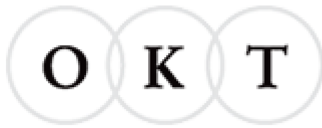

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A Primer on the Constitutional Duty to Consult

Over the last few decades, the government's duty to consult and accommodate Aboriginal peoples has been recognized by Canadian courts as a means to reconcile the relationship between the Crown and Aboriginal peoples. In practice, it is also an opportunity for Aboriginal peoples to have a greater degree of influence over what happens in their traditional territories. Consultation requires government authorities to create opportunities for participation and input from Aboriginal peoples impacted by proposed Crown conduct.

What is the Duty to Consult and Accommodate?

The duty to consult was recognized as a legal requirement pursuant to section 35 of the *Constitution Act, 1982* as early as 1990 in *R. v. Sparrow* and has been affirmed and developed by the Supreme Court of Canada in several cases since. The goal of consultation and accommodation is to provide protection for Aboriginal and treaty rights and to minimize or eliminate the impacts on such rights.

Consultation – When is it Triggered?

1. Crown knowledge of existing or claimed Aboriginal or treaty right,
2. Crown conduct, and
3. Potential to adversely affected those rights.

There is NO threshold test to determine when an Aboriginal or treaty right is sufficiently potentially adversely affected to trigger the duty

How Much Consultation and Accommodation is Required?

The degree of consultation operates on a spectrum and depends on:

1. the strength of the claim to particular rights, and
2. how much potential harm could be caused to those existing or asserted rights by the proposed decision or activity.

"Low End" Consultation	"High End" Consultation	Consent
• Adequate notice • Disclose relevant information • Give enough time to respond • Discuss issues raised, and try to address concerns raised	• Negotiate how consultations should proceed (exchange info, meetings) • Site visits, researching, studies • Provide for participation in the decision-making process • Fund First Nation participation • Accommodate by mitigating harm or negotiating benefits	• Where the right is proven, consent is required (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44)

> *"No relationship is more important to me and Canada than the one with Indigenous peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples"*
> **– Prime Minister Justin Trudeau**

What is the Source of the Duty to Consult and Accommodate?

The source of the duty is the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples because the Crown is essentially in conflict as it plays the roles of both the party making a decision which may negatively impact on Aboriginal peoples' interest and rights, and the party charged with protecting and respecting those rights under the Constitution. Acting honourably dictates that the Crown must always fulfill its promises to Aboriginal peoples, and it must not engage in sharp dealing with Aboriginal peoples.

Consultation – How Should it Work?

The Crown must consult Aboriginal peoples before taking action. The Supreme Court of Canada tells us that consultation that excludes any form of accommodation from the outset is meaningless (*Miskiew Cree First Nation v. Canada*, 2005 SCC 69). This means that the Crown must enter the consultation process with an eye to determining how it may address the Aboriginal party's concerns. Consultation must consist of more than providing an opportunity to blow off steam, and should be aimed at listening, considering solutions to minimize impacts on rights, and possibly changing the government's planned actions or authorizations.

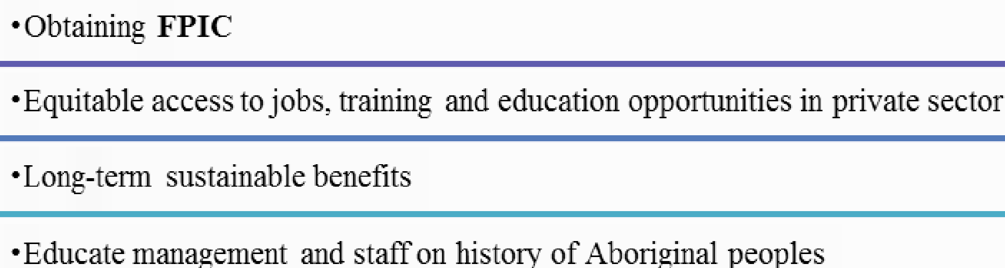
Shifting from Consultation to a Nation-to-Nation Relationship

Canada recently adopted the United Nations Declaration on the Right of Indigenous Peoples ("UNDRIP"). UNDRIP is amongst the mounting international efforts and evolving court direction in support of free, prior, and informed consent ("FPIC"). UNDRIP tells us that states should cooperate in good faith with Indigenous peoples in order to obtain FPIC prior to:

– adopting and implementing legislative or administrative measures that may affect them (Article 19).

– the approval of any project affecting their lands or territories and other resources, particularly with the development, utilization or exploitation of mineral, water or other resources (Article 32(2)).

The 2015 Truth and Reconciliation Commission Report calls Canadian businesses to adopt UNDRIP. This would include:



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