



THE CANADIAN  
CHAMBER  
OF COMMERCE

LA CHAMBRE  
DE COMMERCE  
DU CANADA

*The Voice of Canadian Business™*  
*La porte-parole des entreprises Canadiennes<sup>MD</sup>*

# SEIZING SIX OPPORTUNITIES FOR MORE CLARITY IN THE DUTY TO CONSULT AND ACCOMMODATE PROCESS

*September 2016*





# THE POWER TO SHAPE POLICY & OF OUR NETWORK

## Get plugged in.

As Canada's largest and most influential business association, we are the primary and vital connection between business and the federal government. With our network of over 450 chambers of commerce and boards of trade, representing 200,000 businesses of all sizes, in all sectors of the economy and in all regions, we help shape public policy and decision-making to the benefit of businesses, communities and families across Canada.



# TABLE OF CONTENTS

Introduction 3

Opportunity 1: A Consistent Framework for the Duty to Consult and Accommodate 7

Opportunity 2: Remembering that Engagement with Indigenous Peoples Is Often More Effective than Consultation 11

Opportunity 3: Demonstrating the Crown Has “Skin in the Game” 14

Opportunity 4: The Federal Government’s Commitment to a New, Respectful Relationship with Indigenous Peoples 16

Opportunity 5: Building Capacity for Indigenous Communities 19

Opportunity 6: Businesses Looking at Consultation and Accommodation as an Investment, Not an Expense 22

Conclusion 24

Appendices 25

Appendix 1: The Duty to consult: An Overview and Discussion 25

Appendix 2: Recommendations 50

Appendix 3: List of Those Consulted 52

# Introduction

The Crown (federal, provincial and territorial) has a constitutional duty to consult and accommodate with and accommodate Indigenous peoples<sup>1</sup> when proposed developments have the potential to adversely affect their constitutionally-protected rights.

While the duty to consult and accommodate is an obligation that rests with the Crown, governments have been given the right by the courts to delegate the procedural aspects to industry, usually by incorporating consultation into the regulatory process. Proponents often engage with Indigenous communities through regulatory processes, and the Crown relies upon this as satisfying the duty to consult and accommodate (in the absence of any delegation to industry). However, the legal responsibility of ensuring the duty is fulfilled rests with the Crown.<sup>2</sup>

Businesses often conduct their own engagement with Indigenous communities as they conduct their own project planning before they apply for regulatory approvals, during the regulatory process and after its completion. This work can be tapped into by the Crown as it determines if projects trigger the duty to consult and accommodate<sup>3</sup> and, if they do, as part of its consultation process. Proponents and Indigenous communities often see this direct relationship between them as desirable and productive. That said, once the duty to consult and accommodate is triggered,

businesses often experience confusion that causes uncertainty and delays for themselves and Indigenous communities.

“There’s expectation but no direction from the government. If your project is shut down, it’s your own fault.”

- Saskatoon business person

This lack of clarity can lead not only to the delay or cancellation of private sector projects, but to companies abandoning them altogether. This is unfortunate because most projects have the potential to provide long-term economic and social benefits to Indigenous communities and all Canadians, including education and training, infrastructure, employment, the creation of new Indigenous businesses, improved health care resources and housing as well as the means to sustain cultural priorities.

---

1 First Nations, Inuit, Métis

2 Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development, Douglas R. Eyford, 2013, pg. 33

3 The test, as articulated by the Supreme Court of Canada in 2010 (Rio Tinto v. Carrier Sekani), is: (1) the Crown’s knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.”

Canada is competing amongst global giants. As an advanced economy, the stability and predictability of our laws and regulations – while respecting the rights of citizens and the environment – is a competitive advantage to our businesses and prospective foreign investors. A glaring exception is the opaque approach of the Crown to the execution of its duty to consult and accommodate. This is unacceptable. It is unfair

and potentially harmful to all concerned: business, Indigenous peoples and the Crown itself. Unless addressed, our competitors will dismiss us and get what they need elsewhere leaving the businesses, Indigenous communities who have invested in and/or would benefit from their projects and all Canadians behind.

## Northern Gateway pipeline project approvals quashed due to Crown falling “short of the mark” on its duty to consult and accommodate

On June 23, 2016, the Federal Court of Appeal upheld the appeal of the federal Crown’s approval of the Northern Gateway pipeline project by several British Columbia First Nations, organized labour and environmental groups on the basis that it “offered only a brief, hurried and inadequate”<sup>4</sup> consultation with affected First Nations. The Court sent the issue back to the federal Crown (Governor in Council) for reconsideration after a new consultation process “a matter that, if well-organized and well-executed, need not take long.”<sup>5</sup>

At the same time, the Court found that Northern Gateway had effectively engaged with Indigenous groups. “In all, Northern Gateway engaged with over 80 different Aboriginal groups across various regions of Alberta and British Columbia. It employed many methods of engagement, giving \$10.8 million in capacity funding to interested Aboriginal groups. It also implemented an Aboriginal traditional knowledge program, spending \$5 million to fund studies in that area.”<sup>6</sup>

It is not only Northern Gateway, its investors and the companies depending upon the project to get their resources to international markets that have been left in limbo. This project has 26 Indigenous equity partners “representing almost 60% of the Aboriginal communities along the pipelines’ right-of-way, representing 60% of the area’s First Nations population and 80% of the area’s combined First Nations and Métis population”.<sup>7</sup>

---

4 Federal Court of Appeal, **Citation: 2016 FCA 187, June 23, 2016, paragraph 325**

5 *Ibid.*, paragraph 335

6 *Ibid.*, paragraph 58

7 *Ibid.*, paragraph 16

## Focusing on Opportunities to Improve the Process

During the latter part of 2015 and the first half of 2016, the Canadian Chamber of Commerce gathered the perspectives of more than 90<sup>8</sup> business and Indigenous representatives as well as legal experts and government officials regarding the duty to consult and accommodate process. Our objective was to use their insights as the basis for recommendations to the federal Crown on opportunities to improve its own processes and work with other levels of government to pursue more consistency throughout the country. By doing so, the federal Crown would improve relationships amongst itself, businesses, Indigenous communities and other levels of government. Even more importantly, the duty to consult and accommodate process would be more effective and more efficient and fewer consultations would have to be resolved by the courts. In the end, outcomes would be more satisfactory for all.

Our conversations covered several aspects of the duty to consult and accommodate process including: experiences with the Crowns' (federal, provincial/territorial) approaches; what worked well or badly and why; the challenges faced by Indigenous peoples, businesses and government; and any legislative, policy or institutional/structural changes the federal Crown could make to provide more clarity to the duty to consult and accommodate process for all involved.

A legal brief written by Prof. Martin Olszynski, Assistant Professor of Law, University of Calgary, (Appendix 1) provides an overview of the history and legal framework for Crown/Indigenous relations in Canada as the backdrop to the evolution of the duty to consult and accommodate process. Prof. Olszynski highlights the 2004 Supreme Court of Canada *Haida Nation v. British Columbia (Minister of Forests)* decision (*Haida*) as a turning point in the duty to consult and accommodate process. In that decision, the Supreme Court stated that the Honour of the Crown demanded that "potential, but yet unproven interests" must also be respected. Until then, governments took the view that only proven rights required consultation.

Subsequent Supreme Court decisions have added more granularity to the Indigenous rights triggering the Crown's duty to consult and accommodate and increased its scope geographically as well as to other levels of government.

Prof. Olszynski outlines the differing relationships Indigenous peoples have with the Crown. These relationships include the rights Indigenous peoples have negotiated through treaties (which vary from region to region<sup>9</sup>) and modern land claim agreements as well as rights recognized by Canadian courts. Litigation has generally occurred most often where no treaties exist, but, as Prof. Olszynski explains, can also be when Indigenous peoples believe the Crown is not living up to the letter and/or spirit of the nation-to-nation relationship they understood treaties to represent. As a result, how the duty to consult and accommodate is carried out – like relationships between Indigenous peoples and the Crown(s) – varies throughout Canada.

Further clouding the situation, Prof. Olszynski says, is the fact that there is no clear test to determine whether any given government decision or course of action will result in sufficiently adverse impacts to trigger the duty to consult and accommodate. While recent court decisions appear to have settled doubts as to whether certain kinds of government action (e.g., legislating) may be immune from the duty,<sup>10</sup> determining whether such actions are likely to result in adverse impacts to Indigenous or treaty rights continues to challenge all parties, especially where high level or "strategic" rights are concerned. In looking at the evolution of the duty to consult and accommodate since *Haida*, Prof. Olszynski notes that:

- It is necessary to take the "long view...the Indigenous-Crown relationship has been badly strained for over a century. It is not realistic to expect this relationship to change overnight or within the span of a particularly favourable commodity cycle." (This is corroborated by others we spoke with who said these are not "one-election-cycle" issues.)

8 Individual interviews, roundtables (Vancouver, Yellowknife, Saskatoon and Thunder Bay), Canadian Chamber members & member association surveys.

9 The Duty to consult and accommodate: An Overview and Discussion, Martin Olszynski, University of Calgary, June 2016, See Figure 1: Map of Treaties in Canada

10 *Ibid.*

- "...in contrast to many in the business community, Canadian governments are having difficulty coming to terms with the fundamental change that the constitutional protection of Aboriginal and treaty rights was intended to – and does – represent.
- Indigenous peoples have expressed a "desire to be partners in economic development, to return to the original and mutually beneficial economic relationship between the Crown and Aboriginal peoples..."<sup>11</sup>

Prof. Olszynski identifies opportunities to improve certainty for businesses and Indigenous peoples:

- "Properly carried out" land use planning. (It is his view that comprehensive land use plans, which often come with modern treaties/settled land claims, would assist governments and Indigenous communities in assessing the cumulative impact of projects on their lands.
- Whether it leads or delegates, the Crown ensuring consultation "reflects the interest of the (Indigenous) community and not merely a few of its members".<sup>12</sup>

Our focus is also on opportunities. As of 2011, the duty to consult and accommodate was triggered, on average, over 100,000 times per year for some provinces/territories and over 5,000 times per year for the federal government.<sup>13</sup> Our discussions with business people, Indigenous representatives, legal experts and government officials identified key challenges and the need for improvement. That's no surprise. What might be a surprise is that they also said the process often works well – if not ideally – and it is only when it does not that there is public attention because of the high stakes – and often the courts – being involved. What also may be surprising is that for just about every challenge, many suggestions for opportunities for improvement/more clarity were offered.

We thank to those who took the time – several hours in some cases – to share their perspectives with us. We hope that you feel your time was well invested.

---

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Indian and Northern Affairs Canada, Statement by the Observer Delegation of Canada delivered by Jean-Francois Tremblay, Senior Assistant Deputy Minister, Indian and Northern Affairs Canada, at the tenth session of the United Nations Permanent Forum on Indigenous Issues: Follow-Up to the Recommendations of the Permanent Forum on Free, Prior and Informed Consent, May 17, 2011.

# Opportunity 1: A Consistent Framework for the Duty to Consult and Accommodate

*“The development of a federal approach to consultation and accommodation is not intended to be a one-size-fits-all approach. Differences in history, geography, demographics, governance, relationships and other circumstances of Aboriginal communities and organizations in Canada are relevant when considering how to address any consultation obligations that may arise. Thus, understanding the historical, geographic and legal context relevant to Crown activities is essential. Differences in contexts can require different approaches to fulfilling the duty to consult and accommodate and, where appropriate, accommodate.”*  
- Aboriginal Consultation and Accommodation Updated Guidelines for Federal Officials to Fulfill the Duty to consult and accommodate, Aboriginal Affairs and Northern Development Canada, 2011<sup>14</sup> (Guidelines)

Given the varying histories of the relationships between Indigenous peoples and the Crown(s) as well as their established or claimed rights and the nature or scope of differing projects, it is unrealistic to expect that consultation and accommodation processes will be identical amongst projects within the same region of Canada let alone throughout the country. That said, the federal Crown cannot throw up its hands and say “we can never strive for consistency.” The federal government, as the primary interlocutor between Indigenous peoples and other constituencies, must seize the opportunity to take the lead in bringing more consistency into the process. Most importantly, no matter what type or scope of project, as well as the Indigenous communities affected and their rights, it needs to be clearer to all concerned what is expected of, and can be expected from, each.

*“A patchwork of regulations – with varying degrees of clarity – throughout the country.”* - Vancouver business person.

When we asked business people about their experiences with the duty to consult and accommodate process, their answers were as varied as their companies and projects. However, they were united in their views that the role of the Crown (federal, provincial/territorial) in the duty to consult and accommodate process is often not clear. While this could be expected when different levels of governments are involved, business people said they have even experienced inconsistencies within the same levels of government. They told us that what is needed is a consultation framework that is consistent across all jurisdictions while also having the flexibility demanded by differing circumstances, including Indigenous rights and the nature and scope of projects.

The Supreme Court has given the Crown the right to delegate the procedural aspects of the duty to consult and accommodate. The term “delegate” implies a conscious decision on the part of the Crown. However, the current *Guidelines* exude an abundance of caution in providing possible scenarios for many different approaches to the consultation process. For example, the *Guidelines* state that the Crown “can rely on its partners...to carry out procedural aspects of a consultation process,”<sup>15</sup> yet there is no indication of when in the process this can or should occur and what the handoff process is. The *Guidelines* do provide some guidance on some of the aspects/activities associated with consultation; for example, “information sessions or consultations with Aboriginal groups, mitigation measures and other forms of accommodation, etc.”<sup>16</sup> However, there is no indication of what type of consultation is most appropriate for differing Indigenous rights and the types of projects or their impacts.

---

14 At the time of writing an update to the *Guidelines*, by Bryn Gray, Partner, McCarthy Tetrault, had been presented to Indigenous and Northern Affairs Canada but not publicly released.

15 Aboriginal Consultation and Accommodation Updated Guidelines for Federal Officials to Fulfill the Duty to consult and accommodate, Aboriginal Affairs and Northern Development Canada, 2011, pg. 14

16 *Ibid.*, pg. 14

The *Guidelines* also advise officials of the desirability of coordinating work amongst jurisdictions “to the maximum extent possible, to increase efficiency by minimizing duplication.”<sup>17</sup> More federal rigour in, and commitment to, coordinating this work with other levels of government would be welcomed by business people who spoke of a “patchwork quilt” of consultation and accommodation processes within and amongst the various levels of government.

“Canada will seek to benefit from the outcomes of a third-party consultation process and any accommodation measures undertaken by third parties. However, the ultimate responsibility for consultation and accommodation rests with the Crown as the Honour of the Crown cannot be delegated... Therefore, it will need to evaluate whether the proponent has adequately consulted with Aboriginal groups and whether further consultations are required to be undertaken by the Crown to fulfill its consultation obligations.”<sup>18</sup> The Federal Court of Appeal’s decision on the approval of the Northern Gateway project leaves no doubt regarding the scrutiny to which the Crown’s fulfillment of its duty will be subjected by the courts.

## Tools Available to Proponents

### Consultation Information Service (CIS) and Aboriginal and Treaty Rights Information System (ATRIS)

Offered by Indigenous and Northern Affairs Canada (INAC), CIS<sup>19</sup> is a single window of “baseline” information for federal officials and others on established and potential Indigenous rights as well as Indigenous communities’ contact information. Proponents can request information on the historical and current relationships between the Indigenous peoples and the Crown in the regions their projects touch.<sup>20</sup>

ATRIS, operated by CIS, is an interactive on-line tool (still under development) that provides the same information along with maps. Both services offer access to INAC’s regional subject experts.

### Consultation and accommodation advice for proponents<sup>21</sup>

Available since mid-2015 and described as a draft that could be included in the third edition of the *Guidelines*<sup>22</sup> (expected to be released in the fall of 2016), this document states, “Should the Government of Canada rely on the activities of industry proponents in meeting its obligations, it will clearly communicate this reliance to both the proponent and the potentially affected Aboriginal groups.”<sup>23</sup> However, it is not apparent when in the process this would occur.

---

17 *Ibid.*, pg. 18

18 *Ibid.*, pp. 19 & 28

19 <https://www.aadnc-aandc.gc.ca/eng/1331832983717/1331833056925>

20 Requests for information can be sent to: [cau-uca@aadnc-aandc.gc.ca](mailto:cau-uca@aadnc-aandc.gc.ca) and must include: Description of the project being pursued; Geographic information, such as location and project footprint; Specific information sought; and Time sensitivities of the request, if applicable.

21 <https://www.aadnc-aandc.gc.ca/eng/1430509727738/1430509820338>

22 <https://www.aadnc-aandc.gc.ca/eng/1100100014680/1100100014681>

23 <https://www.aadnc-aandc.gc.ca/eng/1430509727738/1430509820338>

While this document provides the helpful advice to proponents to “develop the relationship” with Indigenous peoples as one of their first steps in moving their projects forward, it also advises proponents to “carry out consultation activities” without any apparent involvement of—or more than vague guidance from—the federal Crown.

Missing are:

- Clarity concerning the triggers to the duty to consult and accommodate.
- The relationship between Indigenous communities’ “strength of claim,” the severity of the impact of an activity/depth of consultation required and what constitutes “minimal” vs. “deep consultation.”

The advice the document offers is, “In general, the greater the degree of potential for adverse impacts on an Aboriginal group, the more intensive the consultation should be.” More detail would ensure a more productive process for business, Indigenous communities and the Crown.

In this document, the federal Crown reserves the right to reach out to Indigenous communities other than those consulted by proponents. Proponents could be asked to consult with additional communities as well, and a “quick response to identified additional consultation activities” to support “faster federal decision making” is advised. However, there is no reference to how “quick” or “faster” will be determined. It would make sense for the Crown, proponents and Indigenous peoples to determine at the outset who should be consulted, what level of consultation is required, timelines, etc.

The federal government also acknowledges the inconsistencies in processes amongst itself and other levels of governments. Proponents are advised to contact other governments as needed to determine their requirements.

## A consistent framework is needed

*“We don’t need legislation, but we do need clear definitions so that everyone (government, business, Aboriginal peoples) knows what’s expected of them.” - Yellowknife business person*

Business people have no difficulty with the Crown delegating the procedural aspects of the duty to consult and accommodate as it is often the most desirable path for themselves and Indigenous communities. While the details of duty to consult and accommodate processes can and should vary according to the projects and Indigenous peoples involved, a consistent framework is needed that includes essential information at the outset that includes:

- The aspect of the project that has triggered the duty to consult and accommodate.
- Which Indigenous peoples are affected and their rights (established and/or potential).
- What information the Crown will provide to businesses and Indigenous communities.
- The Crown’s involvement:
  - Will it provide advice or direction only?
  - Will it be “on the ground” in Indigenous communities?
- If appropriate, a pre-consultation engagement process initiated by the Crown that brings the affected Indigenous peoples and proponent(s) together.
  - Guidance should be available for businesses on how to most effectively engage with the Indigenous peoples involved.
- How the consultation should be undertaken:
  - Who the proponent should consult with.
  - What is the project’s impact and level of consultation required.
  - What information needs to be provided to/received from the community(ies).
  - What costs will be borne by whom.

- Expectations of the Indigenous community(ies).
- What is on and off the table.
- Timelines (for proponents, Indigenous communities and the Crown) that give all involved the time they need to engage, consult and respond.
- How the Crown will follow up to measure if the process met its objectives and whether those involved met the expectations of them.

*“Industry always wants certainty and clarity. Just tell us what the rules are. It’s not clear what’s expected at the handoff and what the process should look like from the Crown to business as well as at the back end. There needs to be follow up by the government that it is going to ensure that business meets the commitments it has made.”*  
 - Calgary business person

### Recommendations:

That the federal government:

- More actively communicate the services available to assist proponents in obtaining background information on Indigenous peoples, their historical and current relationships with the Crown, their rights and relevant contact information.
- Work with businesses, Indigenous peoples and other levels of government to develop a consistent duty to consult and accommodate framework that recognizes the different approaches to engagement, consultation, accommodation each community and project requires and clearly defines:
  - The aspect of the project that triggers the duty to consult and accommodate.
  - If the Crown will delegate all or some aspects of the consultation/accommodation, which ones and when.

- The Indigenous peoples affected and their rights (established and/or potential).
- The level of consultation required and how it should be undertaken.
- What information the Crown will provide to businesses and Indigenous communities.
- What resources/capacity are required by the Indigenous communities and who is responsible for providing them and bearing any costs involved.
- The Crown’s involvement, including:
  - o Primary contact person/resource
  - o Whether it will facilitate pre-consultation engagement between the proponent(s) and the affected Indigenous communities.
  - o Whether it will provide advice or direction only.
  - o Whether it will be “on the ground” in the Indigenous community with the proponent, on its own or not at all.
- Expectations of the affected Indigenous community(ies).
- Timelines (for proponents, Indigenous communities, and the Crown).
- How the Crown will monitor the consultation and accommodation negotiations between proponents and Indigenous communities to measure whether each met the expectations of them and met their commitments.

# Opportunity 2: Remembering that Engagement with Indigenous Peoples Is Often More Effective than Consultation

*“Consultation is a dirty word. It’s as simple as engaging. Find out what we want.”*- First Nations representative (Thunder Bay)

When we asked Indigenous representatives for their views on the duty to consult and accommodate process, their responses focused on the pro forma/box-ticking perception of consultation. In the words of one, “You can consult all you like but that doesn’t mean you have to do anything with the input you receive.”

*“The duty to consult and accommodate does not include an obligation on the Crown to agree with Aboriginal groups on how the concerns raised during consultations will be resolved.”*- *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to consult and accommodate*, Aboriginal and Northern Affairs Canada, 2011

Engagement is meaningful to Indigenous peoples. Just what that means was put succinctly by Assembly of First Nations National Chief, Perry Bellegarde, “Before you build something, build a relationship.”<sup>24</sup> When undertaken with sincerity, engagement with an Indigenous community before a specific project is proposed can help a lot in moving developments forward.

*“We would never think of sending a delegation to another country to negotiate a trade or other agreement without first doing them the courtesy of learning something about their language, culture and priorities. Consultation with Indigenous peoples should be regarded in the same manner.”*  
- Thunder Bay business person

Like the duty to consult and accommodate process, engagement can take many forms and – according to the Indigenous representatives we spoke with – needs to involve the Crown at the beginning. When the duty to consult and accommodate is triggered, Indigenous peoples want the first point of contact to be the Crown out of respect for their nation-to-nation-relationship.

*“It needs to be government-to-government. This was the relationship promised in the Royal Proclamation<sup>25</sup> and by the Indian Act. The Crown needs to establish itself at the beginning as the source of the process. After that, it’s fine to hand it over to proponents, although it needs to be clear that the Crown is still keeping tabs on the process.”*  
- Indigenous representative (Yellowknife)

Ongoing Crown engagement is critical, said one Indigenous representative, as a lot of engagement (e.g., living up to treaty commitments) is what companies can’t actually do. “This is government’s job and companies need to hold it accountable for doing what it’s supposed to do.”

---

<sup>24</sup> Economic Club of Canada, March 7, 2016

<sup>25</sup> The Royal Proclamation of 1763 issued by King George III is one of Canada’s foundational constitutional documents. Following on the Treaty of Paris (1763) in which France ceded much of its North American territories to the British, the Royal Proclamation lays out “the new administrative structure for British North America, as well as establish new procedures and protocols for its relations with First Nations people”. Aboriginal and Northern Affairs Canada, [www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a1](http://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a1), accessed September 8, 2016

One Indigenous legal expert described the ideal framework for the engagement of and consultation with Indigenous communities as the Crown laying out:

- This is the proposed project and proponent(s).
- Our role is the following:
  - What the Crown will undertake
  - What the Crown will delegate to the proponent
- Our schedule is this.
- This is what we want your perspectives on.
- We need your input in this form.
- We take your views seriously.
- We will document your input.
- We will keep you updated.

*“Right now, relationships are bilateral between the various players but not amongst them all at the same time. This needs to change, and there needs to be more transparency.”*  
- Calgary business person

As for business, Indigenous representatives said getting engagement right means establishing relationships with Indigenous communities before there’s a project on the table. *“Spend time to get to know the communities. Spend time to get to know their leadership, whether it’s traditional or hereditary versus chief and council. Spend time in the communities affected and those around them. Because if you’re looking at a long-term project, you might want to get to know your neighbours really well. Money and time invested in this will be well spent.”* - Indigenous representative

Business people with long-standing relationships with Indigenous communities agree. We heard several times from business people that while it’s the Crown’s duty to consult and accommodate, industry’s job is to engage as early as possible and mitigate any negative impacts as best it can.

*“First Nations want to understand what the project is and how they can become involved. Engagement allows business – when it dares to do so – to demonstrate great leadership by engaging, early, often and meaningfully. And the rest, for the most part, of takes care of itself.”*  
- Saskatoon business person

Aside from helping to establish a foundation for consultation and accommodation, engaging with Indigenous communities can have tangible business benefits. For example, “traditional ecological knowledge,” (as it was called by one Indigenous representative) can complement companies’ scientific data.

Businesses know – often based on difficult experiences – that the time and resources devoted to building relationships are investments not only in their projects but in their companies. Companies need to step up and take this on. Timing is critical said one business person, “If you have a project and you wait until it’s in the regulatory approval process to start consultation, it makes it look like you’ve already made up your mind what the project is going to look like and that you’re not serious.”

While ideal, engagement with Indigenous communities by business prior to consultation is not easy and can never compensate for poor relationships with the Crown. Sometimes, due to the nature of a project, it is simply not possible. A failure to develop good relationships is not a reason for the Crown to deny approval for a project.

Engagement becomes even more complex with linear infrastructure projects, for example roads, power lines, railways and pipelines. *“Unlike a mine, the initial disruption is relatively minimal. However, in the situation where something does go wrong, there is a responsibility for a protocol for how to address it. You can only effectively do this if you have ongoing communications with the communities involved.”* - Calgary business person

*“When you ask people who have been successful, it’s those who have continuous relationships with those they do business with. Once the project is completed, relationships shouldn’t end. We’re talking about lifecycle relationships. The old mold of just consulting when a project is ramping up has to be broken. You have to have sustained relationships should something go wrong, etc.”- Alberta business person*

Just as government needs to be held accountable for upholding its commitments to Indigenous peoples, businesses expect the Crown will ensure proponents also live up to their obligations be it providing training and jobs, protecting the environment and remediation, building community infrastructure, etc. Government needs to make it clear that this is important and needs to follow up with proponents.

The current version of Indigenous and Northern Affairs Canada’s *Consultation and Accommodation Advice for Proponents* offers four sentences regarding engagement under “Develop the relationship.” This is inadequate for what is clearly regarded by Indigenous peoples and experienced businesses as the critical first step towards improving the prospects of projects delivering satisfactory results for both.

*“Many Indigenous communities will give guidance to project owners on how they define adequate engagement. It would be nice if we could stitch these together, get businesses involved to provide their perspectives and then the federal government could use this as the basis for a policy. It may take awhile, but we would be a lot better off at the end of the day. Even if we don’t get the policy at the end of the day, the conversation would have been worthwhile.” - Calgary business person*

## **Recommendation:**

The federal government needs to bring Indigenous and business representatives together to develop a robust framework for engagement that emphasizes building relationships as a first step, whenever feasible, before consultation and accommodation discussions focused on particular projects begin as well as what each party will be accountable for. The resulting framework must be accompanied by resources to assist the Crown, business and Indigenous communities in ensuring that engagement:

- Respects the nation-to-nation relationship.
- Reflects the rights and circumstances of Indigenous communities.
- Provides businesses with the ground rules they need to avoid derailing potential projects due to missteps.

## Opportunity 3: Demonstrating the Crown Has “Skin in the Game”

*“Governing and making important decisions are always about trade-offs; it’s an art as much as a science ... You don’t ever hope for total 100 per cent unanimity.”* - Prime Minister Justin Trudeau, referring to the decisions required regarding the building of pipelines, *National Post*, June 16, 2016

*“Will there be a consensus or unanimity? No, absolutely not. That’s why these decisions have to be clearly thought through, and we come to those decisions being as transparent as we can be, and for which we’ll ultimately say to the Canadian people. ‘This is what we’ve heard. This is what we’ve done. These are the reasons why we’re making the decision we are, and you will hold us accountable.’”* - Hon. Jim Carr, Minister of Natural Resources, re: ministerial review panel process following the National Energy Board’s conditional approval of the Kinder-Morgan Trans Mountain pipeline project – *The House*, CBC, May 21, 2016

Despite the Prime Minister’s and Minister Carr’s bold language, business and Indigenous representatives were united in their view that one of their biggest frustrations with the duty to consult and accommodate process is that the Crown doesn’t appear to have any “skin in the game” beyond minimizing its own exposure to risk. One Yellowknife business person summed up what we heard from several others, “The Crown should be held to account for its role in the process. What’s the incentive for government to ensure the process meets the needs of businesses and Indigenous peoples? Business and Indigenous peoples will do what they have to do given so much is at stake. However, government has nothing to lose.”

“The Crown is simply too slow,” said another business person. “The reality is that by the time a bureaucrat in Ottawa who has to write a memo to a senior official saying they consulted, the proponent has been in the community(ies) dozens of times. We will have established a consultation protocol and held community meetings, etc. Where things have worked well is where the Crown has recognized this, and we brought government along.”

Some business people believe government officials are well qualified and conduct themselves with integrity and goodwill. The issue, in their minds, is more one of capacity than a conscious effort to proceed as cautiously as possible to avoid risk. “I think they’ve got highly qualified people. I just don’t think that there’s enough of them,” said one.

Federal officials told us that they are executing the duty to consult and accommodate in a “quickly changing legal environment” in which the way the Crown must conduct itself is regularly subject to refinement by the courts. The “immense differences amongst federal agencies” and varying operating procedures – often developed according to their respective mandates – make the environment even more complex for officials (as well as the businesses and Indigenous peoples involved). The officials we spoke with recognized the importance of the Crown conducting its duty to consult and accommodate “properly,” and relationships with Indigenous peoples are critical to this. Officials are often faced with challenges beyond a Crown regulator’s competence to resolve. “The law is only one level of validity,” said one official. “It cannot compensate for terrible relations.”

The federal Crown audits its execution of its duty to consult and accommodate and accommodate. *Aboriginal Affairs and Northern Development Canada's 2014 Internal Audit Report Audit of Consultation and Accommodation* (its most recent) lays out the federal Crown's whole-of-government approach to Indigenous consultation led by that department's Consultation and Accommodation Unit (CAU). The audit's objective "...was to assess the adequacy and effectiveness of AANDC<sup>26</sup> controls for consultation and accommodation and, more particularly, to assist therefore the department with its legal duty to consult obligations... and to identify areas for improvement to processes and controls."<sup>27</sup> There is no mention of assisting Indigenous communities or project proponents.

*"The audit was identified as a priority area due to the significant legal ramifications and liabilities that may result from not adequately consulting with Aboriginal groups when AANDC, on behalf of the Crown, contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights."* - *Internal Audit Report Audit of Consultation and Accommodation*, Aboriginal Affairs and Northern Development Canada, November 2014

The audit report, which makes it clear that it is not a legal assessment of the Crown's fulfillment of its duty to consult and accommodate Indigenous peoples, concludes that there were not "any instances where AANDC procedures with regards to legal duty to consult and accommodate were not being followed appropriately" but that some areas of "management practices" could be improved including "...department-level coordination of consultation and accommodation; mechanisms used to obtain consistent legal advice and reporting on Justice resource utilization; guidance and clarification to staff concerning some aspects of consultation and accommodation in some Sectors; and, communication related to system (ATRIS Aboriginal and Treaty Rights Information System) capabilities used in supporting the legal duty to consult and accommodate."<sup>28</sup>

What is striking about this audit is that it does not mention the number of times the duty to consult and accommodate was triggered, how often aspects of the duty were delegated or their outcomes. The audit is focused on managing internal Crown processes and risk exposure, including procedures to ensure consistent legal advice is obtained from the Department of Justice.

*"The private sector is more effective in early engagement because it has very real timelines and other contingencies to meet. The Crown has no skin in the game."* - Yellowknife business person

Just as a duty to consult and accommodate framework must have a mechanism to ensure proponents are living up to their commitments, business and Indigenous representatives we spoke with agreed it has to include mechanisms – preferably arm's length – to measure the Crown's performance of its constitutional duties to Indigenous peoples. Some suggested that, just as there is Commissioner of the Environment and Sustainable Development within the Office of the Auditor General, there be a Commissioner of Indigenous Consultation and Accommodation established in that office that would report semi-annually on a whole-of-government basis on the Crown's performance of its constitutional duties to Indigenous peoples.

### **Recommendation:**

That the federal government establish a Commissioner of Indigenous Consultation and Accommodation within the Office of the Auditor General with the mandate of providing semi-annual whole-of-government reports on the federal Crown's performance of its constitutional duties. In addition to assessing the Crown's risk management, the Commissioner's reports should include the number of consultations undertaken in the period reviewed, those that were conducted by the Crown, completely and/or partially delegated as well as their outcomes/status.

---

26 Aboriginal Affairs and Northern Development Canada

27 Internal Audit Report Audit of Consultation and Accommodation, Aboriginal Affairs and Northern Development Canada, November 2014, pg. 5

28 *Ibid.*, pg. 8

# Opportunity 4: The Federal Government's Commitment to a New, Respectful Relationship with Indigenous Peoples

*"We have a government that has made commitments to fulfilling its responsibilities to Indigenous peoples. If it doesn't, we'll have another lost decade. Let's hope that it does happen, and the federal government's example will lead to improvements as well in the provinces and territories."*

- Thunder Bay business person

The business and Indigenous representatives we spoke with are taking the federal government at its word that (as stated by Prime Minister Trudeau in every Cabinet minister's mandate letter), "No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation and partnership."

Business people are encouraged by the opportunities to change the narrative amongst the Crown, Indigenous peoples and business and to turn a new page. They are, however, seeking clarity in just what it does – and will – mean.

The mandate letter of the Minister of Indigenous and Northern Affairs includes additional direction to ... "Undertake, with advice from the Minister of Justice, in full partnership and consultation with First Nations, Inuit, and the Métis Nation, a review of laws, policies and operational practices to ensure that the Crown is fully executing its consultation and accommodation obligations, in accordance with its constitutional and international human rights obligations, including Aboriginal and Treaty rights." (emphasis added) This also has business people asking questions.<sup>29</sup>

Of additional concern to business people are the implications of the Prime Minister's direction to the Minister of Indigenous and Northern Affairs, "to implement recommendations of the Truth and Reconciliation Commission, starting with the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples.*" [UNDRIP]. Article 19 of the Declaration states: "States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adoption and implementing legislative or administrative measures that may affect them."<sup>30</sup>

---

29 Bryn Gray, Partner, McCarthy Tetrault, has recently completed an assignment as Ministerial Special Representative for Indigenous and Northern Affairs Canada to consult with Indigenous groups, industry and other stakeholders authoring a report on how the federal government can improve its approach to the duty to consult and accommodate, including updated guidance for federal officials and new guidance for business. This material is expected to be released in the fall of 2016.

30 The United Nations Declaration on the Rights of Indigenous Peoples, 2008 Article 32(2) is another example of consent-based provisions in the Declaration, i.e., : "States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

One of the recommendations (#92) of 2015's Truth and Reconciliation Commission report is a call-to-action for Canada's businesses to:

"... adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework ... This would include, but not be limited to, the following:

- i. Commit to meaningful consultation, building respectful relationships and obtaining the free, prior and informed consent of Indigenous peoples before proceeding with economic development projects.
- ii. Ensure that Aboriginal peoples have equitable access to jobs, training and education opportunities in the corporate sector and that Aboriginal communities gain long-term sustainable benefits from economic development projects.
- iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law and Aboriginal – Crown relations. This will require skills – based training in intercultural competency, conflict resolution, human rights and anti-racism."

Business peoples' thoughts on recommendation 92 were consistent, i.e.:

- Businesses can adopt the principles of the UNDRIP while the adoption/implementation of the Declaration itself is the role of the federal government.
- Many businesses have already integrated some, if not all, of the recommendations (particularly 1 and 2) into their operations. "Businesses that are there for the right reason are already doing this and those that don't should be pushed out."<sup>31</sup>
- Some companies, particularly smaller firms, will need to tools to assist them in fulfilling

recommendation 3, and the federal government should work with other levels of government to provide them.

"Our history has now caught up with our reality. It's a good time. However, we need a steady hand on the helm."  
- Saskatoon business person

The federal government has started a conversation, in the business community at least, that causes excitement, some trepidation and raises many questions.

The federal government has the goodwill of business and Indigenous peoples on its side, but, nearly a year into its mandate, the window is closing.

At the time of this report's publication, it is not clear how the federal government's commitments to implement the recommendations of the Truth and Reconciliation Commission will affect government, business and Indigenous peoples. Regarding the UNDRIP, the Minister of Justice, Hon. Jody Wilson-Raybould, has said that the Declaration's adoption into Canadian law is "unworkable" and that what is needed is "an efficient process of transition that lights a fire under the process of decolonization but does so in a controlled manner that respects where Indigenous communities are in terms of rebuilding."<sup>32</sup>

If not a review of laws and regulations, then what? The government needs to communicate the process/processes and timelines for how it plans to move forward.

## Addressing Unfulfilled Commitments

A lack of clarity around delegation "appears to run into problems ... when concerns extend beyond the immediate project or development being considered."<sup>33</sup> Sometimes businesses find their projects run into trouble not because Indigenous communities oppose the project but because they want to make a point with the Crown regarding un-kept promises.

31 Yellowknife business person

32 Ottawa won't adopt UNDRIP directly into Canadian law: Wilson-Raybould, iPolitics, July 12, 2016

33 The Duty to consult and accommodate: An Overview and Discussion, Martin Olszynski, University of Calgary, June 2016

While the Supreme Court has ruled that the duty to consult and accommodate “applies to current and future activities and not historical infringements,”<sup>34</sup> business people told us that Indigenous peoples cannot be criticized for taking the opportunity presented by the consultation process to seek the resolution of long-standing, and often fundamental, issues including potable water, housing and education. “These quality of life issues aren’t being addressed, and they don’t see a path forward for them. I don’t begrudge them taking advantage of the regulatory process to try and do so.”  
- Calgary business person

Indigenous and business representatives told us that rare is the Indigenous community that does not want to participate in economic development and to be self-sufficient. Yet, despite constitutional recognition of Indigenous peoples’ rights and billions of dollars spent on programs and commissions, the social and economic situations of many Indigenous peoples remain appalling.

It is because, according to the Indigenous representatives we spoke with, “root causes” are not being tackled. “It’s like having a decaying tooth,” said one. “You’re polishing it up but not treating it. Nobody has really taken the time to examine why programs aren’t working despite all the resources and billions of dollars being devoted to them. One example of how bad things are is that dozens of First Nations communities have been on boil-water advisories for 20-plus years.”

Amongst its commitments to Indigenous peoples, the current government promised “to make progress on the issues most important to First Nations, the Métis Nation and Inuit communities – issues like housing, infrastructure, health and mental health care, community safety and policing, child welfare, and education.”<sup>35</sup> Keeping this commitment will go a long way to removing stumbling blocks that stall – or terminate – projects and the benefits they bring.

## Recommendations:

The federal government:

- By mid-2017, should establish the framework and timelines for the review of laws, policies and operational practices related to its implementation of the recommendations of the Truth and Reconciliation Commission and the UNDRIP in its entirety. This review needs seek the perspectives of a broad range of stake/rights holders, including businesses and Indigenous communities, and address the tools to be available to each to fulfill additional obligations required of them.
- Communicate, annually, its progress in addressing fundamental quality of life issues for Indigenous peoples including clean drinking water, housing, education and healthcare.

---

34 Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to consult and accommodate, Aboriginal and Northern Affairs Canada, 2011, pg. 66

35 A New Plan for a Strong Middle Class, Liberal Party of Canada, October 2015, pg. 46

# Opportunity 5: Building Capacity for Indigenous Communities

*“The current evidence suggests that Aboriginal people are poorly positioned from a capacity and community-readiness perspective ... Generally speaking, communities have a limited ability to negotiate with private sector businesses... This increased capacity would allow communities to manage the economic processes themselves, as opposed to letting a developer manage projects for them, and potentially not take the communities’ interests into consideration.”*

- Evaluation of Aboriginal Economic Development Strategic Partnerships Initiative, Aboriginal Affairs and Northern Development Canada, September 2014

The business people we spoke with agreed that the times when the process works best are when the proponent is well prepared and the Indigenous community has capacity.

## Strategic Partnerships Initiative (SPI)

SPI, launched by Aboriginal Affairs and Northern Development Canada (AANDC) in 2010, aims to bring the collective resources of 15 federal departments together to assist Indigenous communities in developing the capacity to engage in economic development partnerships with different levels of government and the private sector. The 2014 evaluation of SPI says that while the program was successful in facilitating 103 partnerships between Indigenous communities and others, there is some confusion that the program is restricted to AANDC (now Indigenous and Northern Affairs Canada or INAC) and that the uptake is not as great as it could

be. Like so many other federal assistance programs, the help is there it is just hard to find. The evaluation recommends that INAC work on a single window delivery approach to encourage more use of the program.

Building the capacity to benefit from social and economic development partnerships involves more than the ability to review, assess and respond to many proposals at the same time. It can also involve having the capital to become financial partners in projects and having the inventory of skilled people in their communities needed to ensure as many as possible benefit from employment opportunities. As one Indigenous representative told us, “Capacity is a concern for us. We could use a plan that helps us respond. The pace of demand is high.”

The *Guidelines* advise that, “Courts look favourably upon government providing assistance, where needed, to support Aboriginal participation in the consultation process.” And while there may well be a role for federal financial assistance to Indigenous communities to aid them in the consultation process, there are other alternatives that may be less bureaucratic and more effective.

Some Indigenous communities have taken matters into their own hands. “We have to recognize that there are many different levels of capacity, experiences with colonization, etc. It’s not all despair and poverty.”  
- Saskatoon business person

## Haisla Nation Charts Its Own Path

“We’ve turned down a lot of projects but we are interested in economic development.”  
- Ellis Ross, Chief Councillor, Haisla Nation

The Haisla Nation saw the potential of liquid natural gas (LNG) for economic development and decided to chart its own path, primarily with the British Columbia government, in how it wanted consultation with proponents to proceed. “We decided we were going to learn more about how the provincial government works, thinks, what it wants. We had to change our thinking about how to talk with the province. We improved our presentations and paid attention to the province’s plans and intentions.” Today, project proponents approaching the provincial government are directed to the Haisla Nation as the first step in moving forward.

“When someone has a project to propose, they are screened by our economic development staff. Then the proponents see Council, which will ask them to explain in detail how the project will affect our people. We’ll analyze the environmental impacts and the employment opportunities,” says Ross. “We hear from many, many project proponents. The really sound projects are taken forward. Not everybody comes in.”

The Fort William First Nation in Ontario has developed a guide for proponents to Aboriginal Consultation and Accommodation<sup>36</sup> that, in addition to providing a history of its peoples, their contact with Europeans, treaties and lands, advises “If you want to do business on First Nation land, you had best be prepared to enter into negotiations with any First Nation that may be adversely impacted by your proposed activity.”<sup>37</sup>

*“And right now if I ask you across Canada on a national level, do we truly understand what Aboriginal communities and individuals have to offer this country? The answer is we don’t know.”* - Indigenous representative

In his 2013 report to Prime Minister Harper, *Forging Partnerships Building Relationships*, Douglas Eyford recommends that the federal government assist Indigenous communities to build their capacity to “effectively engage in project reviews and

development” through “community exchanges, workshops and conferences” that would involve other levels of government. These forums would be a means for Indigenous communities to “share knowledge, best practices, skills, experience and capacity...”<sup>38</sup> While this report and its recommendations were prepared in the context of resource development projects in western Canada, this is a model that could be adopted as an option throughout the country.

“There could be workshops in the communities – and I’m not talking once a year – to get the communities ready to take on a consultation process with a proponent. To teach them negotiation skills. To teach them that wherever there is impact it can be mitigated and the benefits are business, joint ventures, employment. To help them look ahead to what they want their communities to be in 10 to 20 years.”  
- Ontario business person

36 <https://fwfn.com/traditional-territory-the-duty-to-consult>

37 *Ibid.*

38 *Forging Partnerships Building Relationships Aboriginal Canadians and Energy Development*, Report to the Prime Minister, Douglas Eyford, 2013, pg. 13

## A Proponent-financed, Arm's-length Fund

Several business people suggested another option for providing Indigenous communities with the capacity they may need to best represent their interests in the consultation and a accommodation process is an independently-managed trust fund that proponents would finance. Business people did add the proviso that the federal government direct that the funds provided by proponents be used for purposes in addition to legal fees to oppose their projects. Examples included environmental assessments and economic development plans.

## Building Access to Capital and Establishing Credit Ratings

Several business people we spoke with believe that capacity building in Indigenous communities also involves laying the groundwork for them to be financial partners in projects. This, they said, means access to the capital necessary for them to invest in projects, equipment, training, etc. "We as industry proponents can, and should, help with capacity building, as should the federal government in terms of putting in place things like guarantees for loans that can help the communities build capital and be more self-sufficient." - Alberta business person

## Recommendations

That the federal government be more ambitious in its definitions of Indigenous capacity building including such options as:

- Tools to help Indigenous communities develop their own consultation guidelines for proponents based on their histories, rights and lands.
- Organizing, in cooperation with other levels of government, regional conferences, workshops, etc. for Indigenous communities to share their expertise, best practices, etc.
- Seeking the views of business and Indigenous representatives on a proponent-financed, arm's-length fund that would be available for Indigenous communities to hire the capacity they do not have, what it could/could not be used for, etc.
- Working with the provinces/territories to develop a list of suggested legal, environmental and other advisers to whom Indigenous representatives could turn for assistance if needed.
- Assisting Indigenous communities to establish access to capital, for example, business loan guarantees and credit rating assistance.
- Helping Indigenous communities document their resources (natural, human, financial, etc).

**Some Indigenous communities are also finding their own sources of capital through negotiating royalty agreements with business proponents. In June, the Assembly of Nova Scotia Mi'kmaq Chiefs signed an agreement with the owner of the Donkin mine for a royalty on coal production. While the amount was not disclosed, CBC quoted assembly co-chair, Chief Terry Paul of Membertou First Nation, as saying the agreement will give Mi'kmaq communities access to private capital, which is "sorely needed" in many communities.<sup>39</sup>**

39 [www.cbc.ca/news/canada/nova-scotia/assembly-mi-kmaq-chiefs-donkin-royalty-coal-kameron-terry-paul-1.3622464?cmp=rss](http://www.cbc.ca/news/canada/nova-scotia/assembly-mi-kmaq-chiefs-donkin-royalty-coal-kameron-terry-paul-1.3622464?cmp=rss), June 8, 2016

# Opportunity 6: Businesses Looking at Consultation and Accommodation as an Investment, Not an Expense

Companies know they can do a lot to help themselves and their projects by engaging early and consulting often with Indigenous communities. We approached the business people we did because they had experience in consultation with, and accommodation of, Indigenous peoples to move their projects forward. Their view is that companies need to look at the value of thorough, sincere, consultation. In addition to the knowledge many Indigenous peoples have of the environment that complements proponents' scientific data, Indigenous communities are sources of talent with their relative youth, traditional knowledge and proximity to project sites. Investing in them can often be very cost-competitive for a business. "We need to recognize that we need Indigenous peoples if we're going to compete with countries with hundreds of millions of people," said one.

*"If you engage with Indigenous peoples on a regular basis, your projects will ultimately move forward more quickly. We need to help communities understand 'what's in it for them.'"* - Saskatoon business person

Business people also acknowledged that while they recognize their success depends upon how they engage and consult with Indigenous peoples, outreach may not always be welcomed.

*"We need to recognize that companies are up against more than two centuries of the reality of the Crown's representatives trying to wipe out Indigenous peoples and their cultures."* - Thunder Bay business person

A couple of the Indigenous representatives we spoke with advised project proponents to enter into engagement and consultation with Indigenous peoples being mindful of not only their rights but of the additional time and effort that could be needed to get to where everyone wants to go. "Slow down," said one Indigenous representative. "Sometimes, we see the finish line. We know where the finish line is, but sometimes, we lose sight of the work that needs to be done in the here and now to get there."

## Suncor's Winter Drilling Consultation

Suncor Energy uses the stability the cold weather gives to the muskeg occupying much of the Ft. McMurray region to conduct its annual exploratory work for new drilling sites. The work involves core drilling, seismic testing and sourcing locations for “borrow pits” from which materials for roads, well pads, etc. are obtained. These activities definitely meet the “surface disturbance” criterion that triggers the duty to consult and accommodate with the First Nations on whose lands these activities would occur. Three years ago, Suncor decided to make changes to its internal consultation process as it had ballooned from three months to nearly a year in some cases.

Firstly, Suncor has gotten its internal teams together to identify all exploration projects and related work, including roads, power lines, etc. scheduled for a season. This means that they can present a “bundled” proposal to the First Nations, many of whom are being approached by other companies at the same time.

Suncor's next step is to approach the First Nations whose lands would be affected to present their plans beginning with tours of the proposed sites in February/March each year and using 3D LiDar™ digital mapping technology to show them how their activities will appear when completed, including distances from of bodies of water, etc. By late spring, Suncor is ready to provide First Nations with a detailed plan and provide aerial tours if requested. This leaves the First Nations three months to discuss the plans with Suncor and amongst themselves and provide their reactions by the fall.

According to Wayne Beatty, Suncor's Senior Advisor, Aboriginal Relations Consultation, when First Nations have said “no” to what the company is planning they have come back with proposals that are better than what was originally suggested.

Suncor has learned, says Tracey Wolsey, Director, Oilsands Stakeholder Relations, projects are more successful when the company reaches out to First Nations early, uses a tool that shows their impact and asks First Nations that don't like what's being proposed, “Do you have an alternative?”

Business people also need to ensure they are effectively managing their relationship with the Crown. This can include providing engagement and consultation terms of reference/plans (that, ideally, have been reviewed and commented upon by the Indigenous communities involved) to regulators. They also need to contact the

Crown/regulator regularly to ensure any issues are addressed as early and quickly as possible. This serves the purpose of avoiding any last-minute surprises. “The last thing you want is for the Crown to come back at the end of the process saying ‘you forgot to this, this and this.’” - Saskatoon business person

# Conclusion

As Canada fights to improve its economic foothold in the global economy, it can no longer afford internal disputes that delay – even terminate – projects that not only improve its international competitiveness but the quality of life of Indigenous peoples and all Canadians. What is particularly perplexing is that many of these conflicts could be avoided if there was more clarity, consistency and accountability in the Crown’s execution of its duties to Indigenous peoples. This includes not only the Crown’s legal obligation – which has resulted in a pre-occupation with avoiding litigation – but what really matters to Indigenous peoples’ (and all Canadians’) lives: clean water and air, housing, education, etc.

The current government has committed to renew the Crown’s relationship with Indigenous peoples. It took us a lot longer than an election cycle to get where we are. It is going to take a lot longer than an election cycle to get to where we need to be. All involved need to be realistic. However, this is not an excuse for not getting to work.

Can the federal Crown fix it all? No. It can, however, take the lead in positioning itself, and others, at the beginning, during and end of the duty to consult and accommodate process. The federal Crown also needs to remember that while its processes can be improved, it has the tools today it needs to effectively govern. It needs to keep in mind that it has duties to not only Indigenous peoples but to all Canadians – and that includes business.

For more information, please contact:

Susanna Cluff-Clyburne | Director, Parliamentary Affairs | 613.238.4000 (225) | scluff-clyburne@chamber.ca

# Appendix 1

## THE DUTY TO CONSULT AND ACCOMMODATE: AN OVERVIEW AND DISCUSSION

For the Canadian Chamber of Commerce

By Martin Olszynski, LL.M, LL.B, B.Sc., Assistant Professor of Law, University of Calgary Faculty of Law  
June, 2016

### Executive Summary

In Canada, all governments have a constitutionally-based duty to consult and accommodate Indigenous peoples when they undertake conduct that has the potential to impact their constitutionally protected rights.

While the duty to consult and accommodate is an obligation that rests with the Crown, Canadian courts have been clear that governments can (and often do) delegate the procedural aspects to industry as projects arise, usually by incorporating consultation into environmental assessment or other regulatory processes. Delegation from the Crown to business is understandable and even desirable in many instances. There is a perception among the business community, however, that a lack of government involvement in some instances has left business exposed to greater uncertainty and delay than is necessary. There is also continued uncertainty as to what represents adequate consultation, what form and degree of consent is expected within Indigenous communities, and how well current processes are able to withstand legal challenges.

The Canadian Chamber of Commerce has launched a project on the duty to consult and accommodate. Its purpose is to outline the current difficulties of fulfilling the duty to consult and accommodate requirement faced by both industry and Indigenous communities, focusing on the federal government's role. The goal is to provide a list of specific recommendations for federal government actions to address gaps identified through the project. As part of this project, the Canadian Chamber has commissioned this research paper to provide background information on the legal dimensions of the duty to consult and accommodate.

As noted above, the duty requires governments (whether federal, provincial, territorial or municipal) to consult with Indigenous peoples whose constitutionally protected rights may be adversely affected as a result of actions taken or decisions made by those governments. This duty applies not only to proven or established rights but also to claimed rights.

The duty can be understood as having two primary and inter-related elements: a triggering element and a content element. The triggering element has three requirements: Crown knowledge of an existing or claimed Aboriginal or treaty right; Crown conduct; and the potential for such conduct to adversely affect those rights. All of these requirements must be met in order for the duty to be triggered. The second and especially the third requirements are the greatest sources of uncertainty at this time. While there are some clear examples of Crown conduct, such as the issuance of a permit or authorization for a project, there is no definitive list. Nor is there a clear test to determine when the potential for an adverse effect will be considered sufficient to trigger the duty.

The content element, which is to say the extent or depth of consultation required, is generally proportional to the strength of the claim to a particular right and the severity of the potential adverse effects. A strong claim coupled with the potential for severe adverse effects will usually require extensive consultation, what the Supreme Court has described as “deep” consultation. On the other hand, a tenuous claim with a low potential for adverse effects may only trigger a minimal duty.

This paper proceeds as follows. Part I sets out the above-noted principles in more detail. Part II provides some of the background and context necessary to understand how the duty to consult and accommodate doctrine arose and the direction in which it may be heading. It begins with a discussion of Aboriginal and treaty rights and their constitutional protection pursuant to section 35 of the *Constitution Act, 1982*, before moving on to the emergence of the duty to consult and accommodate doctrine. Part III contains a more detailed analysis of the various elements of the duty to consult and accommodate with reference to the relevant case law. Part IV takes a step back, beginning with some general observations about the duty to consult and accommodate before turning to a list of four specific challenges. The paper concludes with some brief thoughts on the future direction of this important area of law.

# Table of Contents

<b>I. INTRODUCTION</b>	<b>28</b>
<b>II. BACKGROUND AND CONTEXT</b>	<b>29</b>
A. Aboriginal and Treaty Rights	29
B. Emergence of the Duty to consult and accommodate	31
<b>III. THE Duty to consult and accommodate</b>	<b>33</b>
A. Triggering the Duty	33
1. Knowledge of an Established or Claimed Aboriginal or Treaty Right	33
2. Crown Conduct	34
3. Potential for an Adverse Effect	37
B. The Content of the Duty	39
1. General Principles	39
2. The Consultation Process	40
3. Specific Examples	41
4. Delegation to Third Parties	43
<b>IV. DISCUSSION</b>	<b>44</b>
A. General Observations	44
B. Specific Challenges and Potential Solutions	45
1. Phased Approaches to Consultation	45
2. Failure to Manage Cumulative Effects	45
3. Who to Consult?	46
4. Legislating the Duty to Consult and Accommodate?	46
<b>V. LOOKING AHEAD</b>	<b>47</b>
<b>VI. APPENDIX A</b>	<b>49</b>

# I. Introduction

The purpose of this paper is to provide the Canadian Chamber of Commerce with an overview of the duty to consult and accommodate doctrine in Canada. Recognizing that this is a dynamic and rapidly changing area of the law,<sup>1</sup> the analysis does not purport to be comprehensive but rather aims to describe the primary concepts and principles animating this important subject.

The duty to consult and accommodate requires governments (whether federal, provincial, territorial or municipal) to consult with Indigenous peoples whose constitutionally protected rights may be adversely affected as a result of actions taken or decisions made by those governments, usually but not exclusively in the context of natural resources development. Recognizing that the existence of such rights is often a contested matter and their establishment through the courts (*i.e.* through litigation) is generally a costly and time-consuming process, the Supreme Court of Canada in its 2004 *Haida* decision held that the duty applies to both *proven and unproven* Aboriginal and treaty rights.<sup>2</sup>

The doctrine can be understood as having **two primary and inter-related elements**: a **triggering element** and a **content element**. The triggering element has three requirements:

1. Crown knowledge of an existing or claimed Aboriginal or treaty right;
2. Crown conduct; and
3. The potential for such conduct to adversely affect those rights.

All of these requirements must be met in order for the duty to be triggered. Although the first requirement is not without its challenges, the second and especially the third are the greatest sources of uncertainty at this time. While there are some clear examples of Crown conduct, such as the issuance of a permit or authorization for a natural resource project, there is no definitive list. Nor is there a clear test to determine when the potential for an adverse effect will be considered sufficient to trigger the duty.

The content element, which is to say the extent or depth of consultation required, is generally proportional to:

1. The strength of the claim to a particular right; and
2. The severity of the potential adverse effects.

A strong claim coupled with the potential for severe adverse effects will usually require extensive consultation, what the Supreme Court has described as “deep” consultation. While this may not give Indigenous communities a veto, some degree of accommodation will undoubtedly be required. As a practical matter and as further discussed below, where Aboriginal title lands are concerned actual consent may be the preferred path forward. On the other hand, a tenuous claim with a low potential for adverse effects may only trigger a minimal duty.

The triggering and content elements are further discussed below. The next part of this paper is intended to provide the background and context necessary to understand the dynamics driving developments in this rapidly changing area of law.

---

1 As one indication, the foundational Supreme Court of Canada case for the duty to consult and accommodate doctrine, *Haida* (see note 2 below) has been cited by subsequent courts over 320 times in just over a decade. This means almost three court decisions every month for eleven years.

2 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (referred to herein as *Haida*).

## II. Background and Content

### A. Aboriginal and Treaty Rights

Several commentators have recently suggested that, with respect to Aboriginal law in Canada generally, the Supreme Court of Canada may be ignoring the political and practical implications of its decisions.<sup>3</sup> There is no doubt that Aboriginal law and the duty to consult and accommodate are challenging the *status quo* in Canada, especially but not exclusively with respect to natural resources development. In this author's view, however, rather than ignoring the political and practical implications of its decisions, the Supreme Court's approach is firmly rooted in them.

As noted in the introduction, the duty to consult and accommodate is rooted in the constitutional protection of Aboriginal and treaty rights afforded by section 35 of the *Constitution Act, 1982*:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.<sup>4</sup>

The Supreme Court was first called upon to interpret section 35 in a 1990 decision called *R. v. Sparrow*.<sup>5</sup> In that decision, the Court made several observations that would go on to inform its approach to section

35 and, almost 15 years later, the duty to consult and accommodate doctrine. In *Sparrow*, the Supreme Court agreed with an earlier court decision that “[w]e cannot recount with much pride the treatment accorded to the native people of this country.”<sup>6</sup> The Court went on to note that for “many years, the rights of the Indians to their aboriginal lands...were virtually ignored,” and that “by the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status.”<sup>7</sup> In light of this history, the Supreme Court described section 35 as “the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights,” which “at the least, provides a solid constitutional base upon which...negotiations can take place.”<sup>8</sup> The Court endorsed the notion that section 35 “calls for a just settlement for aboriginal peoples.”<sup>9</sup> This historical perspective, of which Canadians were most recently reminded through the work of the Truth and Reconciliation Commission of Canada,<sup>10</sup> must be kept in mind when considering the current and future direction of Aboriginal law in Canada, and the duty to consult and accommodate doctrine in particular.

Most of the relevant cases in the following decade (1990-2000) were concerned with developing the legal framework with respect to establishing the nature

---

3 See e.g. Tom Flanagan (2015). *Clarity and Confusion? The New Jurisprudence of Aboriginal Title*. Fraser Institute. <[www.fraserinstitute.org](http://www.fraserinstitute.org)>. (arguing that “the Supreme Court’s jurisprudence has taken no account of transaction costs when it has created new aboriginal property rights,” at iii).

4 Section 35 goes on to clarify that “Aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada (subs 2), that “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired (subs 3), and that these rights are guaranteed equally to male and female persons (subs 4).

5 [1990] 1 S.C.R. 1075 (referred to herein as *Sparrow*).

6 *Sparrow*, above note 5, citing *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37.

7 *Sparrow*, *ibid.*

8 *Ibid.*

9 *Ibid.*

10 Truth and Reconciliation Commission, “What we Have Learned: Principles of Truth and Reconciliation,” <[www.trc.ca/websites/trcinstitution/index.php?p=3](http://www.trc.ca/websites/trcinstitution/index.php?p=3)> (accessed 12 August 2015) at 5: “For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as ‘cultural genocide.’”

and scope of Aboriginal and treaty rights. Aboriginal rights were defined as those “practices, traditions and customs” distinctive to the Indigenous community claiming them, most often (but not exclusively) hunting, fishing and gathering activities.<sup>11</sup> They can cover a relatively large area or be site-specific. They can be ceremonial, subsistence or commercial in nature. The most significant of such rights is Aboriginal title – the right to the land itself. The test for Aboriginal title was set out in the 1998 *Delgamuukw* case<sup>12</sup> but no Indigenous community was successful in proving title until fifteen years later. In its 2014 *Tsilhqot’in* decision, the Supreme Court granted title over approximately 1,700 square kilometres of land in south-central British Columbia to the Tsilhqot’in Nation.<sup>13</sup> I return to this case below, as in it the Supreme Court suggested that the duty to consult and accommodate may be at its highest where Aboriginal title lands are concerned.

The vast majority of Aboriginal rights cases are from British Columbia. This is not a coincidence; British Columbia is the only jurisdiction in Canada without significant treaty-making experience. As Figure 1 makes clear, most of Canada is subject to various treaties. For the purposes of this paper, these can be grouped

into three broad categories. Eastern Canada (with the exception of Quebec) is characterized by the earliest treaties, some of which are referred to as “Peace and Friendship” treaties, whose terms are often very specific and which did not generally entail the surrender of land rights. Central Canada (from northern Ontario through to north-eastern British Columbia) is subject to the “Numbered Treaties” (Treaties 1 through to 11). These treaties are sometimes described as “land cession” treaties wherein First Nations, in exchange for certain goods and promises with respect to the continuation of their traditional lifestyles, are considered to have surrendered their legal title to such lands, making settlement of western Canada possible. As further discussed below, this is another important historical consideration driving developments in the duty to consult and accommodate case law.<sup>14</sup> Finally, the northern territories and northern Quebec are subject to the modern treaties, or modern land claims agreements.<sup>15</sup> These detailed agreements were entered into beginning in the 1970s;<sup>16</sup> through them, Indigenous peoples have retained considerable control with respect to natural resource development in their traditional territories – seemingly more than First Nations in the Prairie Provinces.

---

11 *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 160 (referred to herein as *Van der Peet*).

12 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (referred to herein as *Delgamuukw*).

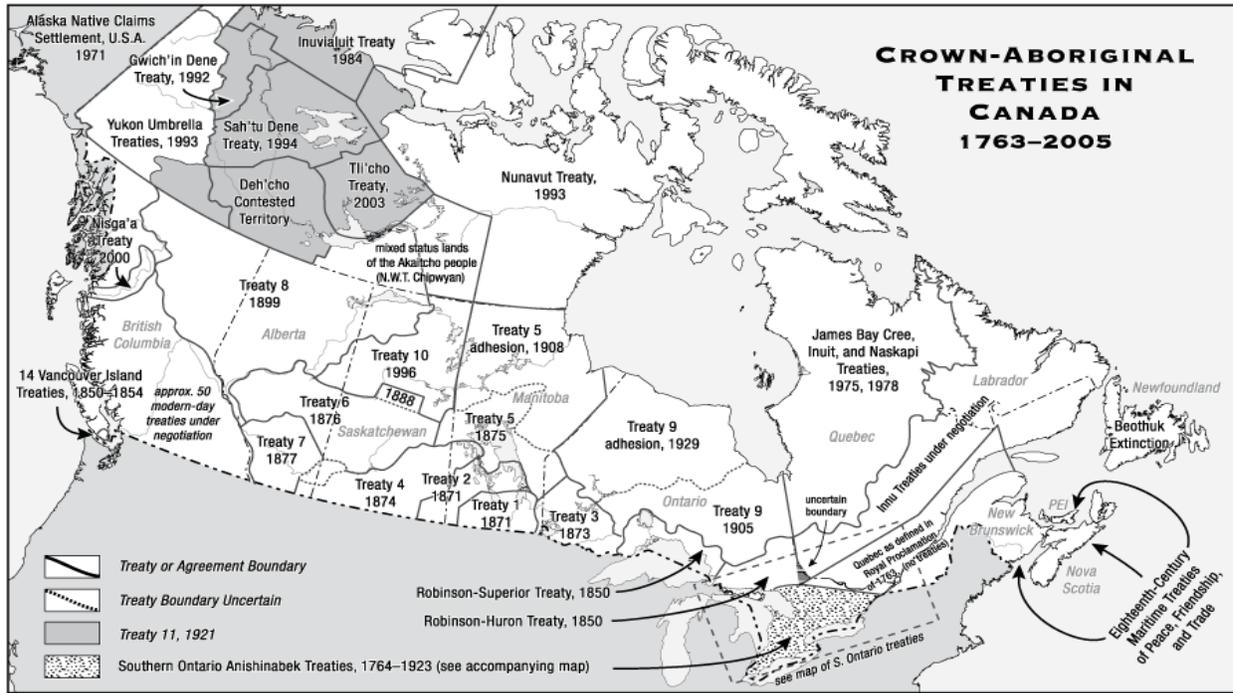
13 *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 (referred to herein as *Tsilhqot’in*). For a comprehensive discussion of the implications of this case and other recent developments, see Nigel Banks, “The Implications of the *Tsilhqot’in* (William) and *Grassy Narrows* (Keewatin) decisions of the Supreme Court of Canada for the Natural Resources Industries,” *Journal of Energy and Natural Resources Law* (20 May 2015) online: [www.tandfonline.com/eprint/cx7sXDkCCgKyMrM298vX/full](http://www.tandfonline.com/eprint/cx7sXDkCCgKyMrM298vX/full).

14 For a good discussion of the numbered treaties, their context and purpose, see several cases by the Supreme Court of Canada, including *R. v. Badger* [1996] 1 S.C.R. 771, *Mikisew Cree*, below note 22, and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

15 *James Bay and Northern Quebec Agreement* (1975), *Northeastern Quebec Agreement* (1978), *Inuvialuit Final Agreement* (1984), *Gwich’in Comprehensive Land Claim Agreement* (1992), *Nunavut Land Claims Agreement* (1993), *Yukon First Nations Final Agreements* (includes 11 distinct agreements), *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (1993), *Nisga’a Final Agreement* (2000), *Tlicho Land Claims and Self Government Agreement* (2003), *Labrador Inuit Land Claims Agreement* (2005), *Nunavik Inuit Land Claims Agreement* (2008), *Tsawwassen First Nation Final Agreement* (2009), *Eeyou Marine Region Land Claims Agreement* (2010), *Maa-nulth Final Agreement* (2011), *Yale First Nation Final Agreement* (not yet effective) (2013), *Tla’amin Final Agreement* (not yet effective) (2014).

16 Commencement of negotiations in Canada’s north followed the recommendations of the Hon. Thomas Berger, QC, who was appointed by the federal Liberal government of Pierre Trudeau to assess the environmental and social effects of the-then first proposed Mackenzie Gas Pipelines. See Berger, “Northern Frontier, Northern Homeland” available online: <http://yukondigitalibrary.ca/digitalbook/northernfrontiersocialimpactenvironmentalimpact/>.

Figure 1: Map of Treaties in Canada<sup>17</sup>



## B. Emergence of the Duty to consult and accommodate

By the turn of the 21<sup>st</sup> century, the primary legal framework for establishing Aboriginal rights, defining their scope and the circumstances under which governments could “justifiably infringe” them, whether for conservation (e.g. fisheries) or in the pursuit of economic development, were relatively well-established.<sup>18</sup> A compelling and substantial public objective, minimal impairment of the affected Aboriginal rights, and consultation with the potentially affected Indigenous communities were integral parts of this framework.<sup>19</sup> Nevertheless, Indigenous

peoples were faced with a new challenge. Aboriginal rights could only be established definitively through litigation or at the treaty table, both of which required significant sums of money and considerable time.<sup>20</sup> Governments, however, took the position that until such rights were proven the groups claiming them were owed no or only minimal consideration in resource management decisions – decisions that were certain to have an impact on those very claimed rights. Such were the facts in the Supreme Court’s landmark *Haida Nation v. British Columbia* decision, which involved the issuance of a tree farm license to Weyerhaeuser with respect to lands claimed by the Haida First Nation. Governments argued that if such

17 Although this map’s authorship is unknown, it is widely available on the internet. This version can be found on Aboriginal Affairs and Northern Development’s website: [www.aadnc-aandc.gc.ca/eng/1100100032297/1100100032309](http://www.aadnc-aandc.gc.ca/eng/1100100032297/1100100032309).

18 *Van der Peet*, above note 11.

19 *Ibid* at paras 136 and 138.

20 Often more than a decade could pass between an initial trial level decision and a final decision from the Supreme Court of Canada.

claimed rights were truly in jeopardy, Indigenous peoples could go to court and seek an injunction. The Supreme Court held that such an approach was not consistent with the Honour of the Crown: “The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests.”<sup>21</sup> The Court also expressed its hope that such an approach would *reduce* litigation and ensure that Indigenous peoples and Canadians generally would continue to benefit from resource development.

The next part of this paper sets out the elements of the duty to consult and accommodate doctrine in more detail. For the purposes of this part, three final developments must be noted. The first is the Supreme Court’s 2005 decision in *Mikisew Cree v. Canada (Minister of Canadian Heritage)*, wherein the Court held that the duty to consult applies not only to Aboriginal rights (proven or claimed) but also treaty rights.<sup>22</sup> In this case, which involved Treaty 8 lands (north-eastern Alberta, including Wood Buffalo National Park), this meant that while the Crown has a treaty right to “take up lands” for settlement and resource development, this right is not unfettered; the Crown has an obligation to inform itself of the potential consequences on Indigenous peoples’ ability to exercise their treaty rights through consultation and, where appropriate, accommodation. Otherwise, the treaty promise that Indigenous peoples would be able to continue their traditional modes of living would be impossible to fulfill.<sup>23</sup>

As a practical matter, this decision expanded the scope of the doctrine from British Columbia to most of Canada. Also worth noting from this decision is its opening paragraph, wherein the Supreme Court reiterated its view of the practical and political context of its decision:

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. *The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding.* The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.<sup>24</sup>

The second development was the Supreme Court of Canada’s decision in *Little Salmon/Carmacks First Nation*, which confirmed that notwithstanding the time spent at the negotiation table and the considerable detail found in modern land claims agreements (especially in comparison to the historical treaties), a duty to consult and accommodate in the course of implementation can still be found even where the relevant provisions are silent on the matter.<sup>25</sup> Thus,

---

21 *Haida Nation*, above note 2.

22 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [referred to herein as *Mikisew Cree*] (emphasis added).

23 *R. v. Badger*, [1996] 1 S.C.R. 771 at p. 5, as cited in *Mikisew Cree* at para 47: “*Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity... The Crown promised that the Indians’ rights to hunt, fish and trap would continue “after the treaty as existed before it.”

24 *Ibid.*, at para 1. [emphasis added]

25 *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53.

for all intents and purposes, the duty to consult and accommodate doctrine is applicable throughout Canada, though how it applies depends on the rights and context in which it is being triggered, as further discussed below.<sup>26</sup>

Finally, in the recent *Keewatin* case,<sup>27</sup> the Supreme Court re-affirmed that although many of the historic treaties were concluded between Indigenous peoples

and the Crown *in the right of Canada*, they were equally applicable to provincial governments. Moreover, by virtue of the division of powers under the *Constitution Act, 1867*, the provinces have the authority to take up lands pursuant to these treaties for the purposes of development but also the obligation to do so in accordance with the honour of the Crown (*i.e.* following adequate consultation and, when necessary, accommodation).

## III. The Duty to consult and accommodate

### A. Triggering the Duty

As stated above, from the very beginning of the doctrine's relatively brief life, the Supreme Court of Canada has consistently held that triggering the duty requires three things:

- 1) **Knowledge** of an **established or claimed** Aboriginal or treaty right;
- 2) **Crown conduct**, such as (but not limited to) the issuance of a permit or authorization;
- 3) **Potential for an adverse effect** on the established or claimed Aboriginal or treaty right;

There are now hundreds of cases to draw on in order to determine whether or not these requirements have been met yet uncertainty remains. These requirements were (somewhat) helpfully summarized by the Supreme Court relatively recently in a case called *Rio Tinto Alcan Inc. v. Carrier Sekani*.<sup>28</sup> The following section begins with that case but also incorporates more recent developments.

#### 1. Knowledge of an Established or Claimed Right

In *Rio Tinto Alcan*, the Supreme Court affirmed that the threshold for establishing knowledge of an established or claimed right is not high.<sup>29</sup> Knowledge can be real or constructive. "Actual knowledge arises when a claim [for an Aboriginal right] has been filed in court or advanced in the context of negotiations [generally in British Columbia], or when a treaty right [the rest of Canada] may be impacted."<sup>30</sup> 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."<sup>31</sup> Proof that the claim will be successful is not required, but tenuous claims may give rise merely to a minimal duty, *e.g.* to give notice.

Not discussed by the Supreme Court here is how to determine which Aboriginal or treaty rights are relevant, *e.g.* what proximity from a proposed project (or other form of development) is required. To some extent, this question is dealt with by the third requirement that must be present in order for a duty to be triggered, which assesses the potential for Crown conduct to result in adverse effects. Generally

---

26 See also Aboriginal Consultation and Accommodation—Updated Guidelines for Federal Officials to Fulfill the Duty to consult and accommodate—March 2011: <[www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675](http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675)>.

27 *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

28 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (referred to herein as *Rio Tinto Alcan*).

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

speaking, the further the Crown conduct is from the rights-bearing or claiming community, the less severe the impacts can be expected to be. This does not mean that consultation is not required, but rather that the extent of consultations may be on the lower end of the spectrum.

## 2. Crown Conduct

It is important to note that it is Crown conduct, not resource or other types of economic development (e.g. the construction of a utility corridor) *per se* that triggers the duty. The simplest and probably still most common example is the issuance of a permit or authorization pursuant to some statutory power (e.g. a *Fisheries Act* section 35 authorization for works, undertakings or activities that result in the destruction of fish habitat that supports a fishery).<sup>32</sup> The issuance of such an authorization in an area where an Aboriginal group has a right to fish clearly has the potential to negatively impact such a right.

That being said, the Supreme Court has consistently held that Crown conduct is not limited to the exercise of statutory powers; an action or decision may be policy-based as opposed to a decision based in law. Nor is it limited to decisions or actions that have an immediate impact on lands and resources: “the duty extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal claims and rights.”<sup>33</sup>

**Table 1** sets out some examples of Crown conduct that have been found to trigger the duty to consult and accommodate, as well as those that have not (both prior to and following *Rio Tinto Alcan*). When considering this table, it should be noted that often the question as to whether certain conduct triggers the duty to consult and accommodate has less to do with the nature of the conduct and more to do with an assessment of the third requirement that must be present in order to trigger a duty to consult and accommodate (*i.e.*, the potential for the conduct to cause adverse effects). As noted above, the potential for an adverse effect decreases the further one is from the location of the relevant conduct (e.g. the site of a proposed development). In addition, the *speculative nature* of the potential adverse effects tends to increase the higher up in the regulatory framework the relevant conduct is situated.

---

<sup>32</sup> *Fisheries Act*, R.S.C. 1985 c. F-14, s 35.

<sup>33</sup> *Rio Tinto Alcan*, above note 28 at para 44.

**Table 1: Examples of Conduct Where Duty was Triggered/Not Triggered**

Conduct Triggering Duty	Conduct Not Triggering Duty
The transfer of tree licences which would have permitted the cutting of old-growth forest; <sup>34</sup>	Issuance of oil sands special exploratory permits (adverse effects too speculative); <sup>35</sup>
Approval of a multi-year forest management plan for a large geographic area; <sup>36</sup>	Entering into international investment agreements (adverse effects too speculative); <sup>37</sup>
The establishment of a review process for a major gas pipeline (the Mackenzie Gas Pipeline); <sup>38</sup>	Provincial decision to renew an operating license for a uranium mine (no new adverse effects from renewal); <sup>39</sup>
The conduct of an inquiry to determine a province’s infrastructure and capacity needs for electricity transmission; <sup>40</sup>	A contract for the sale of excess power from a dam where the contract would not entail changes to dam operation; <sup>41</sup>
The steps that Cabinet Ministers undertake during the law-making process prior to introducing a bill into Parliament; <sup>42</sup>	
The issuance of short-term shellfish aquaculture licences; <sup>43</sup>	
A finding that a project was “substantially started” under British Columbia’s environmental assessment legislation; <sup>44</sup>	
The failure of British Columbia to consult with Coastal First Nations regarding the termination of an environmental assessment (EA) equivalency agreement once it became clear that the federal EA process for a pipeline was not addressing their concerns. <sup>45</sup>	

34 Haida, above note 2. See also *Ehattesaht First Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849.

35 *Buffalo River Dene Nation v The Minister of Energy and Resources*, 2014 SKQB 69, affirmed by the Saskatchewan Court of Appeal (2015 SKCA 31) (referred to herein as Buffalo River Dene Nation). The issuance of these permits was admitted by Saskatchewan as constituting Crown conduct; it was the speculative nature of any impacts that prevented the duty from being triggered.

36 *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642.

37 *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4 (CanLII) (considering the Agreement between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments).

38 *Dene Tha’ First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, affirmed by the Federal Court of Appeal in 2008 FCA 20.

39 *Fond du Lac Denesuline First Nation v Canada (Attorney General)*, 2010 FC 948 (CanLII).

40 *An Inquiry into British Columbia’s Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.).

41 *Rio Tinto Alcan*, above note 28 at para 92: “The un-contradicted evidence established that Alcan would continue to produce electricity at the same rates regardless of whether the [contract] is approved or not, and that Alcan will sell its power elsewhere if BC Hydro does not buy it, as is their entitlement under Final Water Licence No. 102324 and the 1987 Agreement on waterflows. Moreover...BC Hydro, as a participant [of] the reservoir management team, must in the future consult with the [Carrier Sekani] First Nations on any decisions that may adversely impact their claims or rights. On this evidence... the [contract] will not adversely affect the claims and rights currently under negotiation of the CSTC First Nations.”

42 *Courtoreille v. Canada*, below note 52.

43 *K’ómoks First Nation v. Canada (Attorney General)*, 2012 FC 1160 (CanLII).

44 *Taku River Tlingit First Nation v. British Columbia (Minister of Environment)*, 2014 BCSC 1278 (the Court reasoned that “[w]ithout the certificate, the mine cannot be built.” This distinguished the case from *Rio Tinto Alcan*, as further discussed below.

45 *Coastal First Nations v. British Columbia (Environment)* 2016 BCSC 34.

One kind of crown conduct deserves additional consideration here. At the time of *Rio Tinto Alcan*, the Supreme Court explicitly left open the question as to whether legislative action (*i.e.* the drafting and passage of legislation), could trigger the duty to consult and accommodate.<sup>46</sup> Some commentators suggested that Canadian courts would (or at least should) be loathe to impose such a duty on our legislatures out of concern for policy-making and the legislative process.<sup>47</sup>

The first indication that the duty to consult and accommodate may in fact restrict law-making came from the Yukon in relation to that territory's "free entry" mining regime. *Ross River Dena Council v. Government of Yukon*<sup>48</sup> considered whether the Government of Yukon had a duty to consult and accommodate when, pursuant to the *Quartz Mining Act*,<sup>49</sup> it allowed the recording of mineral claims on lands subject to Aboriginal title and rights claims. As a "free entry" system, the acquisition of mineral rights also authorized certain exploration activities on the land without further authorization from government. Although such exploration activities could have an impact on Aboriginal rights, the system seemed to remove "Crown conduct" from the equation, such that the duty to consult and accommodate would not be triggered.<sup>50</sup> The Yukon Court of Appeal held

that such a regime was inconsistent with the goal of reconciliation:

The duty to consult and accommodate exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First Nations can be reconciled with the Crown's right to manage resources. *Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist.*<sup>51</sup>

Then, in *Courtoreille v. Canada (Aboriginal Affairs and Northern Development)*, the Federal Court held that the federal government was in breach of its duty to consult and accommodate with respect to the omnibus budget bills of 2012 (Bills C-38 and C-45).<sup>52</sup> Briefly, certain parts of Bills C-38 and C-45 (referred to collectively by federal government as "Responsible Resource Development" or R2D) introduced significant

---

46 *Rio Tinto Alcan*, above note 28 at para 44: "We leave for another day the question of whether government conduct includes legislative action..."

47 See Dwight Newman, "The Rule and the Role of Law: The duty to consult and accommodate, Aboriginal communities, and the Canadian natural resource sector" McDonald Laurier Institute (24 May 2014) online: <[www.macdonaldlaurier.ca/files/pdf/DutyToConsult-Final.pdf](http://www.macdonaldlaurier.ca/files/pdf/DutyToConsult-Final.pdf)> at 18: "A constitutional requirement to consult prior to legislative action would, for instance, shift some elements of the democratic process, quite possibly making it much more difficult to pursue private members' bills on any matter that could interact with Aboriginal or treaty rights. It could also complicate resource policy and Aboriginal policy generally. If any legislative change with a potential interaction with Aboriginal or treaty rights were subject to a full formal consultation process, any such legislative changes would be significantly complicated..."

48 2012 YKCA 14 (CanLII) (referred to herein as *Ross River*).

49 SY 2003, c 14.

50 *Buffalo River Dene Nation*, above note 35, could be distinguished on this basis: the granting of exploratory permits was not itself sufficient; additional permitting was required from Saskatchewan's Environment Ministry.

51 *Ross River*, above note 22 at para 37 [emphasis added]. For an analysis of this case and its implications for the duty to consult and accommodate, see Nigel Bankes, "The Death of Free Entry Mining Regimes in Canada?" ABlawg (15 January 2013) online: <<http://ablawg.ca/2013/01/15/the-death-of-free-entry-mining-regimes-in-canada/>>.

52 *Courtoreille v. Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244 (CanLII).

53 SC 1992, c 37, repealed 2012, c. 19, s. 66.

changes to Canada’s environmental and natural resource development regimes, including the repeal of the *Canadian Environmental Assessment Act*<sup>53</sup> and its replacement with a more restricted and discretionary *Canadian Environmental Assessment Act, 2012*,<sup>54</sup> a fundamental re-orientation of the *Navigable Waters Protection Act* (now called the *Navigation Protection Act* and applying only to a fraction of navigable waters in Canada),<sup>55</sup> and changes to the habitat protection (now called “fishery protection”) provisions of the *Fisheries Act*. With respect to the *Fisheries Act*, the Federal Court found that the changes (from prohibiting “harmful alteration, disruption or destruction” to only prohibiting “permanent alteration or destruction”) posed “a sufficient potential risk to the fishing and trapping rights [of Indigenous peoples] so as to trigger the duty to consult and accommodate.”<sup>56</sup> The Crown conduct in this case was described as “the steps that Cabinet Ministers undertake during the law-making process prior to introducing a bill into Parliament.”<sup>57</sup> Although the content of the duty is discussed further below, it is worth noting here that the Court found that only a minimal duty was triggered in this case.

At this time, therefore, it is fair to suggest that there is no government action that is not capable of constituting Crown conduct for the purposes of triggering the duty to consult and accommodate. Indeed, following the British Columbia Supreme Court’s decision in *Coastal Indigenous peoples v. British Columbia*, the failure to take action can be Crown conduct triggering the duty to consult and accommodate.<sup>58</sup> In that case, British Columbia and

the National Energy Board had entered into an environmental assessment equivalency agreement (in 2010) that purported to eliminate the requirement for a provincial environmental assessment with respect to federally regulated pipelines, including the Northern Gateway project. By 2014, the applicant Coastal First Nations were of the view that the federal process would not adequately address their concerns and requested consultations with the province with a view towards terminating the equivalency agreement. British Columbia refused such consultations. The Court concluded that while the original decision to enter into an equivalency agreement did not trigger the duty to consult and accommodate, the decision not to terminate following notice of the applicants’ concerns did.<sup>59</sup>

### 3. Potential Adverse Effect

As noted above, determining this requirement is probably the most uncertain step in the triggering test. In *Rio Tinto Alcan*, the Supreme Court affirmed that affected Indigenous communities must “show a causal relationship between the proposed government conduct...and a potential for adverse impacts on pending Aboriginal claims or rights.”<sup>60</sup> The potential impacts also have to be more than speculative: there must be an “appreciable adverse effect on the First Nations’ ability to exercise their aboriginal right.”<sup>61</sup>

This aspect becomes more difficult the further or higher up the regulatory framework one goes. Thus,

---

54 SC 2012, c. 19, s. 52 [CEAA, 2012].

55 R.S.C., 1985, c. N-22 [NPA]. Previously, the NPA applied to all waters in Canada that were in fact or could be navigated for commercial or recreational purposes. The NPA now only applies to those water bodies (162 of them) listed in schedules that are now part of the Act.

56 *Courtoreille*, above note 52 at para 93.

57 *Ibid.*, at para 84.

58 Above note 45.

59 *Ibid.*, at para 213.

60 *Rio Tinto Alcan*, above note 28 at para 45 [emphasis added].

61 *Ibid.* at para 46.

where the Crown is issuing a permit for the destruction of fish habitat in relation to a project, the potential for adverse impacts on fishing rights is clear. Establishing the potential for adverse effects becomes more difficult, or at least uncertain, when (i) establishing the terms of reference for the environmental assessment of such a project,<sup>62</sup> (ii) changing the terms of the governing legislation itself,<sup>63</sup> or (iii) when signing an international trade agreement with resource development-relevant provisions.<sup>64</sup> These are the “high-level management decisions or structural changes” that may or may not “set the stage for further decisions that will have a direct adverse impact on land and resources.”<sup>65</sup> In *Buffalo River Dene Nation v The Minister of Energy and Resources*, the Court held that “there must be a direct link between the adverse impacts and the impugned Crown conduct. If adverse impacts are not possible until after a later-in-time, independent decision, then it is that later decision that triggers the duty to consult and accommodate.”<sup>66</sup>

The Court in *Rio Tinto* also tried to lay down some clear rules around the kinds of adverse effects that are not capable of triggering the duty. Included here are past wrongs: “Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult and accommodate if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.”<sup>67</sup> Such was the case in *Rio Tinto Alcan*. The Supreme Court summarized the situation and the applicable law this way:

... it is suggested that the failure to consult with the [Carrier Sekani Tribal Council] First Nations on the initial dam and water diversion project [from the 1950s] prevents any further development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An

---

62 As in *Dene Tha*, above note 38. The Court held that finalization of a ‘Cooperation Plan’ triggered the duty. The following paragraph is probably the most succinct (para 107): “From the facts, it is clear that the [Cooperation Plan for Environmental Impact Assessment and Regulatory Review of a Northern Gas Project through the Northwest Territories], although not written in mandatory language, functioned as a blueprint for the entire project. In particular, it called for the creation of a [Joint Review Panel] to conduct environmental assessment. The composition of the JRP was dictated by the JRP Agreement, an agreement contemplated by the Cooperation Plan. The composition of this review panel and the terms of reference adopted by the panel are of particular concern to the Dene Tha’. In particular, the Dene Tha had unique concerns arising from its unique position...: the question of the enforceability of the JRP’s recommendations in Alberta and funding difficulties encountered by the Dene Tha’ as result of its not qualifying for the “north of 60 funding programs” (a funding program apparently available only to those First Nations bands north of the 60° parallel). The Dene Tha’ also had other issues to discuss including effects on employment, skill levels training and requirements and other matters directly affecting the lives of its people.”

63 As in *Courtoreille*, above note 52.

64 As in *Hupacasath*, above note 37, where the effects were deemed too speculative. The most succinct paragraph is probably the following (para 90): “Until there is at least a prospect of a decision or event prompted by the Agreement and until we know the nature of that decision or event, we cannot say with any degree of confidence or estimate any possibility that there will be a collision between protecting Aboriginal rights and a monetary award under the Agreement. If a decision or an event prompted by an agreement affecting Aboriginal rights were in prospect, a duty to consult and accommodate might then arise depending on whether it causes a possibility of harm. But nothing is in prospect at this time, nothing can be defined, nor can we even say that anything problematic might ever arise. At this time, all we can do is imagine decisions or events and impacts from them that might or might not happen as a result of the Agreement. *However, the duty to consult and accommodate is triggered not by imaginings but by tangibilities.*” [emphasis mine].

65 *Rio Tinto Alcan*, above note 28 at para 47. The example given by the Supreme Court in *Rio Tinto Alcan* was as follows: A “contract that transfers power over a resource from the Crown to a private party,” which “may remove or reduce the Crown’s power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown.”

66 Above note 35 at para 103.

67 *Rio Tinto Alcan*, above note 28 at para 49.

68 *Ibid* at para 54.

order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights.

*Absent this, other remedies may be more appropriate.*<sup>68</sup>

In addition to confirming the immediate or prospective nature of the adverse effects needed to trigger the duty to consult and accommodate, this passage is important because it heralded the opening of a new legal avenue for the vindication of Aboriginal and treaty rights: private law. Soon after this decision, the same First Nations sued Rio Tinto Alcan in tort law for private nuisance, public nuisance and interference with riparian rights arising out of the operation of

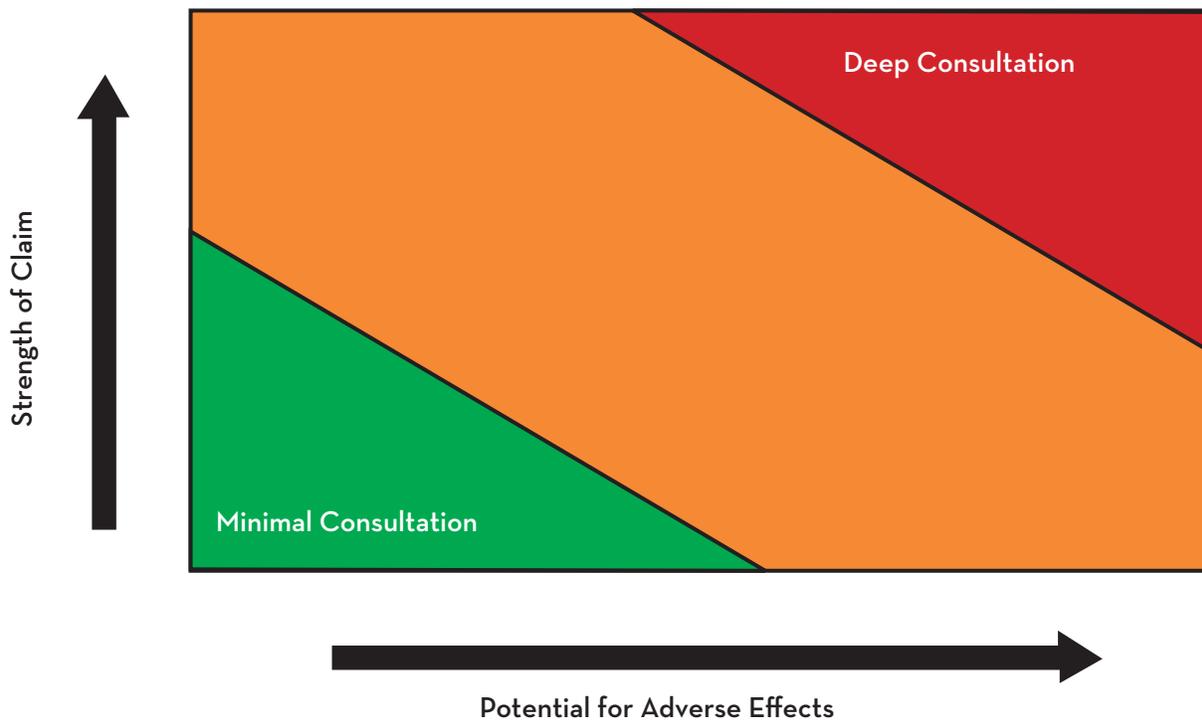
the Kenney Dam—the same dam at issue in *Rio Tinto Alcan*.<sup>69</sup> While this case is still in its early stages, there can be little doubt that developments here will have an impact on the duty to consult and accommodate and reconciliation more broadly.

## B. The Content of the Duty

### 1. General Principles

As noted throughout, the content of the duty is generally proportional to the strength of the claim and the potential for adverse effects on the claimed right(s). Figure 2 (below) is a simplified illustration of this relationship.

Figure 3: Extent of Consultation Depends on Strength of Claim and Potential Effects



<sup>69</sup> See *Saik'uz First Nation and Stelat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154 (CanLII).

On its face, the “strength of claim” analysis (vertical axis) would only seem to apply in British Columbia where the vast majority of situations will involve claimed Aboriginal rights. In the rest of Canada (where treaty rights predominate), the strength of claim analysis would seem unnecessary (treaty rights are *established* as per the relevant treaty’s terms) and it is the potential for adverse effects alone that determines the degree of consultation required. That being said, there is considerable ongoing controversy over the extent and scope of treaty rights, and whether the signing of the treaties extinguished all other claimed Aboriginal rights or whether some remained.<sup>70</sup> In a very recent decision from British Columbia, the Court of Appeal held that whether or not a treaty extinguished all other Aboriginal rights will depend on the wording of that treaty.<sup>71</sup> Practically speaking, many situations will involve a mixture of established treaty rights, contested treaty rights, and claimed Aboriginal rights.

With respect to adverse effects, the focus of the inquiry is on the current exercises of such rights. Typically, Indigenous peoples will adduce evidence establishing the existence of traditional trap lines or hunting grounds that continue to be used and that will be adversely impacted as a result of the relevant Crown conduct. In the context of treaty rights, which for reasons not discussed here technically extend to the entirety of the province within which the relevant treaty lies, the Supreme Court in *Mikisew Cree* confirmed that adverse effects are to be measured against the size and location of a community’s *traditional territory*, as is the case with established or claimed Aboriginal, non-treaty rights. This was

in response to the rather cynical argument from the Government of Alberta that the development at issue in that case, a winter road through Wood Buffalo National Park, would have no appreciable effect on the Mikisew’s rights when considered on a provincial scale.<sup>72</sup>

## 2. The Consultation Process

While the following is a simplification to be sure,<sup>73</sup> the process of consultation can be understood as involving the following steps:

### *Pre-consultation Phase*

- 1) An initial assessment of which Indigenous communities may be affected by a given development, usually based on physical proximity to a proposed development. This is the first step in what is often referred to as a “pre-consultation phase” and can be conducted by governments and/or by project proponents (the principles of delegation are further discussed below);
- 2) Establishing contact with the Indigenous communities identified in (1), informing them of the proposed development and soliciting their views with respect to any potential impacts to their Aboriginal or treaty rights (again, by government and/or industry). This step is also likely to include some assessment of the “strength of claim” and “potential adverse effects” by any or all of the parties in an attempt to set the gauge on the extent of consultations necessary.

---

70 For example, many Indigenous peoples assert Aboriginal rights to water, both in the numbered treaty areas and also in British Columbia. See e.g. Monique Pamela Ross and Christina Smith, “Defining Aboriginal Rights to Water in Alberta: Do They Still ‘Exist’? How Extensive Are They?” Canadian Institute for Resources Law, *Occasional Paper Series #29*, online: <[www.cirl.ca/publications/occasional-papers](http://www.cirl.ca/publications/occasional-papers)>

71 *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 (CanLII).

72 *Mikisew Cree*, above note 22 at para 47: “While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area [essentially the northern half of Alberta], it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899).”

73 One of the most detailed descriptions of the consultation process can be found in federal consultation policy; see *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to consult and accommodate – March 2011*: <[www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675](http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675)>.

## Consultation Phase

- 3) Meetings or correspondence with affected Indigenous communities, usually through designated industry relations officers (IRCs) (*i.e.*, members of the community with knowledge and training in natural resource development issues) with respect to project details, potential effects, as well as the nature of their rights (again, this step can be carried out by government and/or industry). Throughout these meetings, modifications to the proposed development to reduce its adverse environmental effects or other forms of accommodations, such as impact benefit agreements (IBAs), are discussed and agreed upon.
- 4) Consultation concludes (ideally) when all parties have achieved mutually acceptable outcomes or (more realistically) when the Crown considers that consultation efforts have been adequate, which may or may not be the case and often becomes the subject of litigation.

A simplified graphic of the federal consultation process, based on current policy, can be found at Appendix A to this paper.

Of course, consultation probably only rarely – if ever – follows these exact steps. Indigenous communities may request the signing of consultation agreements or protocols at the outset in order to provide some certainty to the process. In many cases, these communities will be experiencing significant capacity issues: there may be too many development proposals for them to analyze and comment on in a reasonably timely manner. Consequently, they may request financial assistance for the purposes of consultation. Finally, proponents and even individual government departments may not be capable of addressing some of the communities' concerns, such as those related to the cumulative effect of numerous developments on the landscape.

## 3. Specific Examples

The purpose of this section is to consider several cases where a court determined the amount of consultation required and then went on to consider whether the Crown's efforts were sufficient or insufficient. Generally speaking, the minimum requirements appear to be (i) receipt of notice, (ii) disclosure of information, and (iii) some ensuing discussion through written correspondence at least (*i.e.* no hearings are required).

In *Taku River Tlingit*, wherein the proponent Redfern sought permission from British Columbia to re-open a mine and which was released at the same time as *Haida*, the Taku River Tlingit First Nation (TRTFN) was found to be owed "something significantly deeper than minimum consultation...and to a level of responsiveness to its concerns that can be characterized as accommodation,"<sup>74</sup> a duty that British Columbia was found to have met on the basis of the following:

- Members of the TRTFN were invited to participate in the Project Committee to coordinate review of the project proposal and were given the original two-volume submission for review and comment;
- They participated fully as Project Committee members, with the exception of a seven month period when they opted out of the process, wishing instead to address the issue through treaty talks and development of a land use policy;
- The Final Project Report Specifications detailed a number of meetings between the TRTFN, review agency staff and company representatives in TRTFN communities;
- Redfern contracted an independent consultant to conduct archaeological and ethnographic studies with input from the TRTFN to identify possible effects of the proposed project on the TRTFN's traditional way of life;

---

74 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 at para 32 [*Taku River*].

- The Specifications document TRTFN’s written and oral requirements for information from Redfern concerning effects on wildlife, fisheries, terrain sensitivity, and the impact of a proposed access road, of barging and of mine development activities;
- With financial assistance the TRTFN participated in many Project Committee meetings. Its concerns with the level of information provided by Redfern about impacts on Aboriginal land use led the Environmental Assessment Office to commission a study on traditional land use by an expert approved by the TRTFN, under the auspices of an Aboriginal study steering group. When the first Staples Report failed to allay the TRTFN’s concerns, the Environmental Assessment Office commissioned an addendum.<sup>75</sup>

In *Mikisew Cree*, on the other hand, the duty owed to the Mikisew was held to fall “at the lower end of the spectrum,”<sup>76</sup> and yet the federal Crown was found to have failed to discharge even this minimal duty:

The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required

to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary.<sup>77</sup>

The Court in *Mikisew* also affirmed that Indigenous communities have a reciprocal obligation to carry their end of the consultation, “to make their concerns known, to respond to the government’s attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution.”<sup>78</sup> In that case, however, consultation “never got off the ground.”<sup>79</sup>

Another case that merits consideration here is *Tsilhqot’in*, as in it the Supreme Court can be understood as suggesting that actual consent may be the easier path where Aboriginal title lands are concerned:

The right to control the land conferred by Aboriginal title means that *governments and others seeking to use the land must obtain the consent of the Aboriginal title holders*. If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.<sup>80</sup>

75 Ibid, at paras 32-36.

76 *Mikisew Cree*, above note 22, at para 64.

77 *Mikisew Cree*, *ibid*. See also *Halfway River First Nation* 1999 BCCA 470 at paras 159-60: “The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met. The Crown’s duty to consult and accommodate imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.”

78 *Mikisew Cree*, *ibid* at para 65.

79 *Ibid*.

80 *Tsilhqot’in*, above note 13 at para 76.

As noted by University of Calgary Professor Sharon Mascher, in some respects this is the same position taken by the Supreme Court over a decade ago (in its *Delgamuukw* decision, noted above) but other passages in *Tsilhqot'in* suggest that justifying any infringement to Aboriginal title could prove very difficult.<sup>81</sup>

Finally, the consultation requirements set out in *Courtoreille*, where the early stages of the legislative process (prior to introducing a bill into Parliament) were held to constitute Crown conduct, are worth considering even though that decision is currently being appealed. The Court held that the duty lay at the lower end: “Upon the introduction of each of the Omnibus Bills into Parliament, notice should have been given to the Misikew in respect of those provisions that reasonably might have been expected to possibly impact upon their “usual vocations” together with an opportunity to make submissions.”<sup>82</sup>

#### 4. Delegation to Third Parties

From the outset (*i.e. Haida*), the Supreme Court has been clear that operational or procedural aspects of the duty to consult and accommodate may be delegated to third parties, but that “the Crown bears the ultimate legal responsibility to ensure the duty is fulfilled.”<sup>83</sup>

What are the “operational aspects” of the duty to consult and accommodate? As noted in all of the government policy documents with respect to the duty to consult and accommodate, most of the steps described above (Part III.B.2) could be carried out by third parties (*e.g.* project proponents) (at least partially): identification of potentially affected Indigenous communities, initial contact, discussion around project effects, mitigation measures, and impact benefit agreements.

Where delegation appears to run into problems is when concerns extend beyond the immediate project or development being considered. For example, an Indigenous community group may be concerned about the cumulative effect of multiple developments on the landscape (this problem is further discussed below) or they may be interested in more formal resource sharing arrangements (*e.g.*, the proponent may be able to offer an impact and benefit agreement but the community is interested in a permanent share of royalties). It is here where an effective transition into government-led consultation will be crucial, failing which the project at hand may be stalled.

---

81 See Sharon Mascher, “Today’s Word on the Street – ‘Consent’, Brought to You by the Supreme Court of Canada” ABlawg (8 July 2014). Online: <<http://ablawg.ca/2014/07/08/todays-word-on-the-street-consent-brought-to-you-by-the-supreme-court-of-canada/>>.

82 *Courtoreille*, above note 52 at para 103.

83 *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al.*, 2011 ONSC 7708 (CanLII).

## IV. Discussion

### A. General Observations

When considering developments in the duty to consult and accommodate doctrine over the past decade, several themes emerge. The first is the necessity of taking the long view. As noted repeatedly by the Supreme Court but also numerous recent government reports, the Indigenous-Crown relationship has been badly strained for over a century. It is not realistic to expect this relationship to change overnight or within the span of a particularly favourable commodity cycle. Practically, this means that the process of consultation should not be expected to run perfectly smoothly, or that efficiency should be the primary concern at this time. Rather, as noted by Doug Eyford in his 2013 report to the Prime Minister, “[r]elationships that prosper require a foundation of trust.”<sup>84</sup> Many perceived inefficiencies in the consultation process, such as the hiring of independent experts to prepare technical reports and the time and cost that this requires, are no doubt rooted in the current lack of trust. These inefficiencies could be expected to resolve themselves *if* and *when* the Indigenous-Crown relationship improves.

A second and related theme is a general sense that, in contrast to many in the business community, Canadian governments are having difficulty coming to terms with the fundamental change that the constitutional

protection of Aboriginal and treaty rights was intended to – and does – represent, as demonstrated by the burgeoning litigation surrounding the duty to consult and accommodate. To some extent, litigation is to be expected; it is one of the inherent contradictions of the duty to consult and accommodate (and the process of reconciliation more generally) that Canadian courts continue to play such a central and significant role. Nevertheless, the amount of litigation does appear excessive, especially when one considers that it is often rooted in spurious Crown arguments (as in *Haida* and *Mikisew Cree*).

A third overarching theme is Indigenous peoples’ desire to be partners in economic development, to return to the original and mutually beneficial economic relationship between the Crown and Aboriginal peoples perhaps best exemplified by the early fur trade.<sup>85</sup> As noted in the federal government’s most recent draft policy statement on consultation and accommodation: “Aboriginal peoples are the Crown’s longest standing partner in building Canada’s identity and economic success.”<sup>86</sup> The one important caveat to this proposition is Aboriginal peoples’ insistence that economic development be environmentally sustainable.<sup>87</sup>

In addition to these general themes, the following sections outline some specific challenges and potential solutions.

---

84 See e.g. Douglas R. Eyford, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Developments* (Report to the Prime Minister) (29 November 2013) at 12 (online: <<http://bit.ly/1SWDHUA>>) [Eyford Report].

85 “In the economic realm, both sides benefited from the commerce that took place. Europeans gained access to valuable resources such as fish and furs and also realized to varying degrees their ambitions to gain new territories. Both societies exchanged technologies and material goods that made their lives easier in their common environment. Some Aboriginal nations, too, profited from serving as commercial intermediaries between the Europeans and other Aboriginal nations...” See *Royal Commission on Aboriginal Peoples* (1996), Volume 1: Looking Forward Looking Back, Part 1: The Relationship in Historical Perspective, Chapter 5 – Stage Two: Contact and Co-operation, online: <[www.collectionscanada.gc.ca/webarchives/20071115053257/www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.collectionscanada.gc.ca/webarchives/20071115053257/www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html)>.

86 See *Public Statement – Canada’s Approach to Consultation and Accommodation (Draft)*, online: <[www.aadnc-aandc.gc.ca/eng/1430509387485/1430509551622](http://www.aadnc-aandc.gc.ca/eng/1430509387485/1430509551622)>

87 Eyford Report, above note 84 at 3: “There is a range of views among Aboriginal groups about the Projects. Most Aboriginal representatives delivered a clear message that their communities understand the value and opportunities associated with economic development. However, they contend that developments must be environmentally sustainable and undertaken in a manner that acknowledges the constitutionally protected rights of Aboriginal peoples.”

## B. Specific Challenges and Potential Solutions

### 1. Phased Approaches to Environmental and Regulatory Review

Generally speaking, the regulatory review process for many developments can be described as follows. A proponent proposes a project, files the necessary applications and prepares an environmental impact statement. Government agencies then conduct a formal environmental assessment, which usually includes hearings, following which high level approval for the project is either given or denied. If the project is approved, it enters into a regulatory phase where project details are further sorted out and included as specific terms and conditions of the necessary permits.

With respect to the duty to consult and accommodate, the federal government has recently adopted an approach whereby the duty to consult and accommodate transcends this entire process. In other words, consultation does not conclude with the completion of a project's environmental assessment but rather is carried over to the regulatory phase. While there may be some advantages to this approach, there is also clearly a downside, including on-going uncertainty with respect to the legality of a given project. As one example, Nalcor's Lower Churchill Hydro electrical Project (Newfoundland), the construction of which has only begun, has already been

the subject of numerous rounds of litigation and nine court decisions.<sup>88</sup> Arguably, the business community would have greater certainty if the federal government endeavoured to satisfy its consultation requirements by the end of the environmental assessment phase rather than postponing that result and allowing projects to be subject to litigation following each step of the regulatory phase.

### 2. Failure to Manage Cumulative Effects

Anecdotally at least, there is a sense that project proponents do a relatively good job of addressing project-specific environmental effects. However, Indigenous peoples are increasingly concerned about the cumulative effect that numerous projects on the landscape are having on their ability to exercise their rights. Although a couple of provinces and territories have moved forward with land-use planning regimes, most notably Alberta but also British Columbia and the Yukon, the majority have not. Further, those that have (Alberta and the Northwest Territories) appear to have done so with minimal consultation<sup>89</sup> or in breach of their constitutional duties,<sup>90</sup> such that conflict remains. For its part, the federal government, through its *Responsible Resource Development* initiative, gave itself the authority to conduct regional assessments to better address cumulative effects but has yet to use this power.<sup>91</sup>

---

88 See *Nunatukavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLTD 44 (CanLII); *Nunatsiavut v. Canada (Attorney General)*, 2015 FC 492 (CanLII); *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46 (CanLII); *Nunatsiavut v. Newfoundland and Labrador (Department of Environment and Conservation)*, 2015 CanLII 360 (NL SCTD); *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2012 CanLII 73234 (NL SCTD); *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189 (CanLII); *Conseil des innus de Ekuanitshit c. Canada (Procureur général)*, 2013 FC 418 (CanLII); *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520 (CanLII); *Nunatukavut Community Council Inc. v. Canada (Attorney General)* 2015 FC 981.

89 Several First Nations have filed requests for review of the first regional plan approved under Alberta's land use framework legislation, the *Lower Athabasca Regional Plan (LARP)* pursuant to the *Alberta Land Stewardship Act SA 2009, c A-26.8*, including the Athabasca Chipewyan First Nation, the Mikisew Cree First Nation, the Cold Lake First Nations, the Onion Lake Cree Nation, the Fort McKay First Nation and Fort McKay Métis Community Association, and the Chipewyan Prairie Dene First Nation. These requests were recently vindicated in *Review Panel Report 2015 – Lower Athabasca Regional Plan*, available online: [https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%20Review%20Panel%20Recommendations\\_2016-05-20.pdf](https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%20Review%20Panel%20Recommendations_2016-05-20.pdf).

90 Several First Nations successfully sued the Yukon government for last minute but also fundamental changes to the Peel Watershed Land Use Plan; see *The First Nation of Nacho Nyak Dun v. Yukon (Government of)*, 2014 YKSC 69.

91 CEEA, 2012, above note 54, sections 73-75.

Properly carried out, land-use (or regional) planning could provide considerable certainty for resource development throughout Canada. On the other hand, failure to address cumulative effects is likely to lead to further litigation. In fact, several First Nations have already sued provincial governments (the Beaver Lake Cree Nation in Alberta and the Blueberry River First Nation in British Columbia)<sup>92</sup> for alleged breaches of their treaties (Treaties 6 and 8, respectively) as a result of cumulative effects. Such cases were foreshadowed by the Supreme Court of Canada in the *Mikisew Cree* case:

If the time comes that in the case of a particular Treaty...First Nation “no meaningful right to hunt” remains over *its* traditional territories, the significance of the oral promise that “the same means of earning a livelihood would continue after the treaty as existed before it” would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.<sup>93</sup>

Although both the Beaver Lake and Blueberry First Nation cases are still in the early stages of litigation, the Beaver Lake lawsuit has already survived efforts by the Alberta and federal Crowns to have it dismissed. It is also worth noting that, post *Keewatin* (discussed in Part II.B), several authorities have suggested that the provinces do indeed have an obligation to assess the cumulative effect of development on treaty rights.<sup>94</sup>

### 3. Who to Consult?

Although in many cases the leadership or representation of the rights-bearing Indigenous community will be clear, in others it may not. This can be the result of internal conflict within communities and/or because government-sanctioned Indian bands under the *Indian Act* do not reflect historical leadership structures and processes. This problem is particularly acute with respect to Canada’s Métis people, whose distinctive culture and political organizations have long been ignored by governments.<sup>95</sup> In addition, the Supreme Court has recently suggested that although Aboriginal and treaty rights are collective in nature, certain rights may “have both collective and individual aspects” and that, as a consequence, it may be that “individual members can assert certain Aboriginal or treaty rights...”<sup>96</sup>

These issues are a source of uncertainty throughout the consultation process and can result in consultation outcomes being challenged from within. Suffice it to say that considerable effort should be made to ensure that consultation reflects the interests the Indigenous community collectively and not merely a few of its members.

### 4. Legislating the Duty to Consult and Accommodate?

Some commentators have suggested that governments could provide greater certainty by legislating the procedural requirements of consultation and accommodation.

---

92 The Blueberry River First Nation lawsuit received national media coverage. See Mark Hume, “First Nations seek injunction barring development in Fort St. John region” *The Globe and Mail* (4 March 2015), describing development in the region as follows: “In addition to two existing hydro dams in the region, there are roughly more than 16,000 oil and gas wells, 28,000 kilometres of pipelines, 4,000 square km of coal tenures, 5,000 square km of logging cutblocks and 45,000 km of road.”

93 *Mikisew Cree*, above note 22 at para 48.

94 Banks, *supra* note 13 at 214; Kirk Lambrecht, “Protecting Aboriginal and Treaty Rights in Alberta’s Environmental Assessment and Regulatory Review System for Energy Projects” in Stanley Berger, ed., *Key Developments in Environmental Law*, 2015 Edition.

95 In its recent *Daniels* decision (*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, the Supreme Court of Canada confirmed that Métis peoples fall within the federal government’s legislative jurisdiction pursuant to subsection 91(24) of the *Constitution Act, 1867*. However, because Métis peoples have always been recognized as potential right holders pursuant to section 35 of the *Constitution Act, 1982*, this decision is not currently considered as having any direct effect on Métis peoples’ section 35 rights or the duty to consult and accommodate Métis peoples.

96 *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para 33.

The idea that legislating a process may give it more certainty and structure is certainly not a new one. Outside of the consultation context, numerous departments and agencies have legislated processes (sometimes found in statutes but more often in subordinate legislation, *i.e.* regulations) that set out the procedural rights of individuals in their interactions with those departments and agencies (*e.g.* what kind of documentation is required, whether there will be a hearing, etc...). Somewhat like the duty to consult and accommodate, the degree of participation afforded in these contexts is governed by factors established through the courts, including the nature of the governmental decision and its potential impact on an individual.

It could be the case that legislation setting out a consultation process would provide additional certainty. Obviously, such legislation would have to be drafted in such a way as to be responsive to the spectrum of consultation requirements (*i.e.* minimal vs. deep consultation), a difficult but not impossible task. Based on the case law discussed in this paper, including but not limited to *Courtoreille*, such legislative action would undoubtedly be deemed Crown conduct requiring extensive consultation with Canada's Aboriginal peoples.

## V. Looking Ahead

More often than not, speculation with respect to the future direction of the duty to consult and accommodate proves incorrect. Nevertheless, several developments stand out as being worthy of keeping in mind. The first is Alberta's and Canada's (following the October election of a Liberal government) announcements that they will implement the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).<sup>97</sup> Of particular relevance to the discussion here is UNDRIP's repeated references to the need for "free and informed consent" prior to government approval of projects or the passage of legislation that will affect Aboriginal lands and/or rights.<sup>98</sup> The

previous federal government endorsed UNDRIP but as an aspirational document only, describing it as a "non-legally binding document that does not reflect customary international law nor change Canadian laws."<sup>99</sup> Although both Alberta and Canada have been ambiguous with respect to what the implementation of UNDRIP will actually mean on the ground, it is bound to have some influence on the duty to consult and accommodate doctrine.

Another important development is the Supreme Court's decision in *Tsilhqot'in* – and not just because of what that decision says about the duty to consult

---

<sup>97</sup> *United Nations Declaration on the Rights of Indigenous Peoples* as adopted by the General Assembly, 13 September 2007. See Brandi Morin, "'We're getting things done,' Alberta Aboriginal Affairs minister taking action to implement UNDRIP mandate" *APTN National News* (15 July 2015) online: <<http://aptn.ca/news/2015/07/15/were-getting-things-done-alberta-aboriginal-affairs-minister-taking-action-implement-undrip-mandate/>>.

<sup>98</sup> *Ibid.* See for example Article 32: "1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources*" [emphasis added].

<sup>99</sup> *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (12 November 2010) online: <[www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142](http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142)>.

and accommodate in the context of Aboriginal title (whether proven or claimed; see discussion in Part III.B). Shortly after its release, numerous Indigenous peoples throughout British Columbia began to assert their own traditional legal orders. The Tsilhqot'in have established Dasiqox Tribal Park in an area adjacent to their judicially-recognized title lands to be governed by their traditional laws.<sup>100</sup> On the Pacific coast, the Tsleil-Waututh Nation conducted an independent assessment of Kinder Morgan's TransMountain pipeline according to their traditional laws. Again, the precise effect of these developments is difficult to predict but some effect is certain, including further assertions of Indigenous legal orders and associated regulatory regimes.

This development also speaks to the discussion in Part II with respect to the asymmetry, in terms of the duty to consult and accommodate, between those parts of Canada without treaties (British Columbia), historic treaties (e.g. the Prairie Provinces) and modern land claims agreements (northern Canada). With modern land claims securing significant participatory rights, and *Tsilhqot'in* raising the bar towards consent in unceded territory, it is reasonable to suggest that Indigenous peoples in the historic treaty areas, and especially the numbered treaties, will continue to press the courts for a greater role in resource management decisions. Bearing in mind the caveat expressed at the outset of this section but also the trajectory of duty to consult and accommodate doctrine, such an outcome does seem more likely than not.

---

100 Information about this park and its purpose is available at <[www.dasiqox.org/](http://www.dasiqox.org/)>.

# Appendix A: Federal Guide to Consultation

Phase 1: Pre-Consultation Analysis and Planning	Phase 2: Crown Consultation Process	Phase 3: Accommodation	Phase 4: Implementation, Monitoring and Follow-up
<p>Step 1: Describe and map out the proposed Crown conduct.</p> <p>Step 2: Identify potential adverse impacts of Crown conduct.</p> <p>Step 3: Identify which Aboriginal groups are in the area of the proposed Crown conduct and ascertain their respective potential or established Aboriginal or Treaty rights and related interests .</p> <p>Step 4: Make an initial determination as to whether there is a duty to consult and accommodate.</p> <p>Step 5: Assess the scope of the duty to consult and accommodate and, where appropriate, accommodate.</p> <p>Step 6: Design the form and content of the consultation process.</p> <p>Step 7: Ensure a records management and filing system is in place.</p>	<p>Step 1: Implement the consultation process.</p> <p>Step 2: Document, catalogue and store all Crown consultation meeting records and other correspondence.</p> <p>Step 3: Develop and maintain an issues management tracking table.</p> <p>Step 4: Adjust the consultation and accommodation process, as necessary.</p>	<p>Step 1: Gather and analyze information supporting the basis for accommodation.</p> <p>Step 2: Identify possible accommodation measures and options.</p> <p>Step 3: Select appropriate accommodation options.</p> <p>Step 4: Communicate and document selected accommodation measures.</p>	<p>Step 1: Communicate and implement the decision(s).</p> <p>Step 2: Monitor and follow-up.</p> <p>Step 3: Evaluate the consultation process.</p>

# Appendix 2: Recommendations

That the federal government:

- More actively communicate the services available to assist proponents in obtaining background information on Indigenous peoples, their historical and current relationships with the Crown, their rights and relevant contact information.
- Work with businesses, Indigenous peoples and other levels of government to develop a consistent duty to consult and accommodate framework that recognizes the different approaches to engagement, consultation, accommodation each community and project requires and clearly defines:
  - The aspect of the project that triggers the duty to consult and accommodate.
  - If the Crown will delegate all or some aspects of the consultation/accommodation, which ones and when.
  - The Indigenous peoples affected and their rights (established and/or potential).
  - The level of consultation required and how it should be undertaken.
  - What information the Crown will provide to businesses and Indigenous communities.
  - What resources/capacity are required by the Indigenous communities and who is responsible for providing them and bearing any costs involved.
  - The Crown’s involvement, including:
    - Primary contact person/resource
    - Whether it will facilitate pre-consultation engagement between the proponent(s) and the affected Indigenous communities.
    - Whether it will provide advice or direction only.
    - Whether it will be “on the ground” in the Indigenous community with the proponent, on its own or not at all.
- Expectations of the affected Indigenous community(ies).
- Timelines (for proponents, Indigenous communities, and the Crown).
- How the Crown will monitor the consultation and accommodation negotiations between proponents and Indigenous communities to measure whether each met the expectations of them and met their commitments.
- Bring Indigenous and business representatives together to develop a robust framework for engagement that emphasizes building relationships as a first step, whenever feasible, before consultation and accommodation discussions focused on particular projects begin as well as what each party will be accountable for. The resulting framework must be accompanied by resources to assist the Crown, business and Indigenous communities in ensuring that engagement:
  - Respects the nation-to-nation relationship.
  - Reflects the rights and circumstances of Indigenous communities.
  - Provides businesses with the ground rules they need to avoid derailing potential projects due to missteps.

- Establish a Commissioner of Indigenous Consultation and Accommodation within the Office of the Auditor General with the mandate of providing semi-annual whole-of-government reports on the federal Crown's performance of its constitutional duties. In addition to assessing the Crown's risk management, the Commissioner's reports should include the number of consultations undertaken in the period reviewed, those that were conducted by the Crown, completely and/or partially delegated as well as their outcomes/status.
- By mid-2017, should establish the framework and timelines for the review of laws, policies and operational practices related to its implementation of the recommendations of the Truth and Reconciliation Commission and the UNDRIP in its entirety. This review needs seek the perspectives of a broad range of stake/rights holders, including businesses and Indigenous communities, and address the tools to be available to each to fulfill additional obligations required of them.
- Communicate, annually, its progress in addressing fundamental quality of life issues for Indigenous peoples including clean drinking water, housing, education and healthcare.
- Be more ambitious in its definitions of Indigenous capacity building including such options as:
  - Tools to help Indigenous communities develop their own consultation guidelines for proponents based on their histories, rights and lands.
  - Organizing, in cooperation with other levels of government, regional conferences, workshops, etc. for Indigenous communities to share their expertise, best practices, etc.
  - Seeking the views of business and Indigenous representatives on a proponent-financed, arm's-length fund that would be available for Indigenous communities to hire the capacity they do not have, what it could/could not be used for, etc.
  - Working with the provinces/territories to develop a list of suggested legal, environmental and other advisers to whom Indigenous representatives could turn for assistance if needed.
  - Assisting Indigenous communities to establish access to capital, for example, business loan guarantees and credit rating assistance.
  - Helping Indigenous communities document their resources (natural, human, financial, etc).

## Appendix 3: List of Those Consulted

Sam	Adkins	Aboriginal Consultation Manager	LNG Canada
Merle	Alexander	Partner	Gowlings
Pete	Bayerle	Manager Public Works	Canadian Pacific Railway
Doris	Bear	Consultant	Bear Global Consulting Services
Darrell	Beaulieu	President & CEO	Denendeh Investments
Wayne	Beatty	Sr. Advisor, Aboriginal Relations	Suncor Energy
Leanne	Bellegarde	Director, Diversity & Inclusion	PotashCorp
Trina	Bender	Director, International and Intergovernmental Relations	Indigenous and Northern Affairs Canada
Terry	Bird	Lead Advisor, First Nation & Métis Initiatives	K + S Potash Canada GP
Beverly	Blanchard	Senior Manager, Strategic Policy, Partnership, and Planning Strategic Partnership Agreement	Native Women's Association of Canada
Mike	Bradshaw	Executive Director	NWT Chamber of Commerce
Mathieu	Boucher	Manager, Aboriginal Relations	Hydro-Québec
Lindsay	Boyd	Director, Municipal and Aboriginal Affairs	Union Gas
Karen	Brandt	Director, Public Affairs and Corporate Communications	International Forest Products
Kim	Brenneis	Director, Stakeholder and Aboriginal Engagement, Public Affairs and Communications	Enbridge Pipelines
Chantelle	Bryson	Associate	Weilers Law
John	Carruthers	President	Northern Gateway Pipeline
Ed	Collins	Consultation Officer	Fort William First Nation
Mary Pat	Campbell	Manager, Stakeholder & Aboriginal Relations	Suncor Energy
Bahram	Dadgostar	Dean, Faculty of Business Administration	Lakehead University
Jamie	Dickson	Vice President, Legal	Des Nedhe Development
Lisa	Ethans	National Aboriginal Client Services Leaders	Deloitte
Mick	Elliott	Stakeholder Relations	Imperial Oil
Deneen	Everett	Executive Director	Yellowknife Chamber of Commerce
Jim	Foley	General Manager	Tetrattech
Jeff	Fowler	Regional Vice-President, North of 60	RBC
Jean-Philippe	Gagné	Executive Vice-President, Business & Legal Affairs	Pacific Future Energy
Eleanor	Gill	Social Impact Specialist, Environmental Services Group	Hatch
Byng	Giraud	Vice President, Corporate Affairs	Woodfibre LNG
Scott	Grant	Vice-President, Commercial Financial Services, Sask North	RBC
Kathy	Gray	Publisher	Inukshuk Publishing

Celeste	Haldane	Commissioner	BC Treaty Commission
Leanne	Hall	National Aboriginal Client Services Leader, Partner	Deloitte
Mike	Henderson	Sr. Executive Director, Major Projects Management Office West	Natural Resources Canada
Tom	Hoefer	Executive Director	NWT & Nunavut Chamber of Mines
Elizabeth	Jordan	National Director, Aboriginal Markets	RBC
Thomas	Isaac	Partner	Cassels Brock & Blackwell LLP
Dave	Knutson	Vice-President	WSP Group
Michael	Keenan	Associate Deputy Minister	Natural Resources Canada
Gabe	Lafond	Director	First Nations and Métis Health Service, Saskatoon Health Region
John	Lagimodiere	President & CEO	Aboriginal Consulting Services
Jennifer	Lester	Senior Manager	MNP LLP
Stephen	Lindley	Vice President, Aboriginal and Northern Affairs	SNC Lavalin
Robin	Linley	Partner	Blake, Cassels & Graydon LLP
Brenda	MacCalder	Managing Director, Corporate Services	Canadian Pacific Railway
Rob	MacKay-Dunn	Director of Public Policy	Vancouver Board of Trade
Jim	Madder	President	Confederation College
Nicole	McLaren	Co-ordinator Indigenous Affairs	Teck Resources
Sydney	McLauchlan	Policy Analyst, Indigenous Affairs	Canadian Association of Petroleum Producers
Sarah	McCullough	Stakeholder Management	Spectra Energy
Keith	Martell	Chairman and Chief Executive Officer	First Nations Bank of Canada
Brian	MacDonald	Chair	Dakwakada Development Corporation
Tyler	McDougall	Senior Manager, Marine Facilities	Canpotex Ltd.
Brian	McGuigan	Manager Aboriginal Policy	Canadian Association of Petroleum Producers
Reg	Moodie	Tribal Councillor	Heiltsuk Nation
Doug	Murray	Chief Executive Officer	Thunder Bay Community Economic Development Commission
Robert	Norris	Senior Strategist, Strategic Partnerships	University of Saskatchewan
Dee	Opperman	President	Norman Wells & District Chamber of Commerce
George	Patterson	Secretary-Treasurer, Board of Directors	Thunder Bay Community Economic Development Commission
Brent	Parker	Director, Policy Leadership & Reporting	Natural Resources Canada
Jay	Pickett	Director of Hydro Operations	NWT Power Corp
Rachel	Pineault	Vice-President Human Resources & Aboriginal Affairs	Detour Gold

Charla	Robinson	President	Thunder Bay Chamber of Commerce
Larry	Rosia	President and CEO	Saskatchewan Polytechnic
Ellis	Ross	Chief Councillor	Haisla Nation
Jack	Rowe	CEO	Rowe's Group of Companies
Murray	Rowe Jr.	President	Forrest Green Group of Companies
Huzaifa	Saeed	Policy & Research Analyst	Hamilton Chamber of Commerce
Jamie	Saulnier	President	Running Deer Resources
Andrea	Sarkic	Director, Government & Regulatory Affairs	Pacific Future Energy
Ed	Schmidtke	President & CEO	Thunder Bay International Airports Authority
Mike	Scott	General Manager	Northern News Services Ltd.
Matt	Simeoni	Vice President Commercial Banking	RBC
Nihal	Sherif	Director, Aboriginal Policy	Natural Resources Canada
Roberta	Simpson	Chair, Board of Directors	Thunder Bay Community Economic Development Commission
Kent	Smith-Windsor	Executive Director	Greater Saskatoon Chamber of Commerce
Tracey	Wolsey	Director, Stakeholder & Aboriginal Relations	Suncor Energy
Stephanie	Snider	Stakeholder Engagement & Communications	Kinder Morgan Canada - Trans Mountain Expansion Project
Kyle	Stanfield	Principal Consultant	Crestview Resource Permitting Solutions
Derek	Stanger	Senior Manager, Corporate Development	CN
Bruno	Steinke	Director, Consultation & Accommodation	Indigenous & Northern Affairs Canada
Natashia	Stinka	Manager, Corporate and Marketing Services	Canpotex Limited
Laura	Strand	Manager, Aboriginal Affairs	Vancouver-Fraser Port Authority
Rebecca	Sullivan	General Manager, Stakeholder & Aboriginal Relations	Suncor Energy
Alexandra	Taylor	Research Analyst	Global Public Affairs
Derek	Teevan	Sr. Vice-President, Corporate and Aboriginal Affairs	Detour Gold
Ann Marie	Tout	Sr. Manager, Northern Region	Enbridge Pipelines
Gary	Vivian	President	Aurora Geosciences
Joe	Wabegjig	Deployment Analyst, Project Delivery Group	Hatch
John	Weinstein	Chief of Staff	Métis National Council
Susan	Whitley	Indigenous Peoples Policy and Negotiations Advisor	Shell Canada
Joe	Wild	Sr. Assistant Deputy Minister, Treaties & Aboriginal Government	Indigenous and Northern Affairs Canada



**THE CANADIAN  
CHAMBER  
OF COMMERCE**

**LA CHAMBRE  
DE COMMERCE  
DU CANADA**

Chamber.ca |  CanadianChamberofCommerce |  @CdnChamberofCom | #AskCCC