SHORTCUTS
Essential, accessible knowledge for self-determining First Nations

September 2023

This series is intended to provide high level and short, easy to read information about some very complex issues. It should not be used as a substitute for expert advice. Links to sources and further reading suggestions are provided throughout for further exploration of the issues.

On the Duty to Consult and Accommodate

by Giuseppe Amatulli, Postdoctoral Fellow, Rebuilding First Nations Governance, Carleton University and Catherine MacQuarrie, Fellow, School of Public Policy and Administration, Carleton University

The duty to consult is a legal principle unique to Canada, expressing the federal and provincial governments' constitutional responsibilities to Indigenous peoples to consult them when planning to take a decision or action that could negatively affect their Aboriginal and Treaty rights.[1] In Delgamuukw-Gisday'way (1997), the Supreme Court of Canada established that "there is always a duty of consultation. […] The nature and scope of the duty of consultation will vary with the circumstances. […] In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands." (At para. 168)

Consultation and accommodation is a process whose main purpose is reconciliation through a balancing of interests. (Morellato, 2008, p. 78).

Other court cases brought forward by First Nations since that time have deepened the case law and sharpened the requirements on governments for how they must carry out their legal duty. Leading case law includes Haida v. BC (2004 SCC 73), Taku River Tlinglit v. BC (2004 SCC 74), and Mikisew Cree v. Canada (2005 SCC 69).

Courts have said that the duty to consult and accommodate is an integral part of the process of fair dealing and reconciliation, and it arises when governments are aware of the existence of Aboriginal and Treaty rights and are planning an action or decision that could affect those rights. In the Haida case, the Court determined that the duty to consult exists even when Aboriginal rights and title are claimed but have not yet been settled by negotiation or upheld by the Court.

Other relevant case law, Taku and Mikisew, advanced two important principles governments must also uphold when carrying out their duty to consult:

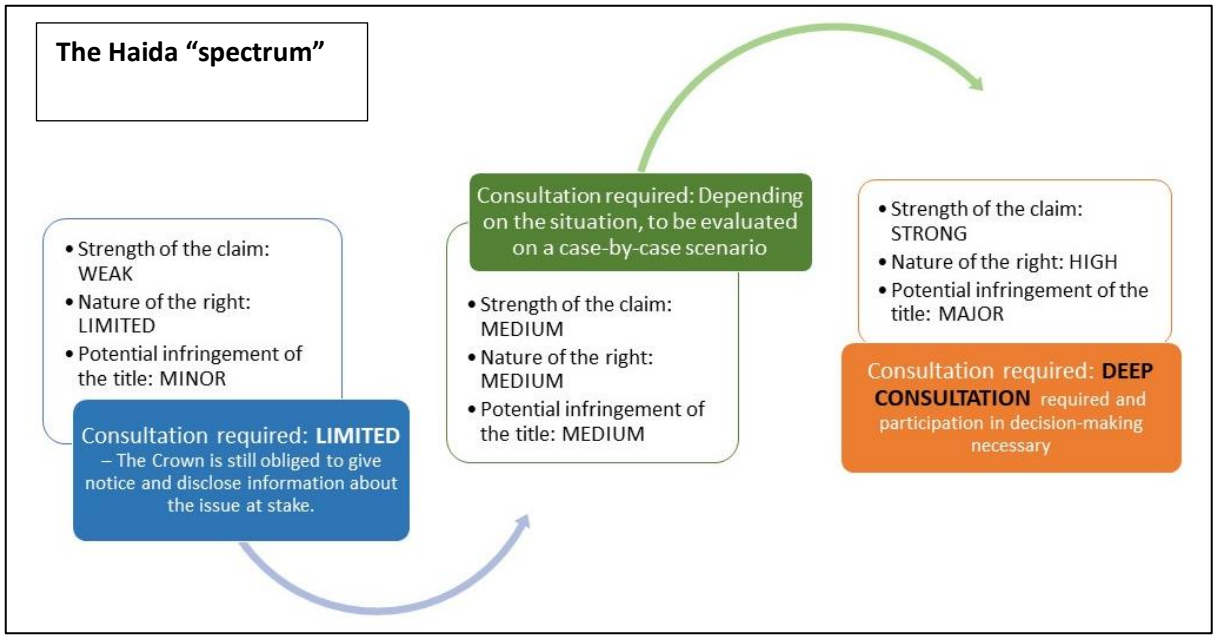
[1] "Indigenous" is used when referring to all Indigenous peoples – Including Inuit and Metis - within Canada. "Aboriginal" is the legal term used in Canada in reference to Indigenous rights and title (Section 35 of the Canadian Constitution)

[…] the duty to consult relates to communal rights. It must be seen as a complimentary right of a First Nation to self-government, as the Crown's duty to consult is fulfilled only if the people holding the aboriginal communal rights are engaged. This means that the decision-making authority relating to how to use title lands, in connection to the duty to consult, requires aboriginal self-government (Morellato, 2008, p. 68).

The **"honour of the Crown"**[2] is a fundamental principle that must be respected when governments deal with all Indigenous issues, including the duty to consult and accommodate.

Second, the honour of the Crown gives rise to a **fiduciary duty**, where the Crown must act in the best interest of Indigenous people (Haida v. BC, 2004 SCC 73, at para. 18).

Courts have said the appropriate breadth and depth of consultation can vary depending on the situation and in proportion to the strength of the claim supporting the right at stake (Haida v. BC, 2004 SCC 73 at paras 43-45). On one end of the so-called "Haida Spectrum", notification and discussion may be enough consultation, and on the other end, deeper consultation with the rights-holders may be required.



A government-to-government perspective on the duty to consult

In the Canadian legal framework, the duty lies only with the Crown, which might be the Crown in right of Canada (the federal government), or the Crown in right of a Province (a provincial government), and sometimes both, depending on the project (Bankes, 2018, p. 167). They cannot delegate or otherwise rely on third parties (such as industry proponents of a development project) to fulfill this duty. This was confirmed in Haida, where it was established

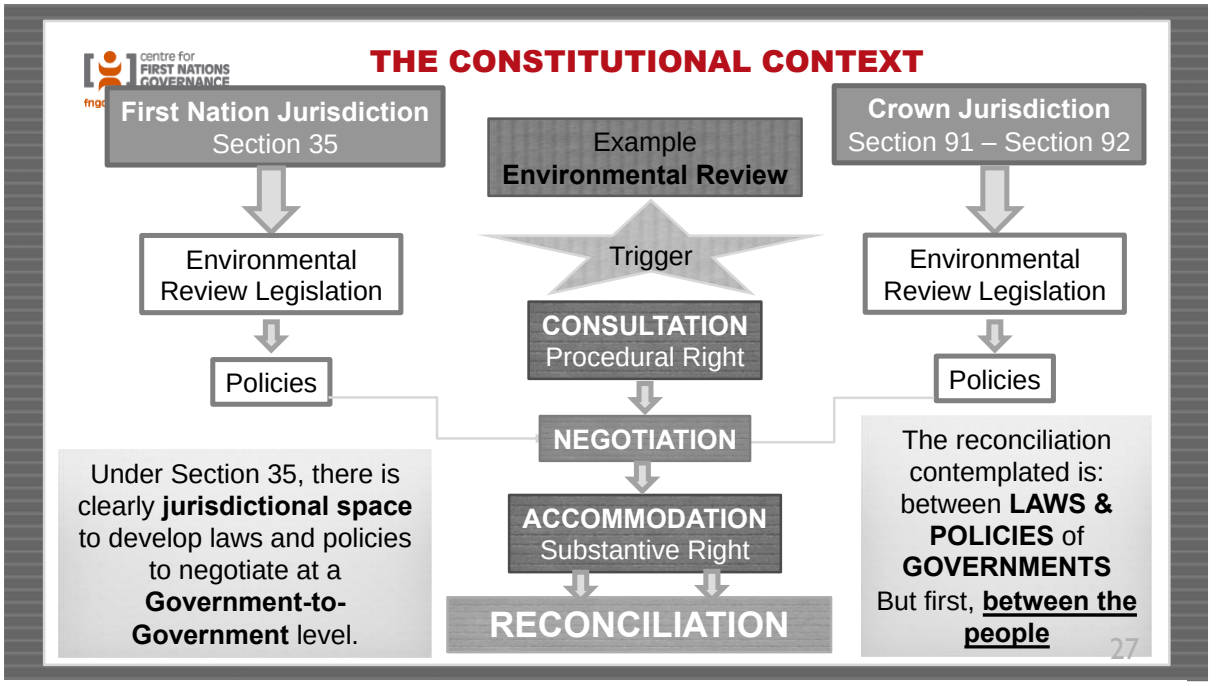
[2] Canadian courts reference the "Crown" when talking about the Canadian and provincial governments. In Canada's system of government as a constitutional monarchy, the power to govern is vested in the Crown (currently His Majesty King Charles the III) but is entrusted to governments to exercise on behalf of and in the interest of the people.

that the province - not the project proponent – had the duty to consult and accommodate. In specific cases however, the "Crown may delegate procedural aspects of consultation to industry proponents seeking particular development." (Haida v. BC, 2004 SCC 73, at para. 53). This means industry might inform and consult a First Nation regarding the technical aspects of a proposed development and may even be the main party to accommodations. But if issues arise, the ultimate responsibility to ensure the duty is fulfilled rests with government.

Because their powers are legislated by provincial governments, municipal governments do not have an independent duty to consult although many will play an important role in helping ensure that the province's duty is fulfilled. Some municipalities may offer to consult with neighbouring Indigenous communities on their own projects, but this is a usually to develop good relationships rather than meet a legal requirement.

On the First Nation side, it must be stressed that the duty to consult relates to the constitutionally protected (Section 35) *collective* rights of a First Nation, which means that only the rights-holders themselves, or the legitimate governing body they have authorized to represent them in a matter, can legally decide on the issues on which the Nation is being consulted. Chiefs and councils operating under Indian Act authority (authority delegated by federal legislation and accountable to the federal government) typically do not have the required legitimacy, particularly when the issue involves lands and resources outside reserve boundaries.

The duty to consult is a right that is complimentary to the right of a First Nation to self-government, as the Crown's duty to consult is fulfilled only if the people holding the rights are engaged. In practice, many Band Councils do wind up being the primary contact for consultation. But Chief and Council should be aware of the limits on their authority to act without the agreement of the people and should organize their internal consultation processes accordingly. Ultimately, decision-making authority about how to use title lands and traditional territories requires self-government (Morellato, 2008, p. 68). True government-to-government relationships will be achieved when a First Nation has developed laws and policy under their inherent right to self-government (recognized in Section 35) to establish rules for how lands and resources may be used in their territories and set out their own requirements and standards for consultation and accommodation.



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Present day practice

In response to the case law, federal and provincial government departments and agencies and a range of other related parties (eg., resource companies) have developed policies, guidance, and processes to better define how they will carry out their consultation and accommodation responsibilities. In regions where there is the potential for a lot of activity, some governments and Indigenous organizations have signed protocol agreements about how consultations will happen.

Increasingly, First Nations are putting in place their own policies and standards for consultation, rather than being driven by government and industry processes. An internet search conducted in the winter of 2023 found 30 First Nations that have publicly posted their consultation and accommodation requirements or listed them as existing. Most are policies that appear to be developed under Indian Act Chief and Council authority rather than as self-governing nations. There are a wide range of approaches in these documents. Some are just broad statements of principle. Others have very specific details for how to file requests, informational requirements, maps of the territory, fee structures, response times and so on. To help it better manage consultation requests, one First Nation in southern Ontario also created an online portal through which all requests must be filed, along with a clear set of protocols for consultation and engagement.

Accommodation

After consultation reveals how and which Aboriginal and Treaty rights will be affected by a proposal and to what degree, accommodation is the phase at which the parties strive to reach agreement on how the impacts will be mitigated. As established in Haida, the accommodation process does not give a veto right to the First Nation. (Morellato, 2008, p. 29). However, as accommodation is linked to the legal principles of the duty to consult, it is expected that

accommodation discussions or negotiations are carried out in good faith with the goal of accommodating the rights, needs and concerns of the affected Indigenous groups.

Depending on the scope and impact of potential rights infringement, accommodation is aimed at:

- Minimizing infringement on Aboriginal or Treaty rights;
- Amending or altering a project to meet the rights holders' concerns and needs;
- Balancing First Nations' and societal interests (as established in Tsilhqot'in v. BC, 2014);
- Ensuring real and ongoing participation of the rights holders in decision-making.
- Providing fair compensation for those infringements that cannot be avoided.

Dealing with consultation and accommodation from a position of strength

While the duty to consult rests with the Crown, First Nations have a reciprocal duty to be ready to respond to those requests. This could include having established internal policies and procedures for how to handle and make decisions about consultation requests, including how costs will be covered and how the First Nation's citizens will be engaged in the decision-making, perhaps including an agreed-upon definition of what "meaningful consultation" should look like in your community. Other things to include in a consultation and accommodation policy are a detailed map of the Nation's traditional territories, perhaps also marking key sites that the Nation has agreed should be left alone or can be available for development.

Ultimately, First Nations may also find themselves preparing positions to negotiate accommodations to minimize infringement or mitigate impacts, which will also require community input and agreement. Among the measures a community might be interested in discussing:

- Changes to the project to address specific concerns and impacts;
- Establishment of no-go zones, land reclamation measures and ongoing environmental monitoring programs;
- Jobs, education, and training opportunities;
- Community infrastructure to meet basic social needs;
- Revenue sharing, compensation, and disturbance payments;
- Equity opportunities (i.e., joint venture, partnership) and contracting opportunities for First Nations businesses.

Read More:

Rachel Ariss, Clara MacCallum Fraser and Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?", 2017 13-1 McGill Journal of Sustainable Development Law 1, 2017 CanLIIDocs 138, <https://canlii.ca/t/6xz>, retrieved on 2023-08-16.

Bankes, N. (2018). *Clarifying the parameters of the Crown's duty to consult and accommodate inthe context of decision-making by energy tribunals*. *6811*. https://doi.org/10.1080/02646811.2017.1403812

Morellato, M. (2008). *The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights*.

Municipal Governments and the Crown's 'Duty to Consult' - Association of Municipalities Ontario:https://www.amo.on.ca/sites/default/files/assets/DOCUMENTS/Indigenous/MunicipalGovernmentsandtheCrownsDutytoConsult20190410.pdf (last accessed July 7, 2023)

Mikisew Cree v. Canada (2005 SCC 69). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2251/index.do (last accessed July 13, 2023).

Haida Nation v. British Columbia (2004 SCC 73). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do (last accessed July 13, 2023).

Taku River Tlinglit v. British Columbia (2004 SCC 74). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2190/index.do (last accessed July 13, 2023).