July 19, 2018: the Métis Nation of Alberta and the Government of Canada execute a comprehensive Consultation Agreement

Métis Consultation

When considering the duty to consult from the perspective of the Métis, there are various and unique areas of caselaw, agreements, and policy considerations which come into play. The list below is not comprehensive. For more information, feel free to contact your Regional Consultation Coordinator.

R. v. Powley (2003):

In 2003, the Supreme Court of Canada ruled the Métis have unextinguished Indigenous rights to hunt, which are protected by S. 35 of the Constitution. For Métis to establish ongoing and unextinguished Indigenous rights, including consultation, the Court designed a modified version of the Indigenous rights test set out in R. v. Van Der Peet specific to the circumstances of the Métis. This 10-part test is referred to as the "Powley Test".

In Alberta, the Métis Nation of Alberta (MNA) has developed a robust registry system adhering to the standards necessary to identify citizens who meet the Powley Test. As part of the registry process, all citizens voluntarily authorize the MNA to represent their Indigenous rights and interests held collectively by the MNA. This high standard for citizenship registry was recognized by Canada in the 2018 "Consultation Agreement".

MNA - Canada Consultation Agreement:

On July 24, 2018, the MNA and Canada entered into a Consultation Agreement, becoming the first sub-agreement under the Framework Agreement for Advancing Reconciliation (2017), between Canada and the MNA.

The agreement sets out recognition by Canada to the MNA as the authorized representatives of the Métis in Alberta. It is also a commitment by Canada to engage the MNA in consultation in accordance with MNA Regional Consultation Protocols.

MNA - Regional Consultation Protocol Agreements:

Each of the MNA's six administrative regions has entered into a Regional Consultation Protocol Agreement recognized as an authoritative document setting out consultation processes for the MNA.

In accordance with the protocols, Regional Consultation Offices (RCO) have been opened under the technical guidance of Regional Consultation Committees. Consultation staff are the "front-line" responsible for reviewing proposed projects, legislation, and policy and undertaking consultation processes ultimately promoting and protecting the collective Indigenous rights Alberta's Métis.

As part of this work, consultation staff actively document contemporary and historical exercise of Métis rights in Alberta through comprehensive Traditional Land Use (TLU) studies. When reviewing proposed activities, RCO staff consider this growing compilation of TLU data, as well as emerging Métis rights caselaw, agreements, and policies such as: ***R. v. Hirsekorn (ABCA), Fort Chipewyan Métis Nation of Alberta Local #125 v. Alberta (ABQB), Daniels v. Canada (SCC), MNA- GoA Métis Harvesting Agreement (2019),*** and the ***Métis Harvesting in Alberta Policy (2019)***.

With these tools in hand, consultation staff are able to fully engage in effective, good faith, and representative consultation and accommodation on behalf of MNA citizens. This includes reviewing project notifications, negotiating mitigation and accommodations, proposing impact benefit agreements for leadership, or participating in regulatory process such as appeals and interventions.

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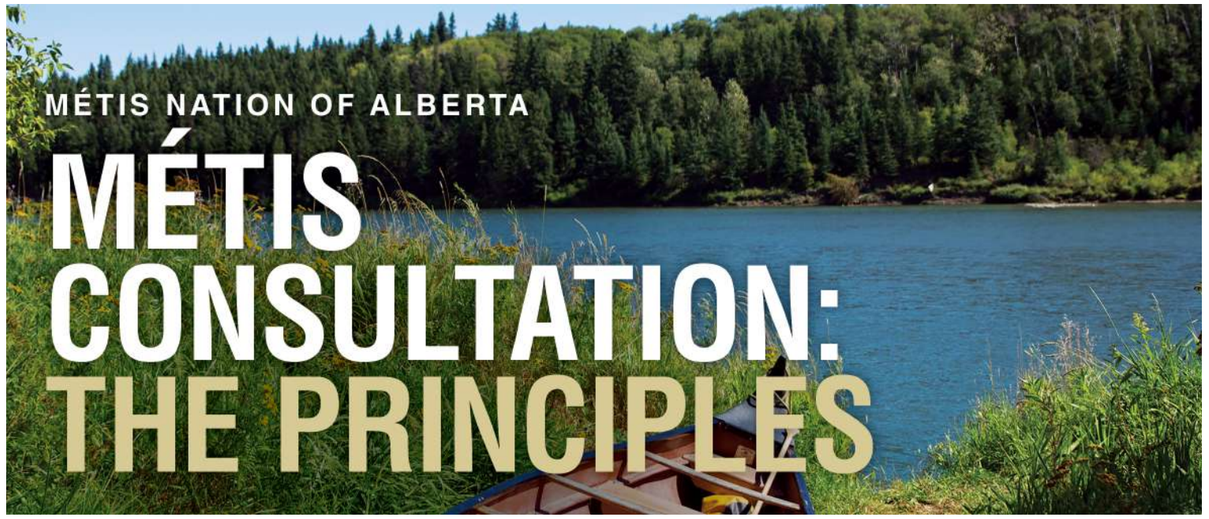


THE CONSTITUTIONAL DUTY TO CONSULT

In a slow progression through the last half century, the governments' duty to consult and accommodate Indigenous peoples, including the Métis, has been recognized by the Canadian courts in efforts to reconcile the relationship between the Crown and Indigenous peoples. When put into practice appropriately, consultation and accommodation processes can be an opportunity for Indigenous peoples to have greater influence over what happens on their lands, as well as protect their unique cultural values and practices.

The "Duty to Consult" requires government authorities to create meaningful opportunities for participation and to receive input from Indigenous peoples impacted by proposed Crown conduct, and for Indigenous peoples to participate in good faith as part of the reconciliation-based processes.

What's the duty?

As early as 1990, the duty to consult has been recognized by the Supreme Court of Canada as the minimum legal requirement for the protection of Indigenous rights and title in R. v. Sparrow and the duty has been affirmed and developed by the Supreme Court of Canada in many cases since. Ideally, consultation and accommodation processes will provide protection for Indigenous rights and title, while minimizing or eliminating the adverse impacts on those rights. These could occur from activities such as development or disposal of Crown lands, or the implementation of legislation and policy by the Crown (federally or provincially).

Unlike most government roles & responsibilities, which are set out in legislation and guided by regulation or policy; indigenous consultation has been almost exclusively defined, advanced and directed by court decisions in Canada, the United States and Australia

In 1996, the Supreme Court of Canada further defined the underlying goal of consultation and accommodation in R. v. Van Der Peet. Consultation and accommodation processes with respect to Indigenous "rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." The duty to consult places a positive obligation on the Crown and Indigenous governments to enter in to processes in good faith, in order to find reconciliation-based solutions to their competing interests.

HONOUR OF THE CROWN?

The duty to consult and accommodate Indigenous peoples' interests is grounded in the "honour of the Crown" and the unique fiduciary responsibility of the Crown to Indigenous peoples in Canada. This fiduciary responsibility requires the Crown to take reasonable action to ensure historical injustices suffered by Indigenous peoples in Canada are not repeated.

The Courts have identified past Crown actions which have led to loss of lands, language, and culture, as well as unfair business deals. These are some examples of the harm resulting from failing to meaningfully consult and accommodate Indigenous peoples.

TRIGGER WARNING

In Canada, the Courts have identified three necessary elements for consultation with Indigenous people to be required by the Crowns' duty. The duty to consult is triggered when:

- The Crown has, or reasonably should have, knowledge of an existing or claimed Indigenous right.
- The activity includes Crown conduct.
- The activity has the potential to adversely affected those rights.

Claimed rights matter. An indigenous right does not have to be recognized by Canada, the province, or proven in Court for consultation and accommodation to be required by the Crown. In the landmark Haida decision in 2004, the Supreme Court of Canada determined the assertion of the existence of an Indigenous right by an Indigenous collectivity is enough to trigger the duty. Ideally, this principle prevents Indigenous peoples from suffering harm to their rights as a result of development or Crown activity while Indigenous rights and title claims make their way through the courts and negotiating processes, which can often take decades.

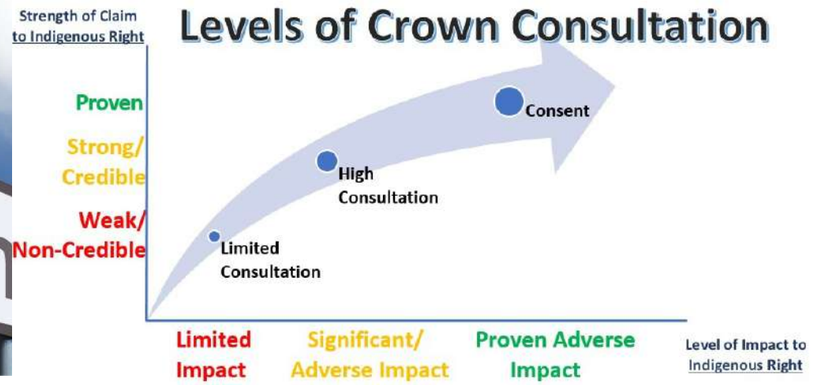
The duty to consult and accommodate is born solely by the Crown. In some circumstances, administrative aspects of consultation may be delegated to proponents. Activities conducted by private persons or non-Crown actors are typically not subject to the duty to consult, unless the activity requires the authorization, regulation, or permission of the Crown.

However, in *Ominayak v Penn West Petroleum Ltd.* (ABQB), the Court ruled that private corporations may be sued by indigenous governments for damages where they have caused harm to indigenous rights as a result of development.

In Alberta, oil & gas development is the primary focus of consultation

In Ontario, consultation on mining has led to impact benefit agreements

Changes to legislation, regulation, or government policy, that may impact indigenous people, can trigger the duty to consult and accommodate



CONSULTATION: HOW MUCH IS ENOUGH?

The duty to consult is triggered as soon as the Crown has knowledge of the claim that a right exists and may be impacted.

Once the duty is triggered, the Crown must engage the Indigenous collectivity claiming the impacted right, to determine the level of consultation necessary to meaningfully address their concerns. The courts have indicated the procedural design of consultation processes must be considered on a spectrum, based upon two criteria:

1. The strength of the claim to the particular right
2. The potential for harm to those existing or asserted rights by the decision or activity

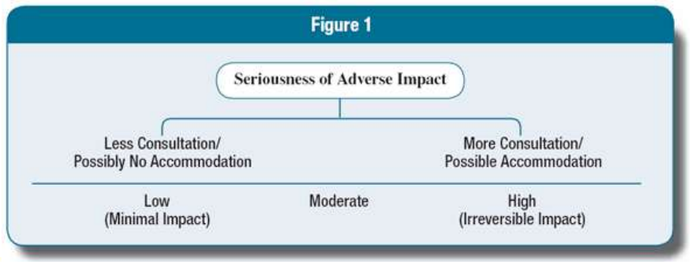
The results of the evaluation will lead to the design of a consultation process falling between 3 basic levels.

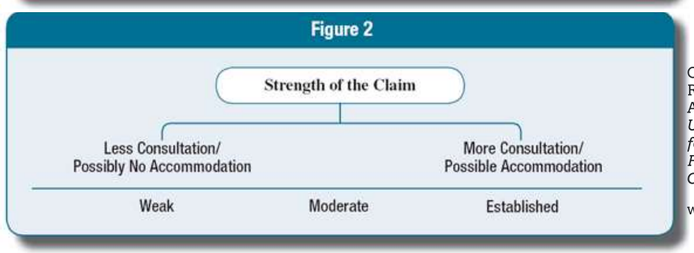
1. Limited Consultation
   a. Notification
   b. Information sharing
   c. Discussion about limiting impacts
   d. No formal mitigation or accommodation of impacts
2. High Consultation
   a. Negotiate consultation process & parameters
   b. Capacity / Participant funding to support indigenous agency
   c. Funding independent research & project related studies by indigenous groups
   d. Negotiating mitigation methods to avoid impacts to rights
   e. Negotiating accommodation terms to compensate for unavoidable impacts to rights
3. Consent
   a. In 2014, the Supreme Court of Canada ruled on Tsilhqot'in Nation v. British Columbia. According to the Court, if both the indigenous right and the impact have been proven at law, the **consent** of the indigenous collectivity may be required for a proposed activity.

This metric for assessment and design of meaningful Crown consultation and accommodation processes is represented graphically above.

It is important to note that Crown attempts to "water down" procedural direction of the courts with respect to Consultation are ongoing. The consultation metric graphics below are published on the Crown Indigenous Relations & Northern Affairs Canada webpage. (last updated in April 2019)

Note, that the potential for requirement of "Consent" of an indigenous Nation is not a Crown consideration even where rights are proven and impacts are serious or irreversible. Canada continues to take this position, despite being called upon by the *Truth and Reconciliation Commission Final Report* (2015) to adopt an approach that would be consistent with the United Nations Declaration on the Rights of Indigenous Peoples.





Crown Indigenous Relations & Northern Affairs Canada: *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011*

www.aadnc-aandc.gc.ca