A Duty to Care:
The Missing Connection between Indigenous Rights and the Rights of Nature in Canada

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Essay for International Human Rights - LLM course
University of Kent, May 2020

Reconciliation between Aboriginal and non-Aboriginal Canadians, from an Aboriginal perspective, also requires reconciliation with the natural world. [1]
Elder Crowshoe

Introduction

It is hard to imagine 'Mother Earth' being discussed in the board rooms in the heart of oil and gas country in Calgary, Alberta, Canada. But times may be changing. In 2019 an article discussing rights of nature and the duty to consult was published in the Journal of Energy & Natural Resources Law.[2] Laura S. Lynes discussed the connection between Canada's obligation for consultation of Indigenous peoples in Canada alongside the recent developments of recognizing legal nature rights in New Zealand, India, Ecuador and other areas around the world. It is a signal for a new consideration of rights. But this mindset of respect and protection of nature is not new. It has just been ignored.

In this essay I argue that the duty to consult is a long way from adopting nature rights and is insufficient as a means of reconciliation for Indigenous peoples in Canada. The connection between nature and indigenous rights is, however, a necessary first step.

[1] Quote from Elder Crowshoe in the Truth and Reconciliation Commission of Canada, 'Final Report of the Truth and Reconciliation Commission of Canada: Summary : Honouring the Truth, Reconciling for the Future' (2015). 18
[2] Laura S Lynes, 'The Rights of Nature and the Duty to Consult in Canada' (2019) 37 Journal of Energy & Natural Resources Law 353.

A DUTY TO KNOW

Without going into too much historical detail,[3] at the very least, some background regarding legal context is needed. In pre-colonial territory, of what is now Canada, Indigenous peoples [4] governed with set of laws and customs that, while differing among the many distinct nations, were mostly consistent in a belief of a Creator that granted them a duty to respect and care for the land.[5]

Post French and British settlement, governance of the First Nations was subordinated legislatively, into the Indian Act first passed 1876.[6] Eleven treaties were created with the intent of a "coherent policy to eliminate Aboriginal peoples as a distinct people and to assimilate them into the Canadian mainstream against their will".[7] Languages and spiritual practices were banned, and children were taken away from their families and sent to residential schools.[8] It is a brutal part of history that most Canadians weren't aware of.[9]

Despite all that, most of the the cultures, customs and languages survived.[10] At the last census, there are over 630 First Nation communities, from 50 different nations and languages.[11] in British Columbia alone there are 30 languages spoken.[12]

One of the recommendations for reconciliation is to remove the outdated Indian Act.[13] It has been amended since the original in 1867 but is still paternalistic and oppressive.[14] It does not align with

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[3] The Truth and Reconciliation Commission's Report (n 1) 500+ page report extensively covers many of the issues surrounding colonialism in Canada. A list of historical books and reports are available on First Peoples Law website as compiled by Bruce McIvor at firstpeopleslaw.com/index/articles/447.php.
[4] The use of the word Indigenous is the internationally accepted term for original peoples. The Canadian Constitution uses Aboriginal and that includes First Nations, Inuit and Metis groups so those terms will be used when appropriate. Note that the Constitution Act does not capitalize 'aboriginal' so lower case will be used in direct quotes from the Act but, as is standard with most legal texts, will be capitalized here.
[5] Truth and Reconciliation Commission of Canada (n 1).
[6] Indian Act (R.S.C., 1985)
[7] Truth and Reconciliation Commission of Canada (n 1). 3
[8] ibid.
[9] Mario Canseco, 'Poll Reveals Canadians' View of Residential Schools' *National Observer* (23 November 2017).
[10] Truth and Reconciliation Commission of Canada (n 1). 12
[11] Government of Canada, '2016 Census - First Nations' (2016).
[12] Kerry Banks, 'The Rise of Aboriginal Law' [2018] *University Affairs*.
[13] Alex Geddes, 'Indigenous Constitutionalism Beyond Section 35 and Section 91(24): The Significance of First Nations Constitutions in Canadian Law' (2019) 3 Lakehead Law Journal.
[14] Doug Beazley, 'Decolonizing the Indian Act: No One Likes It. So Why Is It so Hard to Change?' (2017).

the update to the Constitution and section 35 (1) of the Charter of Rights and Freedoms[15] considering the verbiage: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed' and via 35 (3) 'For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements *or may be so acquired*'.[16]

THE DUTY TO CONSULT

The fact that the Charter states that Aboriginal peoples have rights is one thing, how that plays out in regards to projects that occur on lands where a claim "may be so acquired" is another matter.[17] Duty to consult was implied but lacking clear precedent[18] until the *Haida* decision clarified the duty to consult was necessary 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". [19] The court also made clear that the duty did not equal veto rights but a 'duty to consult and, if appropriate, accommodate'.[20]

How to apply duty to consult into practice has been difficult. The relationship between the government and Aboriginal peoples can be described as similar to the duties the Crown has to corporations with 'political autonomy'[21] or as a 'quasi-municipal' entity. [22] Lorne Sossin describes the decision from the Supreme court *Sparrow* case, where self-governance was confirmed but within the "framework of the Canadian Confederation'.[23]

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[15] Brian Slattery, 'First Nations and the Constitution: A Question of Trust' (1992) 71 Canadian Bar Review 261.
[16] Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, *emphasis added*
[17] Peter J Carver, 'Comparing Aboriginal and Other Duties to Consult in Canadian Law - Page 2' (2012) 49 Alberta Law Review 855.
[18] Dwight G Newman, 'The Role and Rule of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resources Sector' [2014] Macdonal-Laurier Institute Papers Series.
[19] *Haida Nation v British Columbia* (Minister of Forests) [2004] SCC 73 paragraph 35
[20] Carver (n 17).
[21] Slattery (n 15).
[22] Robert Hamilton and Joshua Nichols, 'The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult' (2019) 56 Alberta Law Review 729.
[23] Lorne Sossin, 'The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights' (2010) 23 Canadian Journal of Administrative Law & Practice 93.

The duty may be an obligation of the Crown but it also affects project developers[24] as often the facilitation of the consultation falls with the developer/company.[25] It is not hard to see where bias could lie and consultation could then skew towards lending weight to the proponents and not a balanced consultation. [26]

The extent of the consultation needed also is unclear as it depends on the strength of the claim. The Supreme Court has acknowledged that First Nations were here long before Europeans[27] yet exactly how those lands and titles are validated is still unresolved. Consultation and consent lie on a spectrum depending on the strength of the claim, which is up to the First Nation community to prove.[28]

Even with this duty the government does not have to agree with the results and accommodation isn't always required. [29] While it cannot shirk the duty to the extent it did in the recent *Tsleil-Waututh* Nation case[30] involving the Trans Mountain pipeline (where court deplored the consultation in the last phase as "unacceptably flawed'[31]) instruction has not been enough to clearly direct the degree of consultation.[32] The *Tsleil-Waututh* case revealed improvements in the initial consultation process but the Crown failed to participate in effective consultation that was more than just an 'exchange of information' in the final stages.[33]

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[24] Fasken Law, 'Indigenous Law in Canada | 2019 Guide' <https://www.fasken.com/en/knowledge/doing-business-canada/2019/06/indigenous-law?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration> accessed 16 May 2020.
[25] Alejandro Gonzalez, 'The Evolution of the Duty to Consult' (2020) 10 Western Journal of Legal Studies 680.
[26] Melvin Aron Eisenberg, 'Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller' (1978) 92 Harvard Law Review 410.
[27] Kent McNeil, 'The Jurisdiction of Inherent Right Aboriginal Governments Repository Citation' (2007) <https://digitalcommons.osgoode.yorku.ca/all_papers> accessed 7 May 2020. In reference to R v. Van der Peet [1996] 2 SCR 507
[28] Bryn Gray, 'Building Relationships and Advancing Reconciliation Through Meaningful Consultation' (2016) <https://www.aadnc-aandc.gc.ca/eng/1498765671013/1498765827601> accessed 6 May 2020.
[29] Zachary Davis, 'The Duty to Consult and Legislative Action' (2016) 79 Saskatchewan Law Review.
[30] *Tsleil-Waututh Nation v Canada* (Attorney General) [2018] FCA 153

[31] Tsleil-Waututh Nation v. Canada (Attorney General) 2018 FCA 153 para 557
[32] Robert Hamilton, 'Uncertainty and Indigenous Consent: What the Trans-Mountain Decision Tells Us about the Current State of the Duty to Consult' (2018) <http://ablawg.ca/wp-content/uploads/2018/09/Blog_RH_TMX_Sept2018.pdf> accessed 12 May 2020.
[33] Tsleil-Waututh Nation case, para 564

The pipeline company, Kinder Morgan, decided after years consultation and assessments, that the risks were too much.[34] They pulled out but Canada had promised the electorate that this pipeline would be built and so the government bought the pipeline.[35] The First Nations involved in this case insisted they would continue to fight, but now with Canada is in the role of proponent and regulator.[36] It is not hard to surmise this consultation is not going to end well.

DUTY FOR COLLOBORATION

Like Canada, New Zealand is a colonial state whose laws differ from the original first peoples' laws.[37] Unlike Canada, New Zealand has made greater strides in consideration of the Maori views including historically having Maori representatives in parliament (originating in 1867).[38] The Treaty of Waitangi does prescribe customary rights, similar to Canada's Charter.[39] The real difference though is the granting of legal personhood to Whanganue River and the Te Urewera forest.[40]

A long contested Maori claim to the Te Urewera park facilitated this agreement as a compromise – giving legal personality to the area which is more in line with how Maori perceive land instead of via property transfer. [41] As Christopher Stone years earlier suggested, managing nature rights would require a guardianship[42] and the Te Awa Tupua is now stewarded by a Maori/New Zealand management board.[43] It is essentially a partnership that could be a model for countries like Canada to pursue.

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[34] Hamilton (n 32).
[35] Jason Markusoff, 'The Liberals Own the Trans Mountain Court Loss as Surely as They Own the Pipeline - Macleans.Ca' [2018] *Maclean's*.
[36] Jane Seyd, 'Squamish, Tsleil-Waututh Vow to Continue Pipeline Fight Following Trans Mountain Approval' (*North Shore News*, 21 June 2019) <https://www.nsnews.com/news/squamish-tsleil-waututh-vow-to-continue-pipeline-fight-following-trans-mountain-approval-1.23863417> accessed 18 May 2020.
[37] Anthony Wicks, 'Beyond Audi Alterum Partem: The Duty to Consult Aboriginal Peoples in Canada and New Zealand' [2009] Journal of South Pacific Law 13.
[38] Government of New Zealand, '150 Years of Māori Representation in Parliament - New Zealand Parliament' <https://www.parliament.nz/en/get-involved/features/150-years-of-māori-representation-in-parliament/> accessed 11 May 2020.
[39] Wicks (n 37).
[40] Gwendolyn J Gordon, 'Environmental Personhood' (2019) 43 Columbia Journal of Environmental Law.
[41] McGill Law Journal Podcast, 'Legal Personality of the Environment, Part I' (2017) <https://lawjournal.mcgill.ca/article/legal-personality-of-the-environment-part-i/> accessed 10 May 2020.
[42] Christopher Stone, 'Should Trees Have Standing? Law, Morality and the Environment' (1972) 45 Southern California Law Review 450.
[43] McGill Law Journal (n 41).

But even with ideal of the connection of nature and Indigenous rights, a process of consultation has been argued as too difficult in the New Zealand courts and is not considered a legal duty.[44] Similar to Canada's environmental impact assessment process, New Zealand has a Resource Management Act that acknowledges Maori culture but it does not constitute a requirement for consent.[45] Seeking and implementing consultation has been difficult to manage. [46]

New Zealand courts have elicited instructions of partnership in a similar vein to the duty to consult, reiterating the Treaty of Waitangi.[47] Resource Management Act (RMA) (whose purpose mirrors Canada's Impact Assessment act but with more cultural awareness) recognized the sacred sites and culture.[48] Stewardship was explicit in the act.[49] This follows the Maori beliefs that people are caretakers of the earth, not just utilizers of the resources. [50] [51]

So while nature rights have been recognized in New Zealand, the partnership ideal and consent between the crown and Maori has seen some of the same issues and difficulties as Canada.

Ecuador has taken a different step by acknowledging Mother Earth more formally by adding to their constitution stating that 'Nature of Pachamama has right to exist, persist and regenerate its vital cycles, structures, functions and its processes in evolution'. [52] This over-arching approach adopted the

[44] Wicks (n 37).
[45] Chris Jacobson and others, 'Mainstreaming Indigenous Perspectives: 25 Years of New Zealand's Resource Management Act' (2016) 23 Australasian Journal of Environmental Management 331.
[46] Richard K Morgan, 'Progress with Implementing the Environmental Assessment Requirements of the Resource Management Act in New Zealand' (1995) 38 Journal of Environmental Planning and Management 333.
[47] Wicks (n 37).
[48] Resource Management Act (NZ) Part 2 Section 6e
[49] Resource Management Act (NZ) Part 2 Section 7a
[50] Ulrich Klein, 'Belief-Views on Nature - Western Environmental Ethics and Maori World Views' (2000) 4 NZ J Envtl L 81.
[51] Marsden M, Henare TA. Kaitiakitanga: A Definitive introduction to the holistic world view of the Maori. Ministry for the Environment (1992) as cited by Nin Tomas, 'Maori Concepts of Rangatiratanga, Kaitiakitanga the Environment and Property Rights' in David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Leiden: Martinus Nijhoff 2011).
[52] Tomas (n 51). 244

ontological view of indigenous but in doing so also effectively equalizes rights for everyone (and all of nature). [53]

Ecuador has also had issues with implementing a duty to consult process. The Inter-American Court of Human Rights ruled in 2012 that Ecuador had not consulted with the Sarayaku peoples.[54] The government had insisted that their duty was not applicable until after the ratification of the International Labour Organization Convention 169 and the change to their constitution.[55] It is an example of the resistance to the moral obligation to uphold a duty to consult until which time a government is mandated to do so. Just as we have seen with the Canadian courts, the judgement implored the need for dialogue, 'mutual trust' and the seeking of a consensus.[56]

The recognition of indigenous views in New Zealand and Ecuador, while not perfect, does move their policies towards a nature centric world view.[57]

DUTY TO MOTHER EARTH

As part of the fight for self-governance, some First Nations have developed their own constitutions.[58] The Nipissings First Nations' Gichi-Naaknigewin states in Preamble: 'we declare and acknowledge the Creator for the gifts of Mother Earth, sovereign rights to govern ourselves and for our cultural heritage'.[59] This incorporates the underlying spiritual beliefs as their sacred law.[60]

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[53] Cristy Clark and others, 'Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2018) 45 Ecology Law Quarterly 787.
[54] Lisl Brunner and Karla Quintana, 'The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku' (2012) 16 ASIL Insights - American Society of International Law <https://www.asil.org/insights/volume/16/issue/35/duty-consult-inter-american-system-legal-standards-after-sarayaku> accessed 8 May 2020.
[55] ibid.
[56] ibid.
[57] Susana Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5 Transnational Environmental Law.
[58] Geddes. Alex (n 13).
[59] Nipissing First Nation, 'E-Ntambiigaadeg (Preamble) to Nipissing First Nations Constitution' (2014) <https://www.nfn.ca/wp-content/uploads/2020/04/E-ntambiigaadeg.pdf> accessed 10 May 2020.
[60] McNeil (n 27).

The Truth and Reconciliation Commission Report (TRC), quoted many elders reinforcing the cultural and spiritual connections indigenous have to the earth.[61]

Canada has not adopted the spiritual and cultural acceptance of this indigenous world view that other countries or the nations within Canada have done. The closest that could be found, on federal government pages, was on the Canadian Biodiversity Strategy page. The strategy notes, under a heading of Spiritual Importance and National Identity, that "Indigenous people have developed, over thousands of years, an intimate cultural relationship with nature' but stop short of fully acknowledging the inherent worth of nature by singling out that 'Many Canadians believe that each species has its own intrinsic value, regardless of its value to humanity…*they* believe that we should conserve biodiversity for its own sake'.[62] The use of 'they' highlights the careful regard for a spiritual notion.

Contrast this with the Rights of Mother Earth, spearheaded by Bolivia and adopted by Universal Declaration of Rights of Mother Earth where in the preamble, it states the interconnectivity of all life on earth and "affirming that to guarantee human rights it is necessary to recognize and defend the rights of Mother Earth and all beings in her and that there are existing cultures, practices and laws to do so…'[63]

DUTY TO PROTECT

New Zealand acknowledges guardianship of nature as integral to the indigenous world views and includes guardianship as responsibility within the RMA.[64] Jonathan Sax calls it a duty to protect,[65] and it is analogous to how Indigenous speak of the connection with nature.

In Canada, this stewardship is not as strongly translated into policy or legislation besides the more regulatory requirements of the Impact Assessment Act[66] and the Species at Risk Act (SARA).[67] This

[61] Truth and Reconciliation Commission of Canada (n 1). 18
[62] BiodivCanada, 'Canadian Biodiversity Strategy' <https://biodivcanada.chm-cbd.net/documents/canadian-biodiversity-strategy#wsB4D67704> accessed 10 May 2020. Emphasis added.
[63] World People's Conference on Climate Change and the Rights of Mother Earth, 'Universal Declaration of the Rights of Mother Earth' (2010).
[64] Jacobson and others (n 45).
[65] Gerald Torres, 'Joe Sax and the Public Trust - Environmental Law' (2015) 45 Environmental Law 379.
[66] Impact Assessment Act 2019

burden of this protection often falls indirectly on the First Nations[68] because of their protection of land claims but also because of the intimate tie with nature. Two examples in particular highlight the efforts and advocacy by First Nations to ensure that legislation was heeded.

In the *West Moberly*[69] case the First Nations group sought to protect the threatened caribou from the impacts of a coal mine. Caribou are a traditional food source and hold cultural significance to the First Nations communities and this population in British Columbia was under threat. SARA in particular requires action plans for threatened and endangered animals, of which the caribou was one. Indigenous are not always included in consultations for SARA action plans even though the cultural ties have been noted.[70] Consultation as part of the assessment focused on hunting rights and not on the overall significance of the caribou, nor did it plan for an adequate measures to protect it. The provincial supreme court ruled for the Nation but it took significant effort to raise awareness and fight for those rights. In a scathing analysis of the case, it was found that the government had erred on a number of levels, including the '...the decisions negate federal law, disregard the best available scientific and traditional knowledge, and fail to uphold the constitutional and treaty rights of the First Nation to meaningfully exercise its cultural practices and customs.'[71]

In a similar but more recent case involving killer whales, the British Columbia coastal nations fought the Trans Mountain pipeline[72]. The risks to the Southern Resident Killer Whales population were ignored even though increase shipping traffic was shown as a high risk to the threatened pod. The scientific information to back up the risks to the killer whales was available but essentially ignored as was

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[67] Species at Risk Act 2002
[68] Bruce R Muir and Annie L Booth, 'An Environmental Justice Analysis of Caribou Recovery Planning, Protection of an Indigenous Culture, and Coal Mining Development in Northeast British Columbia, Canada' (2012) 14 Environment, Development and Sustainability 455.
[69] West Moberly First Nation v British Columbia (Chief Inspector of Mines) [2010] BCSC 359

[70] Monique Keiran, 'First Nations Deserve a Role in Species-at-Risk Strategies' *Times Colonist* (3 March 2019).
[71] Muir and Booth (n 68).
[72] Tsleil-Waututh Nation v. Canada (Attorney General) 2018 FCA 153

the cultural relationship many coastal indigenous have with the killer whales.[73] Incorporation of Aboriginal traditional knowledge could have been valuable but that process hasn't been well incorporated either.[74] As Lawyer and professor Pam Palmater, opined "the government should have been acting in the best interests of Canadians, First Nations, killer whales and our entire ecosystem…"[75]

BEYOND A DUTY TO CONSULT

Free, Prior and Informed Consent

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) calls for calls for free, informed and prior consent (FPIC). [76]

The Truth and Reconciliation Report recommended implementing UNDRIP as one of the actions towards reconciliation specifically in the Calls to Action. [77]Both Canada and New Zealand (along with United States and Australia) did not originally sign on and FPIC was a stumbling block for both[78] [79] Canada specifically noted concerns would allow a veto by Aboriginal groups.[80] Canada did eventually sign on to UNDRIP in 2010 but in a rather noncommittal way, calling the declaration "aspirational". [81]

Legislation federally so far has failed as well. A private members bill C-262 was drafted but did not pass the Senate[82] and may have faced great implementation challenges if it had.[83] Adding in UNDRIP

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[73] Nicolas Rehberg-Besler and Cameron SG Jefferies, 'The Case for a Southern Resident Killer Whale Emergency Protection Order under Canada's Species at Risk Act' (2019) 32 Journal of Environmental Law and Practice 137.
[74] Graham White, 'Cultures in Collision: Traditional Knowledge and Euro-Canadian Governance Processes in Northern Land-Claim Boards' (2006) 59 Arctic 401.
[75] Pam Palmater, 'Respect for First Nations Rights Could've Spared Us This Panic over Trans Mountain' (2018) *Maclean's*.
[76] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples (2007) Article 19
[77] 'Truth and Reconciliation Commission of Canada: Calls to Action'.
[78] Naomi Solomon, 'Was the New Zealand Government Justified in Voting against the Declaration on the Rights of Indigenous Peoples?' 0 Te Kahui Kura Maori <http://nzetc.victoria.ac.nz/tm/scholarly/tei-Bid001Kahu-t1-g1-t4.html> accessed 11 May 2020.
[79] Truth and Reconciliation Commission of Canada (n 1). P188
[80] ibid. 189
[81] Government of Canada, 'Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples' (2010) <https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> accessed 14 May 2020.
[82] Justin Brake, ''Let Us Rise with More Energy': Saganash Responds to Senate Death of C-262 as Liberals Promise, Again, to Legislate UNDRIP ' *APTN News* (June 2019) <https://aptnnews.ca/2019/06/24/let-us-rise-with-more-energy-saganash-responds-to-senate-death-of-c-262-as-liberals-promise-again-to-legislate-undrip/> accessed 10 May 2020.

to the impact assessment legislation also failed.[84] The provincial government of British Columbia did add it to legislation to much fanfare in 2019 but it isn't known yet how this will actually affect policies on the ground.[85]

If consent, in line with FPIC, is not likely either at this point, then some interim middle ground is needed.

Negotiation

The courts have confirmed there needs to be more of a dialogue and consideration for both sides[86] to the extent that in the famous *Delgamuukw* case, the duty was considered a moral one. [87] In reviewing the judgements and case analyses, the duty to consult was never intended to be just a fact-finding exercise but a genuine effort to ultimately, reach a consensus, without the Courts having to try to dictate legislation.

The federal government seems to be in agreement, in principle, as per the Crown-Indigenous Relations and Northern Affairs Canada's treaties webpage: 'The Government of Canada believes that co-operative negotiations and respectful dialogue are the best way to resolve outstanding issues'. [88] Making that happen with the current processes of negotiation (or lack thereof) is falling short. A higher level of consultation however adds complexity to an already complex system and isn't as simple as Courts and Government like to project.[89]

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[83] Thomas Isaac and JA Hoekstra, 'Implementing UNDRIP in Canada: Challenges with Bill C-262' (2018) <https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR9776741/br-external/IsaacThomas-e.pdf> accessed 10 May 2020.
[84] Sharon Mascher, 'Aligning Canadian Impact Assessment Processes with the Principles of UNDRIP | Centre for International Governance Innovation' (2019) <https://www.cigionline.org/articles/aligning-canadian-impact-assessment-processes-principles-undrip> accessed 29 March 2020.
[85] B.C. Declaration on the Rights of Indigenous Peoples Act 2019
[86] Hamilton (n 32).
[87] Felix Hoehn, 'The Duty to Negotiate and the Ethos of Reconciliation' (2020) 83 Saskatchewan Law Review.
[88] Government of Canada, 'Treaties and Agreements' <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231> accessed 16 May 2020.
[89] David V. Wright, 'Tsleil-Waututh Nation v. Canada: A Case of Easier Said than Done' (*ABlawg*, 2018) <http://ablawg.ca/wp-content/uploads/2018/09/Blog_DVW_TMX_Sept2018.pdf> accessed 9 May 2020.

These cases are also extremely taxing on the Indigenous communities to litigate. As an extreme example, the *Delgamuukw*[90] case took years and over 300 hours of testimony.[91] This burden is not effective or feasible for the Crown or Indigenous nations. Developing intermediary steps to establish a stronger culture of negotiation and mediation is needed.

Tribunals

One of the solutions may be to move away from crown/proponent led consultations to more equalizing process. Utilizing an expert led tribunal could facilitate negotiations outside the courts[92] The same approach has been used at various jurisdictional levels for an 'ecologically literate approach to their respective human rights instruments'[93] There are models for similar approaches in Canada such as the resource boards in the northern territories.[94] The International Rights of Nature Tribunal is another potential model. It has heard cases from around the world and uses experts from a variety of fields for a holistic understanding of the issues.[95]

Longer terms plans will require a way to better work together that is less adversarial such as the co-management of the Maori/New Zealand board for Te Awa Tupua.[96] This is a pristine example of how land claims could better be handled. One can only imagine the complexities to implement this in Canada where claims are not mostly tied to national parks but to private industrial, agricultural and natural resources-based lands.[97] It will require moving beyond just economic considerations.

A DUTY TO CARE

[90] Delgamuukw v. British Columbia [1997] 3 SCR 1010
[91] Sossin (n 23).
[92] Gonzalez (n 25).
[93] Nickie Nikolaou, 'The Intersection of Human Rights Law and Environmental Law' in Allan E Ingelson (ed), *Environment in the Courtroom Edited* (University of Calgary Press 2019).
[94] Biodivcanada, 'Canada Target 15: Detailed Assessment Report - Prepared as Supplement for Canada's 6th National Report to the CBD' (2018).
[95] David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press 2017). 213
[96] Clark and others (n 52).
[97] Slattery (n 15).

Considering the past harms done, Truth and Reconciliation report has noted the need to heal on the path to reconciliation. To do so we need to go way beyond consultation with more ecofeminist view into an obligation for compassion. [98] This is not a complete stretch away from current processes as it would not be unlike the duty to care that is foundational in health care. The implication is we are not hiding behind the bare minimum legal standards, or justifying monetary values as the public interest, but expanding to approach indigenous rights with moral and ethical understanding and respect. Without what Rodney Harrison refers to as a 'regime of care'[99] any efforts made could be just superficial.

CONCLUSION

While debating the legal personhood of the Whanganui River the Maori spoke of the river as central to their core being and their legacy while non-Indigenous in parliament implored people to speak of the river less emotionally.[100] This dissonance is fundamental to understanding the disconnect and divide facing nature and indigenous rights.

Adopting UNDRIP into Canadian law requires continued consideration. Implementing it will be difficult but a system of tribunals and respectful negotiations would go far as a way to start.

It may be that recognition of the value of nature is necessary for mutual understanding of Indigenous views. Until Canada can reach this level of understanding, it is arguable as to how good negotiations can be due to the polarizations of views. A duty that extends beyond consultation is the bare minimum of what is needed. It needs to envelope the consideration for nature rights along with indigenous rights in a duty to care – for all peoples, the future generations, and nature. It needs to be indoctrinated into a system that acknowledges and respects ecological and human rights law.

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[98] Sabrina Tremblay-Huet, 'Should Environmental Law Learn from Animal Law? Compassion as a Guiding Principle for International Environmental Law Instead of Sustainable Development' (2018) 1 Revue québécoise de droit international 125.

[99] Rodney Harrison, 'Beyond "Natural" and "Cultural" Heritage: Toward an Ontological Politics of Heritage in the Age of Anthropocene' (2015) 8 Heritage & Society 24.

[100] Clark and others (n 52).

The acceptance of indigenous world views, and an appreciation for the intertwining of ecology and spiritual, may be a way forward, not for just reconciliation but as an ideology for harmony for all.

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