Commentary

Proposed Administrative Tribunal Policies Concerning Indigenous Ecological Knowledge and Values, and the Duty to Consult

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> … without administrative tribunals, the rule of law in the modern regulatory state would falter and fail. Tribunals offer flexible, swift and relevant justice. In an age when access to justice is increasingly lacking, they help to fill the gap. And there is no going back.[1]
>
> —The Rt. Hon. Beverley McLachlin, PC, CC, CStJ
> Former Chief Justice, Supreme Court of Canada

1. Introduction

Former Chief Justice McLachlin's recognition of the importance and effectiveness of tribunals is nowhere more relevant than in Canada's North—particularly with respect to the co-management of wildlife and the environment. Prior to the relatively recent establishment of land claim boards, much decision making with respect to environmental and wildlife matters in the northern regions was made in Ottawa, and essentially all decision making followed processes that, at best, afforded insufficient input from those most affected by such decisions.

While significant advances have been achieved over the last several decades, there still remains room for improvement. Accordingly, this article intends to set out recommendations for:

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(a) Enhancements to the integration of Indigenous Ecological Knowledge (IEK)[2] and values into the practice of administrative law in the North; and

(b) Tribunal policies that reflect recent Supreme Court of Canada decisions regarding the duty to consult and, where appropriate, accommodate.

2. The Further Integration of Indigenous Ecological Knowledge and Values into Tribunal Processes

Between them, land claim boards in the Yukon, the Northwest Territories, Nunavut, Nunavik, and Nunatsiavut are arguably already world leaders in the integration, consideration, and application of IEK and Indigenous values in their processes and decision making. That said, each of those tribunals undoubtedly receives occasional, if not regular, complaints about insufficient recognition and consideration of such knowledge and values, as well as accompanying objections to tribunal bias towards Western science—particularly when scientific conclusions or processes are, or appear to be, in conflict with Indigenous perspectives.

Acknowledging all of the above, the following proposed enhancements—some or all of which may already be followed by one or more northern land claim boards—are intended to deepen existing policies that reflect a tribunal's commitment to co-management[3] and to equal recognition and consideration of IEK and Indigenous values.[4]

2.1. Include relevant Indigenous values within the tribunal's core operating principles

In order to achieve its statutory mandate, and its accompanying mission and vision,[5] every administrative tribunal must closely adhere to core operating principles. A number of such principles are usually set out in the tribunal's governing land claim agreement and applicable statutes. In general, administrative tribunals, as masters of their own procedures, have the capacity to adopt additional principles compatible with their statutory mandates.[6]

Accordingly, it is recommended that each northern land claim board—if it has not done so already—conduct appropriate consultations with respect to Indigenous values relevant to its statutory mandate, and formally include within its core operating principles those values that would assist the tribunal in achieving that mandate, as well as its mission and vision.

Examples of relevant Indigenous values are the following:

(a) People must work together in harmony to achieve a common purpose;
(b) People who wish to resolve important matters or differences of interest must treat each other with respect, and must discuss such matters and differences in a meaningful way;
(c) People are stewards of the environment, and must treat nature holistically and with respect because humans, wildlife, and habitat are interconnected;
(d) Malice towards animals is prohibited, and hunters should avoid causing animals unnecessary suffering; and
(e) People must only hunt what is necessary for their needs, and must not waste the wildlife that they hunt.[7]

2.2. Respect and advocate for copyright protection of IEK

Notwithstanding Canada's ratification of the 1992 United Nations *Convention on Biological Diversity*,[8] and its formal and full support in May 2016 of the *United Nations Declaration on the Rights of Indigenous Peoples*,[9] there remain significant obstacles in this country to the copyright protection of IEK.[10] That incomplete protection appears to be primarily due to fundamental differences between Indigenous and Western world views and experience—in particular, individual vs. collective ownership, written/tangible format vs. oral/intangible format, and fixed vs. indefinite protection of intellectual property. The result is that the *Copyright Act*, as currently written,[11] is necessarily discriminatory in its application to Indigenous Peoples.[12]

Northern administrative tribunals are in a unique position to advocate, on behalf of their stakeholders, for the removal of such discrimination under the *Copyright Act*. At the same time, they should ensure respect—within their own operational spheres—for the copyright protection of IEK.[13] Such protection would, at a minimum, achieve two objectives: (i) reflect a proper recognition of the value of IEK; and (ii) reduce the number of instances in which the author of a published work containing IEK holds the legal copyright to that knowledge under the *Copyright Act*, notwithstanding that such knowledge originated from an Indigenous person or persons.[14]

Probably the best way in the current circumstances to achieve IEK copyright protection—and to promote access to justice in the practice of administrative law in the North—is through suitable contracts and licensing agreements with IEK holders. For instance, a tribunal could, with appropriate legal assistance, develop one or more template agreements and/or licences, which could be readily modified to specific circumstances. Because land claim boards are non-profit

public institutions, a typical licence would in all likelihood: (i) explicitly recognize and give credit to the owner(s) of the copyright; and (ii) grant to the tribunal, from the owner(s), a royalty-free, non-exclusive licence to hold, reproduce, display, distribute, publish, translate, and communicate the copyrighted material. The licence would presumably also make clear that the permission granted by the owner(s) is intended to ensure the culturally-appropriate inclusion of IEK in northern environmental and wildlife research and management.

2.3. Require that scientific research addressing issues of high economic, social, or cultural interest to Indigenous stakeholders—and within the tribunal's jurisdiction—be accompanied by relevant IEK research

For proposed northern environmental or wildlife decisions of high economic, social, or cultural interest to Indigenous stakeholders, the federal, territorial, or provincial government, as the case may be, almost always first commissions relevant publicly-funded scientific research to help inform and persuade the eventual decision maker(s). While relevant IEK research is sometimes also arranged, that is certainly not the norm. It should be.

In 2016, Prime Minister Trudeau announced Canada's commitment "… to a renewed relationship with Indigenous Peoples, one based on the recognition of rights, respect, co-operation, and partnership ...".[15] Surely, in the North, the government's formal pledge to reconcile with Indigenous peoples must include a commitment to fund both IEK and scientific research to ensure that crucial environmental and wildlife decisions are always informed by the best science and IEK.

Land claim tribunals play a vital role—as advisors, decision makers, or both—in the protection and management of the northern environment and its wildlife. Acting both individually and collectively, they need to take a leadership role in convincing territorial, provincial, and federal governments that reconciliation includes the provision of adequate funding for necessary IEK research.

2.4. Ensure that all tribunal decisions affecting Indigenous rights or interests are reached in a procedurally fair manner

The Supreme Court of Canada has determined that every public authority making an administrative decision "…which affects the rights, privileges or interests of an individual" is subject to a legal duty of procedural fairness.[16] The principles of procedural fairness consist of the rights to adequate notice, to reasonable disclosure, to a fair opportunity to respond, to a coherent procedure, and, eventually, to a reasoned decision. All northern land claim boards with decision-making authority are bound by such principles. Indeed, even advisory tribunals are expected to meet reasonable standards of fairness in formulating and issuing their advice.

Precisely which procedures are required by the duty of fairness vary according to the circumstances of each case. Among the most significant factors

> …in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.[17]

In the North, decisions concerning wildlife harvesting or land-use activities, such as mineral exploration and development, are highly important to—and can significantly impact—affected individuals and communities. In such cases, the procedural protections required are significant, and generally necessitate a public hearing that meets all of the rights referenced above.

The consistent provision of such procedural protections can raise legitimate administrative concerns, such as efficiency and cost, for affected tribunals. Unfortunately, those concerns sometimes lead to practices and procedures that fall short of the legal requirements of procedural fairness.

By way of example, a land claim board may decide to forego holding a hearing for a proposed wildlife harvest increase, reasoning that an obvious and straightforward decision is not worth the time and cost of a hearing. Such reasoning incorrectly presupposes that no notice, disclosure, or opportunity to respond to the proposal is necessary, presumably based on the faulty assumption that no legitimate conservation or other relevant substantive issue could arise during the course of a hearing.

A practical way forward in such a circumstance might be to hold a relatively inexpensive written hearing. In any case, a tribunal decision arrived at without adequate notice, reasonable disclosure, and a fair opportunity to respond would be unfair, and potentially an invitation for judicial review.

Procedural fairness is always necessary to ensure access to justice. Accordingly, it is essential for all parties to recognize that, as a matter of law, administrative challenges cannot successfully displace the duty of procedural fairness:

> … The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7 [of the *Canadian Charter of Rights and Freedoms*], implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.[18]

3. Tribunal Policies Concerning the Crown's Duty to Consult and, Where Appropriate, Accommodate Indigenous Groups

3.1. The Crown's duty to consult and accommodate

In a series of cases decided between 2004 and 2010, the Supreme Court of Canada asserted the Crown's constitutional common law duty to consult and set out the essential elements comprising that duty.[19] Briefly stated, the duty to consult and, if appropriate, accommodate Indigenous peoples arises when the Crown contemplates conduct that may have an adverse impact on a recognized or asserted Indigenous or treaty right. That solemn duty is grounded in the honour of the Crown, being part of a process of fair dealing and reconciliation that flows from rights guaranteed by section 35(1) of the *Constitution Act, 1982*. The content of the duty varies with the circumstances, being proportionate to the strength of the case and the seriousness of the potentially adverse effect on the (claimed) right.[20] Where a strong case is established, deep consultation is required, which "… may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[21]

3.2. The role of tribunals in the Crown's exercise of its duty to consult

In the 2010 case of *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, the Supreme Court considered the role of tribunals in the Crown's exercise of its duty to consult. Therein, the Court held that an administrative tribunal or regulatory agency with the capacity to consider questions of law has both the authority and the responsibility to evaluate the adequacy of the Crown's consultation effort relevant to a proposed decision—as long as its constitutive legislation does not clearly exclude such jurisdiction from the tribunal or regulatory agency. Furthermore, it may have the ability to partially or wholly meet the Crown's consultation obligations if such authority is explicitly or by necessary implication granted by the legislature.[22]

In two recent judgments—*Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41—the Court clarified and expanded its rulings on the role of tribunals with respect to the Crown's duty to consult. Its judgments support the following conclusions:

(a) A tribunal empowered to consider questions of law must determine whether consultation measures undertaken by the Crown were adequate, "... absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Carrier Sekani* at para 69)."[23] After completing its assessment, the tribunal should provide written reasons for its determination, as they foster reconciliation and are a sign of respect.[24]

(b) With respect to a tribunal's authority to itself fulfill the Crown's duty to consult, it must determine whether its "... statutory duties and powers enable it to do what the duty requires in the particular circumstances..."[25] Where the tribunal determines its own procedures are adequate to rectify prior Crown consultation failures, it should consider and decide the matter pursuant to those procedures.[26] Where the tribunal is of the view that its own processes are not appropriate to rectify the situation, it cannot approve the project.[27] In such a circumstance, the tribunal would likely have no alternative but to adjourn the proceedings until such time as the Crown's duty has been fulfilled.[28]

(c) The Crown is justified in treating a tribunal's proceedings as fulfilling the Crown's duty to consult, as long as the tribunal's "…statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani* at paras 55 and 60)."[29]

(d) The content of the Crown's duty to consult can vary significantly, depending on the facts of each case—from limited to deep consultation. One example where deep consultation would be necessary is when the potential infringement of a constitutionally-protected Indigenous right is of high significance, and the risk of non-compensable damage is high.[30] Where the Crown has a duty of deep consultation, the tribunal's procedural requirements will include the following elements:

    (i) Adequate notice;
    (ii) Reasonable and timely disclosure in an accessible form;
    (iii) Participant funding;
    (iv) An oral hearing; and
    (v) Written reasons to demonstrate that Indigenous concerns were fairly considered, and to explain the impact they had on the decision.[31]

Based upon the four conclusions set out immediately above, it is submitted that every northern land claim board empowered to consider questions of law should develop a useful tribunal policy concerning the Crown's duty to consult and, where appropriate, accommodate Indigenous groups.[32] The purpose of each such policy would be to set out the tribunal's expectations—and relevant roles and responsibilities—concerning the application of the duty to consult within its area of authority. It is recommended that the development of the policy include significant consultation with Indigenous and government co-management partners.

Conclusion

The practice of administrative and Indigenous law in Canada's North is both profoundly challenging and deeply rewarding. The challenges include a severe climate that is warming more rapidly than almost anywhere else on the planet; a vast wilderness territory of 3.5 million square kilometres with minimal physical infrastructure; and a small, economically disadvantaged and widely-scattered human population. The rewards include rich Indigenous cultures with an unbroken connection, over thousands of years, to the land and sea; a still-pristine environment teeming with life; and regular opportunities to showcase to the world co-operative wildlife and environmental management based on the wisdom of Indigenous values, Indigenous Ecological Knowledge, and Western science.

It is this author's sincere hope that the foregoing discussion and recommendations concerning those values, that knowledge, and the duty to consult, will assist in further strengthening northern administrative tribunals and the co-management systems within which they play such a vital role.

Notes

1. "Administrative Tribunals and the Courts: An Evolutionary Relationship," Remarks of the Right Honourable Beverley McLachlin, PC, Chief Justice of Canada. 6th Annual Conference of the Council of Canadian Administrative Tribunals, Toronto, Ontario, 27 May 2013, online: <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.
2. For the purposes of this article, "Indigenous Ecological Knowledge" (often referenced as "Traditional Ecological Knowledge," "Traditional Environmental Knowledge," or "Aboriginal Traditional Knowledge") refers to specific factual knowledge—obtained through Indigenous experience—about various parts of the environment, including plants, animals, land, water, weather, and other physical elements. The author acknowledges that Indigenous knowledge is considerably more comprehensive than what is referenced herein. See, for instance, Peter J. Usher, "Traditional Ecological Knowledge in Environmental Assessment and Management" (2000) 53(2) Arctic 183 at 185.

3. In this article, "co-management" refers to a system of informal partnerships in which the partners—Indigenous stakeholders, governments, and the relevant environmental/wildlife tribunal—work co-operatively to ensure that applicable research, advice, recommendations, and decisions secure, on behalf of future generations, an ongoing healthy environment, including sustainable wildlife populations.
4. At least some of the enhancements proposed herein have potentially significant capital cost implications. With tribunal operating budgets for the current land claim implementation period likely already fully subscribed, a tribunal may have to place one or more of them on its list of necessary improvements for the upcoming implementation period—and then argue for them in the negotiation of its budget for that period. Presumably, a federal government truly committed to reconciliation would be sympathetic to such arguments and to the promotion of IEK (see Crown–Indigenous Relations and Northern Affairs Canada, "Reconciliation," online: <https://www.rcaanc-cirnac.gc.ca/eng/1400782178444/1529183710887>; and Government of Canada, "Indigenous Knowledge Policy Framework for Proposed Project Reviews and Regulatory Decisions," online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/discussion-paper-development-indigenous-knowledge-policy-framework.html>).
5. Many organizations adopt mission and vision statements to help guide them in achieving their mandates. A mission statement succinctly sets out the organization's business (its "mission"), which is the core of what it already does. A vision statement describes what the organization is striving to achieve (its "vision").
6. *Re: Therrien*, 2001 SCC 35 at para 88; *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 685; *Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59 at para 50.
7. See section 8 of the Nunavut *Wildlife Act*, SNu 2003, c 26 ("… guiding principles and concepts of Inuit Qaujimajatuqangit").
8. United Nations *Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992), online: <http://www.cbd.int/convention/text>. See, in particular, Article 8(j) of the Convention: "Each Contracting Party shall, as far as possible and as appropriate: (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices …"
9. United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, online: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>. See Article 31 of the Declaration: "1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural

expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights." See also Indigenous and Northern Affairs Canada, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples," online: <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

10. A potentially significant step forward was taken in 2018 when the Minister of Innovation, Science and Economic Development Canada announced the development of a federal Intellectual Property Strategy which "… seeks to further support Indigenous peoples' IP knowledge and awareness … [and] seeks to provide opportunities for Indigenous peoples to advocate their interests …" See Innovation, Science, and Economic Development Canada, "Introduction to Intellectual Property Rights and the Protection of Indigenous Knowledge and Cultural Expressions in Canada, online: <https://www.ic.gc.ca/eic/site/108.nsf/eng/00007.html>.

11. From December 2017 to June 2019, the *Copyright Act*, RSC 1985, c C-42, as amended, was the subject of a statutorily-mandated and comprehensive three-phase review by the Standing Committee on Innovation, Science and Technology. The committee presented its final report ("Statutory Review of the Copyright Act," online: <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>) to the House of Commons on June 3, 2019. Of the thirty-six recommendations made to Parliament, only one exclusively deals with Indigenous matters. That recommendation and its accompanying commentary are clear that the current law raises significant difficulties for Indigenous individuals and communities—indeed, regularly fails them. However, instead of setting out specific proposed changes to the Act, the recommendation only advises the Government of Canada to "… consult with Indigenous groups, experts, and other stakeholders on the protection of traditional arts and cultural expressions in the context of Reconciliation …" In addition, because Parliament was dissolved on September 11, 2019, Government is no longer required to reply to any committee report from the previous session. While the new minority Liberal government will undoubtedly respond to this report, the most that can be hoped for by Indigenous interests is more consultation, at least over the short to medium term.

12. See *Law Society British Columbia v Andrews*, [1989] 1 SCR 143 at 174, per McIntyre J: "… discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society …".
13. Note that not all IEK requires copyright protection. For example, widely-known and disseminated community knowledge is presumably understood—and intended—to be public knowledge.
14. See, for instance, the experience of the Maliseet First Nation, wherein a university professor recorded stories from Maliseet Elders and obtained legal copyright to those recordings: Andrea Bear Nicholas, "Who Owns Indigenous Cultural and Intellectual Property?" (June 27, 2017) Policy Options (Institute for Research on Public Policy), online: <https://policyoptions.irpp.org/magazines/june-2017/who-owns-indigenous-cultural-and-intellectual-property/>.
15. "Statement by the Prime Minister of Canada on Advancing Reconciliation with Indigenous Peoples", December 15, 2016, online: <https://pm.gc.ca/eng/news/2016/12/15/statement-prime-minister-canada-advancing-reconciliation-indigenous-peoples>.
16. *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653.
17. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 25.
18. *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 70.
19. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43; and *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53. While these five cases were the most significant, as of 2010, in understanding the Crown's duty to consult, the Court has in fact been actively affirming the duty since 1984. See, for instance, *Guerin v Canada*, [1984] 2 SCR 335; *R v Sparrow*, [1990] 1 SCR 1075; *R v Nikal*, [1996] 1 SCR 1013; *R v Gladstone*, [1996] 2 SCR 723; *R v Badger*, [1996] 1 SCR 771; *R v Van der Peet*, [1996] 2 SCR 507; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *R v Marshall*, [1999] 3 SCR 456; and *R v Marshall II*, [1999] 3 SCR 533 (see also *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44).
20. *Haida Nation, ibid* at paras 16 to 20, 32, 35, and 39.
21. *Ibid* at para 44.
22. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 55 to 73.

23. *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at paras 36 and 37 [*Clyde River*]. See also *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 at paras 36 and 37 [*Chippewas of the Thames*].
24. *Clyde River*, *supra* note 23 at para 41.
25. *Ibid* at para 30. See also *Chippewas of the Thames*, *supra* note 23 at para 48.
26. *Clyde River*, *supra* note 23 at paras 29, 30, 33 and 34. See also *Chippewas of the Thames, supra* note 23 at paras 50 and 51.
27. *Clyde River*, *supra* note 23 at para 39. See also *Chippewas of the Thames, supra* note 23 at para 36.
28. Note that administrative tribunals generally have the capacity to adopt procedures appropriate to their statutory mandate: *Re: Therrien*, 2001 SCC 35 at para 88; *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 685; *Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59 at para 50. In the circumstance where it determines that its processes are inappropriate to rectify a consultation failure, the tribunal's control over its own procedures should presumably enable it to remit the consultation issue to the Crown, with appropriate directions as to what is required to remedy the deficiency.
29. *Clyde River, supra* note 23 at para 30. See also para 22. Note that where the Crown intends to rely upon the processes of a regulatory body to fulfill its consultation duty in whole or in part, it must provide express notice to the affected Indigenous groups (and surely to the tribunal as well) of such reliance. See *Clyde River, supra* note 23 at para 23, and *Chippewas of the Thames, supra* note 23 at para 44.
30. *Clyde River*, *supra* note 23 at paras 20, 43 and 44. See also *Chippewas of the Thames supra* note 23 at paras 47 and 51.
31. *Clyde River*, *supra* note 23 at paras 41, 42, 47, 48, 49 and 52. See also *Haida Nation*, *supra* note 19 at para 44, and *Chippewas of the Thames, supra* note 23 at paras 18 and 62 to 65. Note that the "participant funding" element cannot reasonably be expected to come from a board's operating budget. Unless a tribunal already has in place appropriate arrangements to access and distribute such funding, that element would necessarily require negotiation with government. See footnote 4 above.
32. Boards not empowered to consider questions of law would also benefit from developing a similar policy concerning the Crown's duty to consult and its application to Indigenous stakeholders in their land claim area.

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