FIRST NATIONS LEADERSHIP COUNCIL

ADVANCING AN INDIGENOUS FRAMEWORK FOR CONSULTATION AND ACCOMMODATION IN BC

Photo courtesy of UBCIC.

Advancing an Indigenous Framework for Consultation and Accommodation in BC

REPORT ON KEY FINDINGS OF THE BC FIRST NATIONS CONSULTATION AND ACCOMMODATION WORKING GROUP

2013 ▮ THE FIRST NATIONS LEADERSHIP COUNCIL

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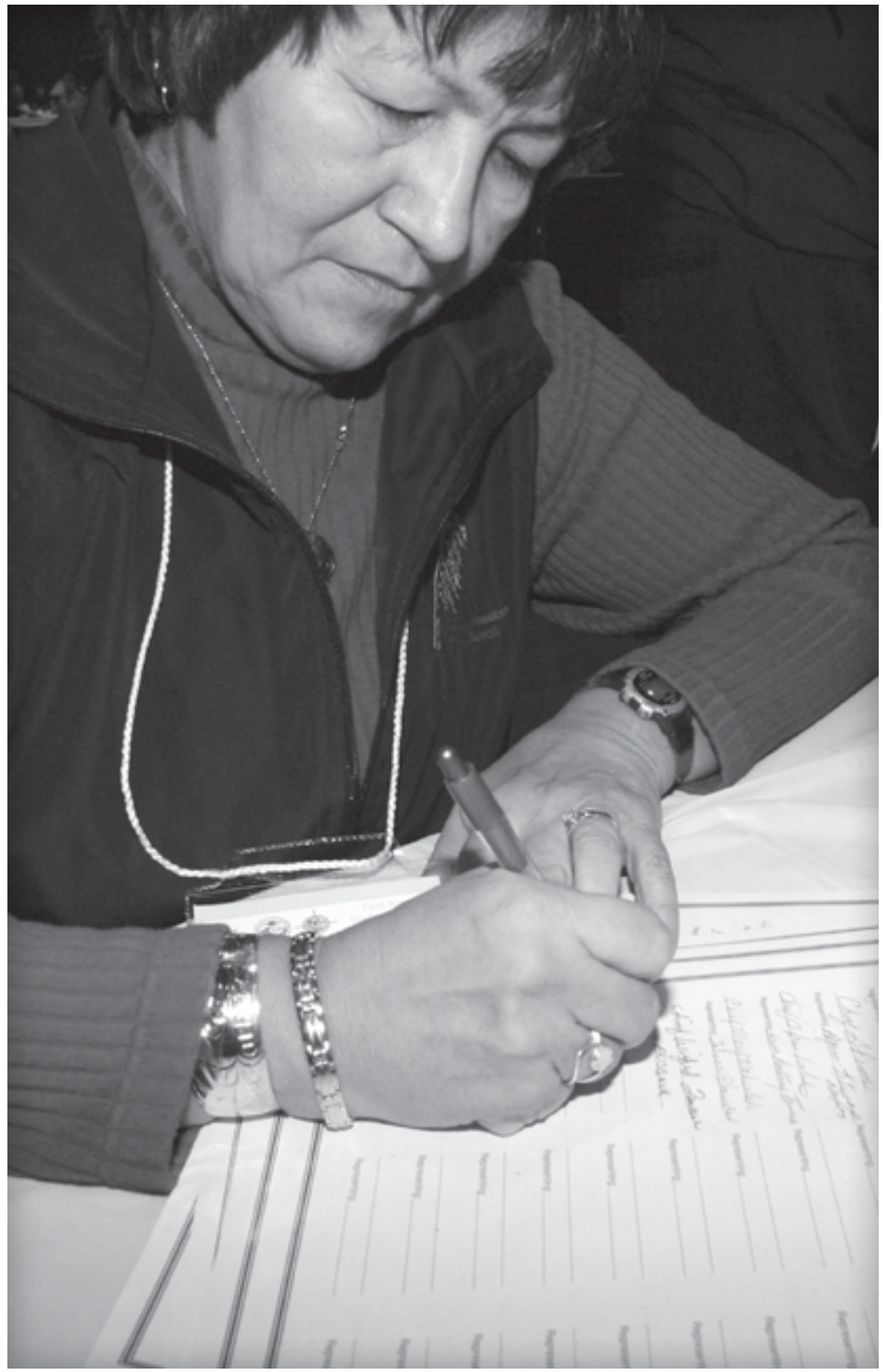

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Background

IN 2011, THE FIRST NATIONS SUMMIT, the Union of BC Indian Chiefs (UBCIC), and the BC Assembly of First Nations (BCAFN) collectively formed the BC First Nations Consultation and Accommodation Working Group. The Working Group grew out of a simple and basic reality – the unmet promise enshrined and embedded in the Constitution for honourable reconciliation of pre-existing sovereignty of Aboriginal peoples with assumed Crown sovereignty, and the continuing and serious obstacles to meeting this promise.

In particular, one of the central mechanisms that the Supreme Court of Canada has crafted for advancing such reconciliation in the **interim** before treaties or other agreements are reached is the positive constitutional obligation on the Crown to consult and accommodate First Nations. However, the challenge is that the Crown is largely not implementing this obligation in a manner that achieves the reconciliation purpose of section 35.

Rather than building the relationships, trust, and momentum required for the transformational change that reconciliation requires, the Crown's approaches to consultation and accommodation are fueling growing impatience, frustration, and conflict. It is not surprising, therefore, that there have been an estimated 100+ cases challenging the Crown's failure to consult and accommodate since the *Haida* decision in 2004. In the vast majority of these cases, First Nations have been successful. Yet, real change on the ground is still perceived to be a distant goal as Crown policies and approaches have failed to live up to the principles and spirit of the court decisions, political assertions and, most importantly, the purpose of section 35 of the Constitution Act, 1982.

By Resolutions of the First Nations leadership in BC, the Working Group was charged with mapping out a pathway for transforming the status quo of ineffective, and often dishonourable practices of the Crown with our Nations, to truly meaningful and appropriate government-to- government engagement processes based on respect, honour, recognition of Aboriginal title and rights and treaty rights, and to advance reconciliation in a tangible way for our communities.

In considering this task, the Working Group recognized immediately the need to undertake a scan of the legal and political landscape and prepare frameworks, ideas and tools to assist First Nations to advocate for and manifest truly meaningful consultation and accommodation arrangements with the Crown and, where appropriate, proponents. The Working Group has recognized that the Crown seems content to only pursue the "window-dressing" of what the Constitution requires and that First Nations must be proactive and take the lead in creating a meaningful government-to-government engagement process. In doing so, First Nations can bring life to the words of First Nations people and the acknowledgement by the Supreme Court of Canada that First Nations' perspectives, including their Indigenous laws, inform Aboriginal title and rights and, therefore, First Nation-Crown relations.

To this end, as a first step, the Working Group commissioned a series of analyses on essential aspects of consultation and accommodation and the current legal and political context in which the Crown's duty is playing out. These include the following:

- Indigenous Legal Orders
- First Nations Policy
- Common Law

- International Law
- Policy
- Provincial Policy
- Economic Policy

Full copies of six of the analyses are attached to this Report. The First Nations Policy remains a work-in-progress that will require First Nations input. This Report is intended to synthesize the key findings of the six analyses and identifies the core elements that should inform First Nations consultation and accommodation strategies.

Based on direction from the First Nations leadership in BC, further steps in this work may involve the development of additional tools to aid First Nations in the essential work of fracturing the Crown's intransigence to move in the direction the Courts have required with respect to consultation and accommodation, and on a path that will lead to social harmony and justice, rather than greater social conflict and discord.

BC First Nations Consultation Working Group

The BC First Nations Consultation Working Group was established via First Nations Summit Resolution #0311.09, BC Assembly of First Nations Resolution 01(d)/2012 and Union of BC Indian Chiefs Resolution 2011-07 and was mandated to consider an overall First Nations approach for Crown consultation and accommodation of First Nations legal interests.

The purpose of the BC First Nations Consultation Working Group was to implement the direction of the Chiefs in Assembly and consider an overall First Nations strategy and approach for constitutionally required Crown consultation and accommodation. The BC First Nations Consultation working group's central purpose was to develop this framework which seeks to reflect First Nations principles and standards for engagement, worldviews, values, Aboriginal Title and Rights, the Canadian common law and relevant international standards regarding consultation and accommodation.

Members of the working group who played a role in the development of this framework include:

- Chief Douglas White III Kwulasultun
- Robert Morales
- Don Dixon
- Chief Mike Archie
- Jasmine Paul
- Chief Garry Feschuk
- Ken Smith
- Bev Clifton Percival (Gwaans)
- Chief Jackie Thomas
- Chief Don Harris
- Bonnie Leonard
- Chief Byron Louis
- Stacey Edzerza Fox
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- Andrea Glickman

The Joint Consultation and Accommodation Working Group wishes to acknowledge contributions to this report by:

- Chief Douglas White III, LL.B. (Kwulasultun, Tliishin)
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- Andrea Glickman
- Robert Morales, J.D.
- Sarah Morales J.D., LL.M., Ph.D. candidate
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Key Findings

THERE ARE A NUMBER OF KEY findings that emerged from the reports and analyses produced by the Working Group. Collectively, these key findings illustrate that fundamental goals of achieving a just resolution and reconciliation of the outstanding land question in British Columbia is not being appropriately or substantively advanced through current approaches to consultation and accommodation.

The key findings outlined below represent a synthesis of core observations made in the analyses produced through the Working Group. Every reader is encouraged to carefully read each of the analyses to gain a fuller perspective on the ideas generated through this work.

1. The concepts of sovereignty and reconciliation are central to understanding the purpose of consultation and accommodation

The term "reconciliation" is often used to evoke what must occur to improve and structure the relationship between Aboriginal Peoples and the Crown. It is often not emphasized, however, that reconciliation in the context of the relationship between Aboriginal Peoples and the Crown is about sovereignty. It involves reconciling the reality "of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory" *(Van der Peet).* This reconciliation is of sovereignties, with its ultimate expression being in developing shared and collaborative patterns of how sovereigns will interact with each other with respect to governing and making decisions.

Reconciliation of this nature and scope is not a mere adjustment to processes of Crown decision-making, or a mechanistic and formulaic exchange of information. It is much broader, extensive, and complex then this. For example, the Dictionary of Canadian Law, Third Edition says this about reconciliation:

> Reconciliation. n. 1. The settlement of differences after an estrangement. 2. " [D]oes not take place unless and until mutual trust and confidence are restored. It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married, but their relationship must be restored, by mutual consent, to a settled rhythm in which the past offences, if not forgotten, at least no longer rankle and embitter their daily lives. Then, and not till then, are the offences condoned. Reconciliation being the test of condonation [forgiveness], nothing short of it will suffice" (quoting Lord Denning).

The Courts have echoed this broad vision of reconciliation in various ways. The Supreme Court of Canada in the *Mikisew* case declared that the concept of reconciliation is the "fundamental objective," or purpose, of the modern law of Aboriginal and treaty rights:

> 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.

Consultation and accommodation is an expression of, and not divorced from, the relationship between sovereigns and the goal of reconciliation. The "honour of the Crown" is "always at stake" and arises from the very fact of the Crown's assertion of sovereignty, with which "arose an obligation to treat [Aboriginal peoples] fairly and honourably, and to protect them from exploitation." Consultation and accommodation, when carried out meaningfully and honourably, is intended to preserve "the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation." As such, the duty is a mechanism that reins in Crown conduct as a function of advancing reconciliation under section 35(1). Consultation must therefore be designed to achieve this objective, meaning the concerns of the Aboriginal peoples whose lands are at issue must be addressed. The controlling question in all situations is "what is required to maintain the honour of the Crown and to affect reconciliation between the Crown and the Aboriginal peoples with respect to the interest at stake." In each and every case, what will promote reconciliation? The core objective of section 35 cannot be achieved if the Crown is free to make land and resource use decisions without regard for Aboriginal rights claims and while those treaties remain outstanding.

So, while it is abundantly clear that consultation itself is not a final reconciliation, it is an important mechanism to move toward reconciliation.

2. The Indigenous perspective, and Indigenous legal orders, must shape and inform the vision and model of reconciliation, and the meaning and content of the process and substance of consultation and accommodation

Reconciliation is something that, by definition, takes place among more than one party and must therefore be informed by two voices and perspectives. It must restore the Crown-Aboriginal relationship to a settled rhythm, each party exercising its authority over lands and resources – each thriving in its representation of its communities. This is reflected in how the Courts have continually emphasized the importance of the Indigenous perspective in informing and shaping the understanding and interpretation of core elements, doctrine, and principles of section 35 of the Constitution Act of Canada. For example, the Supreme Court of Canada in *Delgamuukw* stated that "the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law." Further,

> …the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the "aboriginal perspective while at the same time taking into account the perspective of the common law" and that "[t]rue reconciliation will, equally, place weight on each". As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for

> aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use. *(Delgamuukw)*

Ultimately, "the only fair and just reconciliation is…one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each." *(Delgamuukw)*

As these statements illustrate, legally required reconciliation requires engaging with, understanding, and working within our Indigenous legal orders. They form a part of the foundational principles and imperatives relevant to the First Nation-Crown constitutional relationship. This also holds true for consultation and accommodation to the degree which – as it must – consultation and accommodation is to express and advance the efforts by Aboriginal Peoples and the Crown towards reconciliation, including protecting lands, resources, and values in the interim period before broader reconciliation might be achieved.

The importance of Indigenous perspectives and legal orders is affirmed by the Supreme Court of Canada. They are also supported by international mechanisms and instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples* as being rooted in the core principle of "self-determination." The Declaration articulates an array of individual and collective rights deemed essential to or derivative of self-determination, including rights to lands and resources. With respect to lands and resources, it articulates a standard of free, prior, and informed consent which allows for, and ensures space for, Indigenous legal orders to operate effectively and influence how decisions will be made.

Our Indigenous legal orders have existed for centuries and continue to exist to this day. This is a matter that is outside the authority of the Crown. Indigenous law does not need to be recognized by the Crown to exist. First Nations continue to be guided by their Indigenous laws in their relations with their territories and each other. What we must now do is more systematically and concretely articulate the visions of reconciliation, and relatedly, the meaning, process, scope and nature of consultation and accommodation that reflects our Indigenous legal orders and the distinct ways of knowing and acting that they embody. We need to clearly ensure that principles, practices, and processes of consultation and accommodation are being shaped as much by our perspectives and legal orders, as by that of the Crown and common law.

Currently, consultation and accommodation is viewed and implemented by governments, at best, as a minor to moderate constraint on the Crown's asserted decision-making authority. While the common law does limit the Crown, this is an incomplete perspective through which to view engagement. Rather, we must view engagement as grounded in a vision of two voices engaging together to have a robust and purposeful dialogue about the space they will create for their constructive, respectful, and harmonious interaction as decisions are made.

3. The current status quo of how consultation and accommodation takes place between the Crown and First Nations is largely dysfunctional, does not reflect core legal principles including those of sovereignty and reconciliation, and does not properly incorporate the Indigenous perspective

It has now been almost a decade since the Crown's duties to consult and accommodate came into clear focus in the *Haida* decision. The basic articulation of the Crown's duty has not changed in the years since *Haida* and the *Haida* principles stand as precedent to be applied in every case. These principles have been applied to a variety of decisions made by different decision makers. The fact patterns brought before the courts relate to a range of industries, including forestry, mining, fisheries, and hydro power; land development including ski hills, golf courses, and casinos; land claims agreements whether in the midst of land claims negotiations or at the conclusion of modern treaties; conversion of Crown lands such as forest lands (provincial) or national defence lands (federal) to fee simple lands.

The fact that there have been over a hundred legal cases about the duty to consult and accommodate since 2004 illustrates the reality that on the ground consultation and accommodation is not occurring in a manner that is advancing reconciliation and building patterns of trust, respect, and understanding. Across all of these litigation situations, the Crown and the Aboriginal people whose lands or resources were affected could not agree on what was required to maintain the honour of the Crown and to meet the Crown's consultation obligations. The sheer number of cases that have gone before the courts graphically illustrates that there have been so many significant impacts experienced in traditional territories where agreement has not been found. Instead, litigation is pursued against the direction of the Courts that negotiated agreements are the preferred route. The number of cases also tells us that there have been significant costs, both out of pocket and to the Crown-Aboriginal relationship.

Further, we know that there is an ebb and flow in the courts and that in each case the duty to consult will land somewhere on the *Haida* spectrum but not necessarily where the parties think that it should land. Clearly, having solutions be imposed by the courts, does not and cannot sustain or enhance the Crown-Aboriginal relationship; this is not the path to reconciliation. If nothing else, the case law reveals that uncertainty about the validity of Crown authorizations, permits and tenures is alive and well. This lingering uncertainty does interfere with third parties and their ability to comfortably pursue their land and resources activities. The uncertainty will only be put to rest when Aboriginal title and rights and treaty rights are recognized, and mutually respectful negotiations advancing an honourable reconciliation process are underway.

The effort to reconcile interests in the courtroom puts the Crown-Aboriginal relationship on and for the record. Aboriginal peoples living in the oral tradition must react to and interact with a written consultation record – every phone call, every meeting, every effort to phone or to meet is presented for review and assessment by the court. No relationship, whether Crown- Aboriginal, federal-provincial, spouses, or otherwise can be enlivened if every contact or engagement is on the record.

While in any specific case there will be specific reasons why efforts at consultation and accommodation resulted in legal conflict, there is an underlying reality that Crown

approaches to consultation and accommodation, as directed by Crown policies have serious flaws. Denial has carried on, cloaked in different clothes. As the analyses illustrate, both provincial and federal policies remain archaisms that do not move us forward toward reconciliation. They fail to set out engagement processes designed to meet the purposes of section 35, and they fall far short of the standards identified by the international community and endorsed by Canada for respecting Indigenous human rights.

In February 2008, the federal government released its Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult, developed to provide general direction to federal departments and agencies when addressing common law requirements for consultation with Aboriginal peoples. The Interim Guidelines were later updated to respond to evolving case law. In March 2011, the government released the *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Legal Duty to Consult,* which apparently set out the government's current approach to fulfilling its legal obligations to Aboriginal people.

There are a number of findings about the Guidelines that illustrate how they fall short of meeting the high standards First Nations have come to expect based on law and international standards and opportunities missed by federal government to play a lead role in reconciliation on the ground:

- The impetus for developing the Guidelines came from litigation, not from Canada's unique relationship with First Nations or political will.
- The Guidelines are not driven to achieve "reconciliation" and therefore represent a minimalist approach to common law principles on Aboriginal and treaty rights and corresponding Crown obligations.
- The Guidelines appear to equate the constitutional nature of the Crown's obligations with government-made statutory and policy requirements.
- The Guidelines emphasize process over substance.
- The Guidelines emphasize the use of "existing processes" to meet Crown obligations,
- Federal departments and agencies do not fully or consistently implement the Guidelines where they do provide useful direction.
- The Guidelines perpetuate impoverished Crown approaches to Aboriginal and treaty rights and First Nations engagement and focus on minimizing Crown liability.

It is important to note that the Government of Canada's current approach to meeting its legal obligations to Aboriginal people is currently in a state of flux, as the Government moves to implement substantive legislative and policy shifts regarding major resource development. In particular, the Conservative Government recently announced its Responsible Resource Development policy agenda; passed the corresponding *Jobs, Growth and Long-term Prosperity Act* (formerly Bill C-38); and brought a second omnibus piece of legislation, *Jobs and Growth Act* (formerly Bill C-45) into force in December, 2012.

Similarly, the Provincial Crown's policy approach has been flawed and deficient. In the early 1990's, British Columbia began developing written policies on consultation and accommodation with First Nations following key court decisions. Since that time, British Columbia's policies have been updated, supplemented, or changed on numerous occasions, typically in reaction to court decisions. In addition to guiding policies, there have been

various operational guidelines for provincial actors in different ministries (e.g. forestry, oil and gas, environmental assessment). Currently, there are three key documents guiding the Province, including the 2010 *Updated Procedures for Meeting Legal Obligations When Consulting First Nations (Interim).* The other two documents addressing Accommodation Guidance and Preliminary Assessment have not been shared with First Nations on the basis that they are internal and protected by solicitor- client privilege.

As a whole, the Province of British Columbia's policies have been narrowly focused, legally reductionistic, procedural and not substantive, and focused on preserving the status quo. The one policy statement that clearly breaks that pattern – the New Relationship Vision Statement (2005) – has not been fully and meaningfully implemented, and is currently the focus of an effort by British Columbia to redefine in a manner more consistent with the predominant policy pattern.

There are a number of interrelated key findings about British Columbia's approach to policy on consultation and accommodation that illustrate the deficiencies of how British Columbia has approached, and continues to approach, the development of policy:

- Provincial Policy on consultation and accommodation has been developed as a reaction to court decisions, and not for other motivations or purposes.
- Provincial Policy has been legally narrow and reductionistic, and not focused on achieving important goals that the law identifies.
- Provincial Policy is aimed at preserving the legislative and operational status quo.
- Provincial Policy is primarily procedural and not substantive.
- Agreements largely reflect, and have not significantly changed, the provincial policy approach and focus.

A review of provincial policy shows a remarkable level of continuity throughout the history of provincial policies on consultation and accommodation. While the evolution of the law necessitated the development of policy, the continued evolution of the law has not resulted in significant changes to the purpose, goal and content of provincial policy.

To achieve the fundamental objective of reconciliation, both federal and provincial policy must undergo fundamental transformation.

4. The treatment of the economic component of Aboriginal Title and Rights illustrates the deficiency of the current status quo, and highlights what actual reconciliation might entail

Considering the economic component of Aboriginal title and rights is a useful framework for understanding what reconciliation may entail. That is, when engaging in meaningful consultation, accommodation measures aimed at advancing reconciliation may be focused on ensuring that the First Nation, among other things, economically benefits from a proposed activity (other accommodation measures may, for example, focus on such things as avoiding or mitigating environmental impacts).

The Supreme Court of Canada has been clear that section 35 has both a substantive nature and procedural obligations. The substantive aspect speaks to the actual nature, content and scope of First Nations title and rights, including economic aspects. The procedural component is the Crown's duty of consultation and accommodation and the need for reconciliation (e.g. through treaties or other agreements).

Although the courts have confirmed substantive economic aspects of Aboriginal title and rights, First Nations are not usually the beneficiaries of economic cycles in their traditional territories. Crown policy does not include as a goal, to ensure that First Nations realize the economic aspects of their Aboriginal title and rights and, so, the Crown may not be enthusiastic to present economic opportunities as a form of accommodation. It seems that only progressive proponents negotiate with First Nations to ensure they economically benefit from development in their respective territories. Other proponents rely on the Crown to discharge its obligations and fail to see the opportunity and value of negotiating agreements with First Nations as a matter of good business. This haphazard approach, largely dependent on the business sense of the proponent and not at all on effective Crown policy, is not a satisfactory framework for ensuring First Nations' economic rights are fully enjoyed.

Since *Haida,* the Supreme Court of Canada has been relatively clear that the duty to consult lies with the Crown, and the Crown can only delegate certain parts of the duty to a third party. The Province, however, has delegated almost its entire responsibility regarding economic accommodation to third parties. First Nations must work to redirect this pattern of Crown behaviour and look to BOTH the Crown through resource revenue sharing, and industry through impact benefits and profit-sharing negotiations. It is critical to engage both the proponent and the Crown and not allow either of them to avoid any responsibility by playing "economic hot potato."

While the Province has committed to all First Nations to develop resource revenue sharing opportunities, currently there are few resource revenue agreements, and primarily only in producing mines and advanced oil and gas developments. Further, these arrangements are limited to direct revenues arising from royalties, mining taxes or fees such as leases, licenses or stumpage and do not include the wide range of potential revenues (e.g. royalties, levies, wages, costs and private sector profits). Provincial forest agreements also purport to accommodate First Nations asserted Aboriginal title and rights; however, this policy and the template agreement are provincially developed documents, not negotiated agreements as a result of meaningful consultation engagement. The reality is that the Crown requires much broader policies and mandate to negotiate appropriate accommodation measures that better reflect the legal and constitutional nature of Aboriginal title and rights, including their economic features.

In private law, proponents and First Nations typically negotiate Impact Benefit Agreements (IBAs), which may address a range of issues (e.g. funding, negotiation protocols, survey of economic benefits, land use disruption fees, traditional knowledge studies, skills and training, preferential hiring and contract bidding, direct awards, equity participation options, compensation, royalties). Some jurisdictions have ratified modern day treaty provisions into regulations that demand an IBA where there is a proposed disposition of natural resources of Aboriginal peoples. Unfortunately, the Courts and legislature of BC have not progressed to this legal and transparent model. A legislative regime that requires agreement with First Nations before a project is approved that adversely impacts a First Nation's territory would, in effect, be incorporating the international legal principle of free, prior and informed consent into domestic law pertaining to consultation and accommodation.

A cooperative, respectful, and affirmative legal relationship with the First Nation affected by a proposed project can garner political and legal support for the advancement of a project, or a "social license" to operate. An adversarial, disrespectful and publicly opposed project can mean extensive regulatory delays and litigation. Companies are recognizing that how they respond and contribute to implementation of Aboriginal title and rights (e.g. implementation of proactive corporate social responsibility policy that recognizes First Nations right of free, prior and informed consent) has a direct impact on their project's feasibility and profitability, and First Nations can leverage this to ensure their title and rights are realized.

Because the Province continues to assert its jurisdiction and denies constitutionally protected Aboriginal title, investors may mistakenly move forward projects thinking there is regulatory certainty. However, major projects such as Enbridge's proposed Northern Gateway Pipeline demonstrate that the need to reconcile Aboriginal title is an absolute reality in British Columbia, and both the Crown and proponent must engage the affected First Nations in consultation and accommodation processes. All of this uncertainty will undoubtedly impact a credit risk assessment of a proposed project.

Aboriginal peoples have always had wealth in resources and understood economies within their societies. Although that there is currently no legislation or court decision that specify exactly how accommodation translates into economic benefits for Aboriginal peoples, the common law framework provides a base for accommodation by the Crown to occur that recognizes the economic component to Aboriginal rights.

5. New directions, patterns and processes of consultation and accommodation will emerge through First Nations systematically and strategically developing approaches that reflect a purposive approach, incorporate Indigenous perspectives, and advance reconciliation

Reconciliation must restore the Crown-Aboriginal relationship to a settled rhythm, each party exercising its authority over lands and resources – each thriving in its representation of its communities. Aboriginal peoples have long understood this idea of reconciliation being one of harmonizing.

There is real possibility for advancing a more robust engagement with the Crown. The past conduct of the Crown and the past infringements in traditional territories continue to be relevant. While the duty to consult will not be the mechanism to address all past wrongs and impacts, the Crown can, and in certain circumstances must, consider what has gone on before. What has happened in the past creates vulnerability in the present and this fact can be a building block for a First Nation's plan of action.

The parties can and should together adopt a generous and purposive understanding of the legal rationale for the Crown's constitutional duty to consult and accommodate, and place all of the assistance provided by the courts under the umbrella of reconciliation. The parties can and should consider land and resource use decisions in Aboriginal homelands with the aim of restoring the Crown-Aboriginal relationship to a place where past conduct no longer "rankles and embitters." Agreement entails balance, compromise and consent on all sides.

If consultation is going to work its intended magic of reconciliation, the rights of Aboriginal peoples must be recognized and the Crown's relationship with Aboriginal peoples must be embraced. Reconciliation founded on a restored relationship and aimed

at reaching agreement is possible. The courts have identified, although not always implemented, this grand vision. It is recommended that the parties, and the courts, return to and embrace the 3 R's: recognition, relationship and reconciliation – not as ideas or as legal statements to introduce a decision or a meeting, but rather as the spirit that imbues every step of the way.

Recourse to the courts can be saved as a strategic option for advancing issues that the parties may agree would benefit from judicial commentary (i.e. the parties may put a reference question before the court), or where First Nations make collective choices about the best and most strategic cases to bring before the courts to advance the legal foundations of the duty. This approach would contribute to good law and reverse the courts' focus on procedural minutiae, and also avoid the pitfalls of the principle bad facts make bad law'.

We must move towards a new future that appropriately and properly advances us towards reconciliation. To do this, First Nations must do even more to define the parameters of meaningful consultation and accommodation, occupy the field on how engagement should occur, and vigilantly ensure that the Crown is not given any room to hide in the ditch of dishonor.

Against the backdrop of the purposes of section 35, there are certain fundamental realities that shape the duties to consult and accommodate, including:

- The Crown cannot unilaterally define the process for fulfilling the duty to consult with and accommodate First Nations.
- Indigenous laws, worldviews and values are essential to both process and outcome.
- Consultation and accommodation must be purposive (i.e. advance reconciliation).
- International law, principles and standards offer normative foundations and valuable guidance for respecting and implementing Indigenous human rights.

This means First Nations must take certain steps independently and together. These include the following:

- Systematically developing and implementing our own policies as an exercise of our inherent title and rights.
- Grounding consultation and accommodation policy in Indigenous laws, worldviews, and values.
- Incorporating international law standards as the new "norms."
- Balancing focus on substance and procedure.
- Continue to advocate for current federal and provincial policies to be revised jointly with First Nations to reflect the key principles in this paper.

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Introduction

ONE YEAR (ALMOST TO THE DAY) after the *Haida* case was decided,[1] the Supreme Court of Canada (SCC) in the *Mikisew* case declared that the concept of reconciliation is the "fundamental objective" of the modern law of Aboriginal and Treaty rights:

> 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.[2]

A relatively recent principle of modern aboriginal law, active on the ground and in the court room, is the Crown's duty to consult and accommodate: Where a First Nation can show evidence that establishes a *prima facie* case for Aboriginal title or rights, then before the Crown can authorize any interference with the Aboriginal title land or resources the Crown must first consult with the rights and title holders and strive to reach an agreement with them about the scope of any Crown-authorized interference with the title lands or resources. The Crown's duty to consult is also triggered to address any potential interference with Treaty rights.

This Paper addresses the developing common law that describes, refines and explains the Crown's duty to consult. The common law in this context refers to the law of the courts as expressed in decisions of the courts. It is built on precedent, and is distinguished from legislation or policy.

Most often, the first point of reference for the Crown's duty to consult is the SCC's decision in *Haida.* This case is an obvious reference point as it (along with the companion *Taku* case[3]) were the SCC's first articulation of the Crown being honour bound to consult with Aboriginal people about *proposed* land and resource activities in their territories. This is often called a 'pre-proof' duty meaning the Crown has the duty to consult now; it is not a duty that waits until a court makes an order declaring that Aboriginal rights exist and it's not a duty that waits until treaties are concluded. No proof of section 35 rights is required to trigger the Crown's honour or the duty to consult.

The duty as explained by the SCC is a mechanism that reins in Crown conduct. The SCC expected that how and for what purposes lands and resources in traditional territories can be used and should be managed is a subject of conversation, negotiation and ideally, agreement between the Crown (having asserted sovereignty) and the original inhabitants (the title and rights holders). All of this effort is driving towards one goal – and it is important to say that this is a shared goal – and that is to achieve reconciliation. Consultation and accommodation are legally (constitutionally) required steps, along the path to reconciliation.

To date, Crown representatives have in courtrooms and meeting rooms alike frequently

1 *Haida Nation v. British Columbia,* 2004 SCC 73.
2 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69, at para. 1.
3 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74.

selected isolated statements from the SCC that serve to establish barriers to the parties reaching agreement. For example, while First Nations are describing their rights and their connection to their homelands, the Crown's official charged with consultation will unequivocally state that First Nations "do not have a veto"[4] and the Crown has "no duty to agree." This veto point is often overrated and misunderstood by Crown representatives. A veto is quite a different legal beast than is reaching agreement or consent by the wish of the parties to the relationship. True reconciliation cannot give either party a veto.

In consultation, as in life, there are no absolutes. The strength of Aboriginal title or right may, as a matter of law, require that consent to the proposed activity must be obtained. The on-the- ground facts must be understood and considered in every case where the Crown is looking to allow exploitation, and in some of those cases, the Crown alone may not be able to allow the work to proceed. As *Delgamuukw* indicated, when Aboriginal title is engaged, some cases may require the "full consent" of the Aboriginal people.[5]This is as true in the "pre-proof" period as it is following a court declaration.

The basic articulation of the duty has not changed. The *Haida* principles stand as precedent to be applied in every case. These principles have been applied to a variety of decisions made by different decision makers. The fact patterns brought before the courts relate to a range of industries, including forestry, mining, fisheries, and hydro power; land development including ski hills, golf courses, and casinos; land claims agreements whether in the midst of land claims negotiations or at the conclusion of modern treaties; conversion of Crown lands such as forest lands (provincial) or national defence lands (federal) to fee simple lands. Across all of these fact patterns, the Crown and the Aboriginal people whose lands or resources were affected could not agree on what was required to maintain the honour of the Crown and to meet the Crown's consultation obligations. This level of court activity is disappointing in light of the SCC's often stated direction that negotiations and agreements are the preferred route over litigation. Instead of the parties reaching agreement, the courts are left to impose an interim solution.

The Paper is organized into two parts. The first part is an overview of the current legal landscape. The second part identifies those fundamental principles (Reconciliation, Recognition and Relationship) that underlie the Crown's consultation obligations and inform where the Crown/Aboriginal relationship might blossom.

4 *Haida,* at para. 48

5 *Delgamuukw v. The Queen,* [1997] 3 S.C.R. 1010, at para. 168.

PART 1

What The Cases Say

The SCC in *Haida* noted that it would be left to future cases to flesh out the details of the duty; the number of cases that have followed certainly bears that out. Since 2004, the *Haida* case has been considered or referred to in approximately 200 Aboriginal cases, 7 times by the SCC itself. By far the majority of the cases originate in British Columbia; this no doubt reflects the historical denial and very slow, reluctant acceptance of the existing rights of Aboriginal peoples in this Province.

In this part of the Paper, we review court decisions that have applied or considered the duty in a variety of circumstances. The Paper seeks here to set out what the cases say. As will be developed later in the Paper, we see some trends that have lost sight of the goal of reconciliation and we see too opportunities for finding our way.

1. Who Must Consult

The duty to consult with Aboriginal peoples is a duty owed by the Crown. The Crown is the federal and provincial governments, and includes Crown corporations.[6] Local governments or municipalities do not have a broad duty to consult; they are creatures of statute and exercise only those powers the Province has delegated to them.[7] Municipalities are not the Crown. Mechanisms for engaging the Province need to be identified when municipalities have the authority to make land use decisions that may seriously and adversely affect Aboriginal rights.

Administrative boards and tribunals can themselves have responsibilities to consult if their legislation gives them that responsibility. Depending on the mandate, duties and powers of the board or tribunal, it may have a duty to consult, a duty to consider the adequacy of the Crown's consultation, both duties or neither duty.[8]

Third parties such as private companies do not owe a legally enforceable duty to consult.[9] The Crown may, however, delegate procedural aspects of consultation to proponents.[10] Ultimately the Crown is responsible for ensuring meaningful consultation.

2. Who Must be Consulted

The Crown must consult with the collective holders of the Aboriginal title or rights. This will usually be Bands or tribal councils.[11] Because Aboriginal title and rights are held collectively, the courts have not required consultation with individuals who may be affected in exercising the right, for example individual hunters or trappers.[12]

6 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, at para. 81.

7 *Neskonlith Indian Band v. Salmon Arm (City),* 2012 BCCA 379.

8 *Rio Tinto,* at para. 58.

9 *Haida,* at para. 53

10 *Haida,* at para. 53.

11 *NNTC v. BC,* 2011 BCCA 78, at paras. 68, 81.

12 *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53, at para. 35; see also *Moulton Contracting Ltd. v. Behn,* 2011 BCCA 31 (leave to appeal to SCC granted).

3. What Triggers a Duty to Consult

The duty to consult is triggered whenever:

a) the Crown has knowledge of the potential existence of Aboriginal title and/or an Aboriginal right, or should know that Aboriginal title and/or an Aboriginal right potentially exists; and
b) the Crown considers making a decision, or taking an action, that might adversely affect the Aboriginal title and/or right.[13]

a. Crown Knowledge

The Crown has actual knowledge when Aboriginal peoples assert their rights and provide information to the Crown in negotiations or litigation, or when a Treaty right might be impacted.[14] But the duty can also be triggered when the Crown should know about the claim, such as when it knows certain lands were historically occupied by an Aboriginal community.[15]

In the context of Treaties, the duty of consultation that flows from the honour of the Crown carries with it a positive obligation to respect existing Treaty rights.[16] In the case of historical treaties, which are much less detailed than modern treaties, there may need to be an inquiry into what the Aboriginal peoples' rights are under the Treaty, and what the Treaty relationship contemplates.[17]

b. Decisions and Actions Subject to a Duty to Consult

The duty is triggered by Crown conduct, actions or decisions.[18] The SCC has not answered the question of whether a duty to consult is triggered when the Crown considers passing legislation.[19]

There does not need to be an immediate impact on lands or resources or on the exercise of Aboriginal rights;[20] strategic or "higher level" decisions trigger the duty to consult.[21]

The Crown must consult when considering "strategic level" or "higher level" decisions. In *Haida,* the Court found a duty to consult even though the decision to replace a tree farm license (TFL) does not authorize logging. The company could not log until the Crown approved a forest development plan and cutting permits. The duty to consult was still triggered, because the TFL replacement reflected the Province's plan for the lands and resources, namely, that logging is the priority land use where the timber is harvestable.[22] The Crown cannot postpone consultation to the operational stage.[23]

13 *Haida,* at para. 35.

14 *Rio Tinto,* at para. 40; *West Moberly First Nation v. British Columbia (Chief Inspector of Mines),* 2010 BCSC 359, at para. 129.

15 *Rio Tinto,* at para. 40.

16 *Mikisew,* at para. 4.

17 *Mikisew; West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2011 BCCA 247, leave to appeal denied, February 23, 2012; *Beckman,* at para. 12.

18 *Rio Tinto,* at para. 43; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests),* 2005 BCSC 697, at paras. 94, 104; *Wii'litswx v. British Columbia (Minister of Forests),* 2008 BCSC 1139, at paras. 11-15.

19 *Rio Tinto,* at para. 44.

20 *Rio Tinto,* at para. 44.

21 *Rio Tinto,* at para. 44.

22 *Haida,* at paras. 75-76; *Dene Tha First Nation v. Canada,* 2006 FC 1354, at para. 108.

23 *Klahoose First Nation v. Sunshine Coast Forest District,* 2008 BCSC 1642, at paras. 128-129.

The duty to consult is triggered if the Crown's ability to direct how lands or resources may be used in the future is reduced, such as when Crown forest lands becomes private forest lands.[24]

Recent cases hold that if a decision or action in the past happened without consultation, that alone does not trigger a duty to consult when the Crown considers a new action or decision related to the old one.[25] If the new decision does not have the potential to cause an impact on the future exercise of an Aboriginal right, the duty to consult may not be triggered.[26] An example is the *Rio Tinto* case, where Alcan's hydro power dam was approved in the 1950s and the new proposed action was the selling of excess power to BC Hydro. The selling of the power would not involve increased production, changes in water releases into the river relied on by the Carrier Sekani people, or a change in control over water flows or levels or management of the water;[27] the Court concluded in this case the sale of the water decision had no potential to impact Aboriginal rights, and the Crown did not have to consult.

However, there are situations in which the Crown must consider and discuss past impacts when consulting about a new related decision that will also have impacts. It is the new decision that triggers the duty, but the past is relevant where it is necessary to consider past and ongoing infringements to properly address the new impact. This is what happened in the *West Moberly* case.[28] When considered in isolation from past decisions, the proposed mineral exploration in that case could be seen to have a minor impact on the caribou. However, the Court held that the Crown had to consider that past decisions had already greatly impacted the caribou herd; taking into account the vulnerability of the herd because of these past decisions, the impact of the exploration activities could be seen as significant.

4. The Timing of Consultation

The Crown must approach consultation with an open mind, meaning that it must be willing to make changes to its proposed action or decision depending on what it learns during the consultation process.[29] It must therefore consult early in the decision making process, before irreversible decisions have been made.[30] The Crown must consult early enough to allow for a full and informed discussion, and provide information to Aboriginal peoples early enough so that there is time to make changes in response to feedback from the Aboriginal peoples, rather than wait to consult and then impose short timelines.[31] It must consult on proposals, not final decisions; consultation is more than an opportunity to let Aboriginal peoples "blow off steam" before implementing a decision that has really already been made.[32]

24 *Hupacasath First Nation v. B.C. (Ministry of Forests)* 2005 BCSC 1712, at paras. 222 and 253; *Adams Lake Indian Band v. Lieutenant Governor in Council,* 2012 BCCA 333; *Rio Tinto.*

25 *Rio Tinto,* at para. 45, 47; *Adams Lake.*

26 *Rio Tinto,* at paras. 45-46.

27 *Rio Tinto,* at paras. 11-12, 90-92.

28 *West Moberly,* 2011 BCCA 247.

29 *Taku,* at para. 29; *Mikisew,* at para. 54; *Kwikwetlem First Nation v. BC (Utilities Commission),* 2009 BCCA 68, at para. 68; *Haida,* at para. 46.

30 *Musqueam Indian Band et al. v. City of Richmond et al.,* 2005 BCSC 1069, at para. 116.

31 *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management),* 2005 BCCA 128, at para. 95.

32 *Haida,* at para. 46; *Mikisew,* at para. 54; *Louis v. British Columbia (Energy, Mines and Petroleum Resources),* 2011 BCSC 1070, at para. 228; *West Moberly,* 2011 BCCA 247, at para. 149.

If a development is subject to a series of decisions, the Crown must consult on early decisions and not postpone it to later decisions or processes, so that consultation happens before momentum to approve the project has been created.[33] Even if a project will be subject to an environmental assessment, the Crown must consult on earlier decisions made before the environmental assessment.[34] The duty is engaged with every decision along the way that has the potential to negatively affect Aboriginal title or rights.[35]

5. What Consultation Should Look Like

In *Haida,* the SCC held that the specific obligations on the Crown in fulfilling its duty to consult depend on two factors:[36]

a) the strength of the Aboriginal peoples' case supporting the existence of Aboriginal title and/or right(s), which is based on a "preliminary assessment" of the strength of claim; and
b) the seriousness of the potentially adverse effect on the Aboriginal title and/or right(s).

a. Preliminary Assessment

The Crown must do a preliminary assessment of the strength of the case supporting the existence of the Aboriginal title and/or rights, and of the potential impact, at the very beginning of the process, because this assessment determines what is required of the Crown.[37] However, the Court of Appeal recently held that if there is no potential for a significant impact, then the Crown may not have to do a strength of claim assessment.[38] If there is no significant impact, consultation can be at the low end of the spectrum even in the context of modern treaty rights.[39]

Consultation may be anywhere along a spectrum between consultation at the "low end" of the scale, to "deep consultation." The level of consultation required depends on the strength of the rights claim and the seriousness of the impacts or infringements. The level of consultation required may change during consultation, because new information may require a reconsideration of the strength of claim and/or seriousness of the potential infringement.[40] The Crown's ability to consult cannot be limited by its legislation or the mandates of decision makers under legislation.[41]

b. Consultation at the "Low End"

At the low end of the consultation spectrum, the Crown must provide a meaningful process that includes sharing all relevant information regarding the proposed decision and what the Crown knows about the Aboriginal peoples' interests and potential impacts on those interests; as well the Crown must seriously and fully consider Aboriginal peoples' input and concerns with an open mind, and with the intention to address those concerns and integrate them into the proposed plan of action.[42]

c. "Deep Consultation"

At the high end of the spectrum, the Crown must engage in "deep consultation" aimed at finding a satisfactory interim solution.[43] What constitutes deep consultation varies with the circumstances. There is no requirement for the Crown to reach an agreement with Aboriginal peoples although in some cases consent may be required.[44] The Crown's duty requires a balancing of interests and compromise.[45] The courts have suggested that "deep consultation" means that Aboriginal peoples have a greater role in the decision making process.[46] Where Aboriginal peoples are given a greater role in the decision making process, the Crown is more likely to meet the duty.[47] Deep consultation may require the Crown to give written reasons for its decision that show how the Aboriginal peoples' concerns were considered and what impact they had on the decision.[48]

d. Providing Full and Adequate Information

The Crown must gather information and also must provide the Aboriginal peoples with all relevant information.[49] Providing the same information that is provided to the public may not be enough.[50]

When a strength of claim assessment is necessary, it should be shared with the Aboriginal peoples together with the Crown's initial assessment of potential adverse effects, so that the Aboriginal peoples may respond to it or discuss it with the Crown.[51]

e. The Forum and Process

Consultation should be a collaborative process in order to serve the important purpose of mitigating or avoiding potential negative impacts to Aboriginal title and rights.[52]

A process or forum created for a purpose other than fulfilling the duty to consult (for example environmental assessments) can be sufficient if it provides an appropriate level of consultation.[53] The process must be accessible and adequate to provide for meaningful participation.[54] The courts have not allowed the Crown to rely on things such as open houses for the public that are not designed to allow for specific consideration of Aboriginal peoples' interests.[55]

33 *Squamish Nation v. Minister of Sustainable Resource Management,* 2004 BCSC 1320, at para. 74; *Klahoose,* at para. 129; *Sambaa K'e Dene Band v. Duncan,* 2012 FC 204, at para. 165.
34 *Kwikwetlem,* at para. 69.
35 *Klahoose,* at para. 68.
36 *Haida,* at para. 39.
37 *Wii'litswx,* at para. 147.
38 *Adams Lake,* at para. 74.
39 *Beckman,* at para. 86.
40 *Haida,* at para. 45.
41 *West Moberly,* 2011 BCCA 247, at paras. 103-107; *Beckman,* at para. 48.
42 *Haida,* at paras. 37, 42, 43 and 46; *Taku,* at para. 64; *Beckman,* at paras. 7, 22, 74-75; *Halfway River First Nation v. British Columbia,* [1999] 4 C.N.L.R. 1 (BCCA), at para. 160; *Mikisew,* at paras. 34, 64.
43 *Haida,* at para. 44.
44 *Haida,* at paras. 42 and 48 ; *Taku,* at paras. 2, 42-43; *Mikisew Cree First Nation,* at para. 66; *Beckman,* at para. 14; *Louis,* at para. 226.
45 *Haida,* at paras. 48-50.
46 *Haida,* at para. 44.
47 *Taku,* at paras. 6-8, 11.
48 *Haida,* at para. 44; *West Moberly,* 2011 BCCA 247, at paras. 144-146.
49 *Haida,* at para. 46.
50 *Mikisew,* at paras. 9, 13, 65.
51 *Mikisew,* at para. 64; *Klahoose,* at paras. 119 and 126; *West Moberly,* 2011 BCCA 247, at para. 50.
52 *Dene Tha,* at para. 82, aff'd. 2008 FCA 20; *Beckman,* at para. 55.
53 *Beckman,* at para. 39; *Taku,* at para. 40; *Brokenhead Ojibway First Nation v. Canada (Attorney General),* 2009 FC 484, at para. 42
54 *Brokenhead,* at para. 42
55 *Mikisew,* at paras. 9, 13, 65.

Consultation can be found to exist even if discussions or meetings are not labeled as consultation or recognized by the Crown as necessary in order to uphold the honour of the Crown.[56]

6. Aboriginal Peoples' Obligations in Consultation Processes

In order to successfully challenge a decision made by the Crown on the basis that the Crown has failed to uphold the honour of the Crown due to inadequate consultation, Aboriginal peoples must participate in consultation. In *Haida,* the SCC held that Aboriginal peoples should clearly outline the scope and nature of the Aboriginal title and/or rights they assert, and the potential infringements that they are concerned about.[57] The SCC also held that both the Crown and Aboriginal peoples must engage in consultation in good faith.[58]

Since *Haida,* several cases have elaborated on what is required of Aboriginal peoples in consultation. In *Mikisew,* the SCC referred to Aboriginal peoples' obligations as a "reciprocal onus."[59] It is triggered when the Crown gives notice of a proposed action or decision, and it continues so long as the Crown provides an adequate process. While generally, a refusal to participate will prevent Aboriginal people from challenging a decision based on a failure of the Crown to consult, Aboriginal peoples do not have to participate in inadequate processes, for example, where the Crown seeks to rely on public open houses to fulfill the duty to consult.[60]

Aboriginal peoples have a duty to express their interests and concerns after considering the information provided by the Crown; clearly articulate their rights and the basis for asserting them; clearly articulate how their rights might be affected; share relevant information; and discuss the proposed decision or action with an open mind about impacts and possible accommodation.[61]

The courts have suggested that Aboriginal peoples should find ways to share sensitive information with the Crown while protecting the confidentiality of the information.[62] Generally, the more information that is shared, the greater the Crown's onus to address Aboriginal peoples' concerns.[63]

Like the Crown, Aboriginal peoples must make an effort to reconcile competing interests.[64] Aboriginal peoples may not frustrate good faith attempts by the Crown to consult, such as, for example, refusing to meet or participate, or imposing unreasonable conditions.[65] Failing to return calls, cancelling meetings or being unavailable for meetings have been found to be failures by Aboriginal peoples to meet their obligations.[66] Delaying the process can also amount to a failure on the part of Aboriginal peoples to participate in consultation in good faith.[67]

An issue that Aboriginal peoples struggle with is adequate funding and capacity to be able to meaningfully engage. The courts have not squarely addressed the question of whether the Crown has an obligation to provide this funding. Where the Crown does provide funding, the courts consider that positively in deciding whether the Crown has met its duty.[68]

7. Limits on Provincial Jurisdiction and Consultation

Aboriginal title in particular raises issues about provincial jurisdiction over lands and resources. The courts have held that the existence of Aboriginal title can preclude the Province from allocating or managing lands and resources, or imposing its natural resource legislation.[69] This means that the Province may be acting outside of its jurisdiction when it makes decisions about lands and resources in relation to lands where Aboriginal title has not be proven but may exist. This should have consequences for the Crown's obligations, especially if the case supporting the existence of Aboriginal title is strong. The courts have not yet directly addressed this issue, and the First Nations Summit has asked the Court of Appeal to do so in its intervention the *Halalt* case.[70]

With regard to Treaties, the SCC has held that the Province does not have jurisdiction to regulate Treaty rights in a way that interferes with their exercise.[71] The reasoning that led the SCC to conclude that the Province cannot directly interfere with the exercise of a Treaty right by, for example, banning certain hunting practices, suggests that the Province does not have jurisdiction to manage other resources in a way that causes a significant impact on the exercise of a Treaty right (e.g., allowing forestry operations to destroy important habitat).

8. Remedies for Breach

The courts prefer remedies that promote negotiations.[72] The range of remedies that a court can give Aboriginal peoples when the Crown has failed to meet its duty to consult is theoretically broad. Remedies can include setting aside the decision made or action taken, or suspending the operation of the decision made in breach of the duty. The remedies to date have not put a halt to the Crown's decision but instead declare that the Crown owes but did not meet its duty to consult and give directions related to future consultation. Court supervision of the follow-up consultation has also been ordered. The courts have also indicated that various kinds of remedies are available to Aboriginal peoples where there is a breach of their section 35 rights. The SCC stated that compensation is available where Aboriginal title or rights have been adversely affected by Crown decisions or actions made without any consultation.[73] More recently, the Court of Appeal has suggested that if the provincial legislation does not allow for appropriate consultation to occur when municipalities make decisions that potentially infringe Aboriginal title and rights, then Aboriginal

56 *Beckman,* at para. 39.
57 *Haida,* at para. 36; *Mikisew,* at para. 65.
58 *Haida,* at para. 42.
59 *Mikisew,* at para. 65.
60 *Mikisew,* at paras. 9, 13, 65.
61 *Louis,* at paras. 221-224.
62 *Ka'a'Gee Tu First Nation v. Canada (Attorney General),* 2007 FC 763, at paras. 129-130.
63 *Louis.*
64 *Kwikwetlem,* at para. 68.
65 *Halfway,* at para. 161, cited in *R v. Douglas et al.,* 2007 BCCA 265, at paras. 39 and 73; and *Louis,* at para. 221; *Mikisew,* at para. 65; *Brokenhead,* at para. 42.
66 *Ahousaht First Nation v. Canada (Ministry of Fisheries and Oceans),* 2007 FC 567, at para. 60.
67 *Ahousaht,* at para. 60.
68 *Adams Lake; Taku,* at paras. 13 and 37; *Ka'a'Gee Tu; Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General),* 2012 FC 517.
69 *St. Catherines Milling v. R.* (1888), 14 App. Cas. 46 at 55 (P.C.), at para. 14; *Tsilhqot'in* (2007 BCSC 1700; and 2012 BCCA 285).
70 Factum of the First Nations Summit on May 4, 2012, in *Halalt First Nation v. British Columbia and the District of North Cowichan,* Court of Appeal File No. 039263.
71 *R. v. Morris,* 2006 SCC 59.
72 *Rio Tinto,* at para. 38.
73 *Rio Tinto,* at paras. 49, 83.

peoples can seek remedies in the courts.[74] Unfortunately the Court did not further or better articulate what those remedies might be. The courts can do more by introducing greater flexibility in the remedies provided, for example, adopting a rule that says that the Crown cannot proceed with its proposed action, when there is a potential infringement, unless and until the Crown satisfies its consultation obligations.

9. Trends and Opportunities

Through this review of the recent case law, several trends can be identified. One is the requirement for more and better specifics – the courts want to know what exactly is the Aboriginal right claimed, and how exactly will the proposed activity affect that right? Moreover, if no impact can be seen as a result of the proposed Crown decision or activity then the Crown may only need to consult at the "low end" of the spectrum.

The remedies for breach of the duty have for the most part endorsed the status quo existing at the time of the court hearing. The most commonly granted remedy is a declaration of the inadequacy of the Crown's consultation, and of its ongoing obligation to consult. In the meantime, the authorized development, although authorized in breach of the duty and contrary to what is required to maintain the honour of the Crown, continues to build, extract and impact. The courts seemingly prefer to not interfere with the activities of third parties, who have relied on the Crown's tenure, permit or other authorization, rather than uphold the special relationship between the Crown and Aboriginal peoples.

Another issue that arises in Aboriginal court cases, including duty to consult cases, is the matter of 'overlapping' territory, and the question of who is the proper rights and title holder in respect of the lands and resources at issue. The Crown continues to raise these issues as complications in its ability to meet its consultation obligations, and the courts continue to have some sympathy for this.

At the same time, there is real possibility for advancing a more robust engagement with the Crown. The past conduct of the Crown and the past infringements in traditional territories continue to be relevant. No case has said otherwise. The duty to consult will not be the mechanism to address all past wrongs and impacts, but the Crown can, and in certain circumstances must, consider what has gone on before. What has happened in the past creates vulnerability in the present and this fact can be a building block for a First Nation's plan of action.

The cases do reveal that uncertainty about the validity of Crown authorizations, permits and tenures is alive and well. This lingering uncertainty does interfere with third parties and their ability to comfortably pursue their land and resources activities. The uncertainty will only be put to rest when Aboriginal title and rights and Treaty rights are recognized and mutually respectful negotiations advancing an honourable reconciliation process are underway.

74 *Neskonlith.*

PART 2

First Principles – The Three R's

THE SHEER NUMBER OF CASES THAT have gone before the courts graphically illustrates that there have been so many significant impacts experienced in traditional territories where agreement has not been found. The number of cases also tells us that there have been significant costs, both out of pocket and to the Crown-Aboriginal relationship. This Paper urges a return to and focus on the fundamental goal of consultation – reconciliation – a goal articulated by the SCC in *Haida* (and in cases since).

Why? Why did the courts intervene and declare that the Crown has a constitutional obligation, enforceable by the courts, to consult and accommodate prior to proof of any Aboriginal rights or title. The reason lies in the Crown's *de minimis* approach to its relationship with Aboriginal peoples and to their rights in their homelands. Since confederation, the Crown had been cavalierly running roughshod over these rights, making decisions about the land and authorizing exploitation of the resources without any regard to Aboriginal rights. After the SCC articulated the test for proof of Aboriginal rights in *Sparrow* (1990) and for proof of Aboriginal title in *Delgamuukw* (1997), the Crown simply continued its *de facto* control over lands and resources without regard to the claims of Aboriginal peoples. In the Treaty context, the Crown acted as if the conclusion of Treaty was the conclusion of its relationship with that Aboriginal group and the Crown could continue its exploitation of the lands and resources. The SCC put a stop to this. The SCC returned to the constitutional framework and located in the duty to consult a mechanism to hold the Crown's conduct to account. This mechanism is rooted in section 35 of the Constitution and the honour of the Crown.

The three principles that are foundational to the duty to consult as first explained in *Haida* and *Taku* are: recognition, relationship and reconciliation. Despite these guiding lights, the duty to consult cases, taken alone or as a whole, have become somewhat baffling, and oftentimes, courts seem to have lost their course. Not often, and not often enough, have the courts upheld what the SCC has described as the special Crown-Aboriginal relationship and kept its eye on the fundamental objective of reconciliation. As the consultation case law has developed, we see the court becoming overly concerned with the time and resources required to allow the parties to find common ground and reach agreement. In the court's search to find a pragmatic solution that does the least harm to the status quo, the lofty goals of reconciliation, recognition and relationship are lost. A review of first principles may help chart a better path forward.

1. Recognition

Section 35(1) of the Constitution begins with 'recognition':

> **Recognition of existing aboriginal and treaty rights** – The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

The origin of the duty to consult is grounded in principles of the honour of the Crown and reconciliation, which are embodied in the recognition of Aboriginal and Treaty rights in section 35.[75]

Throughout the long history of the interface of Aboriginal peoples with Europeans, we see the recognition by the common law of the ancestral laws and customs of the Aboriginal peoples who occupied the land prior to the European settlement.[76]

English law accepted that Aboriginal peoples possessed pre-existing *rights* in the land and waters, and recognized the continuance of those rights in the absence of treaty. The source of these rights rests in "the fact that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[77] In B.C., however, Aboriginal peoples were dispossessed by the Province from their lands and waters, in most cases without treaty, without consultation or accommodation and without compensation. This conduct of the Province did not extinguish Aboriginal rights. Rather, the Province's conduct was in breach of the common law.

Traditional practices that sustained Aboriginal peoples prior to the arrival of Europeans were recognized as legal interests at the very core of the common law concept of Aboriginal rights.[78] Section 35 protects the way of life of the Aboriginal society's distinctive culture and ensures its continued existence. Section 35 also provides cultural security and allows for the continuity of the Aboriginal society's way of life on the land in its modern expression.[79]

A process for consultation and accommodation and the substantive discussions can and should be measured with a starting point of recognition of Aboriginal and Treaty rights. Quite often the experience of First Nations is that Crown representatives arrive with doubt in their hearts and minds – doubt that the rights exist, or probably more honestly, doubt that the rights could be proven to exist. The SCC has been clear – recognition aligns with the honour of the Crown; the SCC has never upheld doubt as a guiding principle.

2. Relationship

The second principle that shines a guiding light on the Crown duty to consult is the unique relationship between the Crown and Aboriginal peoples. The very relationship between Aboriginal peoples and the Crown imposed obligations on the Crown. With the assertion of Crown sovereignty "arose an obligation to treat [Aboriginal peoples] fairly and honourably, and to protect them from exploitation."[80] The history of Crown obligations can be traced back more than 100 years before confederation when the Crown, in its Royal Proclamation, 1763, promised to keep the Indian Nations "unmolested" and "undisturbed" in their territories. The Crown had the obligation to acquire Indian lands by consent. The assumed sovereignty of the Crown met the existing authority and jurisdiction of the Aboriginal peoples and that meeting, that relationship, has continued historically and will continue into the future.

As the SCC has noted, the special relationship will continue beyond the resolution

75 *Haida,* at paras. 32, 38.
76 *R. v. Van der Peet,* [1996] 2 S.C.R. 507, at para. 263 McLachlin J.
77 *Calder v. Attorney General of B.C.,* [1973] S.C.R. 313.
78 *Mitchell v. Canada (Minister of National Revenue – M.N.R.),* 2001 SCC 33, at paras. 9-10; *Van Der Peet,* at paras. 268-275 (per McLachlin J.).
79 *R. v. Sparrow,* [1990] 1 S.C.R. 1075; *R. v. Sappier; R. v. Gray,* 2006 SCC 54.
80 *Mitchell,* at para. 9.

of claims through treaties or otherwise.[81] Treaties are solemn engagements, not divorce decrees. The duty to consult plays a role in that relationship. Consultation and accommodation "*preserves* the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation."[82]

3. Reconciliation

The purpose of section 35(1) is "the protection and reconciliation of the interests which arise from the fact that prior to the arrival of the Europeans in North America Aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions."[83]

Consultation must be designed to achieve its objectives. The concerns of the Aboriginal peoples whose lands are at issue must be addressed. "The controlling question in all situations is what is required to maintain the honour of the Crown and to affect reconciliation between the Crown and the Aboriginal peoples with respect to the interest at stake."[84] In each case, what will promote reconciliation? It is clear from the SCC's discussion that any consultation process must be tied to the notion of reconciliation.

Reconciliation is a process flowing from the rights guaranteed by s. 35; it is a process that flows from the Crown's duty of honourable dealing toward Aboriginal people which arises from the Crown's assertion of sovereignty over and *de facto* control of land and resources that were formerly in control of that people.[85]

In identifying the duty to consult the SCC was fully aware that reconciliation, the core objective of section 35, could not be achieved if the Crown is free to make land and resource use decisions without regard for Aboriginal rights claims. Consultation is not reconciliation; it is an interim step towards reconciliation.

But how are we to understand this fundamental or core objective of section 35? What does 'reconciliation' mean? The *Dictionary of Canadian Law,* Third Edition says this about reconciliation:

> Reconciliation. n. 1. The settlement of differences after an estrangement. 2. " [D]oes not take place unless and until mutual trust and confidence are restored. It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married, but *their relationship must be restored, by mutual consent, to a settled rhythm in which the past offences, if not forgotten, at least no longer rankle and embitter their daily lives.* Then, and not till then, are the offences condoned. Reconciliation being the test of condonation [forgiveness], nothing short of it will suffice." (quoting Lord Denning) (emphasis added)

Reconciliation must restore the Crown-Aboriginal relationship to a settled rhythm, each party exercising its authority over lands and resources – each thriving in its representation of its communities.

81 *Haida,* at para. 32.
82 *Haida,* at para. 38.
83 *Van der Peet,* at para. 44.
84 *Haida,* at para. 45.
85 *Haida,* at para. 32.

Aboriginal peoples have long understood this idea of reconciliation being one of harmonizing. For example, this concept reverberates throughout the Memorial to Sir Wilfred Laurier brought forward by the Chiefs in 1910: "We will help each other be great and good." It is this concept that informs section 35 and is a foundation of the Crown's duty to consult. To date, however, neither the courts nor government representatives have embraced reconciliation in this fulsome sense. Crown duties must be located and fulfilled in the context of the Crown's historical and future relationship with Aboriginal peoples. The answer to conflict and uncertainty cannot be found in one or more court decisions but rather in the relationship, in a commitment to a settled rhythm of making decisions about lands and resources, in a commitment to fulfilling the hopes and dreams of all. We are all here to stay, not in separate silos, but to all be great and good.

Conclusion

WE KNOW THAT THERE IS AN ebb and flow in the courts and that in each case the duty to consult will land somewhere on the *Haida* spectrum but not necessarily where the parties think that it should land. This absence of agreement, and instead having solutions be imposed by the courts, does not and cannot sustain or enhance the Crown-Aboriginal relationship; this is not the path to reconciliation.

The effort to reconcile interests in the court room puts the Crown-Aboriginal relationship on and for the record. Aboriginal peoples living in the oral tradition must react to and interact with a written consultation record – every phone call, every meeting, every effort to phone or to meet is presented for review and assessment by the court. No relationship, whether Crown-Aboriginal, spouses, federal-provincial, or otherwise can be enlivened if every contact or engagement is on the record.

There is no duty to agree. Crown representatives will often stand on this ground at the risk of ignoring other aspects of the duty. This represents a lost opportunity to reach agreement. The commitment is to make good faith efforts to understand each other's concerns and move to address them. Consultation is not simply an exchange of information; it may oblige the Province to change its proposed action based on information received during the consultation process.[86] The Crown is required to solicit and to listen carefully to the concerns, and to attempt to minimize adverse impacts.[87] So while it is said that there is no duty to agree, these edicts – to listen carefully, to share information, to be responsive to what you learn – are all aspects of the path to reaching agreement; of the path to consent.

The parties can and should together adopt a generous and purposive understanding of the legal rationale for the Crown's constitutional duty to consult and accommodate, and place all of the assistance provided by the courts under the umbrella of reconciliation. The parties can and should consider land and resource use decisions in Aboriginal homelands with the aim of restoring the Crown-Aboriginal relationship to a place where past conduct no longer "rankles and embitters." Agreement entails balance, compromise and consent on all sides.

If consultation is going to work its intended magic of reconciliation, the rights of Aboriginal peoples must be recognized and the Crown's relationship with Aboriginal peoples must be embraced. Reconciliation founded on a restored relationship and aimed at reaching agreement is possible. The courts have identified, although not always implemented, this grand vision. This Paper recommends that the parties and the courts return to and embrace the 3 R's, not as ideas or as legal statements to introduce a decision or a meeting, but rather as the spirit that imbues every step of the way.

The Ministers should tell their officials that if the process does not feel like the kind of reconciliation defined in this Paper, then the process is not the right process and the course of the discussions is not the right course. It's now time for Recognition, Relationship and Reconciliation to come alive.

86 *Haida,* at paras. 42, 46, 49.
87 *Mikisew,* at para. 64.

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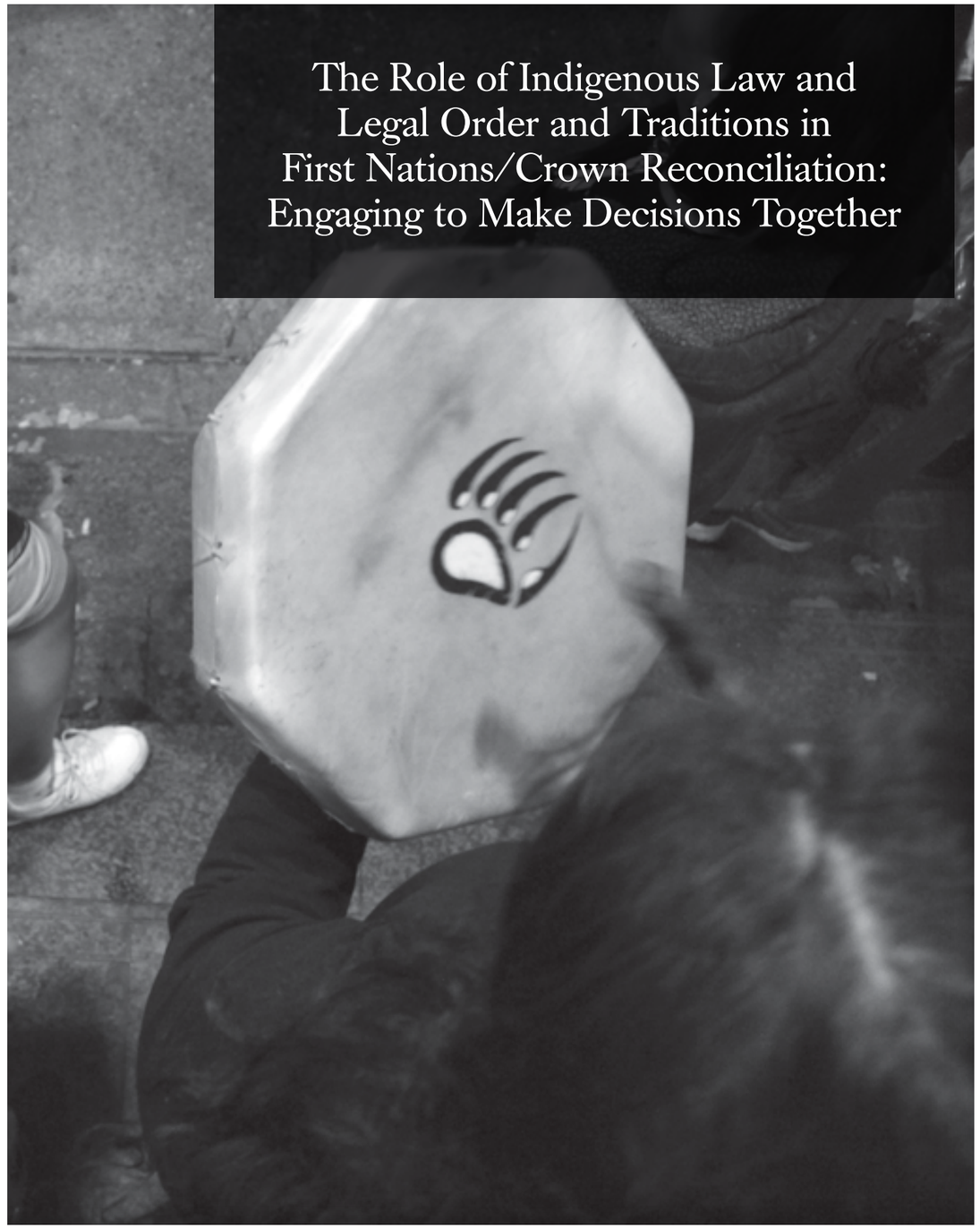
The Role of Indigenous Law and Legal Order and Traditions in First Nations/Crown Reconciliation: Engaging to Make Decisions Together



RECONCILIATION BETWEEN PRE-EXISTING INDIGENOUS SOVEREIGNTY AND assumed Crown sovereignty is the underlying imperative of the duty to consult framework.[1] A key dimension of Indigenous sovereignty is the Indigenous law and legal orders that exist within Indigenous Nations. Indigenous law also has a critical role to play in the definition of Aboriginal title[2] which is a key subject matter for Crown/First Nations engagement under the duty to consult. Indigenous law continues to operate in real ways within the First Nations context. For many centuries First Nations across British Columbia have lived in accordance with their own legal traditions.[3] Today, this continues to matter – and not only to First Nations, but to the Crown and all Canadians, although the latter two are only recently beginning to appreciate this basic fact that is so important to the proper structuring of First Nations/Crown engagement.[4]

This brief paper is not an exhaustive description or analysis of this important topic. Rather, I just highlight four core issues that should be in the forefront of our minds when we think about Indigenous laws and legal orders. It is the realm of each of the First Nations themselves to describe in a detailed way their own worldviews and conceptions of their authority and legal traditions.

Our Indigenous Laws Have Always Existed and Continue Today

The first proposition of this paper is that Indigenous law has existed for centuries and continues to exist to this day. They are outside the authority of the Crown and do not need to be recognized by the Crown to exist. First Nations continue to be guided by Indigenous law in decision-making regarding their territories. Where the distinct legal traditions of Canada and Indigenous peoples have collided in the past, we are now at a time when we must find ways for them to function together.

The inherent nature of our Aboriginal rights and title has as a key foundation the doctrine of continuity as it applies to the recognition of Indigenous law. While much is made of the assertion of Crown sovereignty in the common law regarding Aboriginal title, British law about the settlement of colonies has as a core principle that sovereignty assertion by the Crown over a territory does not necessarily displace pre-existing land laws and ownership.[5] As mentioned above, Canadian common law jurisprudence reflects this in that it requires courts to consider the role of Indigenous law in defining Aboriginal rights and title. It is remarkable to note that through key Aboriginal title litigation of Calder in the 1970s, *Delgamuukw* in the 1990s, and William in this century, Canadian courts have been busy working out and establishing Canadian Aboriginal title jurisprudence without having squarely or meaningfully addressed the reality and substance of the various Indigenous legal orders at issue and how they relate to the content of specific titles.[6]

1 See Haida Nation generally, and para. 20 in particular.

2 See the comment of Chief Justice Antonio Lamer in Delgamuukw at para. 147: "the source of Aboriginal title appears to be grounded both in the common law and in the Aboriginal perspective on land; the latter includes, but is not limited to, their systems of law."

3 See generally John Borrows descriptions in Canada's Indigenous Constitution.

4 Chief Justice Lance Finch of the BC Court of Appeal presented a paper entitled "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" at the Indigenous Legal Orders and the Common Law conference held on November 15 & 16, 2012 in Vancouver wherein he recognizes the critical need for the Canadian legal system to seek out knowledge of Indigenous legal orders.

5 See Kent McNeil's Common Law Aboriginal Title.

6 This point was made by Dr. Roshan Danesh in his comments at the Indigenous Legal Orders and the Common Law conference held on November 15 & 16, 2012 in Vancouver.

Outside the courts, engagement between the Crown and First Nations must reflect the reality of continuing Indigenous legal orders if the engagement is to be structured in a way to achieve meaningful reconciliation. This includes engagement in relation to the Crown's duty to consult. This requires an approach that is not focused solely on defining limitations on Crown authority and sovereignty (as the current impoverished patterns of Crown engagement are too often shaped) but rather one that truly provides a role to Nuu-chah-nulth law, Coast Salish law, Haida law, Sekani law, Ktunaxa law and all of the other Indigenous legal orders across British Columbia in achieving the proper decision-making framework and the reconciliation imperative that the duty to consult must operate from.

Indigenous Laws have their source in Indigenous Sovereignty

What is the source of Indigenous law? Simply put, it arises from centuries of Indigenous peoples living together as sovereign distinct nations with the right of self-determination and in sovereign relation with their territories. Chief Justice McLachlin of the Supreme Court of Canada was clear in her unanimous decision in Haida Nation that "[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty".[7] This remarkable statement for a Canadian judge (given the careful judicial avoidance of the term sovereignty in relation to Indigenous peoples throughout decades of decision- making) specifies the substance that must be reconciled – sovereignties. At international law, state's sovereignty is recognized to be composed of two key dimensions: first, the right to self-determination; and, second, the possession of territorial sovereignty over a given territory. We can see how far McLachlin advanced the discussion over what Chief Justice Lamer stated in *Delgamuukw*:

> Since the purpose of s.35(1) is to reconcile the prior presence of Aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s.35(1) must recognize and affirm both aspects of that prior presence – first, the occupation of land, and second, the prior social organization and distinctive cultures of Aboriginal peoples on that land.[8]

We also see in his words the clear skirting around the word sovereignty and its full implications by use of the phrase "prior presence". In particular, it is interesting to note that the development of Canadian Aboriginal rights jurisprudence has become overly focused and obsessed with Lamer's "distinctive culture" add-on at the expense of the self-determination ("prior social organization") and territorial ("occupation of land") components of sovereignty. This failing of the courts has led to significant distortions in both the development of Aboriginal rights jurisprudence and on the ground patterns of engagement between the Crown and First Nations.

It is time for the Crown and First Nations to seek to reframe the nature of discussions and engagement with regard for Indigenous legal orders and their roots in Indigenous sovereignty. If this is not done, the duty to consult framework will remain impoverished and focused on defining mere limitation and constraint of Crown sovereignty rather than advancing the reconciliation of pre-existing Aboriginal and assumed Crown sovereignties that McLachlin directs.

7 Haida Nation, 2004 SCC 73 at para. 20.

8 *Delgamuukw*, [1998] 1 C.N.L.R. 14 at para. 141.

Indigenous Laws are sui generis and Distinct from Common Law Norms

The recognition of Indigenous laws and legal orders cannot be for the purpose of incorporating them into the Canadian common law framework. Indigenous law is distinct from the common law. It may interact with the common law, but it should not be subsumed in it. Each Indigenous people has a distinct legal tradition. Each of these legal traditions stands as a unique body of law akin to the common law or civil law in Canada.[9]

It is this unique aspect, or sui generis nature, of Indigenous law that requires each Indigenous people to ensure that the substance and content of their legal tradition is upheld, maintained, lived and expressed.

In the context of Crown/First Nations engagement, the role of these laws and legal traditions in guiding First Nations decision-making about the use of territory must be recognized and respected. Processes of consultation and engagement must be developed in light of these laws if they are to contribute to the achievement of taking steps toward meaningful reconciliation.

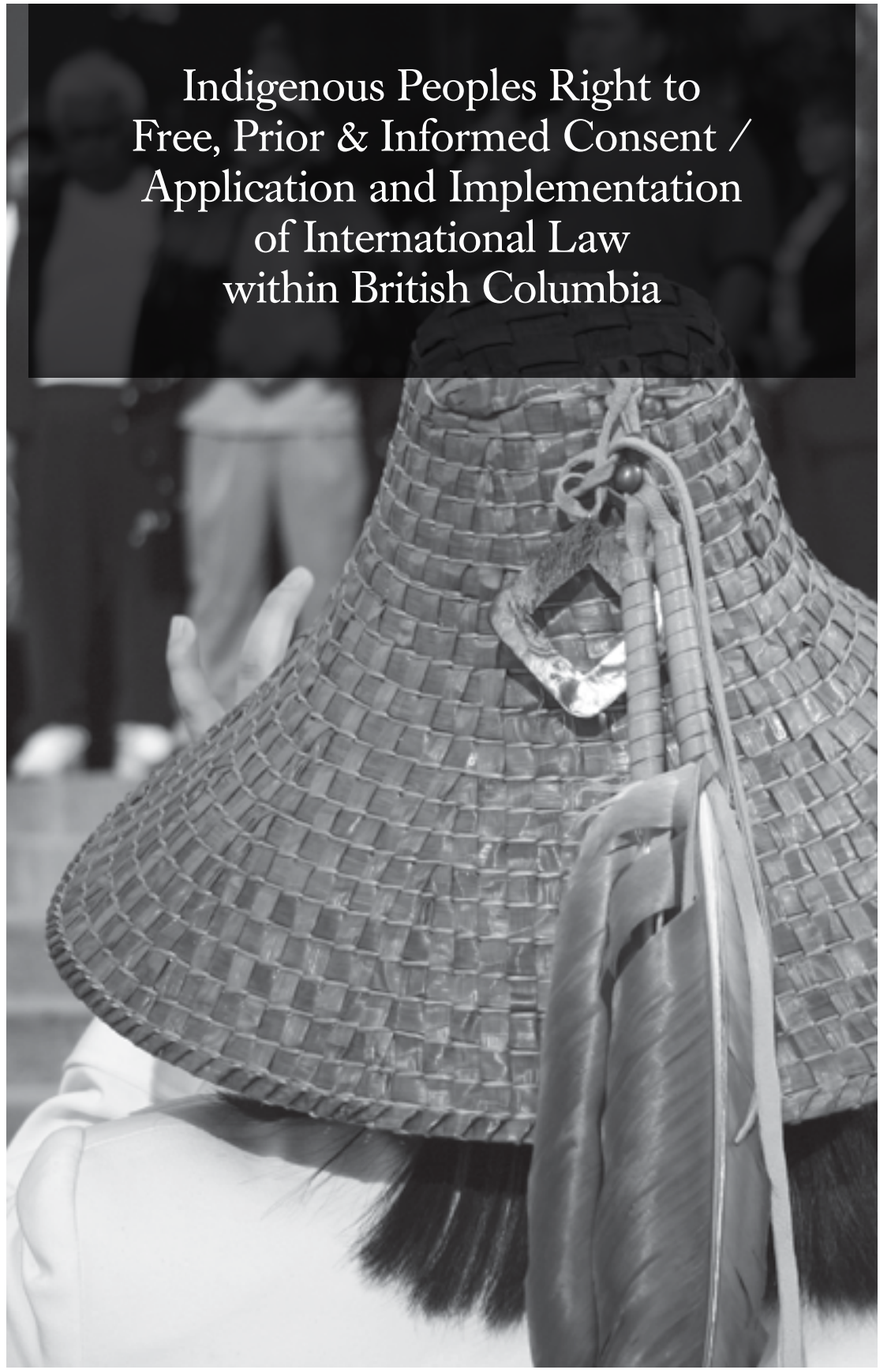
Indigenous Laws and Legal Orders are Fundamental to Achieving Reconciliation

If the reconciliation of sovereignties is the goal and purpose of s. 35 of the Constitution Act, 1982 and the negotiation through treaty between the Crown and First Nations as has been stated by the courts, then Indigenous law and legal orders will be fundamental to achieving reconciliation. The honour of the Crown (in relation to Indigenous peoples), which raises fiduciary obligations in relation to established rights and a duty to consult in relation to undetermined rights, has its birth in the Crown's original assertion of sovereignty over Indigenous peoples and territories. That same assertion of sovereignty by the Crown "crystallized" the Aboriginal title of Indigenous peoples of British Columbia according to the courts. Today, these two issues of the ongoing definition of Aboriginal title in the courts (and failure of any court over the past four decades to declare any Aboriginal title anywhere in Canada), and the need for the Crown and First Nations to engage in relation to the duty to consult in the interim, form the substance of much of the grief that exists in the Crown/First Nations relationship. Current Crown mandates in the negotiation of treaties do not allow for the recognition of Aboriginal title and in fact have the effect of extinguishment.[10] This leaves First Nations, given the reluctance of the courts to declare title, without options for achieving proper reconciliation as mandated by Chief Justice McLachlin in the Haida Nation decision.

In this context, it is important for First Nations across the province to appreciate the importance of advancing recognition of our Indigenous law and tradition to stand as a bulwark against the erosion of our rights through impoverished Crown approaches to its duty to consult and accommodate. To achieve the necessary reconciliation, it will be necessary for Indigenous law to be recognized, respected, and play a meaningful role in decision-making about the use of Indigenous territories.

9 The significant body of work of Professor John Borrows is the leading jurisprudence on this matter.

10 The Ad-hoc Comprehensive Claims Policy Working Group of the Assembly of First Nations has been focused on achieving fundamental federal Crown mandate change in this regard. The federal government has recently committed to a high-level political discussion on the CCP to address this and other issues.



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PART 1

Introduction

CURRENTLY THE FEDERAL AND PROVINCIAL GOVERNMENTS have established policy to implement the duty to consult. Some First Nations in British Columbia have also established their own consultation policies for implementation. This paper hopes to expand upon the dialogue by presenting the international law on this topic. There are two streams of law with respect to the duty to consult with First Nations in British Columbia. The first stream is the domestic legal system, which deals with the concept of aboriginal and treaty rights in Canadian constitutional law and common law court decisions. Other contributors to this project will discuss this area of law and as such, this system will not be discussed in this paper. The second stream is that of international human rights law. This area will be the main focus of discussion in this paper. First, the application of international human rights law to indigenous peoples will be discussed generally. Second, challenges to implementing international law within the Canadian legal system will be discussed. Finally, options for overcoming the challenges and implementing international law within the domestic system will be examined. This paper attempts to demonstrate how First Nations can draw upon international legal principles in the domestic legal sphere and how they can use international law in their advocacy.

PART 2

International Human Rights & Indigenous Peoples

1. Indigenous Peoples within the International Forum

Groups identified as indigenous peoples, such as the First Nations of British Columbia, are now important subjects of concern within the international program to advance human rights. The most important manifestation of the international concern for this group of peoples is the United Nations Declaration on the Rights of Indigenous Peoples,[1] adopted by the U.N. General Assembly on September 13, 2007. The Declaration represents international recognition of the ongoing effects on indigenous peoples of historical forces of oppression linked to colonialism, such as the doctrine of discovery, or other similar invasive practices. Historical colonial practices have actively suppressed indigenous peoples' own political institutions and cultural patterns, and deprived them of vast landholdings and access to life-sustaining resources. As a result, indigenous peoples of today exist under conditions of severe disadvantage relative to others within their domestic countries.

Increased sensitivity to the oppression of indigenous peoples over the past few decades has pushed the international community to re-evaluate the application of international human rights law to indigenous peoples and the place of indigenous peoples within the international community. As a result, the U.N. Declaration on the Rights of Indigenous Peoples contains normative trends on the subject of human rights, substantially in line with indigenous peoples' own articulated aspirations.[2] It affirms that "Indigenous peoples have the right to self-determination" (art. 3), and an array of individual and collective rights deemed essential to or derivative of self-determination, including rights to lands and resources. It embodies the demands asserted by representatives of indigenous peoples and their advocates for decades at the international level.[3] This is reflective of the fact that over the last few decades, indigenous peoples have ceased to be mere objects of the discussion of their rights and have become real participants in the international community.

2. International Human Rights Sources and Related Instruments

As previously discussed, the most important international instrument dealing with the rights of indigenous peoples is the U.N. Declaration on the Rights of Indigenous Peoples

1 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly,* 2 October 2007, A/RES/61/295.

2 S. James Anaya, *International Human Rights and Indigenous Peoples* (New York: Aspen Publishers, 2009) at 2.

3 "This Declaration has the distinction of being the only Declaration in the UN which was drafted with the rights- holders, themselves, the Indigenous Peoples. We see this as a strong Declaration which embodies the most important rights we and our ancestors have long fought for; our right to self-determination, our right to own and control our lands, territories and resources, our right to free prior and informed consent, among others. Each and every article of this Declaration is a response to the cries and complaints brought by indigenous peoples before the UN-Working Group on Indigenous Populations (WGIP). This is a Declaration which makes the opening phrase of the UN Charter, "We the Peoples …" meaningful for the more than 370 million indigenous persons all over the world." Statement of Victoria Tauli-Corpuz, Chair of the U.N. Permanent Forum on Indigenous Issues on the occasion of the adoption of the U.N. Declaration on the Rights of Indigenous Peoples, U.N. General Assembly 61st Sess., Sept. 13, 2007.

(UNDRIP). However, this instrument does not *create* new substantive human rights for indigenous peoples. While the Declaration articulates rights and the need for special measures in terms particular to indigenous peoples, the rights affirmed are simply derived from human rights principles that are deemed to be of universal application to all persons. As UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, states:

> " … The Declaration exists because indigenous peoples have been denied equality, self-determination, and related human rights. It does not create for them new substantive human rights that others doe not enjoy. Rather, it recognizes for them rights that they should have enjoyed all along as part of the human family, contextualizes those rights in light of their particular characteristics and circumstances, and promotes measures to remedy the rights' historical and systemic violation."4

Based on James Anaya's reasoning, all international human rights instruments and sources are applicable to indigenous peoples. Craig Mokhiber has affirmed this reasoning and has referred to the UNDRIP as a harvest of existing rights under a number of international law instruments and law. He states that the Declaration does not create new rights:

> It is clear that the Declaration is not a treaty. It is, in many ways, a "harvest" that has reaped existing "fruits" from a number of treaties, and declarations, and guidelines, and bodies of principle, but, importantly, also from the jurisprudence of the Human Rights bodies that have been set up by the UN and charged with monitoring the implementation of the various treaties. There are no new rights in the Declaration.[5]

a. International Treaties

In the area of human rights, express agreements constitute the most significant source of international law. Various terms are used to describe such agreements. These include treaties, conventions, covenants, instruments, pacts and protocols. The international treaties that Canada is a party to that are of particular relevance to indigenous peoples are: 1) International Convention on the Elimination of All Forms of Racial Discrimination; 2) International Covenant on Economic, Social and Cultural Rights; 3) International Covenant on Civil and Political Rights; 4) Optional Protocol to the International Covenant on Civil and Political Rights: 5) Convention on the Elimination of All Forms of Discrimination against Women; 6) Convention on the Rights of the Child; 7) The Charter of the United Nations; and 8) The Charter of the Organization of American States.

b. Customary International Law

Express agreements are not the only source of international law. In the area of human rights, international custom can constitute a significant source of law. Customary international law is associated with the concept of "State practice." This is the notion that binding rules of international law can be discerned in the ways States habitually behave with one

4 *Supra* note 2 at 63.

5 Craig Mokhiber, as quoted in Joffe, Paul, "*UN Declaration on the Rights of Indigenous Peoples:* Canadian Government Positions Incompatible with Genuine Reconciliation" (2005) 26 *National Journal of Constitutional Law* 121.

another. The elements of custom are: 1) uniform and consistent State practice over time; and 2) the belief that such practice is obligatory.

In determining whether an alleged rule has gained the status of customary international law, it is necessary to consider whether there is sufficient evidence of both State practice and the subjective acceptance of an obligation so to act. Evidence of custom can be found in bilateral treaties, voting patterns on resolutions, ongoing references to particular resolutions of the UN General Assembly, the conclusions of international conferences and drafts adopted by the International Law Commission.

c. Declarations and Other Non-Binding Instruments

Human rights law-making takes place primarily through the development of treaties, but international law is not only made through treaties, as demonstrated by the preceding section on customary international law. Numerous other documents that are in some way endorsed by states or international institutions but not adopted as treaties also express human rights standards with varying degrees of specificity and over an expanding range of topics. In and of themselves, these documents are not legally binding, but they nonetheless have some measure of authority and impact when they are invoked. Soft-law instruments under this category that are of particular interest to indigenous peoples in Canada are: 1) Universal Declaration of Human Rights; 2) U.N. Declaration on the Rights of Indigenous Peoples; 3) American Declaration of the Rights and Duties of Man; 4) Draft American Declaration on the Rights of Indigenous Peoples and 5) International Labor Organization No. 169.[6]

6 It is important to note that ILO 169 is a treaty; however, because Canada is not a party to this agreement, it is a non-binding instrument in Canada.

PART 3

Challenges To Implementing In Canadian Law

AS THE PREVIOUS SECTION HAS DEMONSTRATED, there are many treaties, soft law instruments and international customary legal principles that reinforce and protect the rights of indigenous peoples in Canada. However, the implementation of these norms within the domestic legal system has been, and will in all likelihood continue to be, a significant challenge for First Nations people in Canada. At the political level, colonial attitudes continue to exist, as illustrated by the statement of Prime Minister Harper made at a G20 conference in 2009, "Canada has no history of colonialism." At the legal level, Canada continues to deny that the international law standards should apply. This long history of denial is at the heart of the challenge that First Nations will face in seeking implementation of international law standards into domestic Canadian law and policies.

1. The Doctrine of Discovery in Law

The Doctrine of Discovery is at the heart of the denial of indigenous people's rights to land, including their right to consultation and accommodation. This doctrine has its roots in the papal bulls or policies of the Popes and stated that Christian nations had the right to claim the lands of non-Christian nations.[7] It was adopted into the early court decisions and used by Europeans to justify their claims to land.

United States Chief Justice Marshall followed the reasoning established by the Papal Bulls to explain the function of discovery as a basis for acquiring title to aboriginal lands.[8] This line of reasoning denied the Indians' ownership rights in their lands and reduced their status from "true owners" to "occupants." Marshall disregarded accepted principles of the Law of Nations in his reasoning and argued that discovery and conquest gave ultimate title to the government of the United States, while reserving to the American natives limited rights to use and occupation of their lands.[9]

Chief Justice Marshall's reasoning has been adopted in Canadian Courts. The Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*[10] affirmed that Canada had been settled under the Doctrine of Discovery. In R. v. Syliboy[11] the court stated,

7 In 1095, at the beginning of the Crusades, Pope Urban II issued an edict-the Papal Bull Terra Nullius (meaning empty land). It gave the kings and princes of Europe the right to "discover" or claim land in non-Christian areas. This policy was extended in 1452 when Pope Nicholas V issued the bull Romanus Pontifex, declaring war against all non-Christians throughout the world and authorizing the conquest of their nations and territories. These edicts treated non-Christians as uncivilized and subhuman, and therefore without rights to any land or nation. Christian leaders claimed a God-given right to take control of all lands and used this idea to justify war, colonization, and even slavery. In 1493, Pope Alexander VI issued the bull Inter Cetera, granting Spain the right to conquer the lands that Columbus had already "discovered" and all lands that it might come upon in the future.

8 [T]he character and religion of [the New World's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. To leave them in possession of their country was to leave the country a wilderness. [A]griculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from [their] territory. [E]xcuse, if not justification, [could be found] in the character and habits of the people whose rights ha[d] been wrested from them. The potentates of the Old World . made ample compensation to the inhabitants of the new, by bestowing upon them civilization and Christianity. *Johnson v. McIntosh,* 21 U.S. 543 (1823).

9 Christopher D. Jenkins, "John Marshall's Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence" (2001) U.B.C.L. Rev. 1-42

10 *St. Catherine's Milling & Lumber Co. v. The Queen,* [1888] 14 App. Cas. 46, 48 (J.C.P.C.).

11 *R. v. Syliboy,* [1929] 1 D.L.R. 307 (Co.Ct.)

> "A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation"[12]

Unfortunately, these attitudes and interpretations continue to negatively influence the acceptance of modern indigenous human rights law into domestic law concerned with aboriginal title and the right to consultation and accommodation.

2. Failure to Recognize Customary International Law

A significant challenge to having customary law apply in the domestic legal system is to determine what practices acquire the status of accepted interstate practice and therefore customary law. First Nations in Canada would argue that there are several practices that should be considered customary international law. For example, First Nations would argue that the UNDRIP is an example of customary law. UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, states that in his opinion the UNDRIP is a reflection of customary law.

> … the Declaration builds upon fundamental human rights and principles, such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties. In addition, *core principles of the Declaration can be seen to be generally accepted within international and State practice, and hence to that extent the Declaration reflects customary international law.*[13] (emphasis added)

The U.N. Office of the High Commissioner for Human Rights has highlighted the far-reaching significance of UNDRIP as a universal human rights instrument which now has achieved global consensus, which strengthens the argument that this is a reflection of customary law:

> The Declaration is now among the most widely accepted UN human rights instruments. It is the most comprehensive statement addressing the human rights of indigenous peoples to date, establishing collective rights and minimum standards on survival, dignity, and well-being to a greater extent than any other international text.[14]

Although Canada has stated that they now are prepared to endorse the Declaration, they continue to oppose its application and implementation in the domestic system. This opposition to the Declaration has continued up to the present day:

> *… this Declaration has no legal effect in Canada, and its provisions do not represent customary international law.* It is therefore inappropriate for the Special Rapporteur to promote the implementation of this Declaration with respect to Canada.[15] (emphasis added)

12 *Ibid.* at 313-314.

13 *General Assembly, Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 85 (Conclusions).*

14 Office of the High Commissioner for Human Rights, "Indigenous rights declaration universally endorsed" 2010 online: *http://www.ohchr.org/EN/NewsEvents/Pages/Indigenousrightsdeclarationendorsed.aspx*

15 Canada. Statement to the Human Rights Council on the Mandate of the UN Special Rapporteur on the situation of the human rights and fundamental freedom of indigenous people, Geneva. 26 September 2007.

The most recent example of this refusal was seen in the case of the *Hul'qumi'num Treaty Group v. Canada,* currently before the Inter-American Commission on Human Rights, where Canada argued against the application of the Declaration and its classification as customary law.[16]

The application of customary law to the Canadian domestic legal system has not always been clear. However, in *R. v. Hape,* the Supreme Court has finally stated that "international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declared that its law is to the contrary."[17] There is now greater certainty that customary international law forms part of the common law of Canada. Accordingly, Canada's failure to recognize the human rights norms articulated in the UN Declaration on the Rights of Indigenous Peoples as customary law poses a significant to challenge to First Nations in Canada wishing to utilize that instrument to influence domestic laws and policies.

3. The Failure to Implement International Treaties

As previously mentioned, there are several international and regional treaties, instruments and covenants that deal with human rights and are of relevance to indigenous peoples.[18] However, closely related to Canada's failure to implement customary law is its failure to ratify international treaties. There are three aspects of the Canadian legal and constitutional framework relevant to the implementation, or failure to implement, human rights treaties: 1) treaty adherence is an executive act; 2) federalism and 3) dualist system.

a. Treaty Adherence is an Executive Act

In Canada, treaty-making is an Executive act, derived from the Royal Prerogative. Accordingly, parliamentary approval is not required for Canada to enter into international treaties.

b. Canadian Federalism

Secondly, although only the federal executive is empowered to enter into international treaties, the federal government cannot legislate to implement treaties in areas that would otherwise fall within provincial jurisdiction.[19] This stands in contrast to other countries, such as Australia, where the federal government retains a residual power to legislate in furtherance of a treaty, even if the subject matter typically falls outside of federal jurisdiction. As human rights are a matter of shared federal-provincial jurisdiction, the general

16 *…The HTG also cites Article 28 of the UN Declaration on the Rights of Indigenous Peoples ("UN DRIP") in support of its proposed interpretation of the American Declaration. However, the* ***UN DRIP is a non-binding, aspirational document which cannot be said to represent customary international law.*** *Not only was it drafted much later than the American Declaration, it does not give rise to legal obligations, present or retroactive. Therefore, UN DRIP cannot support the interpretation of the American Declaration proposed by the HTG regarding retroactive application of rights:* Submission of Canada to the Inter-American Commission on Human Rights on the merits of the petition of the Hul'qumi'num Treaty Group case no. 12.734, August 26, 2010.

17 *R.v. Hape* (2007) SCC 26

18 Inter-American human rights instruments include the American Declaration on the Rights and Duties of Man, American Convention on Human Rights, Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights (Protocol of San Salvador), *Proposed American Declaration on the Rights of Indigenous Peoples* Universal human right instruments include Charter of United Nations, International Covenant on Civil and Political Rights, Universal Declaration on Human Rights, International Human Rights Covenants, International Convention on the Elimination of All Forms of Racial Discrimination, ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, and the *UN Declaration on the Rights of Indigenous Peoples.*

19 *A.G. Can. v. A.G. Ont. et al. (Labour Conventions Case),* [1937] 1 D.L.R. 673.

practice is to only ratify a human rights treaty after obtaining the support of Canadian provinces and territories.

c. Dualist System

Finally, Canada follows a dualist approach with respect to the domestic effect of international treaties.[20] This is similar in approach to other Commonwealth countries such as the United Kingdom, Australia and New Zealand. The dualist system means that international treaties in Canada are not self-executing. In other words, an international treaty alone cannot form the basis of an action in domestic courts, nor can Canadian courts grant specific performance of a treaty.[21] In order for the treaty obligations to be given the force of law domestically, they must be incorporated into domestic legislation. As a general rule, human rights treaties are not incorporated into domestic legislation. This is often due to the fact that the same obligation appears in other international and domestic human rights instruments. Where the same guarantee appears at the domestic level, there does not seem to be a practice of expressly incorporating the international guarantee.

These three features of the Canadian legal system make it one of the most difficult places in the world for the purposes of implementing international human rights treaties.

20 With respect to customary international law, Canada's approach is monist in the sense that customary international law automatically forms part of domestic law. However, domestic legislation would prevail in the event of any inconsistency.

21 *J.H. Rayner Ltd. v. Department of Trade,* < 1990<< 2 A.C. 518 (at p. 476). See also: *A.G. Canada v. A.G. Ontario (The Labour Conventions Case),* < 1937< < A.C. 355 (P.C.); *Bancroft v. The University of Toronto* (1986), 24 D.L.R. (4th) 620 (Ont.H.C.); *Re Vincent and Min. Employment and Immigration* (1983), 148 D.L.R. (3rd) 385 (F.C.A.).

PART 4

Overcoming The Challenges & Working Towards Implementation

GIVEN THE CHALLENGES ARTICULATED IN PART 2, what options are open to First Nations to implement their rights, in particular the right to consultation and accommodation, at the domestic level? The remainder of this paper will focus on solutions to these difficult issues.

1. "Just do it": Establishing Standards and Policy

In recent years, First Nations have come to recognize that they do not have to wait until they have a self-government agreement with Canada or have signed or ratified a treaty before they begin to exercise their rights, including their right to consultation and accommodation. Based on the recognition of their inherent right to self-determination, they can "just do it."

Accordingly, one option open for First Nations wishing to utilize international law principles in their consultation and accommodation policies is to develop a policy based on these norms and present it to all individuals wishing to do business in their traditional territories or in a manner which would interfere with their rights. Some of the major international human rights norms that could be reflected in these policies are outlined below:

a. The Right to Consultation and Accommodation is connected to the Right to Self-Determination

The right to FPIC is intimately connected to the right of self-determination. It has been argued by indigenous peoples that the fulfilment of their right to self-determination is dependent on the recognition of their rights to lands and territories and the resources contained therein.22 Accordingly, in order to be meaningful, the duty to consult "must logically and legally carry with it the essential right of permanent sovereignty over natural resources."23 International law also recognises that implicit in indigenous peoples' right to self-determination is the right to effective participation and consultation in relation to any measures that impact on them.

b. The Right to Consultation and Accommodation is connected to Various Other Human Rights

The right to consultation and accommodation, while of particular significance to issues pertaining to control over lands, territories and natural resources, is also essential for the realisation of other international human rights. Reflective of this is the fact that references to consultation and accommodation in the UNDRIP are broad in scope and extend to such areas as redress for the taking of cultural, intellectual, religious and spiritual property[24] and the requirement to obtain consultation and accommodation "before adopting and implementing legislative or administrative measures that may affect" indigenous peoples.[25]

22 E-I Daes, *Indigenous Peoples' Permanent Sovereignty over Natural Resources,* E/CN.4/Sub.2/2004/30/Add.1 at para 8.

23 *Ibid.* at para 17.

24 Art. 11

25 Art. 19

c. Consultation Must Occur Free from Coercion, Manipulation, Intimidation etc.

Consultation and accommodation must occur absent coercion, manipulation, intimidation, outside pressure (including monetary inducements unless mutually agreed upon) or interference by either the government (local, regional or national) or the corporation seeking their consent. For example, it is inconsistent with the right to consultation for indigenous peoples to be told by a state, "This is your only choice, you better take it or you'll be left with nothing at all," or, "We're going to do this on your land whether you like it or not, so you better agree so you can at least get a share of the jobs/cut of the profits/a little piece of your land back."

d. Full Disclosure is Necessary for Consultation and Accommodation

The consent of the indigenous community affected must be requested and freely given *prior* to any authorization, exploration, or beginning of a proposed activity that could impact their lands, resources or rights. This means that there must be sufficient lead time to allow information-gathering and sharing processes to take place, including translations into traditional languages and verbal dissemination as needed, according to the decision-making processes of the Indigenous peoples in question. There must be enough time to read and understand the information received, to consider it carefully, to request additional information or clarification, to seek advice, to consult and to come to consensus within the affected indigenous community. In addition, this process must take place without time pressure or constraints. It is important to note that a plan or project must not begin before this process is fully completed and an agreement with the indigenous peoples concerned is reached.

e. Consultation must be based on a Full Knowledge and Understanding of All Parties

Consultation must be based on a full knowledge and understanding of the proposed project or activities. This means that all relevant information, reflecting all views and positions, must be available for consideration by the indigenous peoples concerned. The affected indigenous peoples or communities must be provided with information, in a form that is both understandable and accessible to them. All information provided must be factually and legally correct. If misleading or false information is provided, any consent already given could be made invalid and, in some cases, withdrawn.

f. Consultations Must Occur with the Proper Representative Institutions

Article 32(2) of the UNDRIP specifically requires states to "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 or other resources." Article 33 states that indigenous peoples have the right to "determine the structures and to select the membership of their institutions in accordance with their own procedures."

This requirement addresses one of the most issues encountered by indigenous peoples in consultations with states and companies where the requirement to consult has been recognised: that of portraying individuals amenable to the interests of these external entities, but who are not selected according to the community's procedures, customs or traditions, as being representative of the community.

g. Consultation Process must Recognize Indigenous Peoples' Law, Traditions, Customs and Land Tenure

Any process developed to consult should give due recognition to the laws, traditions, customs and land tenure systems of the indigenous peoples concerned. The final decision to approve or reject a project or activity should be based on the consensus of all indigenous people affected and be reached through their traditional decision- making processes and representative institutions in accordance with their customary laws and practices.

h. Consultation Agreements should be Binding and Include a Dispute Resolution Mechanism

Agreement may be required at multiple phases during the consultation and negotiation processes and throughout the projects lifecycle. If consent is given following good faith negotiations, it should result in a legally binding agreement that ensures equitable benefit sharing arrangements. Effective grievance mechanisms spanning the entire project lifecycle, including any post-project impacts should be guaranteed. The duty to consult therefore establishes the processes for consultation and negotiations that have to be followed and imposes a requirement that the outcome of these processes be recognised and upheld.

i. Restitution and Compensation Should Occur when Violations to Lands, Territories and Resources Occur

The UNDRIP also clearly sets out terms and criteria for redress, including restitution and compensation, when violations of rights to lands, territories, and resources occur. Article 27 requires that:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Where lands, territories, and resources traditionally owned or otherwise occupied or used by indigenous peoples have been "confiscated, taken, occupied, used or damaged without their free, prior and informed consent," according to article 28(1), the indigenous peoples in question "have the right to redress, by means that can include restitution or, when this is not possible, just fair and equitable compensation." Article 28(2) states that such compensation is to "take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress" – "[u]nless otherwise freely agreed upon by the peoples concerned."

The "just do it" approach has proven to be a very powerful tool for some First Nations; however, there are some risks involved. In this respect, it is important to consider other options as well.

2. Domestic Legislation

To harmonize their domestic law with their international legal obligations, many states have adopted constitutional and legislative provisions that explicitly incorporate and give primacy to human rights treaties to which they subscribe. As previously mentioned, Canada has not done this. All international treaties require legislative implementation if they are to enjoy direct legal effect in Canadian law. The development of domestic legislation is necessary to make international treaties part of Canadian law. First Nations may wish to work towards developing legislation to implement the UNDRIP, American Declaration on Rights and Duties of Man and other human rights treaties as they relate to indigenous peoples.[26]

3. Education of first nations, legal profession, parliamentary members, general public, schools

The general lack of knowledge of the indigenous human rights law is a problem. The 2011 adoption of the Declaration on Human Rights Education and Training represents a global consensus that:

> Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms and should have access to human rights education and training. States and relevant governmental authorities have the primary responsibility to promote and ensure human rights education and training, developed and implemented in a spirit of participation, inclusion and responsibility (Article 7.1).27

In a study conducted by Lawyers Rights Watch Canada they found that there is a significant lack of knowledge relating to international human rights, including indigenous human rights.[28]

First Nations should undertake a human rights education program which follows the "plan of action" the World Programme for Human Rights established by the UN General Assembly.[29]

26 Under the Canadian system the Executive branch (cabinet) has the constitutional jurisdiction to enter into treaties. Parliament legislative branch does not get involved. International treaties are therefore entered into by the executive, and the executive cannot make law, therefore treaties must not be law. Canadian courts, like those of England and other Commonwealth countries, have repeatedly affirmed that a treaty is not itself a source of domestic law.

27 *Declaration on Human Rights Education and Training,* 19 December 2012, UN General Assembly, A/RES/66/137, online: OHCHR <*http://www2.ohchr.org/english/issues/education/training/UNDHREducationTraining.htm*> [Declaration on HRET].

28 The right to know our rights; International law obligations to ensure international human rights education and training/ Availability of international human rights education and training in British Columbia, Lawyers Rights Watch(LRWC) May 2012 pp.76, 84: The majority of judges who responded indicated that they do not see international human rights as particularly relevant to their work. "fewer than a third of the judges responding indicated international human rights law as "always relevant" or "sometimes relevant." The results for lawyers in BC found that the "levels of training in international human rights law were dramatically lower. Training regarding the Inter-American human rights system (IAHRS) was even lower. reported no training at all in the IAHRS; only two had more than 30 hours of training at p.p. 73-86

29 *United Nations Decade for Human Rights Education (1995-2004) and public information activities in the field of human rights, Report of the Secretary-General, Addendum, Guidelines for national plans of action for human rights education,* 20 October 1997, UN General Assembly, A/52/469/Add.1, online: UNHCHR The plan provides:

(a) Knowledge and skills — learning about human rights and mechanisms for their protection, as well as acquiring skills to apply them in daily life;

(b) Values, attitudes and behaviour — developing values and reinforcing attitudes and behaviour which uphold human rights;

(c) Action — taking action to defend and promote human rights

4. Lawyers Representing First Nations could Incorporate Customary International

Law and International Human Rights Treaty Obligations Relating to Indigenous Peoples into Legal Arguments

As stated by the S.C.C.,

> The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.[30]

5. Political

A major motivation for state compliance is with regard to reputation in the world community. In many instances, positive results are achieved only with strong lobbying efforts of non-governmental organizations and the leadership role of key states. Absent effective procedures for authoritative interpretation and implementation, all governments know that the likelihood of being held to such promises is remote; lip-service can be paid and propaganda gains can be achieved at little risk. First Nations should establish an effective lobby and secure support from non-government organizations such as Amnesty International, Lawyer's Rights Watch, Lawyers Without Borders, Native Women's Association etc.

6. Human Rights Mechanisms

What remedies exist in the international legal system to enforce human rights? Because domestic states, such as Canada, often fail to effectively implement international human rights norms and the corresponding obligations, over time the international system has developed mechanisms to oversee their implementation. Generally, there are two main types of international mechanisms: 1) monitoring and 2) complaint.

a. Monitoring Mechanisms

Every UN human rights treaty adopted since the mid-1960s has created a monitoring body and established compliance review procedures. The main role of these bodies is to receive State reports about the implementation of the human rights treaties they monitor, and to adopt Concluding Observations on the basis of this information. Furthermore, pursuant to its mandate of promoting human rights among all OAS member states, the Inter-American Commission has developed a practice of issuing reports on human rights situations in particular countries. This practices does not involve mandatory periodic reporting by governments but rather is driven by the Commission's own initiative, subject ordinarily to the cooperation of the government concerned.

First Nations in Canada can utilize these monitoring procedures to help implement their rights, such as the right to consultation and accommodation, by providing Committee members with first-hand information, in the form of 'shadow reports' which are now often as well or even better documented than the official State report. The monitoring

30 *Reference re Public Service Employee Relations Act* (Alberta) I [1987] 1 S.C.R.

system then shifts from a dialogue between the Committee members and the State's delegation to an exchange during which the Committee members confront the State with information obtained from other sources that may contradict the presentation made in the official report.

b. Complaint Mechanisms

Although self-reporting is mandatory for State parties, provisions for interstate complaints and individual petition procedures are usually optional. All of the major UN treaties (except the Convention on the Rights of the Child) have optional provisions that permit the filing of individual complaints by victims of alleged violations, although that of the Covenant on Economic, Social and Cultural rights has not yet come into force. The Inter-American Commission on Human Rights may also hear and act on complaints, or "petitions," concerning human rights violations involving any of the countries that are members of the Organization of American States, (OAS) such as Canada. When a complaint concerns a state that is a party to the American Convention on Human Rights, the substantive rights and procedures specified in that Convention apply. OAS member states that are not parties to the American Convention, such as Canada, may have complaints lodged against them by reference to the human rights norms articulated in the American Declaration of the Rights and Duties of Man.[31] Accordingly, if a First Nation believes that its right to consultation and accommodation; or any of its international human rights have been violated, it can issue a complaint to one of these bodies, subject to admissibility requirements.

31 Interpretation of the American Declaration of the Rights and Duties of Man, Advisory Opinion OC-10/89, Inter- Am. Ct. H.R. (Ser. A) No. 10, para. 45 (1989).

PART 5

Conclusion

THE RIGHT TO CONSULTATION IS A major legal victory for First Nations. However, in order to be truly meaningful, these consultations must be undertaken in an atmosphere of good faith. The challenge is to develop an effective process for the implementation.

Governments have developed policies according to their interpretation of the law. However, these polices fall far short of the interpretation that First Nations have of an effective consultation process. Furthermore, these policies also fall short of that which is required under international human rights law. Accordingly, First Nations need to familiarize themselves with the international law that is relevant to both their rights and the governments duty to consult and accommodate.

This paper has attempted to give a brief overview on the aspects of international human rights law that is relevant to First Nations in B.C. and Canada. It has described some of the challenges that may occur in trying to implement these norms at the domestic level. However, it has also presented several options or strategies which First Nations can utilize in trying to influence domestic laws and policies through the international legal framework and system.

The current government policies around the duty to consult are based on the history of denial, this must change. However, it is acknowledged that the development of strategies by First Nations to move British Columbia and Canada towards an acceptable approach will require considerable effort. This paper has presented some options for consideration and implementation, not only at the local level but also at the regional, national and international level.

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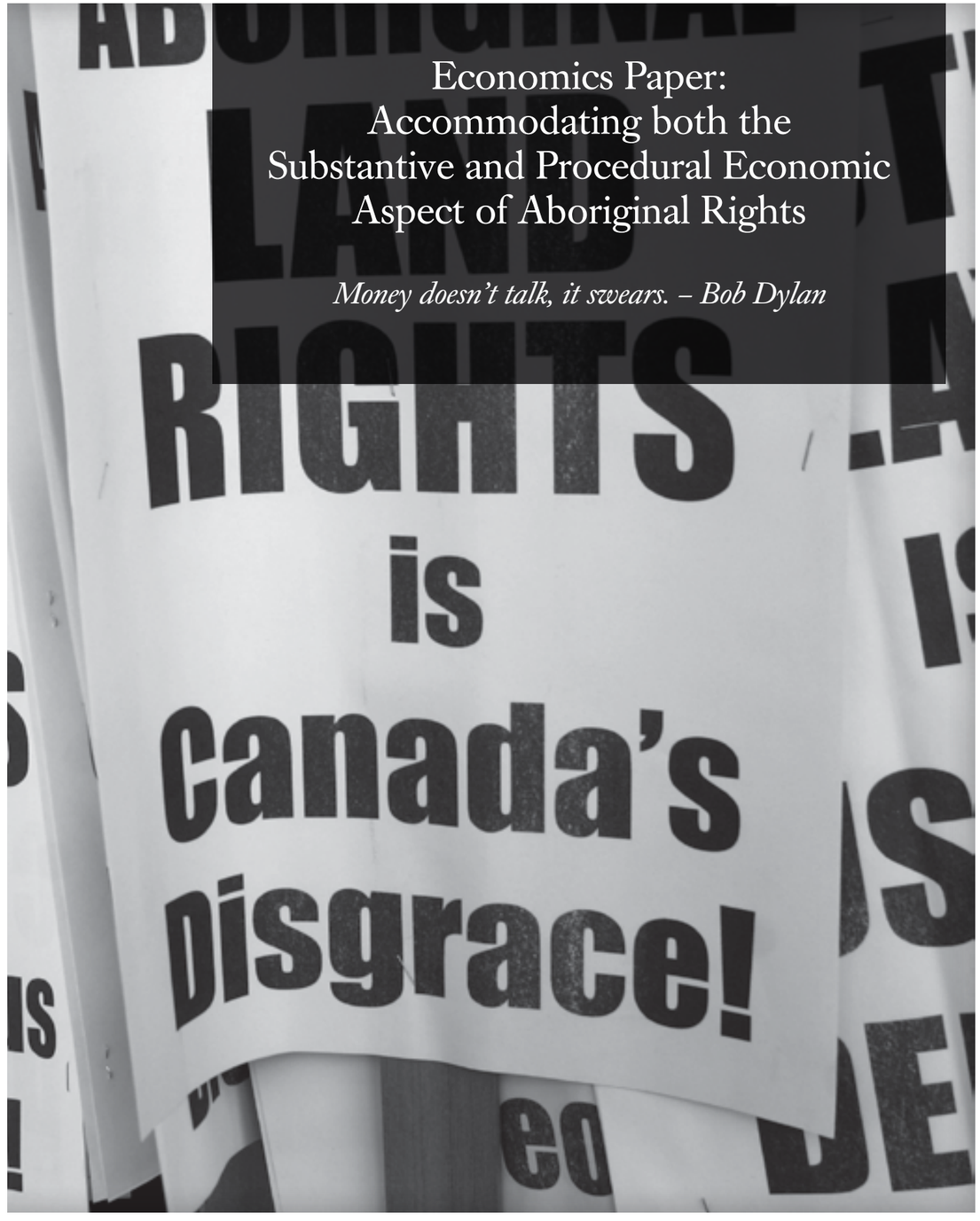

Economics Paper: Accommodating both the Substantive and Procedural Economic Aspect of Aboriginal Rights

Money doesn't talk, it swears. – Bob Dylan

Table of Contents – Economics Paper: Accommodating both the Substantive and Procedural Economic Aspect of Aboriginal Rights

Introduction

ABORIGINAL PEOPLES ARE NOT USUALLY THE beneficiaries of economic cycles in their traditional territories. This inequity cannot continue. Aboriginal Peoples must be proactive in their positive assertion of Title and Rights and corresponding obligations. Too often, Governments and corporations with their substantial capacity set the terms of engagement and Aboriginal Peoples struggle to react, let alone be proactive. This must and will change.

It is an agreed requirement that Aboriginal Peoples receive an equitable share of the economic benefits that derive from our natural resources. This requirement is political, legal and economic. Wisdom advises us to be patient with economic cycles; cautious with big promises; value long term investment; and, open-minded to learning from our direct experience for the next generation. This wisdom will inform our next steps forward as we approach a potentially declining exploration/mining industry, rising oil/gas/pipeline development and emerging clean energy sector.

This section of the Consultation and Accommodation Paper looks at the substantive and procedural economic aspects of Aboriginal title and rights. We seek to move beyond a reactionary financial compensation analysis of accommodation and towards positive assertion of the true economic value of rights and strategic leverage of risk assessment. This section will explore the following topics:

1. Substantive and Procedural Aspects of Aboriginal Title and Rights
2. Recognition of Economic Aboriginal Rights
3. Inescapable Economic Accommodation
4. Economic Benefits through Negotiations:
   a. Resource Revenue Sharing; and,
   b. Impact Benefit Agreements
5. Financial Risk Assessment:
   a. Corporate Social Responsibility;
   b. Credit Risk Analysis; and,
   c. Strategic Communication to the Financial Markets;
6. Recommendations:
   a. Economic Policy Working Group;
   b. Aboriginal Leaders Economic Advocacy Delegation

PART 1

Substantive and Procedural Aspects of Aboriginal Title and Rights

IN *MIKISEW CREE,* THE SUPREME COURT of Canada stated that section 35 affirming Aboriginal Title and Rights has both a substantive nature and procedural obligations. The substantive aspect speaks to the actual nature, content and scope of our rights such as the Aboriginal title to a specific historical winter village; ceremonial site on a sacred mountain; fishing region within our traditional territory; etc. The procedural component is the consultation, accommodation and consent requirement. So, there are the Title and Rights in one hand and the duty to consult obligations in the other. *We must remember, our rights have a one-two punch.*

Unfortunately, this distinction is commonly lost in our analysis; too often, we shift immediately to the consultation analysis and do not adequately assess the rights adversely affected. To substantially improve our economic benefits, we must look importantly at the content of our rights, in addition to economic accommodation.

PART 2

Recognition of Economic Aboriginal Rights

SINCE THE *VAN DER PEET* TRILOGY, Aboriginal law has affirmed and developed three recognized categories of Aboriginal economic rights in Canada. These three purposive categories are:

(1) food, social and ceremonial (“**FSC**”);

(2) sale, trade and barter for livelihood, support and sustenance, but not for the accumulation of wealth (often referred to as the “**Moderate Livelihood**”); and

(3) sale, trade and barter of a commercial nature (“**Commercial**”).

In *Van Der Peet*, the Court specifically set out the purposive categories when discussing the application of *Sparrow* to the case at bar, they stated:

> This Court, in *Sparrow, supra,* proposed to leave to another day the discussion of commercial aspects of the right to fish, since (at p. 1101) “the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes” (emphasis added). Accordingly, Dickson C.J. and La Forest J. confined their reasons to the aboriginal right to fish for food, social and ceremonial purposes. In so doing, however, it appears that they implicitly distinguished between (1) the right to fish for **food, social and ceremonial purposes** (which was recognized for the Musqueam Band), (2) the right to fish for **livelihood, support and sustenance** purposes, and (3) the right to fish for **purely commercial** purposes (see *Sparrow,* at pp. 1100-1101). The differentiation between the last two classes of purposes, which is of key interest here, was discussed and elaborated upon by Wilson J. in *Horseman, supra*.[1]

In the landmark Aboriginal title case, *Delgamuukw,* the Supreme Court of Canada noted that there are three aspects: (1) Aboriginal title encompasses the right to exclusive use and occupation of land; (2), Aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and (3) that lands held pursuant to aboriginal title have an **inescapable economic component**.[2]

These three categories are deeply meaningful in an Aboriginal Peoples’ analysis of the socio-economic value of the Title and Rights that may be adversely affected. Too often, we do not characterize our rights *prior* to determining the appropriate economic benefits that might be negotiated in both Aboriginal-industry and Government-to-Government agreements. This Paper considers this characterization *fundamental* to greater affirmation of our actual economic rights. We must have confidence that our pre-existing societies achieved great economic wealth. This confidence can substantially alter the minimal benefits currently being offered and accepted.

Another important aspect of this analysis is that Aboriginal Peoples must look more comprehensively at the wide array of Aboriginal rights that may be adversely affected by a prospective project in our territories. That is, there may be dozens, if not hundreds, of Aboriginal rights that could be adversely affected by any given project. We must comprehensively work

1 *R. v. Van der Peet,* 1996 CanLII 216 (SCC), [1996] 2 SCR 507, *http://canlii.ca/t/1fr8r* at para 183.

2 *Delgamuukw v. British Columbia,* 1997 CanLII 302 (SCC), [1997] 3 SCR 1010, *http://canlii.ca/t/1fqz8* at para 166.

with our Elders and traditional knowledge holders to understand what a simple before and after situation may look like. We should at minimum be in as good a position (if not better) than we were prior to the development. In law, this is called restitution.

As an example, consider a mineral exploration project that develops into a moderate size mine. From the start, a substantial internal consultative study of all western and traditional knowledge of the specific site area with sensitivity to cumulative effects must be conducted. This study might likely disclose:

- sacred, heritage and ceremonial sites;
- hunting and fishing of sale, trade and barter of sustenance scale;
- trapping for commercial trade;
- water rights of a fundamental sustenance nature;
- permanent and temporary occupation indicating Aboriginal title;
- food, social and ceremonial gathering of plant life and fauna in the study area; and
- other diverse harvesting rights.

In short, when a proposed project is before our community, we must ask "what is the range of Aboriginal title and rights that may be potentially affected?" Too often there is not enough time and energy devoted to asking and answering this question. Answering this question will inform the Aboriginal community in a real and tangible way what is necessary to negotiate and radically alter the economic analysis on what is fair and equitable. Aboriginal Peoples must acknowledge that our title and rights entitle us to a true economic value and sustained prosperity.

PART 3

Inescapable Economic Accommodation

AS DISCUSSED IN THE COMMON LAW section of this Paper, the Aboriginal rights analysis begins first with characterization of the Aboriginal title and rights itself; next, establishes the extent of infringement and then looks to the appropriate level of consultation and accommodation. Since *Delgamuukw,* the Courts have commonly and narrowly spoke of the "inescapable economic aspect" of Aboriginal title and connected this to justifiable infringement of such title where "fair compensation" is provided. There are a number of flaws with this judicially lead perception.

First, it is settled law that other Aboriginal rights have this same inescapable economic aspect. An Aboriginal Peoples that has a commercial right to fish herring and eulachon, clearly has an inseparable economic right. Second, there are few accommodation measures that do not have a financial cost, which are not strictly compensatory in nature. Very often environmental avoidance or mitigation measures are said to costs hundreds of millions. Investment in socio-economic measures such as skill upgrades, education and other programs like also have a real cost. Third, Aboriginal Peoples are equally entitled to the just enrichment that developers purport entitlement. If we are to establish a truly equitable accommodation, Aboriginal Peoples should be part of the prosperity that is derived from our territories.

With regard to the economic aspects of duty to consult and accommodate, the law has divided into two key solutions: (1) private law contracts between proponent and Aboriginal Peoples and (2) public law government to government agreements, primarily resource revenue sharing arrangements. It is important that Aboriginal Peoples engage on both of these negotiation fronts, if we are to truly maximize our economic Aboriginal rights. When a project is in the horizon, we must engage both the Proponent and Crown and, most importantly, not allow them to both avoid any responsibility by playing "economic hot potato".

PART 4

Economic Benefits through Negotiations

SINCE *HAIDA* AT THE SUPREME COURT of Canada,[3] the law has been relatively clear about the source of the duty to consult, accommodate and obtain consent from Aboriginal Peoples arising from the elusive "honour of the Crown". Accordingly, if the source is with the Crown, logically, a third party cannot in itself have a stand-alone duty to consult. Only where the duty has been delegated by the Crown will a third party such as an industry proponent have aspects of the duty to consult to fulfill. More recently, the Courts have expressly stated that the Crown can delegate both "procedural" and "operational" aspects of the duty to consult, but not the duty in its entirety.

Knowledge of this distinction is not for purely academic or legal purposes, but to highlight a simple fact. Aboriginal Peoples cannot simply negotiate with one party to achieve complete fulfilment of the duty to consult; we must look to both the Crown through resource revenue sharing and Industry through impact benefits and profit-sharing negotiations.

There is a significant lobbying effort beginning whereby industry associations seem to have become allies of Aboriginal Peoples and appear to be arm-in-arm supporting our advocacy for resource revenue sharing. This support may have a selfish motivation in that many industry experts are arguing that achievement of substantial economic accommodation through resource revenue sharing with the Crown will mean that industry itself does not need share any financial compensation. In other words, revenue sharing = no financial provisions in IBAs. Clearly, this must be resisted.

This said, lets us examine both the public and private law solutions to economic accommodation.

a. Public Law – Negotiation Capacity Funding and Resource Revenue Sharing

When it comes to economic accommodation, the BC Government has delegated almost its entire responsibility to third parties. The Crown does not create a permanent annual budget item to share the natural resource wealth of the Province with Aboriginal Peoples. Instead, most of the Crown- First Nation revenue sharing programs have been ad-hoc, inconsistent and primarily at the Crown's discretion. A goal for Aboriginal Peoples might be to develop a long term fund where investment of revenues can be pooled.

Negotiation Capacity Funding

One of the common inequities in bargaining power in both the First Nation-Crown and First Nation-Industry negotiation environment is the fact that the Government or company has deeper pockets and can afford advisors and internal consultative processes. Aboriginal Peoples, on the other hand, have the immediate choice of using social program funding or other own-source monies to finance or bolster inadequate funding. Very often, the First Nation goes without and negotiates with its limited internal capacity. This situation

3 *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 (CanLII), [2004] 3 SCR 511, *http://canlii.ca/t/1j4tq* at para 16.

favours a one-sided agreement and a template developed by the Crown or company. This situation must change because it is an identified inequity and the Crown and third parties are knowingly relying on this disadvantage.

Negotiation Capacity Funding is a fundamental requirement for advancement of this economic Paper. We need the capacity in ourselves and advisors to level the playing field and this must become a priority. The development of First Nation funding mechanism that is triggered when a Crown referral or Proponent engagement commences may be a key to better economic accommodation and better agreements.

An important point that must be made is this negotiation capacity funding must occur in the early stages of a proposed development. Many proponents argue that they do not have the financial capability to resource both sides of a negotiation table at the developmental stages of an unproven resource. There are two responses to this argument. First, companies need to accept that Aboriginal capacity funding is a regular expense in the development of a project and fundraise on this basis that there will be an intergovernmental cost to negotiate an agreement with a First Nation. Second, the Crown has to acknowledge that it has positive obligation to provide negotiation funding if it wants to ensure that early stage impact benefit agreements are enforceable and equitable. Crown funding of specific internal training and development of internal governance protocols will only benefit further self-sufficiency and greater openness to assessment of natural resource project on their merits.

Resource Revenue Sharing

The BC Government has committed to all First Nations to develop resource revenue sharing opportunities. On the whole, there are few resource revenue sharing agreements and primarily only in producing mines and advanced oil and gas developments. This must change. Both Aboriginal Peoples and industry require a substantial Crown economic accommodation that creates legal and business certainty.

Overall, revenue sharing with Aboriginal Peoples throughout Canada has been and continues to be undertaken on an *ad hoc* basis and largely in the absence of any official public policy. To date, the federal Comprehensive Claims process is the only policy that explicitly adopts revenue sharing. However, in response to growing industry pressure, most provinces are increasingly moving towards bilateral agreements with Aboriginal Peoples in their jurisdictions. Resource revenue sharing is now often used by provinces to promote success in certain resource sectors. Aboriginal Peoples at many levels and forums are consistently advocating for resource revenue sharing.[4]

Forms of Revenue Sharing

The issue of resource revenue sharing with Aboriginal Peoples triggers a number of considerations including political, constitutional, jurisdictional, economic and policy factors. Federal-provincial relations, fiscal relationships, resource management and ownership, governance and capacity are other related issues arising from a discussion of resource revenue sharing.

We are increasingly advocating for a share of the wealth generated from resources

4 Aboriginal submissions to the Canada-Aboriginal Peoples Roundtable – Economic Opportunities (2005), and statements/positions of the National Chief of the Assembly of First Nations at Kelowna First Ministers Meeting in 2005; BC First Nations Energy & Mining Council, *Sharing the Wealth: First Nation Resource Participation Models,* October 2009.

within our traditional territories and view it as fundamental to reconciliation between Aboriginal Peoples and the Crown.

Resource revenue sharing generally includes some measure of economic rent derived from the use of renewable and non-renewable resources. This description could include the aggregate amount of direct and indirect taxes, fees, royalties, levies, wages, costs and private sector profits. However, in most of the instances where resource revenue sharing is occurring, revenues have been limited to direct revenues arising from royalties, mining taxes or fees such as leases, licences or stumpage.

The issue of resource revenue sharing raises a number of questions and considerations including:

(a) With whom will revenues be shared, how will they be distributed and to what purpose?

This is ultimately a decision best left to the First Nation itself after extensive community consultation. Some communities develop specialized political/Elder/community member committees to make recommendations on the overall purpose, short and long term investment of monies and key determination of individual and collective programs. In short, it is advisable to have a plan before monies arrive.

(b) If fiscal resources are transferred, will responsibility for program delivery and services also be devolved?

This issue is relative to the proportion of revenues transferred. If the resource revenue sharing was an accurate full transfer of all economic rents derived from a certain mineral project, then, a First Nation might be expected to reconcile these revenues with other social program monies. To date, this has not occurred in Canada, the "sharing" has been only a lesser proportion of a royalty tax, stumpage or other partial tax sharing.

(c) How will revenues be distributed internally within the First Nation?

As a general rule, Chief and Council have decision-making authority on the First Nation's financial distributions. It is common for a community-lead board of trustees to be established to administer funds to separate the political influences and immediate social program necessities from the long term needs of the community. A trust or fund with flexible and not overly restrictive terms that is supported by a public referendum would likely be ideal.

(d) What implications will resource revenue sharing have upon self-government, treaty and comprehensive claim negotiations and agreements?

There is always a concern that substantial resource revenue sharing outside of the BC treaty process as an "interim agreement" can derail a bilateral or tripartite negotiation process. It is thought that there is little incentive to negotiate a modern day treaty that locks land quantum; requires the First Nation to lose the minimal tax exemption under s.87 of the *Indian Act* and attempt a surrender and extinguishment of Aboriginal Title and Rights. This may be correct, but one might expect that a Crown that equitably shared all revenue derived from Aboriginal resources would also not insist on such antiquated terms. If resource revenue sharing is achieved in such great proportion, a progressive Crown government would also likely be open to a treaty on progressive terms.

From the perspective of Aboriginal Peoples, significant resource wealth generally bypasses communities that are facing challenges of poor economic growth and inadequate investments in education, health and social institutions. This dynamic is often referred to as a resource paradox and is a key element in demands for resource revenue sharing arrangements with developers and public governments. Further, Aboriginal Peoples view revenue sharing on a government-to-government basis as a direct recognition of co-existing Aboriginal and Crown titles and jurisdiction.

b. Private Law – Accommodation by Negotiation of Impact Benefits Agreements

Since the early 1990s, the negotiation of agreements between Aboriginal Peoples and industry proponents has become a developing legal and business norm. Some jurisdictions such as Northwest Territories, Nunavut, Yukon and Newfoundland-Labrador, have ratified modern day treaty provisions into regulations that legally demand that an impact benefit agreement is required where there is a proposed disposition of natural resources of Aboriginal Peoples. Unfortunately, the Courts and legislature of BC have not progressed to this legal and transparent model.

It is often said by Courts, Governments and businesses, "there is no legal requirement to enter into an agreement with a First Nation, there is no right to veto and no requirement to agree in consultation". This sentiment can only foster economic and legal uncertainty in this Province and encourage adversarial relationship between First Nations, Crown and industry. A key recommendation of this Paper is First Nations in British Columbia must advocate for legal reform and be architects of a legislative regime that requires agreement with First Nations before a project adversely impact our territories. That must be a goal if we are to achieve Free Prior Informed Consent.

This Paper must advise on the current lay of the legal landscape. We will discuss a number of key issues in impact benefit agreements and achievement of economic benefits as follows:

(i) Engagement agreement – setting appropriate funding and negotiation protocols;
(ii) Internal governance protocols for mandate and negotiations;
(iii) Value of an independent third party financial due diligence;
(iv) Survey of common economic benefits:
(v) Land use disruption fees;
(vi) Consultation/referral administration fees;
(vii) Baseline study participation – monitors and independent advice;
(viii) Traditional knowledge studies;
(ix) Skills, training and upgrade funds;
(x) Preferential hiring of all employees by Proponent and contractors;
(xi) Preferential contract bidding process;
(xii) Direct awards;
(xiii) Equity participation options;
(xiv) Financial compensation; and
(xv) Royalties.

(i) Engagement agreement – setting appropriate funding and negotiation protocols

It is common experience of Aboriginal Peoples that they have minimal designated financial resources to engage with Proponents. This situation leads to under resourced negotiations, direct engagement by Chief and Council and restricted use of industry-specific advisors. In a bad faith environment, Proponents are able to build a consultation record at minimal cost by simply have multiple meetings by telephone, in person and correspondence. This consultation record can be used against a First Nation to justify infringement.

An engagement agreement at the onset of first contact with a proponent can establish a set funding of negotiations (i.e., a budget for negotiation of preliminary agreements); set a phased negotiation of agreements (i.e., exploration memorandum of understanding; traditional knowledge protocol; environmental assessment funding agreement; equity participation agreement and comprehensive impact benefit agreement) and determine key communication protocol issues (i.e., establishment of key contacts and negotiation format).

(ii) Internal governance protocols for mandate and negotiations

Aboriginal Peoples, like any party, will make more efficient, transparent and accountable decisions when they have a clear mandate for their negotiations and a protocol to follow during negotiations.

Proponents will commonly use disorganization and political/administrative division to their advantage.

To adequately develop a negotiation mandate, it is important for the First Nation to due proper due diligence on the exact nature of the project with full Council and designated negotiators and advisors. A norm is to develop a phased approach to negotiations and set mandate for each specific negotiation. For instance, the Council would establish a set mandate for a memorandum of understanding including all key topics, minimum standards and excluded topics.

It is also important to establish an internal protocol for your negotiation team to report back to Council; senior Council members that may be asked for advice and instructions throughout negotiations and the process to obtain a change in mandate.

(iii) Value of an independent third party financial due diligence

A key economic consideration in any Aboriginal-Industry negotiation will be assessing the true value and economics of a prospective project. A Proponent will always highlight the pessimistic financial weaknesses of the project to the First Nation. The Proponent will always provide the optimistic financial strengths and profits to an investor. In this environment, many Aboriginal Peoples are proposing that a third party advisor conduct an assessment on the project in order to develop a recommendation on the commercially reasonable economic provisions for an impact benefit agreement. An industry specific advisor can assist with realistic terms and provide key information for a First Nation's overall assessment of the adverse effects vs. the real benefits.

(iv) Survey of common economic benefits

This Paper does not purport to comprehensively review all key terms for an impact benefit agreement. Notably absent are the environmental provisions that are absolutely necessary terms to each IBA. It is common for certain environmental conditions to trigger a veto-like right against the prospective project. This section is intended to briefly address common economic terms for accommodation.

(v) Land use disruption fees

This term is an estimate of the value of on-the-ground economic cost for damages by the proposed action. A simple example is $50,000 annual payment during an exploration program.

(vi) Consultation/referral administration fees

There is a financial cost in time, energy and advisory costs that are triggered by a consultation referral within the administration of a First Nation. These costs are often recouped as an economic accommodation. An example is $10,000 for the cost of referral administration fee.

(vii) Baseline study participation – monitors and independent advice

As an indirect economic term, many First Nations require enhanced participatory rights in environmental baseline studies, including the hire of Citizens as employees of contractors and environmental monitors. As a project develops, there will also be increased regulatory processes triggered, these will have real financial costs. A common negotiated financial term is to require that a set budget be jointly developed to cover full costs of the First Nation's participation in addition to any public monies available. Public programs are grossly underfunded and cannot be relied upon.

If there is an environmental assessment triggered, the First Nation should insist upon a separate "environmental assessment funding agreement" for a stable source of funding to participate with environmental and legal advisors, if necessary.

(viii) Traditional knowledge studies

A substantial financial commitment may be the conduct of a traditional knowledge study by the First Nation of the project area. A developing approach on this topic is the negotiation of separate "traditional knowledge protocol" that speaks to the research, interviewing, report-drafting and mapping of traditional land use information help by the community's traditional knowledge holders/Elders. A separate budget will need to be developed for such a study.

It is trend for the Proponent to request that such a traditional use study be conducted at later stages of the proposed developed (pre-production for a mine) or by their own environmental consultant. The First Nation should resist this approach, as many pre-construction and exploration activities have the same potential to damage unknown sacred sites. Also, a Proponent's consultant will acquire certain intellectual property rights over the traditional land use information if their own staff conducts interviews and maintains reports.

(ix) Skills, training and upgrade funds

Most communities do not have specifically trained citizens for the industry that is engaging them. Key economic terms under this heading include the conduct of a skills inventory, identification of specific training programs and the establishment of a skills/training/education fund. It is advisable for the community to focus on skills that are transferable from one industry to the next.

(x) Preferential hiring of all employees by Proponent and contractors

Hiring of the local workforce should be a guarantee and fundamental term for any IBA. It is advisable to be careful with Proponent commitments that leave them with all of the ultimate decision-making powers on hiring. Proponents should be required to make "best efforts" as a minimum standard. In progressive agreements, some First Nations have negotiated financial penalties for not hiring specific numbers of Citizens as employees (i.e., $15,000 penalty for each employee not hired).

(xi) Preferential contract bidding process

A right of first refusal for eligible Aboriginal-owned businesses on all contract is a commonly negotiated term. This commitment may be the most valuable economic term negotiated. Proponents often resist this condition unless there is a specialized bidding process with specific timelines. Many First Nations negotiate what is called a "open-book negotiation process" that requires a first offer to all Aboriginal-owned businesses and direct negotiation with transparent financial terms.

(xii) Direct awards

For a First Nation with skilled and competitive contractors, the negotiation of guaranteed specific contracts is often achieved with significant financial awards. Examples of such direct awards could include all clearing of a right-of-way for a natural gas pipeline easement, camps and catering, office services and construction of mine site.

(xiii) Equity participation options

With industry-specific economic advice, equity participation in the project may provide a long term economic benefit. Equity can allow the Aboriginal Peoples to attain profits derived from the production and operation of the Project itself. A very important consideration that a First Nation must take into account is that such a substantial economic accommodation is with prejudice. The First Nation's economic interest in the project advancing likely requires providing public support and a substantial stake in the profits will likely fulfill the Crown's duty to accommodate. If a First Nation opts to take an equity position, it is advisable to negotiate for the option to increase equity over the life of the project and tie such options to significant milestones of the project (i.e., 5% at exploration, 10% at small mine permit, 20% at mine production). Using your own funding or financing can also increase your stake in the project. If the investment is good, finding financing may be viable. Another final consideration under this heading is to tie investment to a board of director's position. Having a role in the management of the Proponent may provide an important decision-making right.

(xiv) Financial compensation

Payment of specific lump sum amounts remains a common economic term of IBAs, especially at advanced stages. It is advisable to determine the when and where before the monies are provided. In determining "when", the First Nation might consider connecting payment periods to specific milestones. Ask for money when the Proponent has money. A common milestone is the granting of key licences or permits.

In determining the "where", the First Nation may also consider if it wants the monies sent to a specific non-profit society, a foundation or a trust.

(xv) Royalties

Another economic term common to many advanced project is a share of the royalties. An advisable negotiation approach is to tie an escalating royalty share to the value of the natural resource (i.e., 5% at $20/ounce, 6% at $25/ounce, 7% at $30/ounce).

PART 5

Financial Risk Assessment – Rights Influence on the Economics

Aboriginal Title and Rights implementation can have a positive or negative influence on whether a project is "economical". A cooperative, respectful and affirmative legal relationship with the affected First Nation can garner political and legal support for the advancement of a project. An adversarial, disrespectful and publicly opposed project can mean extensive regulatory delays and litigation. Most matured industries have come to the informed conclusion that we are all better as allies and good neighbours. Immature industries create greater risk in the business environment. All businesses and governments have a decision to promise or peril.

a. Corporate Social Responsibility

Many companies openly accept that they require a "social licence" to operate in a community, region and province. A key instrument used to achieve this licence is Proponent-written corporate social responsibility ("**CSR**") policy. Core components that First Nations may measure the content of CSR policy include:

- environmental management;
- cultural heritage protection;
- financial compensation;
- indigenous participation in employment and training;
- indigenous participation in business opportunities;
- indigenous consent and support for project development;
- recognition of indigenous rights in land; and,
- support for agreement implementation.

To date, the most substantial study of the effectiveness of CSR policies implemented through 45 Aboriginal-mining agreements from Australia did not provide an optimistic picture. It held that:

> A major finding of the study was that a substantial majority of the agreements scored poorly on most criteria. For instance, many agreements did not include substantial financial compensation, relative to the size and expected revenues of the project. About three-quarters of agreements offered little additional protection to Aboriginal cultural heritage beyond that already available under general legislation. Only one in four agreements provided for substantive Aboriginal participation in environmental management of the projects involved. Two agreements actually reduced opportunities for Aboriginal participation, by requiring the Aboriginal signatories to refrain from exercising rights.[5]

The above study highlights the disconnect between the positive soft commitments found in policy and the implementation into legally binding agreements. A basic conclusion that may be held is that Aboriginal Peoples cannot rely on broad and general commitments, concrete and tangible terms through a well-developed impact benefit agreement are required. A simple suggestion that might advance the CSR policy gap could be to invite the Proponent to develop binding language into the IBA based upon their CSR policy. At minimum, this approach will test the good faith nature of the Proponent beyond principles.

5 O'Faircheallaigh, Ciaran, *CSR, the mining industry and indigenous peoples in Australia and Canada – From cost and risk minimisation to value creation and sustainable development*, Greenleaf Publishing, Griffith University, Australia at page 7.

b. Credit Risk Analysis

Credit risk analysis looks at a long list of economic, political and legal factors in determining whether monies lent to a company for a project are safe investments or volatile investments. A key consideration in risk assessment is the regulatory certainty of the jurisdiction. As identified throughout this Policy, British Columbia is not a legally certain jurisdiction without First Nation consultation and accommodation.

Although there are no specific documented studies on the role that more responsible financing policies are occurring, it is clear that most primary Canadian financial institutions are including consideration of the principle of "free, prior and informed consent" in establishing risk assessment. TD Bank's corporate responsibility report states:

> **Environmental Risk Profile**
>
> As part of our proactive approach to risk management, TD monitors current and emerging environmental and related social issues that may affect the risk of our financing portfolio. We monitor these risks through:
>
> - review of technical information;
> - project tracking;
> - engagement with clients and stakeholders; and
> - participation in multi-stakeholder groups.
>
> Examples of key issues that TD is currently monitoring include…
>
> - **Free Prior and Informed Consent** of Aboriginal Peoples relating to natural resource development.

The Royal Bank of Canada also incorporated the law of duty to consult in its Environmental, Social Risk policy at a somewhat lower standard of "free prior informed consultation" as follows:

> **Capital Markets ESRM Policy**
>
> We screen all our debt and equity underwriting activities, and corporate credit facilities, for environmental and social risk, regardless of whether the use of proceeds is known. In addition, our policy requires that clients operating in industries of elevated environmental risk be subject to an Environmental and Social Risk Review of the following social and environmental factors:
>
> - Record of environmental compliance
> - Future environmental legislation such as carbon regulations
> - Approach to community engagement

- Approach to consultation with aboriginal communities, and the degree to which the principles of **free, prior and informed consultation** are applied
- Impacts on water…

To date, Aboriginal Peoples have not made a concerted campaign to lobby financial institutions on its lending practices. It seems clear that as substantial customers, that BC First Nations may have an opportunity to significantly and tangibly influence lending. Even a simple premise that a key lending factor on assessing FPIC would include evidence of a legally binding agreement with the affected First Nation could have important sway.

PART 6

Recommendations

IT IS ACKNOWLEDGED FROM THE ONSET that these recommendations can only be the beginning, so we have separated the suggestions into two categories: First Nation-specific and Economic Policy Working Group. First Nation-specific recommendations deal with more on-the-ground immediate suggestions for projects directly in front of the community. The Economic Policy Working Group is generally a call for further discussion with informed advisors and leaders to develop higher level policy change and legal reform. We need to advance, work on the ground and work with industry associations and Crown Governments.

First Nation-specific:

This Paper offers the following suggestions for consideration of First Nations:

- Development of a community specific protocols for dealing consistently with Project Proponents;
- Consider hiring specialized legal counsel, negotiators, financial advisors and other consultants through a request for proposals ("RFP") process to ensure you have the right advisors with industry-specific experience;
- Establishment of a clear line of authority between Council, negotiation team and appropriate staff;
- Development of a suite of template agreements for negotiations with proponents: (1) engagement agreement – setting out capacity funding for negotiations and phased negotiation; (2) memorandum of understanding for preliminary phases of development (i.e., exploration – mining; pre-construction – pipelines; surveying – forestry, etc.); (3) traditional knowledge protocol – project specific traditional knowledge study; (4) if appropriate, environmental assessment funding agreement; (5) equity investment/participation agreement; and (6) comprehensive socio-economic participation agreement/impact benefit agreement;
- Engagement and requirement of a parallel government-to-government agreement, including consideration of a capacity funding agreement and resource revenue sharing agreement;
- Perform due diligence to determine if other First Nations have engage the same proponent and are willing to information-share their general experience, strategy and lessons learned (try not to reinvent the wheel); and
- Ask for a second opinion on negotiated agreements (if possible), our own peer review is invaluable.

Economic Policy Working Group

This Paper suggests the establishment of BC First Nation Economic Policy Working Group to further consider the following proposals:

- Development of regional workshops directly with Leaders and negotiators in communities to create dialogue and information-sharing within and among Aboriginal Nations;

- Corporate Social Responsibility Licences actually issued by an Aboriginal authority;
- Legal reform of applicable legislation to require negotiated impact benefit agreements with Aboriginal Peoples;
- Legal reform to consider the creation of an economic accommodation/impact benefit agreement facility that could act as a mediator or arbitrator to assesses socio-economic consultation and accommodation commitments;
- Legal reform to consider the development of a labour law model for impact benefit negotiations to ensure:
  - Good faith negotiations;
  - Certification of the appropriate negotiating parties;
  - Alternative dispute resolution mechanisms available to all Parties during negotiations and in the implementation of IBAs;
  - Establishment of decision-making bodies where both Parties are equally represented (one First Nation appointee, one industry or Crown appointee, and one neutral third party);and
  - Capacity to penalize Parties for contravention of IBAs, including termination of licences, permits, etc.
- Third party financial analysis of proponent to determine economics of project and the most viable economic accommodation benefits and opportunities;
- Lobbying campaign of entities such as major financial institutions, Vancouver Board of Trade, Canada Board of Trade, Chambers of Commerce, BC Business Council and others to develop appropriate credit risk assessment principles that include the requirement for free, prior informed consent of Aboriginal Peoples in natural resource projects.

PART 6

Concluding Remarks

ABORIGINAL PEOPLES HAVE ALWAYS HAD WEALTH in resources and understood economies within our societies. Barter, trade and other economic activity are fluid and dynamic practices. It is said by a very wise colleague of mine often that "economic development is our new hunting". He also shares that economic opportunities are just a "licence to hunt". It is up to each of us to draw upon our wisdom, perseverance, knowledge and infinite skills to deliver the wealth of our Territories to our Peoples. When anyone looks to hunt in any new Territory, they always look for local traditional knowledge of the region and this is an invaluable asset and advantage we will always have. Now is the time for our Nations to use our advantages to their fullest. If there is a time, it is now.

This Paper has touched on some key themes throughout. We have highlighted that Aboriginal Title and Rights have dual strengths. First, the Courts have acknowledged that we have economic Aboriginal Rights, in some cases commercial in nature. Second, there is an "inescapable economic aspect" to all Aboriginal Rights when determining appropriate and equitable accommodation. Like any fighter, we must use both of our strengths.

Another dual theme in this Paper is that First Nations take a position that equitable-sharing of the benefits derived from our resource will require both: (1) resource revenue sharing with the Crown and (2) profit and benefit sharing with the Proponents. One solution will not solve the true equity sharing problem. Since the Crown has primary responsibility for accommodation, clearly, we must not allow it to continue to delegate all responsibility to third parties. It is illegal and both First Nations and industry should call them on it. Since industry has been delegated a significant proportion of the on-the-ground consultation/accommodation obligations and, honestly, will achieve the greatest economic benefits of a successful project, they also must share. In this economic context, we should perhaps be evolving away from both "rights holder" and "stakeholder" language and start using the term "equitable shareholder". Aboriginal Peoples equitably deserve our fair share.

Finally, there is work beyond this Paper that must be further explored by experienced leaders and specialists that are literally in the battlefield. Our recommendations reflect this simple wisdom, we must share information among ourselves more readily to lift each other up. Think of our journey as mountain climbing, when you are above you offer your hand to the person below to pull them up with the clear expectation that they will do the same. Aboriginal Peoples will not achieve our great potential soon enough for this generation if we do not act collectively and lift each other up.

We have a great deal of resistance against our success, but we remain here with eternal wisdom strength. Now, let's get hunting.

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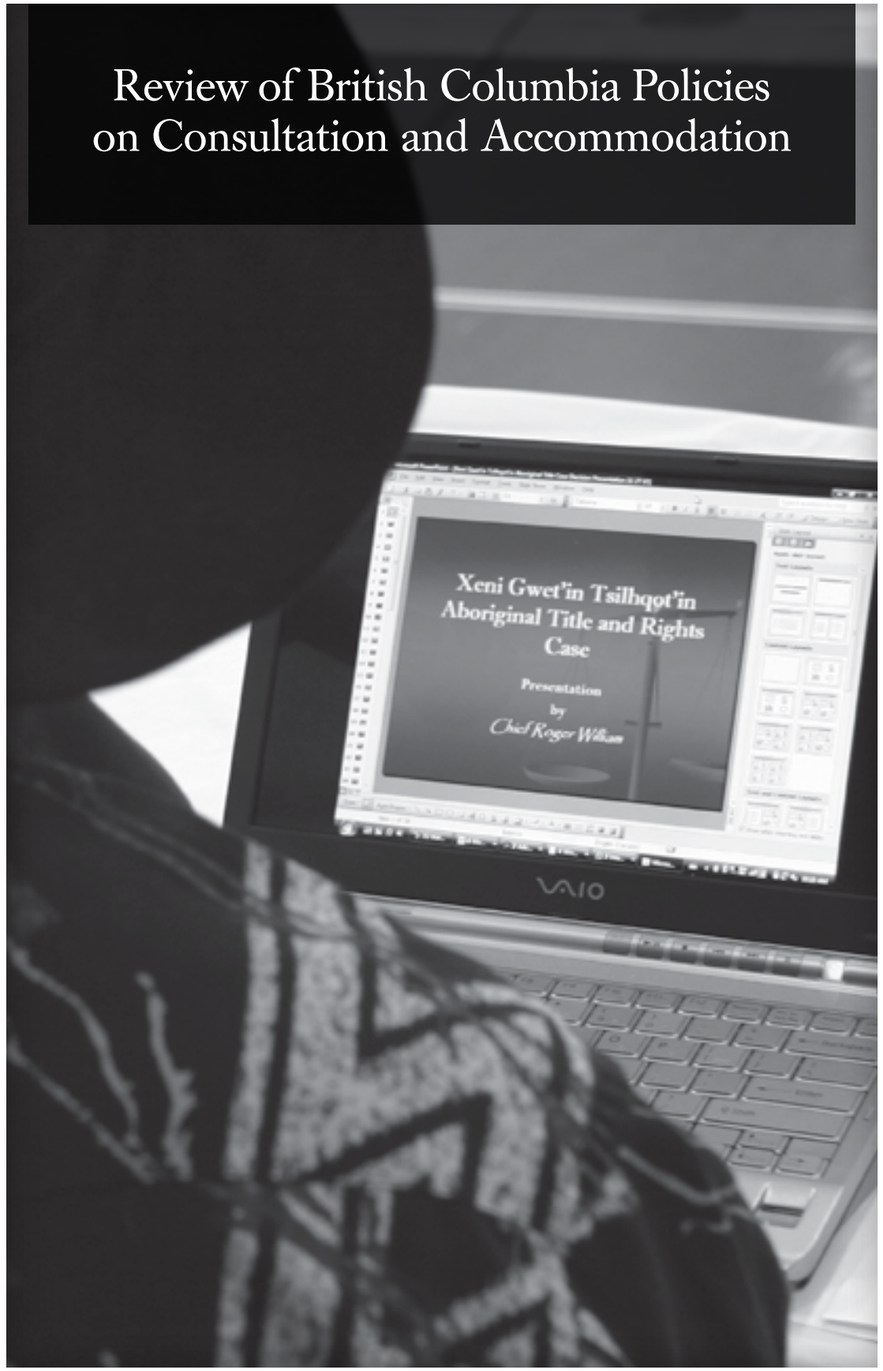

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Introduction

IN THE EARLY 1990's, BRITISH COLUMBIA began developing written policies on consultation and accommodation with First Nations. Since that time, British Columbia's policies have been updated, supplemented, or changed on numerous occasions, typically in reaction to court decisions.

This document analyzes the main features and elements of almost two decades of policy development by British Columbia, and identifies themes and strategies for First Nations developing and implementing their own consultation approaches and policies. As the analysis illustrates, there has been a relatively consistent approach to policies of consultation and accommodation in British Columbia over these two decades. As a whole, British Columbia's policies have been narrowly focused, legally reductionistic, procedural and not substantive, and focused on preserving the status quo. The one statement that clearly breaks that pattern – the *New Relationship Vision* (2005)[1] – has never been meaningfully implemented, and is currently the focus of an effort by British Columbia to redefine in a manner more consistent with the predominant policy pattern.

It is time for a serious change to British Columbia's approach to consultation and accommodation policy development, and to place a focus on the development of policies that will advance the long-awaited and required reconciliation. First Nations can spur this advancement by developing and implementing their own policies and strategies that move towards that goal.

1 It is important to note that the Province never formally adopted the *New Relationship Vision* as a policy. This is one reason for it never having been implemented and applied consistently.

A Note on the Role of Public Policy

BEFORE DISCUSSING THE SPECIFICS OF POLICIES on consultation and accommodation, it is important to briefly consider public policy generally, as there are many different ways of understanding and defining the role and nature of public policy.

From an ideal standpoint, good public policy has the following elements and purposes:

Principles for action: Public policy should state the principles which guide government action with respect to a particular topic or subject matter. Public policy informs government actors, as well as the general public, about what course of actions they can expect from a government.

Responsive to a Challenge: Public policy is engaged with tackling, in a transparent and meaningful way, a particular challenge or problem. As such, public policy is best developed through consideration and engagement with those segments of the population that are most involved with that challenge.

Implemented and Enforceable: Public policy should be capable of consistent implementation and enforcement in a regularized and transparent manner. Only when implemented and enforced one truly measure if public policy is guiding government action as intended.[2]

While these elements represent some of the aspects of good public policy, it should be recognized that public policy is often developed in a range of ways, and for a range of purposes, and as such may not have these elements in coherent or meaningful manner. For example, sometimes policy may seem to be a label that is applied to what is being done, as opposed to being developed as a systematic response to a particular challenge.

Similarly, the purposes for which policy is developed may vary and result in widely different policies. For example, what is the purpose of policies with respect to engagement with First Nations in British Columbia? Is it to advance reconciliation? Is it meet legal standards? Is it to protect and advance a legal position? Is it to maintain (or change) the structure of government decision-making? Depending on how the purpose is defined a policy may look widely different.

As will be seen in the analysis below, British Columbia has made particular choices about why and how it develops policies on consultation and accommodation, which are quite narrow and not up to the broader challenges which policies on consultation and accommodation could and should address.

2 Some discussion of these different elements and aspects of public policy, as well as other ideas about public policy, can be found at *http://profwork.org/pp/study/define.html.*

A Short History of British Columbia Policies on Consultation and Accommodation with First Nations

POLICY HAS ALWAYS PLAYED A CENTRAL role in how British Columbia has engaged with First Nations. Of course, for much of the history since the entry of British Columbia into Confederation, Canada's twin policies of assimilation of Aboriginal Peoples and denial of the pre-existence of Aboriginal sovereignty have been the cornerstones of all Crown relations with First Nations. Detailed examination of the history of denial and assimilation has been well documented elsewhere, and is not repeated here. Simply stated, the policy of assimilation can be summed up in the following statement from Duncan Campbell Scott: "Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question." The policy of denial is an expression of the principle of *terra nullius,* rooted in the doctrine of discovery.

It was in the mid 1990's that British Columbia began to develop its own written policies regarding engagement with First Nations concerning lands and resources in the province. These written policies appeared after key court decisions (e.g. *Sparrow, Delgamuukw* at the Court of Appeal) and the commencement of the BC Treaty process in 1992.

A chronology of some illustrative examples of British Columbia's guiding written policies include:

1994 – Guidelines for Pre-Treaty Consultations with First Nations, Ministry of Environment, Lands, and Parks (*http://www.for.gov.bc.ca/hfd/library/documents/bib71628.pdf*)

1995 – Crown Land Activities and Aboriginal Rights Policy Framework (*http://www.portaec.net/library/firstnations/crown_land_activities_and_aborig.html*)

1995 – Procedures for Avoiding Infringement of Aboriginal Rights, Ministry of Environment, Lands and Parks (updated 2000) (*http://www.for.gov.bc.ca/hfd/library/documents/bib88213.pdf*)

1995 – Protection of Aboriginal Rights, Ministry of Forests 1998 – Consultation Guidelines (*http://www.portaec.net/library/firstnations/consultation_guidelines_septembe.html*)

2002 – Provincial Policy for Consultation with First Nations (*http://faculty.law.ubc.ca/mccue/pdf/2002%20consultation_policy_fn.pdf*)

2005 – New Relationship Vision (*http://www.newrelationship.gov.bc.ca/shared/downloads/new_relationship.pdf*)

2010 – Updated Procedures for Meeting Legal Obligations When Consulting First Nations (Interim) (*http://www.gov.bc.ca/arr/reports/down/updated_procedures.pdf*)

In addition to these guiding policies, there have been various operational guidelines for Provincial actors in different provincial ministries. Some of the earliest ones were for

forestry activity. As well, many government agencies have their own policies and procedures including, for example, BC Hydro and the Oil and Gas Commission. The Environmental Assessment Office also implements British Columbia's environmental assessment process, which is considered by British Columbia to meet the standard of "deep consultation" and to be a process through which duties to consult and accommodate will be discharged.

Currently, it is our understanding that there are three key documents guiding British Columbia. One of these, the 2010 *Updated Procedures,* is a public document that has been widely disseminated. There are two additional documents, one on *Accommodation Guidance* and one on *Preliminary Assessment.* The Province has rejected attempts by First Nations to access these documents, on the basis that they are internal only and protected by solicitor-client privilege.

In addition to written policies there are a growing number of agreements that contain provisions concerning consultation and accommodation, and as such illustrate aspects of the current approach and policies of British Columbia to engagement with First Nations. Key agreements which contain provisions on consultation and accommodation include:

Forestry Agreements (FRA, FRO, FCRSA)
(*https://www.for.gov.bc.ca/haa/FN_Agreements.htm*) (*http://www.newrelationship.gov.bc.ca/agreements_and_leg/forestry.html*)
Strategic Engagement Agreements
(*http://www.newrelationship.gov.bc.ca/agreements_and_leg/engagement.html*)
Reconciliation Agreements
(*http://www.newrelationship.gov.bc.ca/agreements_and_leg/reconciliation.html*)
Incremental Treaty Agreements
(*http://www.gov.bc.ca/arr/treaty/incremental_treaty_agreements/default.html*)
Economic and Community Development Agreements
(http://www.newrelationship.gov.bc.ca/agreements_and_leg/economic.html)
Modern Treaty Agreements
(*http://www.treaties.gov.bc.ca/treaties.html*)

Key Findings

THERE ARE A NUMBER OF INTERRELATED key findings about British Columbia's approach to policy on consultation and accommodation that illustrate the deficiencies of how British Columbia has approached, and continues to approach, the development of policy.

1. Provincial policy on consultation and accommodation has been developed as a reaction to court decisions, and not for other motivations or purposes

As is obvious from the policy chronology above, British Columbia began developing its distinct written policies on engagement with First Nations in reaction to the evolution of the law. It is important to remember this. Prior to significant First Nation victories in the courts, British Columbia was not engaging with First Nations or establishing formal policy on consultation and accommodation. Policy has been developed not as a choice, but because, in effect, it was forced by the evolution of the law. The purpose and motivation of provincial policies can be said to have always been to outline how government actors will meet obligations articulated by the courts.

The fact that policy has been developed as a reaction and response to the law is reflected in all of the policy documents from the earliest to the latest. For example, in the 1995 *Procedures for Avoiding Infringement* it is made clear at the outset that the document is interim and will change "as law in this area evolves" and that "these procedures reflect a balance between legal obligation to First Nations and the ministry's obligation to all people of British Columbia". Similarly the 2010 *Updated Procedures* are clear from the outset that it is "consistent with case law and legal advice as of April 2010 and reflects, in a practical manner, the requirements established by the courts".

This framing of the purpose of policy as being about meeting legal obligations is similarly reflected in how all of the policy documents from the 1990's until today contain somewhat detailed descriptions of the case law. Indeed, many of them read more like summaries of cases, and less like statements of policy.

Taken as a whole, the message of British Columbia's policies on First Nations engagement since the 1990's is almost entirely uniform and clear – 'we are doing this because the courts have told us to'. There is very little discussion of purposes, objectives, and goals, other than the discharge of basic legal obligations, and basically no mention of ethical, moral, historical, societal, economic or relational reasons for distinct patterns of engagement with First Nations. The overwhelming message to government actors, and to the public at large, is that the relationship with First Nations is fundamentally to be defined in legal terms, and the primary objective over all other things is to discharge legal obligations.

Interestingly, some earlier policy statements suggested a broader understanding of purpose than later ones. For example, the 1994 *Pre-Treaty Guidelines* opened with the words "The Province of British Columbia recognizes the principles of aboriginal title and the inherent right of First Nations to self-government. It is upon these principles that treaties and self- government agreements will be negotiated with aboriginal peoples". The *Guidelines* go on to state that "programs are also being developed, however, to meet the province's pre-treaty legal obligations and policy commitments. Acting on these

commitments will require a fundamental shift to a new way of doing business between the province and First Nations, involving enhanced participation in the decision-making processes and government". In contrast to this somewhat broad language and statement of principle, the 2010 *Updated Procedures* describe the evolution of provincial policy in narrow and legalistic terms.[3]

It should be noted that the one standout exception to this narrow, reactive and legalistic focus of provincial policy was the 2005 *New Relationship Vision.* While ostensibly it might be seen as a reaction to the Supreme Court of Canada's *Haida* decision, it stands wholly apart from other policy statements in terms of tone and content. As distinct from being a policy re- statement of basic legal requirements, it articulates in broader terms a vision of reconciliation, core principles, and general steps to be taken.

2. Provincial policy has been legally narrow and reductionistic, and not focused on achieving important goals that the law identifies

It need not necessarily be a negative thing that the purpose of British Columbia's policies is framed primarily in legal terms. However, British Columbia's policies are not only legally focused, they are legally reductionistic. They focus narrowly on certain aspects of the case law, while paying little or no attention to certain legal fundamentals.

All of the policies – with the exception of the 2005 *New Relationship Vision* – identify that there are legal obligations to consult to be met, and the policy provides details of how a government actor should engage in consultation. Generally speaking, the policies describe the steps that should be followed in consulting, and the kind of analysis to be done at each stage up until the government renders a decision. The analysis required, as to be expected, involves identifying Aboriginal title and rights that may be infringed, the degree of potential impacts, and to consider what accommodation measures may be required, if any. The importance of documenting each step is also highlighted in various ways. As the 2010 Updated Procedures states "to demonstrate completeness and integrity of the process, maintain detailed records documenting actions and outcomes for each step."

One would expect many of these elements to be contained, in one form of another, in a policy on consultation. But when these are the primary content of a policy on consultation the impression left is a significant distortion of the law, and what must actually be done in order for the law to be upheld and honored.

The purpose of the enshrinement of Aboriginal title and rights in s. 35 of the *Constitution* is aimed "at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory."[4] Such reconciliation is a not a procedural or formalistic legal goal. It "is not a final legal remedy in the usual sense". It is a "process" that must engender a "mutually respectful long-term relationship" between Aboriginal and non-Aboriginal Canadians. As one Justice has described, the vision of co- existence we are working towards is one that acknowledges and reflects that "aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort".[5]

This consideration of the fundamental foundation and purpose of the law of section 35 of the Constitution is an essential backdrop to the duties of consultation and accommodation. It reminds us that these duties exist as one element and aspect of a much larger and significant enterprise. They are not an end in themselves, but one important means for advancing the fundamental purposes of honourable reconciliation. The mechanics of how to consult and accommodate should not and cannot be understand apart from a substantive understanding about how they are to be a means towards broader goals. Yet, this is precisely what provincial policies have done. In reading them, one is provided almost no clarity or guidance about the ultimate objectives and goals of the duties to consult and accommodate. The policies are formal, mechanistic, and procedural. They are without substantive guidance about "why" government actors must do certain things, and the reality that "why" they are doing them has real implications for "how" they will be done. The policies are an attempt to write 'how-to' manuals, while failing to provide an description of what the end product might look like when the important work of reconciliation has significantly advanced.

Indeed, when policies turn their attention to themes such as relationships and reconciliation they do so in a misguided way. For example, the 2010 *Updated Procedures* say under the heading "Reconciliation of rights and interests" that the "Province wishes to reconcile the respective Aboriginal interests of First Nations communities and government's other objectives". That is not the meaning of reconciliation as used by the Courts. Further, policies have sometimes been on their face dismissive of First Nations views and perspectives – including by portraying them as extra-legal, and as such illegitimate – thus sending the message to government actors to be dismissive of the First Nation perspective when engaged in consultation. For example, the 1995 *Ministry of Forests Policy* states:

> First Nations' view of aboriginal rights often differ from that of the Provincial Government. Many First Nations view aboriginal rights as rights which have existed since time immemorial that will continue irrespective of court decisions. The First Nations' view of aboriginal rights may include the land itself, as the use, ownership, jurisdiction and sovereignty over their traditional territory.
>
> The following is the government's view as defined by court decisions and constitutional obligations.

The risks and negative consequences of this approach to policy development are significant. It can create situations where – not being truly aware of the enterprise they are engaged in – government actors may significantly set-back progress towards reconciliation while following the steps and procedures outlined in a policy. Indeed, all First Nations across the Province likely have examples of how government following of policy and procedures on engagement set-back the cause of reconciliation (in some cases for years), by damaging or otherwise breaking down relationships, trust, and communication. Unmoored from clear and detailed guidance on why government actors are engaged with First Nations (other

3 The *Updated Procedures* state: "In 1995, the Province developed its first aboriginal rights policy in response to emerging aboriginal case law requiring the Province to avoid or justify infringements of aboriginal rights, where such rights were determined. The evolution of aboriginal law necessitated several amendments to the policy with the last amendment in 2002. Significant developments in case law, most notably the 2004 Supreme Court of Canada decision in *Haida*, have since expanded the Province's duties to consult regarding claimed but not yet proven rights and where appropriate accommodate those."

4 Para 80, *Delgamuukw* (***http://scc.lexum.org/en/1997/1997scr3-1010/1997scr3-1010.html***)

5 Justice Binnie, para 129, Mitchell (***http://scc.lexum.org/en/2001/2001scc33/2001scc33.html***)

than the Courts said they had to) policies on consultation are empty shells with no necessary or direct connection to the ends the courts have said must be served.[6]

3. Provincial policy is aimed at preserving the legislative and operational status quo

The narrow legal purpose that has been used to define provincial policy is directly related to how such policies have been designed to maintain and preserve the province's legislative and operational status quo.

First Nations, reflecting Court decisions, have made consistently clear the view that legislative change is needed in order to align the Province's land and resources frameworks with section 35 of the *Constitution.* This reflects the reality that the current statutory regime has largely been enacted without consideration of Aboriginal Title and Rights, and as such that efforts at consultation and accommodation, and advancing processes of reconciliation, occur in a legislative context which complicates rather then facilitates real progress. Other than the ultimately aborted plan for recognition and reconciliation legislation in 2008 – 2009, the Province has resisted making much substantive legislative change. Indeed, provincial policies have been specifically contemplated and designed to 'fit' the duties to consult and accommodate within the status quo legislative regime, denying the reality that those regimes have evolved and developed in response to challenges and issues removed from that of section 35.[7]

This preservation of the status quo as a policy principle was made explicit in early policies. The 1994 *Guidelines* state at the outset "It must be emphasized that they [the guidelines] are for use within the existing legislative framework, for on-going decisions of the ministry". The 2002 *Policy* emphasizes as framing guideline the "need to streamline existing consultation processes and incorporate the consideration of aboriginal interests into Provincial land and resource use decision-making", clearly implying that already by 2002 a focus was on limiting consultation processes so that they could fit even better within the existing regimes.

In some instances, such as the 1995 *Procedures,* statements are made which come close to explicitly saying that the consultation that takes place will be shaped by the demands and frameworks that govern the rights of non-aboriginal people:

> It is the policy of the Ministry of Environment, Lands, and Parks to avoid, mitigate or justify infringement of aboriginal rights when carrying out its mandated responsibilities, in a manner which is timely and considerate of the rights of non-aboriginal people in the province.
>
> –Given the volume and complexity of activities undertaken or authorized the ministry will apply risk management in decision-making processes in implementing this policy;

Perhaps most notable, and shameful, is how the one statement which clearly sought to break through the status quo – the 2005 *New Relationship Vision* – has been co-opted, re-defined, and appropriated by the Province so as to now mean the status quo. This tactic is made offensively apparent in the 2010 *Updated Procedures* where through sleight of hand the *New Relationship Vision* is equated with the Province's reductionistic and formalistic interpretation of case law concerning the duties to consult and accommodate. The Procedures say that "the duty stems from court decisions and is consistent with the Province's commitment to building a new relationship with First Nations" that "the goal of this document [the Procedures] is to facilitate the Province's compliance with case law while fulfilling the vision of a new relationship". The 2010 *Updated Procedures* positions the *New Relationship Vision* as outside, apart, and irrelevant to what government does on a day to day basis when it consults with First Nations. Of course, the New Relationship Vision did not draw this distinction. It articulated a set of far-ranging principles to guide, amongst other things, working with First Nations towards "establishing effective procedures for consultation and accommodation". Yet the 2010 *Updated Procedures* were unilaterally developed, do not reflect the principles of the New Relationship, and continue the pattern of all previous government policies with no demonstrable change.

4. Provincial policy is primarily procedural and not substantive

The main focus of provincial policies is to provide guidance about procedures government actors should follow when engaged in consultation. These come with varying levels of specificity. The 2010 *Updated Procedures* outlines a four stage process, presented as a flow chart with a set of steps. Some of the more operational level guidelines are more prescriptive in various ways. For example, the 1995 *Procedures for Avoiding Infringement* sets a general target timeline of 60 days for the assessment of potential infringements. Other Ministry specific guidelines or operational policies often include a series of targeted timelines for each step in the process.

Contrary to the significant focus on procedure, there is far less discussion and explanation of the substance of what the outcomes seeking to meet the duties of consultation and accommodation may be. Whereas discussion of procedure is detailed, specific, and often prescriptive, discussion of accommodation is often general and vague. For example, the 2010 *Updated Procedures* describe the substance of accommodation only through a list that states that "practical" accommodation measures include mitigation, avoidance, proposal modification, commitments to take other action, and a spectrum of land protection measures. It also states that proponents may be in a better position to provide solutions than the government, and that "In certain situations, economic or financial accommodations may be considered where mitigative measures are insufficient and there is a reasonable probability of permanent or ongoing infringement of a strong rights claim involving title or an economic component. Higher level provincial authority may be required in order to proceed with certain accommodations, particularly economic or financial accommodations."

In addition to providing only general statements about accommodation, policies include a number of other types of statements that are used to minimize the substance

6 It is also interesting to note what statements from Court decisions the Province chooses to emphasize in policies. For example, the 2010 *Updated Procedures* has a number of "pop-up" quotes from Court decisions. The first quote that is highlighted in this way is the following statement from the British Columbia Court of Appeal in *Halfway River,* paragraph 161: "There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them." It is quite revealing that of all judicial statements regarding the Crown's obligations to consult and accommodate Aboriginal Title and Rights the Province would choose this quote as the first one to highlight in the 2010 *Updated Procedures.*

7 The issue of the scope and nature of legislative change that might be required to fully shift Provincial conduct is a matter beyond the scope of this paper. However, it is observed generally that changes in policy alone can create some improvement and progress, but at the same time there is need for legislative change in order for progress towards reconciliation to be made in some contexts and matters.

of accommodation. One consistent theme in this regard, which was noted earlier, is the consistent highlighting on balancing interests that runs throughout British Columbia's policies. This continues today – the 2010 *Updated Procedures* state when defining the duty to accommodate "balance and compromise are important – the Crown must balance concerns regarding potential impact of the decision on the Aboriginal Interest with other societal interests." While the concept of balancing reflects aspects of the established law, it is a naked statement when not put in the context, as the Court does in the *Haida* case, of the principle of the honour of the Crown: "The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake." This requirement to act honorably stems from the reality that "To unilaterally exploit a claimed resource during the process of proving and resolving the aboriginal claim to that resource, may be to deprive the aboriginal claimants of some or all of the benefit of the resource. That is not honourable." There is no discussion or explanation of the "honour of the Crown" in the 2010 *Updated Procedures*. The term is only used once.[8]

Another example is how British Columbia policies continue to consistently avoid the relationship between compensation/economic measures and accommodation. This is true in pre-Haida policies, such as the 1998 *Guidelines* where it states that "it is the Province's view that compensation is the exclusive responsibility of the federal government". It is also true in the 2010 *Updated Procedures* where it states "The courts have not been clear on whether economic or financial accommodations are legally required before aboriginal rights or title are proven. The Province has been found to have fulfilled its duty to accommodate in the absence of providing such financial or economic benefits. In certain situations, however, it may be reasonable to offer financial or economic benefits to accommodate Aboriginal Interests. For further guidance please see *Accommodation Guidance.*"

One last element of the Province's policy focus on procedure that should be highlighted is the issue of the role of proponents or other third parties in the consultation process. It is generally understood that the law permits the delegation to third parties of some procedural (not substantive) aspects of the Crown's duty to consult. At the same time however, the duties to consult and accommodate are Crown duties, and it is the Crown that must act and discharge them. The Province's approaches to consultation have generally emphasized a utility of delegating as much procedural responsibilities as possible to third parties.[9] This is perhaps seen most clearly in the Province's environmental assessment process which has as part of the core of its design significant requirements placed on proponents to engage with First Nations, including through the issuance of formal orders outlining what a proponent must do. At the same time, Crown actors within the environmental assessment process have limited mandates to engage with First Nations on substantive issues of accommodation.[10] While the law allows some element of procedural delegation to third parties, there is a difference between something being permissible, and something being appropriate, desirable, or meaningful. For many First Nations, proponent driven processes create perceived and real obstacles to undertaking the type of dialogue and engagement required with the Crown to advance processes of reconciliation.

In summary, within Provincial policy there is a disproportionate focus on procedures for consultation, and based on what is available publicly, a de-emphasising of the nature and content of accommodation. This would appear to reflect a larger strategy and approach of the Province to focus as much attention as possible on procedures, and documenting procedures, rather than the real work of substantively finding new ways for the Province and First Nations to interact and make decisions together.

5. Agreements largely reflect, and have not significantly changed, the provincial policy approach and focus

In recent years, there have emerged some agreements between First Nations and the Province concerning consultation and accommodation. In general terms, these agreements do not signal a clear break from the provincial policy approach. There may be some agreements that are beginning to work out some substantive matters related to reconciliation which meet the interests of those First Nations involved. But to the degree that agreements deal with the duty to consult and accommodate, reports from First Nations indicate that the Province's approach continues to largely reflect the general policy approach.

This is most clearly evidenced in a principal focus of the Province's model of "Strategic Engagement Agreements" to achieve agreement on prescribed consultation timelines, steps, and categories which the Province and First Nation will follow. This prescribed, and now agreement based approach, is ideally expressed for the Province through a "matrix" which predetermines what has to be done with respect to consultation on any particular type of government decision. These matrixes are typically organized around categories of statutory decisions. Different statutory decisions are agreed to require different levels of engagement, including different timelines. The procedures for dealing with a referral are often outlined in significant detail, including how letters will be exchanged, on what intervals, and to whom. While such prescriptive and routinized approaches to engagement can have some benefit for some First Nations, in many respects it is also a more detailed expression of the government's policy effort to maintain the organizational and legislative status quo of how the government makes decisions. They tend to focus on streamlining and routinizing the Province's existing referral system, and providing capacity and structure so that referral system can proceed in a context of procedural certainty.

It is worth noting that to date the Province has worked very hard to insulate the Province's environmental assessment process from being in any way impacted by agreements with respect to consultation and accommodation. This reflects the government's position that the current environmental assessment process reflects the highest standard of "deep consultation that may ever be required for a project, and is too high a standard for any

8 The *Updated Procedures* state: "In addition to negotiated reconciliation processes between First Nations and the Province, legal consultation and, where appropriate, accommodation obligations need to be fulfilled by the Province in a manner consistent with the "honour of the Crown". To this end, the Province has updated its procedures to establish effective practices for consulting and accommodating. The Province intends to apply these procedures to assist with a more consistent approach to, and fulfillment of, legal obligations by provincial decision-makers." In addition in a pop-window in the *Updated Procedures* there is one quote concerning the Crown's honor from the decision of the Supreme Court of Canada in *Taku,* paragraph 24:" In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)." The *Updated Procedures* also state generically that "The Province must act with honour and integrity when dealing with First Nations."

9 While not reviewed in this paper, there are questions to be considered about what the legal line is between permissible and impermissible delegation of procedural aspects of the duty to consult, and how this relates to current Crown practices.

10 It has been reported that Provincial actors sometimes refer to the Province's environmental assessment process as the "proponent's process". For some this deepens perceptions that the environmental assessment process is not structured to encourage or facilitate meaningful Crown-First Nation consultation and accommodation.

other decisions other than mega-projects that trigger the environmental assessment process. In recent years, the Province, along with the Federal Government, has advanced a vision of "one project, one assessment" which would see intensive harmonization between the Provincial and Federal governments in conducting environmental assessment. With the passage by the Federal Government of Bill C-38 harmonization has now reached the next stage, where in many instances there will only be a Provincial environmental assessment, and in the few cases where there are both Federal and Provincial environmental assessments, the processes will be significantly aligned. The exact details of the implications of Bill C-38 for how the Province will conduct environmental assessment remains uncertain at this time. However, given the more leading role the Province will play, as well as the Province's long-standing position that its process represents the apex of deep consultation, it would not be surprising to see the Province even further entrench its current model and approach of consultation through the environmental assessment process, and continue to resist significant changes whether through agreements or otherwise.

There have, of course, been agreements with financial elements with the Province - most notably with respect to forestry (Forest and Range Agreements and later versions) and mining (e.g. Economic and Community Development Agreements). To date, the following general observations can be made about the Province's approach to financial agreements.

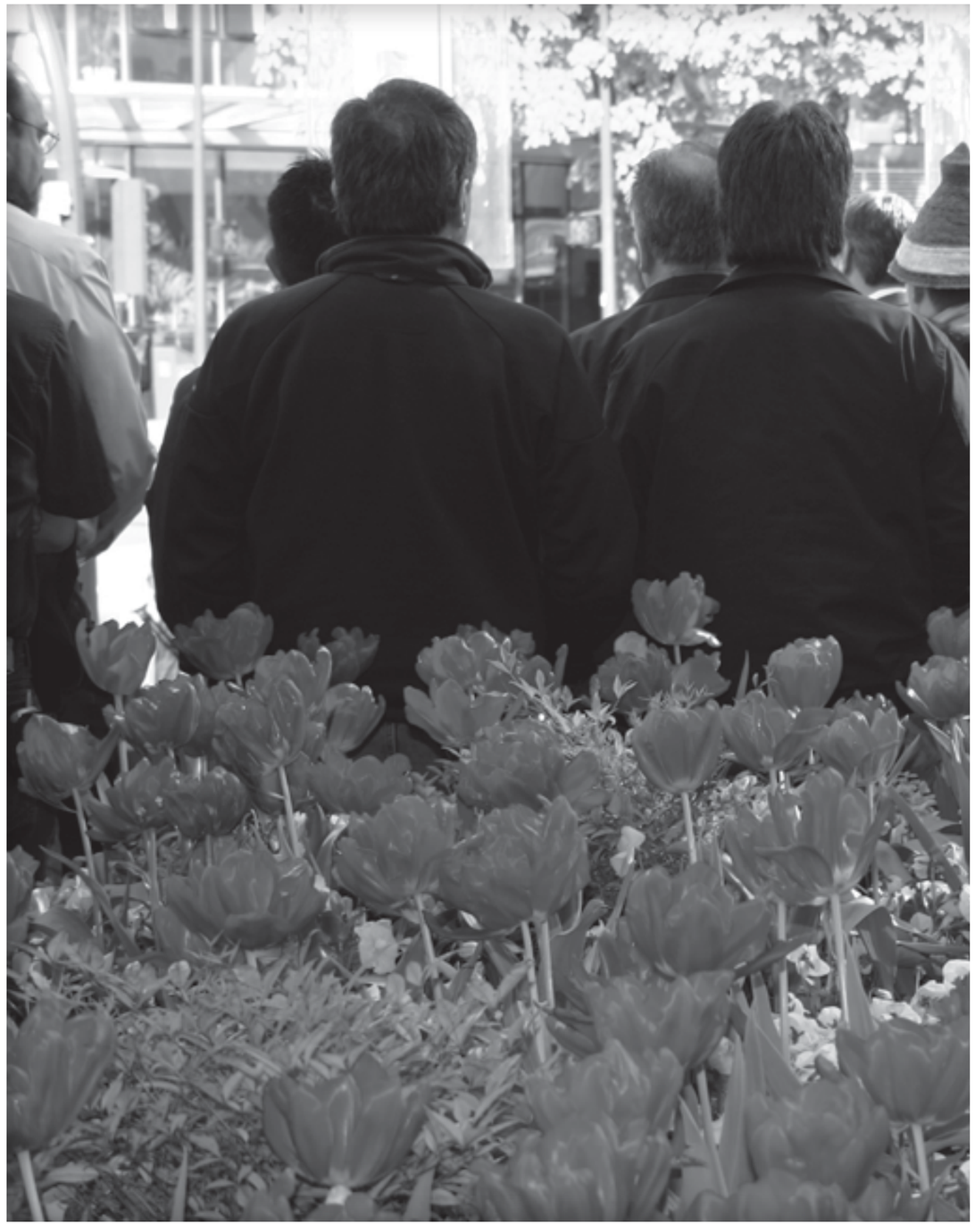
First, the Province continues to try to maintain the position that economic measures are not an element required for accommodation. For example, in ECDA discussions it has been reported that the Province insists that the financial offer of revenue sharing is not accommodation. At the same time, however, in the agreements they require acknowledgements and releases from the First Nation that accommodation has been provided.

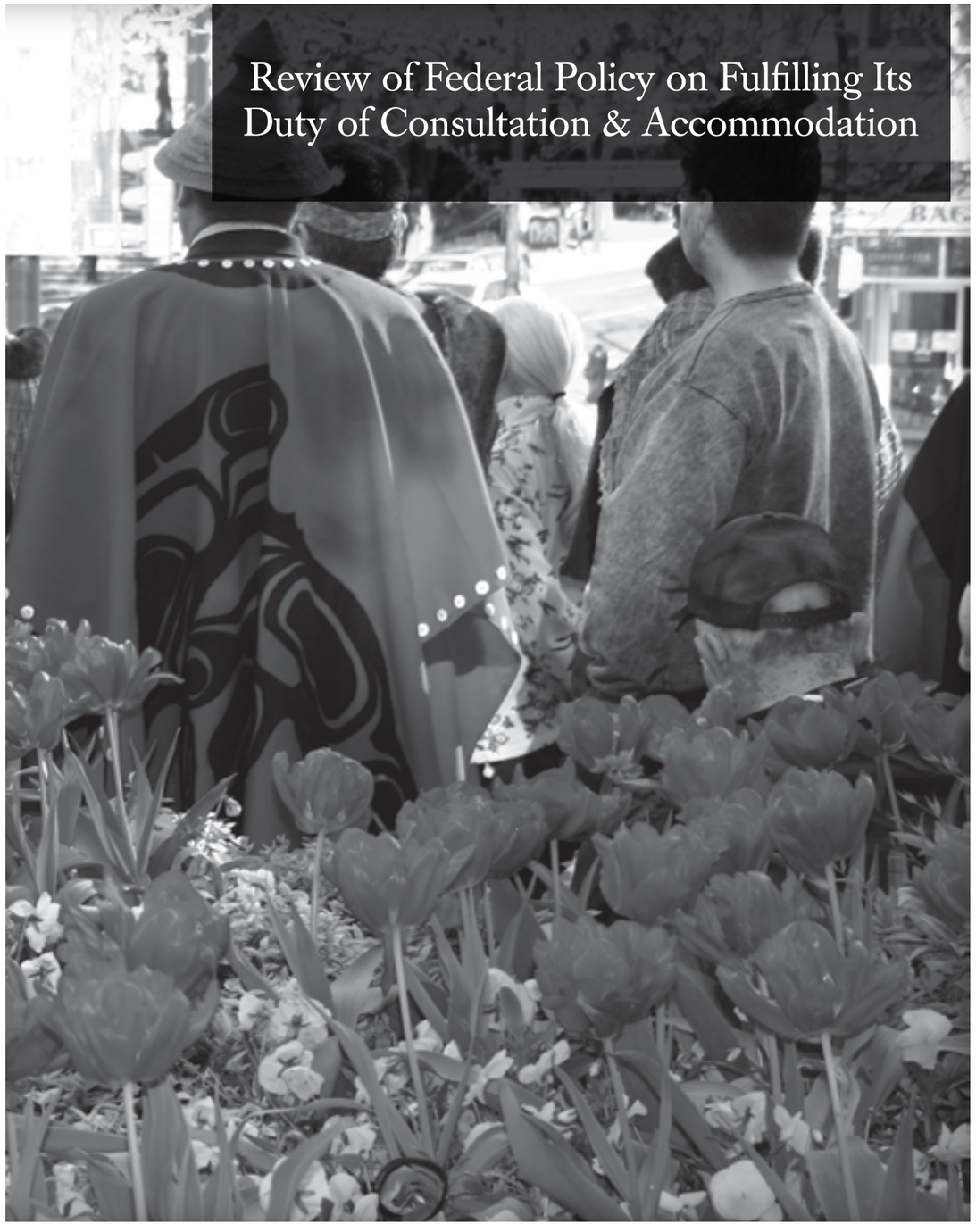
Second, the motivation for financial agreements is driven not by principles of accommodation for infringement of Title and Rights, but the desire to drive forward resource development in certain sectors in a certain manner. The initial focus on forestry, and now mining, is an expression of the Province's economic needs and interests, and not of a vision of reconciliation with First Nations.

Third, financial agreements and measures have basically been driven by a "take it or leave it" model. Financial policies for revenue sharing have been developed internally and unilaterally based on assessments of what the government is willing to pay, and not a principled assessment of Aboriginal Title and Rights considerations.

Conclusion

As the key findings illustrate, there is a remarkable level of continuity throughout the history of British Columbia policies on consultation and accommodation. While the evolution of the law necessitated the development of policy on engagement with First Nations, the continued evolution of the law has not resulted in significant changes to the purpose, goal, and content of provincial policy. If provincial policy is going to take a real step towards meeting the "fundamental objective" of reconciliation, it must undergo a fundamental transformation. This requires a focus on the development of policy rooted in a vision of where the Crown and First Nations wish to go in the future - as distinct from the current approach which is primarily focused on preserving where the Crown is currently.




Review of Federal Policy on Fulfilling Its
Duty of Consultation & Accommodation

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PART 1

Introduction

THIS PAPER DESCRIBES THE GOVERNMENT OF Canada's policy approach to addressing its obligations as the federal Crown in relation to its dealings with Aboriginal people, including a review and discussion of:

- The "Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult" (March 2011);
- Announcements in relation to the 2012 Budget and related *Jobs, Growth and Long-term Prosperity Act;*
- Federal consultation policy, procedures and bodies as they relate to or arise out of the April 2012 *Responsible Resource Development Plan;* and
- Departmental policies and approaches (e.g. Major Projects Management Office, Canadian Environmental Assessment Agency, Department of Fisheries and Oceans).

Generally speaking, the federal government has largely addressed its-obligation to consult through its environmental assessment (EA) process, similar to the Province, even though this process was not developed with the Crown's constitutional duties to First Nations in mind. It was not until 2008 that it released an interim set of guidelines for meeting its duty, with updated guidelines being release in 2011.

It is **important to note** here at the outset that the Government of Canada's current approach to meeting its legal obligations to Aboriginal people is currently in a state of flux, as the Government moves to implement substantive legislative and policy shifts regarding major resource development. In particular, the Conservative Government recently announced its Responsible Resource Development policy agenda and passed the corresponding *Jobs, Growth and Long-term Prosperity Act* (formerly Bill C-38).

These developments mark a major shift in federal policy and legislation, with far-reaching, substantive and yet unfolding implications. As a result, response by many Canadians has been swift as public interest groups, private sectors and concerned citizens have decried the federal government's aggressive approach, lack of appropriate consultation, and blatant disregard for democratic processes.

Aboriginal people, in particular, have sounded the alarm on the federal Crown's marked departure from processes that are legally required and that form a crucial part of the constitutional fabric of Canada. For example, an immediate result of these legislative changes is federal abdication of regulatory responsibility in washing its hands of nearly 500 EAs of projects in BC (and apparently offloading regulatory responsibility to the Province), while at the same time increasing decision-making at the Ministerial and Cabinet levels with respect to major resource projects. Further substantive changes to the *Fisheries Act* are set to be in force in the near future as well. All this was done without any consultation with First Nations.

As such, this paper discusses the federal approach to its duties of consultation and accommodation as at the time of writing. With the government now developing regulations to implement the new legislation, and in anticipation of further omnibus bills in fall 2012[1] the federal approach may change substantially in the near or foreseeable future.

1 All indications are that the federal government will present another omnibus bill during the fall 2012 sitting that may address issues such as species at risk. This is significant in light of litigation launched on September 26th, 2012 by public interest environmental organizations against the federal government regarding the protection of species at risk along Enbridge's proposed Northern Gateway pipeline route.

PART 2

Historical Themes of Federal Aboriginal Policy

BROADLY SPEAKING, FEDERAL CROWN POLICY TOWARD Aboriginal peoples in Canada since early contact has evolved through the following related "themes":

- Military alliances and trade relations (Early contact),
- Treaty making as independent sovereign nations (1700-1800s),
- Colonization through attempted integration and assimilation (i.e. "kill the Indian in the child" through) (late 1800s-1990s),
- Abdication of federal responsibility and deference to provinces (1990s-2012),
- Denial of Aboriginal title and rights prior to "proof' (1990s-2012), and
- Federal attempt to "occupy the field" on major resource development, increasing Cabinet decision-making while abdicating regulatory responsibility (2012).

While it is beyond the scope of this paper to go into detail about these themes, it is important to understand that the federal government's policy toward Aboriginal people has largely been negative and paternalistic in recent history, and driven by the underlying notions of the Doctrine of Discovery and that the lands were *terra nullius.* Any federal policy shifts to engage in consultation or negotiation processes has evolved largely not out of good will but, rather, in response to conflict and litigation. It was not until 2008 that the federal government had a stated approach regarding its duty of consultation and accommodation, many years after the Province of BC started developing its policies for engaging First Nations on matters related to land and resources.

PART 3

Guidelines for Federal Officials to Fulfill the Duty to Consult

IN NOVEMBER 2007 (THREE YEARS AFTER the SCC decisions in *Haida* and *Taku*), a federal Action Plan was announced in an attempt to demonstrate Canada's commitment to addressing issues around Aboriginal consultation and accommodation. As a result, a Consultation and Accommodation Unit was established within Indian and Northern Affairs Canada (INAC) in early 2008 to implement the Action Plan.

In February 2008, the federal government released its *Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult,* developed to provide general direction to federal departments and agencies when addressing common law requirements for consultation with Aboriginal peoples. The Interim Guidelines were later updated to respond to evolving case law. In March 2011, the government released the *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Legal Duty to Consult,* which apparently set out the government's current approach to fulfilling its legal obligations to Aboriginal people.

a. Overview of Federal Guidelines

The stated purpose of the Guidelines is to establish a "government-wide" approach and provide guidance to all federal departments and agencies for meeting Crown obligations. They are primarily concerned with department procedural practices in engaging with Aboriginal peoples and integrating the Guiding Principles and Directives within their day-to-day activities.

It is important to understand that the Guidelines *are informed by Canada's understanding* of the legal parameters of the duty to consult and accommodate. This means they often do not meet the standards of engagement expected by First Nations, who are increasingly measuring the adequacy of Crown conduct against the standards set out in the *United Nations Declaration on the Rights of Indigenous Peoples.*

The Guidelines are organized into the following sections:

- *Part A:* Overview, including the legal framework of the Crown's duty and the historical, geographic and legal contexts within which the duty applies;
- *Part B:* Directives to federal officials on how to "get ready" for consultation, including developing a department or agency approach and organizing internally; and
- *Part C:* Step-by-Step guide to designing and implementing a consultation process, from a pre-consultation stage through to the decision and follow-up.

Included are eight "Guiding Principles and Consultative Directives" that provide more direction to federal departments and agencies (discussed below).

The Guidelines are to be used in conjunction with other federal government policy and consultative tools, such as the Consultation Information Service and the Aboriginal and Treaty Rights Information System administered by Aboriginal Affairs and Northern Development Canada (AANDC, formerly INAC).[2] The Guidelines also make specific reference to scope and consultation obligations set out in modem day treaties.

Other aspects of AANDC's role are to help federal, provincial and territorial departments and agencies fulfill their duty to consult by:

- Providing policy direction on consultation practices, advising and supporting AANDC and other government officials;
- Delivering training and guidelines to federal officials;
- Developing partnerships with Aboriginal groups and organizations; and
- Increasing coordination within AANDC, with other federal government departments, provincial and territorial governments and industry.[3]

A review of other federal departments and agencies (e.g. Parks Canada, Environment Canada) reveal that the Updated Guidelines are referenced across government as the federal approach to consultation and accommodation. A few, such as the Canadian Nuclear Safety Commission (CNSC), attempt to build on the Updated Guidelines to some extent by elaborating on the Guiding Principles to establish project-specific consultation processes with Aboriginal groups to provide opportunities to have dialogue before a hearing process and to allow for community meetings.[4] The CNSC also draws linkages to the Canadian Environmental Assessment Agency process, implements a participant funding program, and includes information on consultation for licensees.[5]

Three departments or agencies that have particular roles in consultation, and which are especially impacted by the *Jobs, Growth and Long-Term Prosperity Act* include the Major Projects Management Office, the Canadian Environmental Assessment Agency and the Department of Fisheries and Oceans, each discussed later in this paper.

b. Key Findings

There are a number of findings about the Guidelines that illustrate how they fall short of meeting the high standards First Nations have come to expect based on law and international standards and opportunities missed by federal government to play a lead role in reconciliation on the ground.

2 The CIS is to act as a single window for providing information on the location and nature of established and potential Aboriginal and Treaty rights. It provides contact information of Aboriginal groups and their leadership, information on multipartite agreements, historic and modem treaties and their provisions, comprehensive and specific claims, litigation and other assertions. The CIS is responsible for maintaining the ATRIS, an electronic system which brings together information on the location of Aboriginal communities and information pertaining to their potential or established Aboriginal or Treaty rights. ATRIS provides information on claims processes and litigation and associates it with a geographic location or an Aboriginal group, increasing the accessibility of up-to-date, site-specific information on the rights of Aboriginal groups. ATRIS Version 1 was successfully launched in April 2011, and now federal officials across all departments and agencies have direct access to the system. ATRIS Version 2 is currently in development and will: provide access to all federal officials, provincial and territorial governments, and the public; access and display relevant consultation/section 35 data from other sources (e.g. provinces and territories; and develop enhancements to the system [e.g. geographic and reporting functionality]): *http://www.aadnc-aandc.gc.ca/eng/l 331832983717/1331833056925*

3 *http://www.aadnc-aandc.gc.ca/eng/1100100014649/1100100014653*

4 *http://nuclearsafety.gc.ca/eng/ea/aboriginal/, http: /nuclearsafety.gc.ca/ eng /lawsregs ld utytoconsult/index.cfm.* and *http://nuclearsafety.gc.ca/eng/pdfs/duty-to-consult/August-2011-Codification-of-Current-Practice-CNSC? Commitment-to-Aboriginal-Consultation e.pdf*

5 *http: /lnuclearsafety.gc.ca I eng/lawsregs /dutytoconsult/supplementary-information-August-9-2011.cfm*

1. The impetus for developing the Guidelines came from litigation, not from Canada's unique relationship with First Nations or political will

Much like the Province of BC, the federal government did not develop guidelines for implementing its duties of consultation and accommodation out of good will but, rather, federal policy for meeting the Crown's duties arose in response to a series of court cases.

An important contextual factor in considering the federal government's "role" in legal framework of consultation and accommodation is the fact that the federal government has exclusive jurisdiction, *vis-a-vis* provinces, in relation to "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867.* This gives rise to certain required standards of conduct that ought to compel the government to play a unique and central role in government-to-government relations with First Nations.

In particular, exclusive jurisdiction under section 91(24) and corresponding distinctive obligations to First Nations, which are guided by the honour of the Crown and include fiduciary standards, should lead the federal government to being proactive in developing and implementing law and policy in consultation with First Nations on the basis of recognition of and respect for First Nations' Aboriginal title and rights and governance rights. These could, in turn, set a standard for Crown-First Nation engagement across the country, much like the *United Nations Declaration on the Rights of Indigenous Peoples* sets standards for the enjoyment of Indigenous human rights around the world.

However, this unique constitutional relationship between the federal Crown and First Nations has not manifested in this way, and certainly not in the day-to-day land and resource use and managements issues faced by First Nations. Instead, the provinces have played a central role in determining the nature and scope of engagement with First Nations, often leading to conflict and uncertainty and the federal government's approach can reasonably be seen as "ad hoc" in many cases.

Generally speaking, the provinces have wider jurisdiction in relation to land and resource management than the federal government as a result of their powers over such things as property rights and management of public lands, and the fact that much of the land is so-called "provincial Crown land". Provinces therefore typically occupy the field of land and resource regulation to a greater degree than Canada.

What is problematic is that the Province governs on the assumption that it has perfected provincial Crown title and therefore exclusive jurisdiction of the land and resources. The Province largely ignores the fact it cannot benefit from "lands, mines, minerals and royalties" as a source of revenue unless and until the "burden" of Aboriginal title has been addressed. This is a constitutional limit on provincial jurisdiction under section 109 of the *Constitution Act, 1867*. While courts have confirmed that Aboriginal title continues to exist in BC, the Province nevertheless largely ignores this restraint on its powers. This serves as an example of a missed opportunity for the federal Crown, having jurisdiction in relation to First Nations and their lands (including Aboriginal title), to exercise its positive duty and influence provincial policy and behaviour to ensure all Crown obligations (federal and provincial) are met.

The federal government also has exclusive jurisdiction in other key areas – such as fisheries, navigable waters, and species at risk- that are critical to First Nations title and rights. These authorities, combined with federal jurisdiction under section 91(24), ought to result in exemplary policies for engaging with First Nations, consistent with the highest standards of the law and international principles. What we have seen, however, is the federal government largely 'absenting' itself even further from the daily, ongoing land and resource management, allowing provinces to assume these responsibilities.

Similarly, the federal government has failed to demonstrate leadership with provinces to ensure that legislation, regulations and policies are guided by appropriate and meaningful engagement with First Nations with regard to those areas of shared jurisdiction, such as the environment and transportation. Again, it has mostly offloaded or deferred responsibilities to the provinces.

The federal government has largely refused to exercise its unique authority under section 91(24) as means of taking a lead role to ensure that consultation and accommodation occur appropriately and to the highest standards across the nation. Instead, it has taken a lesser role, offering no direction to provinces on how the undivided Crown's duty is to be fulfilled, or to ensure First Nations' rights and interests are not overrun by provincial or industrial desires. Indicative of this is the fact the federal government has never sided with First Nations in litigation against provinces or companies, despite its fiduciary and unique constitutional relationship with First Nations.

2. The Guidelines are not driven to achieve "reconciliation" and therefore represent a minimalist approach to common law principles on Aboriginal and treaty rights and corresponding Crown obligations

The Guidelines are premised on the federal government's interpretation of the legal principles governing Aboriginal and treaty rights and corresponding Crown obligations. They are not "purposively" driven -that is, to achieve the purpose of reconciliation under section 35 -but, rather, are designed to minimize risk and federal exposure to liability in relation to potential conflict or litigation. The Guidelines make few references to reconciliation and, where such references are made, they are very narrow and focus largely on the notion of reconciling Aboriginal interests with "societal" interests.

The Guidelines articulate a very shallow understanding of what reconciliation really means, describing reconciliation as having two main objectives: a) the reconciliation between the Crown and Aboriginal peoples, and 2) the reconciliation by the Crown of Aboriginal and other societal interests. There is no elaboration on the complexities of these relationships, in particular the constitutional imperative of reconciling pre-existing Aboriginal sovereignty with assumed Crown sovereignty,[6] and corresponding restrictions on Crown title and jurisdiction pending reconciliation through treaties.

As such, this approach gives rise to deficiencies and missed opportunities. In particular, the Guidelines:

- Assume that the federal government has perfected Crown title and jurisdiction to take up and alienate lands and resources that are subject to Aboriginal title -there is no explanation that Aboriginal title is not extinguished and continues in BC and the consequent implications on Crown jurisdiction (i.e. that the Crown cannot unilaterally dispose of lands and that Aboriginal title has both governance and economic components);
- Effectively preserve the current *status quo* by preserving final decision making authority with the Crown and perpetuating Crown unilateralism (e.g. preparation of strength of claim and impacts assessments without First Nations input and verification);

6 *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, 2004 SCC 73, at para 20.

- Fail to provide useful guidance on determining the appropriate scope and content of the Crown's duty (i.e. applicable legal criteria for assessing different aspects of Aboriginal title and rights and potential impacts), a crucial aspect of ensuring the Crown engages in a meaningful and responsive manner;
- Do not commit to designing consultation processes with First Nations and suggest only that officials "consider" involving Aboriginal groups in the design of consultation processes;[7]
- Do not commit to providing funding to support First Nations participation in consultation and, instead, will "consider" requests for funding on a case-by-case basis;[8]
- Are not instructive on approaches to past grievances (e.g. past and ongoing infringements);
- Speak to "managing" Aboriginal consultation and accommodation rather than achieving genuine reconciliation through a constitutional relationship; and
- Misleadingly speak to "reciprocal duties" of Aboriginal people (i.e. to make known their concerns, share information, attempt to resolve overlap issues, and consider that they have no veto over a project), without acknowledging that: i) the obligations of Aboriginal people to participate reasonably depend on there being an adequate process in place to begin with; and, ii) there is no legal requirement for Aboriginal people to attempt to resolve overlaps and the Crown is not relieved of its duty because of a purported overlapping claim.[9]

3. The Guidelines appear to equate the constitutional nature of the Crown's obligations with government-made statutory and policy requirements

While the Guidelines acknowledge the Crown's obligations are required by section 35 of the *Constitution Act,* 1982, they also equally link the Crown's duties to statutory requirements and good policy.[10] They also appear to equate consultation with departmental planning exercises, where department policies, mandates and objectives are preserved, and "needs and operational realities" of the department are reflected.

The Guidelines fail to properly reflect and emphasize that consultation is a constitutional duty that is superior to any statutory obligation that cannot be sacrificed or constrained by procedural or administrative efficiency.[11] This distinction is important in situations where the statute or policy is inconsistent with the common law principles established by the courts. The government missed the opportunity to clarify and ensure that government decision-making processes are carried out first and foremost with the intention of substantially addressing Aboriginal concerns, beyond merely adjusting timelines or project scope.

7 Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines Federal Officials to Fulfill the Legal Duty to Consult* (March 2011) at p. 49.

8 *Ibid,* at p. 50.

9 Mandell Pinder, Analysis of Canada's Updated Guidelines to Fulfill the Duty to Consult, July 2011, with permission.

10 *Ibid.*

11 *Ibid.,* referring to *Nlaka 'pamux Nation Tribal Council v. BC (Environmental Assessment Office),* 2011 BCCA 78.

4. The Guidelines emphasize process over substance

Much of the Guidelines are focused on providing guidance on "step-by-step" procedures that departments and agencies can take to consult. These are guided by eight "Guiding Principles" which speak to: respecting potential and established Aboriginal and treaty rights by consulting with First Nations; assessing potential impacts to determine need to consult; consulting early to identify concerns and address them where appropriate; balancing Aboriginal and societal interests; ensuring a lead federal department; relying on existing processes; coordinating with partners; and, consulting in accordance with commitments and processes involving Aboriginal groups. So, even these "Guiding Principles" focus largely on procedural matters.

The Guidelines concentrate heavily on mechanical processes, such as documentation and managing the record of consultation. There is no guidance on making consultation a more iterative process, where the government and First Nations would come together to determine a mutually acceptable process on a government-to-government basis, with shared principles of respect and good faith. There is no guidance on approaching First Nations to determine culturally and politically appropriate protocol for engagement. For the most part, the Guidelines are a purely federal process, setting out what federal officials will do, without any anticipation that their processes may not be appropriate for, nor satisfy, First Nations. It is almost as though it is a one-sided "consultation" process where First Nations are simply the target audience. There is no mutuality embedded in the approach.

Underscoring this is the government's narrow understanding of what accommodation means. The government's view is that the "primary goal" of accommodation is to "avoid, eliminate, or minimize the adverse impacts on potential or established Aboriginal or treaty rights, and when this is not possible, to compensate the Aboriginal community for those adverse impacts." There is no mention of substantive opportunities for shared decision-making or revenue sharing as means for addressing First Nations' concerns and advancing reconciliation in a true sense.

5. The Guidelines emphasize the use of "existing processes" to meet Crown obligations

Overall, it appears that the federal government expects to meet its legal obligations to First Nations largely by following its "existing processes" (e.g. EA and other regulatory processes). It is inappropriate to rely heavily on existing processes that were not designed with the Crown's obligations toward Aboriginal people, and the legal nature and implications of Aboriginal and treaty rights in mind. This is particularly problematic in light of the recent replacement of the *Canadian Environmental Assessment Act* and amendments to the *Fisheries Act.* The ambiguity and confusion created by these legislative shifts increases the likelihood that the government will miss opportunities to engage in deeper, more meaningful consultation processes with Aboriginal people.

The Guidelines also encourage the use of processes that address department needs and realities, resulting in inconsistent messaging that the Guidelines represent a unified, "whole of government" approach. The reality on the ground appears to be that departments determine their own processes and receive "Directives", such as from the Department of Justice, on a case-by-case basis. This raises the question of how fully the Guidelines are actually followed by federal departments and agencies. It also means that First Nations cannot rely solely on the Guidelines as representing the government's complete approach

to consultation and that they must anticipate that other processes, requirements or factors may come into play with when they are dealing with individual departments or agencies.

6. Federal departments and agencies do not fully or consistently implement the Guidelines where they do provide useful direction

The Guidelines include potentially useful aspects or clarifications that, if implemented, could improve federal approaches to fulfilling its obligations – some of these speak to the deficiencies and missed opportunities discussed above and include:

- Clarifying that limitations on the mandate of any one department, agency or other federal entity will not limit what is required of the whole Crown in circumstances: this could help reduce bureaucratic red-tape and delays in efficient consultation;
- Acknowledging that funding may be required for consultation to be meaningful and that capacity funding should be made available for Aboriginal participation: this could be a valuable improvement if the federal government assured that funding will be provided;
- Acknowledging that consultation is required on strategic, high level decisions: if implemented, this could help ensure First Nations have input on critical decisions or processes affecting them; and .
- Acknowledging that accommodation is not limited to mitigation measures and may have a financial component: if implemented meaningfully, this could include negotiations of such things as revenue sharing and First Nations decision-making.

Unfortunately, experience to date is that federal departments and agencies do not regularly implement these provisions as broadly as possible so as to facilitate positive and constructive processes with First Nations.

7. The Guidelines perpetuate impoverished Crown approaches to Aboriginal and treaty rights and First Nations engagement and focus on minimizing Crown liability

In distilling the underlying Crown values and principles, the Guidelines suggest that attitudes have not changed very much and that the policy of "denial" of Aboriginal title and rights, and even treaty rights, is still very much alive in federal policy and processes. This demonstrates continued intransigence on the part of the Crown and the relentless impoverished view of Aboriginal title and rights and First Nations-Crown relations.

Arguably, the attitudes that prevailed during the eras of assimilation and integration also linger, with the notions that:

- The Crown has superior, perfected title and jurisdiction and Aboriginal title and rights are contingent on Crown verification,
- Reconciliation can only be achieved through extinguishment of Aboriginal title and,
- Aboriginal consultation and accommodation are issues to be "managed".

A key underlying goal of Crown policy is clearly to minimize Crown responsibilities, legal liability and risk through a papered consultation process.

PART 4

Federal Resource Development Agenda 2012

a. Responsible Resource Development Plan and Jobs, Growth and Long-Term Prosperity Act (2012)

The recently announced Responsible Resource Development (RRD) plan and Jobs, Growth and Prosperity Act (the Act), formerly known as Bill C-38, mark a major and drastic shift by the federal government in regard to its role in resource development, giving rise to uncertainties about its approach to fulfilling its legal obligations to Aboriginal people.

The RRD plan, announced by Minister Oliver in April 2012, is aimed at streamlining the review process for major economic projects to "prevent the long delays in reviewing major economic projects that kill potential jobs and stall economic growth by putting valuable investment at risk." It includes four related "themes":

- Making the review process for major projects more predictable and timely;
- Reducing duplication in the review process;
- Strengthening environmental protection; and
- Enhancing Consultations with Aboriginal people.

The RRD plan proposes several "program measures" to help "build more consistent, accountable, meaningful and timely consultations with Aboriginal groups, thus helping to reduce the potential for delays, legal risks and uncertainties for all parties involved." The government proposes the following measures to achieve this:

- Better integrate Aboriginal consultations into the new EA and regulatory processes;
- Provide funding to support consultations with Aboriginal people to ensure their rights and interests are respected;
- Designate a lead department or agency as a single Crown consultation coordinator for specific project reviews;
- Establish consultation protocols or agreements with Aboriginal groups to clarify what the expectations and level of consultation should be in project reviews;
- Negotiate memoranda of understanding with provincial governments to better align federal and provincial processes and improve the involvement of Aboriginal groups, project proponents and government organizations; and
- Promote positive and long-term relationships with Aboriginal communities in order to improve reconciliation and facilitate greater participation of Aboriginal people in the direct and indirect benefits of new resource projects.

The *Jobs, Growth and Long-Term Prosperity Act* (2012), known as Bill C-38, was an omnibus bill to amend, repeal, replace or establish a number of laws. In large part, the Act is intended to implement a "one project, one review" EA regime, as described in the federal RRD plan. The result is a significant focus on legislative and regulatory shifts related to resource development and management, largely benefiting industry and resource developers. Projects set to potentially benefit from the changes include: Enbridge's Northern

Gateway Pipeline, Kinder Morgan Pipeline Expansion, Taseko Mines Ltd.'s Prosperity copper-gold project, Liquid Nitrified Gas Projects (e.g. Kitimat), as well as facilitate the BC Government's resource development goals set out in the November 2011 BC Jobs Plan and the very recent May 2012 *British Columbia's Mineral Exploration and Mining Strategy.*

Major changes as a result of the Act include:

- Overhaul and replacement of Canadian EA process to facilitate a "One Project, One Review" regulatory process;
- Weakened Fisheries Act Protections for Fish and Fish Habitat;
- Weakened protections for species at risk;
- Facilitation of Pipeline and Other Major Resource Development Projects pipeline development (e.g. changes to National Energy Board, *Navigable Waters Protection Act,* and *Canadian Oil and Gas Operations Act);* and
- Increase Cabinet and Ministerial decision-making over major resource projects.

The amendments in the Act demonstrate the federal government is divesting itself of its role in the protection of the environment and shifting responsibility to provinces. At the same time, the federal government is increasing Cabinet and Ministerial decision-making roles on major resource development projects. New Cabinet and Ministerial authorities will allow them to override decisions of regulators, such as the National Energy Board, on major oil and gas pipelines. This creates great potential for decisions to be made behind closed doors with little public input and participation, and without meaningful consultation with Aboriginal groups. This has caused great concern in terms of access to information, the role of the Cabinet in consultation with First Nations, and remedies available should First Nations need to challenge a Cabinet decision.

Since the release of the RRD plan and the passage of Bill C-38 in July 2012, there has been little to no information on how the federal government intends to fulfill its duty, and whether or to what extent the Guidelines serve as a basis for fulfilling the federal Crown's consultation and accommodation obligations to Aboriginal people. Minister Oliver has indicated that, "through the RRD we are seeking to build on our approach to Aboriginal consultation. By utilizing existing processes and mechanisms to fulfill our duty to consult, we will ensure that the results of consultations are fully integrated into the decision making process on major projects," and that, "over the coming months, federal departments and agencies will also be consulting with provinces, Aboriginal groups and stakeholders on the development of specific regulations that will support the new direction set out by the proposed changes."[12] In this regard, the government has posted "public notices" regarding the development of regulations (e.g. under CEAA 2012), but there has been no distinct process with First Nations to address their unique concerns.

In terms of funding, the government has indicated it will invest $13.6 million over two years to support consultations with Aboriginal peoples to ensure that their rights and interests are respected. However, there is no information on *how* these funds will support consultation, nor any indication of, or commitment to, assured and continued financial support in light of the Crown's duty _being an ongoing obligation to Aboriginal people.

What is clear is that the federal government will proceed on the basis of distinguishing between "major projects" and other projects. It is also apparent that the intent is for the provinces to increasingly fill the field and assume the regulatory oversight role in regard

12 Minister Oliver letter to First Nations Summit, August 17, 2012.

to these projects.

The development of the Act has been highly criticized as being contradictory to the Crown's duty, as the duty lies at the strategic level and "upstream" of legislation. The stated federal policy that the government will "consult early on" was not implemented regarding the RRD plan or Bill C-38, which represent the most profound single policy and legislative shift by the federal government in relation to lands and resources.

The most significant aspects of the Act and the RRD plan are that they focus federal involvement in resource development on major projects and facilitate this by replacing the *Canadian Environmental Assessment Act* (and make corresponding legislative amendments to other statutes), and substantially amend the *Fisheries Act.*[13]

1. Major Projects

The distinction of "major projects" is problematic from the outset as it cuts to the core of differing worldviews, perspectives and values regarding what is a "major" project versus what constitute significant impacts to First Nations. While the government determines they are major "due to the complexity and size", First Nations are concerned with the nature of impacts, along with the scale and cumulative effects with other developments. This difference in perspective will inevitably lead to conflicts in the federal Crown-First Nations relationship in BC.

The government created the Major Projects Management Office (MPMO) in 2008 to fulfill a Crown consultation and coordinating function and to drive the ongoing system-wide improvements to the regulatory system in Canada.[14] The MPMO is responsible for providing overall project management, accountability and policy leadership with respect to the overall regulatory system. Major resource projects are defined as "a large scale project south of 60 that is subject to a comprehensive study, review panel, or a complex (or multi-jurisdictional) screening under the CEAA, typically including mining, oil sands, and energy."

Current information is that one of the MPMO's main roles is to track and monitor the Crown's Aboriginal consultation requirements in relation to the review of major resource projects and maintain the "official record of Aboriginal/Crown consultation" for the Government of Canada. The MPMO works with AANDC and other departments and agencies to ensure that the federal government fulfills its consultation responsibilities in a consistent, adequate and meaningful manner.[15]

The MPMO is guided by the *Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects* (June 2007), which requires that Aboriginal consultation be included in "Project Agreements" for specific projects. Project Agreements are between federal Deputy Ministers (not with First Nations) and outline the process by which federal departments will carry out their particular roles during the federal regulatory review of a major resource project. They are "coordination tools" and can include: an EA work plan; Aboriginal Consultation and Engagement work plan; a Permitting, Authorizations and Approvals work plan; and, a Monitoring work plan.[16] The Project Agreements typically refer to the "whole of government" approach to Aboriginal consultation and

13 Much information is available, including by the First Nations Leadership Council websites and meeting kits from March 2012, that provide summaries of these changes. For purposes of this paper, the focus will be on the government's approach to consultation in the midst of, or in light of, these legislative and policy shifts.

14 *www.mpmo-bggp.2:C.Ca*

15 *Ibid,* "Questions and Answers", date modified: 2012-08-03, after the passing of Bill C-38.

16 *Ibid,* "Project Agreements".

include an appendix that sets out the departments' respective roles in consultation and makes reference to the 2008 Interim Guidelines. It is unclear if this process will continue; the last posted Project Agreement is dated May 2012, prior to the RRD plan and Act.

Regional project-specific teams of federal (and where relevant provincial) officials will be established on a "project-by-project basis" as a mechanism to coordinated delivery of any Crown consultation requirements. These teams will be coordinated by the Canadian Environmental Assessment Agency (the Agency), not the MPMO. Once the EA phase has been completed, federal departments may carry out "outstanding consultation requirements" in respect of their regulatory decision-making. This general approach to consultation will be used on an *interim* basis while the broader federal policy on Aboriginal consultation is developed.[17] At the time of writing, the "broader federal policy" being developed is unknown.

2. CEAA 2012 and the Canadian Environmental Assessment Agency

The *Canadian Environmental Assessment Act (CEAA)* 2012 provides for EA by: i) a responsible authority (e.g. the Agency, National Energy Board, and Nuclear Safety Commission), and ii) a review panel (including a joint review panel). The Agency conducts most EAs and provides support to joint review panels.[18]

There is a greater reliance on the Agency, which acts as the "Crown Consultation Coordinator", to integrate the government's consultation activities into the EA process to the greatest extent possible. As Crown Consultation Coordinator, the Agency coordinates federal consultation activities and provides Aboriginal groups with an opportunity to comment on: potential environmental effects of a project and how they should be included in the EA; the potential impacts of a project on potential or established Aboriginal or Treaty rights; mitigation measures; and follow-up programs.

As Crown Consultation Coordinator, the Agency:

- Identifies Aboriginal groups whose potential or established Aboriginal or treaty rights may be adversely affected by the proposed project;
- Invites identified Aboriginal groups to provide comments in relation to the EA;
- Provides information to Aboriginal groups about the proposed project and EA process;
- Provides funding to assist eligible Aboriginal groups in preparing for and participating in consultation activities through the Agency's "Participant Funding Program";
- Considers the feedback provided by Aboriginal groups during the consultation process, including any concerns or issues raised, prior to any decisions being final; and
- Identifies mitigation and accommodation measures that may be required to address issues raised during the consultation process.[19]

Available information states that the nature and level of consultation undertaken by the Agency will vary on a project-by-project basis and is dependent on the nature of the potential or established Aboriginal or treaty rights, and the extent and severity of the potential adverse impacts of the proposed project on those rights. A step-by-step approach

17 *Ibid,* "Questions and Answers", date modified: 2012-08-03, after the passing of Bill C-38.

18 *Ibid.*

19 *http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=ED06FC83-I*

to federal Aboriginal consultation is articulated in the *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult.*[20]

Under CEAA 2012, an EA will now focus on potential adverse environmental effects that are "within federal jurisdiction" regarding projects that are designated by the Minister.[21] These effects include: fish and fish habitat; other aquatic species; migratory birds; federal lands; effects that cross provincial or international boundaries; effects that impact on Aboriginal peoples, such as their use of lands and resources for traditional purposes; and changes to the environment that are directly linked to or necessarily incidental to any federal decisions about a project.[22]

CEAA 2012 includes in the definition of "environmental effects" effects that cause changes to Aboriginal peoples': health and socio-economic conditions; physical and cultural heritage; current use of land and resources for traditional purposes; or, structures, sites or things of historical, archaeological, paleontological or architectural significance.[23] While it has yet to play out on the ground, this may offer a potentially useful provision for First Nations to require consultation on how a project impacts on their title, rights and interests. On other hand, where the Minister of the Environment determines whether a project is likely to cause significant adverse environmental effects, "the federal Cabinet will then decide whether these effects are justified in the circumstances."24 It is entirely unclear how the Cabinet would determine if adverse impacts on Aboriginal people are "justified".

While the details are too voluminous to describe in this paper, it is important to note that the overhaul of the CEAA has resulted in the termination of nearly 500 federal EAs. Only three projects in BC are currently in the federal EA process: Kutcho Creek Copper, Zinc, Silver Gold Mine; Vancouver Airport Fuel Delivery Project; and, Kitimat Disposal At Sea.[24] This raises serious questions as to the federal Crown's obligations to First Nations and role in environmental protection, including potential legal challenges to its lack of consultation around the Act itself. It also leaves uncertain what role if any the federal government will play in the hundreds of non? major resource projects and how it will fulfill its constitutional obligations to First Nations. What is clear is that it places greater focus on the Province to assume a much greater regulatory role over proposed development.

On a final note, these shifts by the federal government to its EA regime underscore yet again how EA processes are not sufficient to discharge Crown obligations to First Nations and cannot be the sole consultation process relied upon. They may change at the whim of government and are not designed with reconciliation and protection of Aboriginal title and rights, and treaty rights, in mind.

3. *Fisheries Act* Amendments and Department of Fisheries & Oceans

Amendments to the federal *Fisheries Act* through the passing of Bill C-38 are significant and warrant a look at how the Department of Fisheries and Oceans (DFO) addresses consultation and accommodation with First Nations.

While the full range of amendments cannot be covered here, those that will impact

20 *Ibid.*

21 This is a new aspect of the federal environmental assessment process and highlights the increased division of powers and creating of space for provinces to assume greater regulatory responsibilities.

22 *Ibid.*

23 *Ibid, "Overview: Canadian Environmental Assessment Act, 2012 ".*

24 CEAA 2012 no longer sets out 'triggers' for federal environmental assessment. Instead, projects that will be federally assessed must be "designated" by the Minister in Schedule 1 to the Order Designating Physical Activities, dated July 6, 2012 by the Honourable Kent, Minister of Environment.

DFO's approach to consultation include:

- Reducing and streamlining the number of fisheries authorizations required;
- Shifting from protection of "fish and fish habitat" to protection "fisheries" (eliminating one of the most powerful environmental protections in federal law and increasing the threshold of harming habitat and destroying fish to a prohibition against "serious harm" to fish (i.e. killing or permanently altering or destroying fish habitat);
- Enabling the Minister to exempt activities or projects from prohibitions;
- Identifying "prescribed waters", or specific bodies of water, that are exempt from prohibitions, allowing activity that harms fish in these waters; and
- Allowing for federal-provincial agreements, including delegation of roles, powers and functions, and allow for "equivalency" of provisions of a province's laws, where the *Fisheries Act* or its regulations would not apply in that province.[25]

During the Cohen Commission of Inquiry, which examined the Fraser River Sockeye, DFO identified the following documents as guiding its approach to consultation:

- Consultation Framework for Fisheries and Oceans Canada (2004);
- Policy for the Management of Aboriginal Fishing (1993);
- Allocation Policy (1999);
- Consultation Framework for Fisheries & Oceans (2004);
- Consultation with First Nations: Best Practices (2006);
- Integrated Aboriginal Policy Framework (2007);
- Canada's Aboriginal Consultations and Accommodation: Updated Guidelines to Federal Officials to Fulfill the Duty to Consult (2011); and
- FSC Launch Group – DFO policies and practices (2011).[26]

Available information also states that DFO's Consultation Secretariat of its Policy Branch provides policy guidance and identifies links to the Updated Guidelines without any explanation as to how DFO implements them. Presumably, DFO uses the Guidelines to be consistent with the "whole of government" policy approach to consultation.

It should be noted that many of the documents pre-date *Haida* and *Taku,* as well as the Interim and Updated federal Guidelines. Also, despite these documents, experience of First Nations is that DFO generally lacks adequate and transparent processes and structures to ensure that it appropriately assesses Aboriginal and treaty rights and potential impacts of its decisions to determine a meaningful process for consultation. DFO is known for trying to consult on the basis of large group sessions or workshops with various stakeholders (e.g. Integrated Harvest Planning Committee, which includes commercial, recreational and provincial members), even though DFO owes its constitutional duty directly to First Nations as rights holders. While these sessions may be useful to have dialogue and build understandings, First Nations have long called on DFO to act honourably and consult directly with them on a government-to-government basis on their unique and specific issues.

Adding to this are the implications of the amendments to the *Fisheries Act* and the new CEAA 2012. Specifically, numerous triggers that existed in the previous *Fisheries Act* that would require a propose project to undergo a federal EA have been removed, making it unclear whether or how the federal government will ensure that it consults with First Nations on projects that may affect fisheries resources or habitat. Even where impacts may occur, changes to the *Fisheries Act* now allow government to narrow the scope of projects that will be captured (e.g. to those that cause "serious harm"). If there is no "serious harm" then, again, a policy void is created.

Critical to this analysis, however, is the fact that the lack of a clear federal regulatory does not absolve the federal government of its constitutional duty to consult with and accommodate First Nations whenever it contemplates a decision or action that may adversely impact Aboriginal or Treaty rights. On a practical level, though, it does create great uncertainty and confusion as to how DFO will fulfill its obligations. Further, following the passage of Bill C-38, drastic budget and personnel cuts were made to DFO across the regions, seriously diminishing its capacity and raising questions as to whether it will be able to discharge its constitutional duties in a meaningful way.[27] Further, where there has been progress in DFO-First Nation relations (e.g. in advancing co-management), the changes to the *Fisheries Act* and DFO cutbacks may put those efforts in jeopardy.

25 Many of the substantive amendments (e.g. elating to habitat protection) will come into force when ordered by Cabinet. It is unclear at the time of writing when this order is anticipated, however it has been suggested this will happen within six months of the passing of Bill C-38 in order for government to develop corresponding regulations.

26 These are available to from the Commission's website: ***http://cohencommission.ca/en/Exhibits.php***

27 Media reports indicate the Government of Canada intends to cut DFO's operational budget by $79.3 million, including cuts to staff and offices: CBC News. 2012. "More DFO cuts could be on the way, minister says" [Online] Available: ***http://www.cbc.ca/news/canada/newfoundland-labrador/story/2012/06/08/nl-dfo-ashfield-cuts-609 .html*** [9 June 2012].

PART 5

Closing

FEDERAL POLICY ON CONSULTATION AND ACCOMMODATION has developed much like provincial policy in that it has evolved in reaction to court decisions, rather than from a sincere political will to achieve reconciliation through honourable processes that recognize First Nations unique place and rights within the constitutional fabric of Canada. In designing processes to achieve the preservation of federal decision-making and limiting federal risk, the Government of Canada has failed to assert its unique constitutional role vis-a-vis First Nations under section 91(24) in the context of reconciliation prescribed by section 35 of the *Constitution Act, 1982.* It has failed to set an exemplary example and influence progressive consultation frameworks across the country.

The recent legislative and policy shifts embodied in the RRD plan and the Act are clear markers of federal priorities: to benefit from major development of resources in First Nations territories. As such, it appears that key federal policy is found less in its Guidelines or department policies, and more in initiatives such as the RRD plan and the Act. The most significant federal shift regarding land and resource development occurred with NO consultation with First Nations, and attempts to circumscribe federal obligations not only to First Nations but to the public and the environment as well.

The federal government appears to be under the mistaken impression that it can legislate around the principles enumerated by the Courts that guide Crown conduct, and that the government can run roughshod over constitutionally protected rights. However, the reality is that, unless and until it transforms its impoverished approaches to dealing with First Nations, it may never realize its economic aspirations.

As well stated by Jim Prentice, Vice-Chairman, CIBC and former senior Cabinet Minister of the Harper Government:

> "The Crown obligation to engage first nations in a meaningful way has yet to be taken up .A failure to consult with aboriginal bands is not merely a political misstep: It could have dire legal repercussions for the proponents of pipelines through British Columbia.
>
> The Supreme Court has ruled that the federal government has a duty to consult with aboriginal communities over developments that would impact their traditional land, and to accommodate their concerns. Failure to do so has triggered successful legal actions by aboriginal bands.
>
> The obligation to consult with and accommodate First Nations . these are responsibilities of the federal government. And take it from me as a former minister and former co-chair of the Indian Claims Commission of Canada, there will be no way forward on West Coast access without the central participation of the first nations of British Columbia." (Jim Prentice, Speech, University of Calgary, September 27th, 2012)[28]

It is noteworthy and ironic that this epiphany comes from a former high ranking federal Harper Government Cabinet Minister. One can only hope his message resonates with Ottawa. Certainly, First Nations' messages have yet to land on listening ears.

Whatever the case, it is clear that this is not the last word on what approach the federal government will take to fulfilling its duties to First Nations and, indeed, this paper will likely need to be revisited in the next 6-12 months as the government continues to misstep and roll out its resource development agenda, forcing First Nations and others to respond through inevitable court challenges.

28 29 McCarthy, S. and N. Vanderklippe. 2012. The Globe and Mail, "Crucial pipelines jeopardized by failure to consult first nations" [Online] Available: ***http://www.theglobeandmail.com/report-on-business/industry? news/energy-and-resources/crucial-pipelines-jeopardized-by-failure-to-consult-first-nations-prentice? warns/article4572255/*** [27 September 2012].

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