbc.ca/news/canada/nova-scotia/the-controversial-rise-of-the-eastern-metis-where-were-these-people-all-this-time-1.4680105>.

233 Inuit Tapiriit Kanatami represents 51 Inuit communities spread across the Inuvialuit Settlement Region (Northwest Territories), Nunavut, Nunavik (Northern Quebec), and Nunatsiavut (Northern Labrador). This region encompasses roughly 35% of Canada's landmass and 50% of its coastline. See Inuit Tapiriit Kanatami, "Who We Are" (2019), online: <www.itk.ca/national-voice-for-communities-in-the-canadian-arctic/>.

234 Statistics Canada, "Geography" (2018), online (pdf): <www150.statcan.gc.ca/n1/pub/11-402-x/2011000/chap/geo/geo-eng.htm>.

approach with the highest chance of success. Nevertheless, the current state of the law in Canada demonstrates that there are certainly obstacles.

Even if the duty to consult and accommodate can be triggered in this context, many questions remain as to the scope of this duty. Further research must be done to determine what would be the scope of the duty to consult in this case and whether it would require "deep consultation" and substantive accommodations. This article only serves as a building block for those looking to trigger this duty.

What remains certain is that Indigenous communities in the Arctic will increasingly continue to face the serious impacts of climate change, thus further threatening their survival as distinctive communities. Though the duty to consult and accommodate offers a legal tool for Indigenous communities to ensure their involvement in climate change decision-making and potentially secure rights to accommodation, it does not provide these communities a veto right; the duty to consult and accommodate is rather focused on guaranteeing a decision-making process that upholds the honour of the Crown.[235] Nevertheless, should the Crown fail to uphold its duty to consult and accommodate, courts have consistently quashed government orders, notably orders approving resource development projects.[236]

Still, the question for these communities remains how to incite the government to substantially reduce its GHG emissions and proactively support climate adaptation. As stated by Sniderman & Shedletzky, "the drawback of this approach, at least with respect to climate change, is that the duty to consult does not necessarily entail equally effective remedies."[237] Instead, this is likely a question better suited for section 7 and section 15 of the *Canadian Charter of Rights and Freedoms*[238] or within a section 35 rights infringement analysis. For instance, Chalifour & Earle[239] note that "[i]t is worth underlining the strength that indigenous claimants would have in bringing a section 7 climate challenge." Nonetheless, it is wise to question whether courts are open to interpreting *Charter* rights from an Indigenous perspective after the majority's decision pertaining to the right to freedom of conscience and religion under section 2(a) in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource*

---

235 *Coldwater Indian Band v Canada (Attorney General)*, 2020 FCA 34 at para 53.

236 *Clyde River, supra* note 115 at para 53; *Tsleil-Waututh, supra* note 126 at para 768.

237 Sniderman & Shedletzky, *supra* note 5 at 14.

238 *Charter, supra* note 6, s 7 & 15.

239 Chalifour & Earle, *supra* note 5 at 719. See also the following who mention the possibility of an Indigenous section 7, 15, or 35 claim: Gage, *supra* note 5 at 262; Sniderman & Shedletzky, *supra* note 5; Klaudt, *supra* note 5 at 221-224 & 235.

*Operations)*,[240] which has been criticized by Peter Hogg, among others, as having taken an overly western approach to religion.[241]

To conclude, Margaret Atwood once noted that "for many Canadians, the North is part of the imagined body. It's an extension of the self, not the rational self but the self that feels. When the North is damaged and we hear about it, we hurt. The twenty-first century will tell us—once and for all, I suspect—how much of ourselves we're prepared to destroy."[242] Though this rings true, the North is much more than a part of an "imagined body" for Indigenous communities in the Arctic who have called it home since time immemorial. And for these communities, the harms of climate change are all too real. A duty to consult and accommodate these affected communities will ensure their voices are heard, even at the very least to remind the Crown that its actions and decisions destroy more than Canadian identity.

---

240 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54, [2017] 2 SCR 386. In this case, the *Ktunaxa Nation* argued that the government's decision to allow the Glacier Resorts project to proceed violated their right to freedom of conscience and religion protected by s 2 (*a*) of the *Charter*. They asserted that "the project, and in particular permanent overnight accommodation, [would] drive Grizzly Bear Spirit from Qat'muk. As Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices, its departure […] would remove the basis of their beliefs and render their practices futile. The Ktunaxa argue[d] that the vitality of their religious community depends on maintaining the presence of Grizzly Bear Spirit in Qat'muk" (para 59). However, the majority ruled that s 2(a) was not engaged because the scope of the freedom of religion includes "the freedom to believe and the freedom to manifest belief" (para 67) but does not "protect the object of beliefs." This interpretation clearly prefers a western notion of religion and spirituality as something internal to oneself and abstract rather than Ktunaxa's understanding of spirituality as something linked to the physical world.

241 For example, see Howard Kislowicz & Senwung Luk, "Recontextualizing Ktunaxa Nation v. British Columbia: Crown Land, History and Indigenous Religious Freedom" (2019) 88:2 SCLR 205; Natasha Bakht & Lynda Collins, "The Earth is Our Mother: Freedom of Religion and the Preservation of Aboriginal Sacred Sites in Canada" (2017) 62:3 McGill LJ 777; Centre of Constitutional Studies, University of Alberta, "Peter Hogg—First Nations' Freedom of Religion" (January 31, 2018), online (video): YouTube <www.youtube.com/watch?v=jb6i9iqwjYo>.

242 Environment Yukon, *Yukon Government Climate Change Action Plan* (Whitehorse: Environment Yukon, 2009), at 2, online (pdf): <www.env.gov.yk.ca/publications-maps/documents/YG_Climate_Change_Action_Plan.pdf>.