Consultation Requirements in the Post-Treaty Context

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I. INTRODUCTION

Considerable attention has been given to recent decisions of the Courts regarding the duty of the Crown to consult and accommodate the interests of Aboriginal people in the context of *asserted but unproven* claims. These issues were addressed in two Supreme Court of Canada decisions—*Haida* and *Taku River*[1]—that confirmed that the Crown has a duty to consult, and must seek a balanced approach to accommodation, when it has knowledge, real or constructive, of the *potential* existence of an Aboriginal right or title and contemplates conduct (in those cases, authorization of land and resource uses) that might adversely affect it. These cases clarify the scope of the duty to consult in circumstances where Aboriginal rights or title have been asserted, but have not yet been proven or confirmed through either litigation or through the negotiation of a land claim agreement or treaty.

The Supreme Court of Canada's decision in *Mikisew Cree*[2] clarifies the extent to which the Crown's duty to consult also applies in the context of the numbered treaties, which cover much of Ontario, Western Canada and part of the North. Many modern land claim agreements (either completed or under negotiation) opt to expressly define consultation requirements and where they apply.

The purpose of this paper is to review the approach of the Courts to the concepts of consultation, accommodation, and justification in the post-treaty context. This consideration will begin with the numbered treaties and then compare the approach to consultation that appears to be reflected in modern land claims agreements and treaties, including the various agreements-in-principle currently under negotiation under the auspices of the British Columbia Treaty Commission. Essentially, the issue under consideration is how, and to what extent, the concepts of consultation, accommodation and justification may continue to apply with respect to land and resource decisions on Crown land in the post-treaty context.[3] While the historic numbered treaties differ greatly in form and detail from modern land claims agreements, some broad parallels are noted between the requirements for consultation.

II. CONSULTATION UNDER THE NUMBERED TREATIES

Between 1871 and 1923, the federal government, and various Aboriginal people entered into 11 numbered treaties covering most of the provinces of Ontario, Manitoba, Saskatchewan, Alberta, plus the Mackenzie District of the Northwest Territories and the northeast corner of British Columbia. Treaty Number 8 was negotiated in 1899 and was adhered to by a number of bands that lived in what are now Alberta, Saskatchewan, British Columbia and the Northwest Territories.

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[1] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73;
Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74.

[2] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69.

[3] While the concepts of consultation, accommodation and justification also apply to proposed government legislation or regulations (eg. regulation of hunting and fishing rights through licences and allocations, etc.), this paper will focus only on the issues associated with Crown decisions relating to projects and activities involving the use of Crown lands or the development of natural resources.

Treaty Number 8 contains the following clause (which is included in similar terms in most of the other numbered treaties):

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

The numbered treaties did not expressly incorporate the concepts of consultation, accommodation and justification in relation to land that is "required or taken up."[4]

The Courts have specifically considered the question of the duty of the Crown to consult before making land and resource decisions which might affect Aboriginal interests under Treaty Number 8. This consideration by the Courts has recently culminated in the decision from the Supreme Court of Canada in *Mikisew Cree*. However, in order to fully frame the issues at stake in this decision, it may be useful to briefly examine two Court of Appeal decisions that preceded the Supreme Court's decision, namely the BC Court of Appeal's decision in the case of *Halfway River First Nation v. B.C. (Ministry of Forests)*, 1999 B.C.C.A. 470, and the Federal Court of Appeal's decision (which was the subject of the appeal to the Supreme Court of Canada) in *Canada (Canadian Heritage) v. Mikisew Cree First Nation*, 2004 F.C.A. 66.

(a) The *Halfway River* Case

In the *Halfway River* case, the British Columbia Ministry of Forests issued a cutting permit over certain lands within the area of northeast British Columbia covered by Treaty Number 8. The Halfway River First Nation challenged the issuance of the cutting permit through judicial review proceedings on the grounds that, *inter alia*, the Crown had a legal obligation to consult with the Halfway River First Nation before issuing the permit, and that the Crown had failed in meeting that obligation. The Crown and forest products company that had received the permit argued that the Crown had an independent right under the terms of the treaty to take up lands for lumbering and other purposes, that the rights of hunting, trapping and fishing were consequently limited, and that the issuance of the cutting permit, therefore, did not amount to an infringement, giving rise to the legal obligation to consult.

The British Columbia Court of Appeal found that the Aboriginal right of hunting, trapping and fishing, on the one hand, and the Crown's right to regulate or to take up lands, on the other hand, "cannot be given meaning without reference to one another". The Court found that "the Crown's right to take up land cannot be read as absolute or unrestricted", and that "a balancing of the competing rights of the parties to the Treaty was necessary" (see paragraph 134 of the decision). The Court also found that the enactment of s. 35 of the Constitution Act in 1982, "improved the position" of the First Nation signatories to the Treaty by confirming that their rights "cannot be

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[4] Other sections of the numbered treaties do expressly reference consultation. For example, Treaty 8 provides that the Crown is to "set apart such reserves and lands, *after consulting with the Indians* concerned as to the locality which may be found suitable and open for selection." [Emphasis added.]

infringed or restricted other than in conformity with constitutional norms" (see paragraph 135 of the decision).

Chief Justice Finch concluded as follows:

> I respectfully agree with the learned Chambers Judge that any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act*, 1982. (See paragraph 144 of the decision) [Emphasis added.]

The Chief Justice went on to confirm that the approach set out in the *Sparrow* case is therefore applicable in deciding whether infringement of a treaty right is justified, requiring consideration of the following questions (said in *Sparrow* not to be an exhaustive or exclusive list):

1. Whether the legislative or administrative objective is of sufficient importance to warrant infringement;

2. Whether the legislative or administrative conduct infringes the treaty right as little as possible;

3. Whether the effects of infringement outweigh the benefits derived from the government action; and

4. Whether adequate meaningful consultation has taken place.

The Court found that, while the decision of the Ministry of Forests that the harvesting authorized under the cutting permit would have minimal impacts on hunting, fishing or trapping, the Crown had not met the requirements of consultation:

> . . . namely to provide in a timely way information the aboriginal group would need in order to inform itself on the effect of the proposed action, and to ensure that the aboriginal group had an opportunity to express their interests and concerns. (See paragraph 165 of the decision)

This interpretation of the treaty uses the adoption of s. 35 in 1982, as a vehicle for modifying the existing Aboriginal and treaty rights, through the imposition of restrictions on the exercise of treaty rights by the Crown. The Court imposed the more demanding standard of "justification" based on the *Sparrow* test, applicable to potential interference with established rights or title in the absence of any express consultation requirements in the text of the Treaty.

(b) The Federal Court of Appeal Decision in the *Mikisew Cree* Case

In the *Mikisew Cree* case, the Federal Court of Appeal reached a different conclusion respecting the interpretation and application of Crown duties and Aboriginal rights under Treaty Number 8.

The case arose out of a proposal to re-establish a winter road through Wood Buffalo National Park for winter access from four communities in the Northwest Territories to the highway system in Alberta. The Mikisew Cree First Nation, a Treaty 8 signatory based in Fort Chipewyan, Alberta,

objected to the proposed road on the grounds that it would infringe on their hunting and trapping rights under Treaty 8.

Parks Canada had provided a standard information package about the road to the First Nation, and the First Nation was invited to informational open houses along with the general public. Parks Canada did not consult directly with the First Nation about the road, or about means of mitigating impacts of the road on treaty rights, until after important routing decisions had been made.

The First Nation challenged the decision of the Minister of Canadian Heritage, the Minister responsible for Parks Canada, to authorize the construction of the road on the grounds that the Minister had not adequately consulted the First Nation about the road. The Mikisew Cree relied on the decision of the British Columbia Court of Appeal in the *Halfway River* case.

The First Nation's challenge was successful at trial, but on appeal the Federal Court of Appeal held, in a 2-1 split decision, that no Crown consultation obligation was triggered by the approval of the winter road.

The Province of Alberta, an intervenor at the Court of Appeal, argued that the approval of the construction of the winter road was a "taking up" of land as contemplated in the provisions of Treaty Number 8, that the hunting, trapping and fishing rights were expressly "subject to" such taking up of land, and that therefore there was no infringement of the treaty rights. The Federal Crown did not rely on this argument at the hearing of the appeal (although it did rely on the argument in the court below).

By a majority, the Federal Court of Appeal found that the treaty included a geographical limitation on the existing hunting rights where there was a "visible, incompatible land use". It found that the taking up of land for a winter road, and the prohibition of the use of firearms on or within 200 metres of the road, was such a visible, incompatible land use. The Court noted that s. 35 of the *Constitution Act*, 1982 protected "existing" Aboriginal and treaty rights. The Court found that the intention of the parties to the treaty included the acceptance of settlement and other uses of land that would restrict rights to hunt, "so long as sufficient unoccupied land would remain to allow them to maintain their traditional way of life". (See paragraph 17.) The Court noted that the land required for the road corridor was only 23 square kilometres out of the 44,807 square kilometres of Wood Buffalo National Park and the 840,000 square kilometres encompassed by Treaty Number 8. It found that this was not a case "where no meaningful right to hunt remains". (See paragraph 18.)

The majority decision[5] concluded:

> [19] The treaty right to hunt has always been limited by the fact that hunting is not permitted on land that has been taken up. It is the right to hunt on land which is not required for settlement, mining, lumbering, trading or other purposes which obtained constitutional protection when s. 35 came into force.
>
> …
>
> [21] Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of s. 35.

[5] The Honourable Madam Justice Sharlow issued dissenting reasons in which she adopted the reasoning in the *Halfway River* case.

(c) Supreme Court of Canada Decision in *Mikisew Cree*

On November 24, 2005, the Supreme Court of Canada handed down its decision in the case of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.[6] In the decision, the Supreme Court confirmed that, while governments have the power under treaties to authorize land uses which infringe on treaty rights, the exercise of that power imposes on governments a duty to consult where the taking up of land adversely affects those rights.

Consistent with other recent Supreme Court of Canada decisions which have emphasized the need for ongoing reconciliation of aboriginal interests into government decision-making, the Supreme Court overturned the Federal Court of Appeal's decision, and crafted a decision that balances governments' need to manage lands and resources in the broader public interest with proper consideration of impacts on treaty rights in governments' decision-making processes. The Supreme Court found that, because the taking up adversely affected the First Nation's treaty right to hunt and trap, Parks Canada was required to consult with the Mikisew Cree before making its decision. As Parks Canada had failed to do so, the Supreme Court set aside the Minister's approval of the winter road, and sent the matter back to the Minister for reconsideration in accordance with the decision.

(i) Power to Take Up Land Confirmed

The first point in the decision, and perhaps the most fundamental, is the Supreme Court's recognition that the purpose of Treaty 8 and other post-Confederation treaties was to open up lands in Canada for settlement and development. The treaties were not a guarantee to First Nations that their hunting, trapping and fishing activities would remain as they were in 1899. Rather, the treaties put First Nations on notice that lands would be taken up over time for other uses.

While Treaty 8 lists a number of purposes for which lands may be taken up by governments, the Supreme Court emphasized that this list — "settlement, mining, lumbering, trading or other purposes" — should not be read restrictively. This is important for resource activities such as oil and gas development, which are not included in the list of purposes but which are very important purposes for which lands are taken up for development today.

In the *Badger* decision, the Supreme Court had held that Treaty 8 hunting rights were circumscribed by geographic limits and by specific forms of government regulation. In *Mikisew Cree*, the Supreme Court held that Treaty 8 rights are further limited by the Crown's right to take up lands, subject to the consultation obligations set out in the decision.

(ii) Honour of Crown Requires Consultation Where Taking Up Infringes Treaty Rights

The Supreme Court recognized that there is an "uneasy tension" between governments' power to take up lands under treaties and the treaties' promises of continued hunting, trapping and fishing. To balance governments' powers against the need to protect treaty rights, the Court stated that, while the right to hunt and trap under the treaties is limited by the governments' power to take up lands, in exercising that power governments must inform themselves of the potential impact of that taking up on the exercise of treaty rights. Where treaty rights are infringed, a government must discharge its obligation to consult and, if appropriate, accommodate First Nations' interests *before*

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[6] 2005 SCC 69.

reducing the geographic area over which treaty rights may be exercised. The Court held that Treaty 8 confers on the Mikisew Cree substantive rights (hunting, trapping, and fishing) along with the procedural right to be consulted about infringements of the substantive rights.

(iii) Not Every Taking Up of Land is an Infringement

At the same time, the Court held that not every taking up of land under the treaty will trigger the Crown's duty to consult. The Court rejected conclusions of the BC Court of Appeal in *Halfway River* that *any* taking up of land would constitute an infringement of treaty rights. However, the Court indicated that a low threshold would apply to trigger Crown consultation obligations, consistent with the standards set out in the *Haida Nation* and *Taku River Tlingit* decisions. Governments are required to consult before taking up land where that taking up "might adversely affect" the exercise of treaty rights. Given that a taking up of land by definition removes that land from the exercise of treaty rights, it is difficult to envision circumstances where the duty to consult would not be triggered. In this case, the Court held that the taking up of land for the construction of the winter road would adversely affect the treaty hunting and trapping rights of the Mikisew Cree.

(iv) Sliding Scale for Content of Consultation Obligation

While a low threshold applies to trigger Crown consultation obligations, the degree of consultation and, in some cases, accommodation required will depend on the degree to which the taking up of land will affect treaty rights. The Court noted that the same sliding scale of consultation obligations applied in a treaty context as in a non-treaty context, stating that "adverse impact is a matter of degree, as is the extent of the Crown's duty" to consult.[7] In this case, the Court held that, while the winter road would affect Mikisew Cree treaty hunting and trapping rights, this was a fairly minor road that was built on lands surrendered by the Mikisew Cree when they signed Treaty 8. As a result, the lower end of the consultation spectrum was engaged. This meant Parks Canada should have provided notice to the Mikisew Cree, and should have engaged them directly to solicit their views and to attempt to minimize adverse impacts on their rights. As Parks Canada had unilaterally determined important matters like road alignment before meeting with the Mikisew Cree, the Court held that the Crown's duty to consult had not been adequately discharged.

Consistent with its *Haida Nation* and *Taku River Tlingit* decisions, the Supreme Court held that there is a reciprocal onus on the Mikisew Cree to carry their end of the consultation process by making their concerns known, responding to governments' attempts to address concerns and suggestions, and trying to reach a mutually satisfactory solution. The Court emphasized that the Mikisew Cree did not have a veto over the alignment of the road, and noted that consultation efforts would not always lead to agreement on appropriate accommodation measures to address their concerns.

(v) Crown Obligation to Consult Tied to Traditional Lands

The decision also helped to clarify an important area of uncertainty about the geographic scope of the Crown's duty to consult in a treaty context. Treaty hunting rights can be exercised by members of signatory First Nations throughout the area covered by the treaty. In the prairie provinces, the geographic scope of hunting rights was extended to apply throughout each province by the Natural

[7] At ¶ 55.

Resources Transfer Agreement. Theoretically speaking, therefore, land use decisions in southern Alberta could affect the exercise of treaty rights by the Mikisew Cree.

However, in *Mikisew Cree*, the Supreme Court held that the duty to consult under Treaty 8 does not mean that "whenever a government proposes to do anything in the Treaty 8 surrendered area it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact".[8] The Court indicated that treaty rights to hunt are not determined on a treaty-wide basis, but rather on the basis of the lands over which the First Nation traditionally hunted, fished and trapped and continues to do so today. This suggests that the Crown's duty to consult First Nations is tied to activities only within lands traditionally and currently used by First Nations for treaty harvesting rights, and, more importantly, that the Crown is not required to consult with a First Nation about activities located outside those lands.

(vi) Risks of Inadequate Consultation Underscored

Finally, the *Mikisew Cree* decision underscores the potential consequences for a project proponent where the Crown fails to discharge its duty to consult. In this case, even though the road at issue would have only minor impacts on treaty rights — the decision characterizes it as a "fairly minor winter road located on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation"[9] of Treaty 8 — and even though the Court held that the Crown's duty to consult lay at the lower end of the consultation spectrum, the Court nevertheless set aside the Minister's decision to approve the winter road and sent the matter back to the Minister for reconsideration in accordance with the decision.

(vii) Implications

While the Mikisew Cree were the successful party in the appeal, it is likely that the decision will not have significant practical implications. The federal and provincial governments had already been gearing up for consultation activities with treaty First Nations in anticipation of this decision. The decision's balancing of governments' power to manage lands and resources with protection of treaty hunting, fishing and trapping rights is consistent with the theme of prior Supreme Court decisions emphasizing the need for reconciliation of aboriginal interests with the broader public interest. The decision will provide further impetus for the federal and provincial governments to develop and implement appropriate processes for Crown consultations with Aboriginal groups affected by governmental land and resource use decision-making. As the Court noted, "consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation."[10]

As will be seen below, modern land claim agreements and treaties, particularly those in northern Canada, provide mechanisms for the balancing of these interests that is in line with the reconciliation approach articulated by the Courts.

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[8] At ¶ 55.

[9] At ¶ 64.

[10] At ¶ 63.

III. CONSULTATION UNDER MODERN LAND CLAIMS AGREEMENTS

Since 1973, 14 comprehensive land claims have been reached in the northern territories (Yukon, the Northwest Territories, and Nunavut) and three other comprehensive land claims have been concluded in the rest of Canada, including the Nisga'a Final Agreement ratified in 2000.

A common approach in these agreements, which each contain their own structural and procedural arrangements, is as follows:

1. a specific tract of land is identified and confirmed as land held by the Aboriginal group in fee simple;

2. a larger tract of land is identified as a management area, within which the Aboriginal group, federal government and either territorial or provincial government participate in land use planning and land use permitting and approvals; and

3. a larger area within which Aboriginal land use rights, such as hunting, fishing, trapping and gathering, continue to apply. This larger area often overlaps with management areas or other areas within which neighbouring Aboriginal groups have and exercise rights.

Clearly, decisions regarding land and resource projects on the fee simple lands under these agreements are within the control of the Aboriginal group, subject to the laws and regulations of the Aboriginal group, as well as to any generally applicable environmental assessment or environmental protection laws and regulations. The more difficult and nuanced issue is to identify the degree of control exercised by the Aboriginal group on the second and third categories of land identified above.

(a) The Nisga'a Final Agreement

The Nisga'a Final Agreement follows the above model in identifying different categories of land and attempts to identify and clarify the consultation obligations that attach to each category. For example, Chapter 10 of the Nisga'a Final Agreement, which deals with environmental assessment and protection, provides that:

1. if a proposed project (physical works or activities) is located on Nisga'a lands, it is potentially subject to Nisga'a laws in respect of environmental assessment, and may be subject to concurrent or coordinated assessments under federal (eg. CEAA) and provincial (eg. BCEAA) laws; and

2. if a proposed projects that will be located off Nisga'a lands (that is, on Crown lands) may reasonably be expected to have adverse environmental effects on residents of Nisga'a lands, Nisga'a lands, or Nisga'a interests set out in this Agreement (eg. hunting and fishing rights), Canada or British Columbia, or both must ensure that the Nisga'a Nation:

    (a) receives timely notice of, and relevant available information on, the project and the potential adverse environmental effects;

(b) is consulted regarding the environmental effects of the project; and

(c) receives an opportunity to participate in any environmental assessment under federal or provincial laws related to those effects, in accordance with those laws, if there may be significant adverse environmental effects (see Chapter 10, paragraph 6).

The Nisga'a Final Agreement defines consultation (such as that referenced in paragraph b, above) as follows:

> "consult" and "consultation" mean provision to a party of:
>
> a. notice of a matter to be decided, in sufficient detail to permit the party to prepare its views on the matter,
>
> b. in consultations between the Parties to this Agreement, if requested by a Party, sufficient information in respect of the matter to permit the Party to prepare its views on the matter,
>
> c. a reasonable period of time to permit the party to prepare its views on the matter,
>
> d. an opportunity for the party to present its views on the matter, and
>
> e. a full and fair consideration of any views on the matter so presented by the party.

With respect to the obligation to ensure that the Nisga'a Nation receives an opportunity to participate in any environmental assessment, Chapter 10, paragraph 7 provides as follows:

> If Canada or British Columbia establishes a board, panel, or tribunal to provide advice or make recommendations with respect to the environmental effects of a project on Nisga'a Lands or a project off Nisga'a Lands that may reasonably be expected to have adverse environmental effects on residents of Nisga'a Lands, Nisga'a Lands, or Nisga'a interests set out in this Agreement, the Nisga'a Nation will:
>
> a. have standing before the board, panel, or tribunal; and
>
> b. be entitled to nominate a member of the assessment board, panel or tribunal, unless the board, panel, or tribunal is a decision-making body, such as the National Energy Board.

The general provisions of the Nisga'a Final Agreement contain the following provision on consultation:

> CONSULTATION
>
> 28. When Canada and British Columbia have consulted with or provided information to the Nisga'a Nation in respect of any activity, including a resource development or extraction activity, in accordance with their obligations under this Agreement and federal and provincial legislation, Canada and British Columbia will not have any additional obligations under this Agreement to consult with or provide information to the Nisga'a Nation in respect of that activity.

Accordingly, the Nisga'a Final Agreement specifically addresses the extent and nature, as well as the limits, of consultation obligations in relation to land and resource projects on Crown land, in circumstances where those projects may have an impact on Nisga'a residents, Nisga'a lands or Nisga'a interests.

(b) The Tlicho Agreement

As indicated above, 14 land claim agreements have been reached between the federal government and Aboriginal groups in the three northern territories. The most recent of these is the Tlicho Agreement. The federal legislation ratifying this agreement received royal assent on February 15, 2005.

The Tlicho Agreement follows the general structure of identifying and confirming Tlicho lands which are held in fee simple, a larger tract of land known as Wek'èezhìi, within which the Tlicho people participate directly in land use planning and the issuance of land and water permits and licences, and a broader area of land known as Mowhì Gogha Dè Niitlèè within which the Tlicho people have rights such as hunting, fishing, and trapping.

Proposed projects on Tlicho lands are within the general control of the Tlicho government.

Proposed projects outside of the Tlicho lands, but within Wek'èezhìi or Mowhì Gogha Dè Niitlèè are, with some similarities to the Nisga'a Final Agreement, subject to consultation with the Tlicho government and subject to environmental assessment and review by the Mackenzie Valley Environmental Impact Review Board, on which the Tlicho people will have direct representation, and the Mackenzie Valley Land and Water Board (of which the Wek'èezhìi Land and Water Board is a local panel), again with direct participation of the Tlicho people.

Specific consultation requirements are provided for in the Tlicho Agreement under Chapter 23, which addresses subsurface resources.

Section 23.2 provides as follows:

> 23.2 CONSULTATION
>
> 23.2.1 Any person who, in relation to Crown land wholly or partly in Mowhì Gogha Dè Niitlèè (NWT) or Tlicho lands subject to a mining right administered by government under 18.6.1, proposes to

(a) explore for or produce or conduct an activity related to the development of minerals, other than specified substances and oil and gas, if an authorization for the use of land or water or deposit of waste is required from government or a board established by government to conduct these activities; or

(b) explore for or produce or conduct an activity related to the development of oil or gas,

shall consult the Tlicho Government.

23.2.2 The consultations conducted under 23.2.1 shall include

(a) environmental impact of the activity and mitigative measures;

(b) impact on wildlife harvesting and mitigative measures;

(c) location of camps and facilities and other related site specific planning concerns;

(d) maintenance of public order including liquor and drug control;

(e) employment of Tlicho Citizens, business opportunities and contracts, training orientation and counselling for employees who are Tlicho Citizens, working conditions and terms of employment;

(f) expansion or termination of activities;

(g) a process for future consultations; and

(h) any other matter agreed to by the Tlicho Government and the person consulting that government.

23.2.3 The consultations conducted under 23.2.1 are not intended to result in any obligations in addition to those required by legislation.

23.2.4 No consultation is required under 23.2.1 where negotiations have been conducted in accordance with 23.4.1.

23.3 OIL AND GAS EXPLORATION RIGHTS

23.3.1 Prior to opening any lands wholly or partly in Mowhì Gogha Dè Niitlèè (NWT) for oil and gas exploration, government shall consult the Tlicho Government on matters related to that exploration, including benefits plans and other terms and conditions to be attached to rights issuance.

23.4 MAJOR MINING PROJECTS

23.4.1 Government shall ensure that the proponent of a major mining project that requires any authorization from government and that

will impact on Tlicho Citizens is required to enter into negotiations with the Tlicho Government for the purpose of concluding an agreement relating to the project. This obligation comes into effect one year after the effective date. In consultation with the Dogrib Treaty 11 Council or the Tlicho Government, government shall, no later than one year after the effective date, develop the measures it will take to fulfil this obligation, including the details as to the timing of such negotiations in relation to any governmental authorization for the project.

23.4.2 The Tlicho Government and the proponent may agree that negotiation of an agreement under 23.4.1 is not required.

The term "consultation" is defined in Chapter 1 of the Tlicho Agreement as follows:

"consultation" means

a. the provision, to the person or group to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that person or group to prepare its views on the matter;

b. the provision of a reasonable period of time in which the person or group to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the person or group obliged to consult; and

c. full and fair consideration by the person or group obliged to consult of any views presented.

Accordingly, the Tlicho Agreement contains specific obligations on, and limitations to, consultation in relation to land and resource projects on Crown land, which may have impacts upon the Tlicho people, Tlicho lands, or Tlicho interests.

IV. CONSULTATION UNDER AGREEMENTS-IN-PRINCIPLE IN BRITISH COLUMBIA

While no treaties have been finalized under the British Columbia Treaty Commission process, agreements-in-principle provide some indication of the potential requirements for consultation in relation to land and resource projects on Crown land.

For example, the Lheidli T'enneh Agreement-in-Principle (LTAIP) dated July 26, 2003 provides some guidance on these issues. The Wildlife chapter under the LTAIP confirms that the Lheidli T'enneh will have the right to harvest wildlife for food, social and ceremonial purposes in the Lheidli T'enneh Area in accordance with the final agreement.

Paragraph 9 of the Wildlife chapter addresses the issue of Crown land disposal as follows:

9. The Crown may authorize use of or Dispose of Crown Land, and any authorized use or disposition may affect the methods, times

and locations of harvest in Wildlife under the Final Agreement, provided that the Crown ensures that those authorized uses or dispositions do not deny Lheidli T'enneh Citizens the reasonable opportunity to harvest Wildlife under the Final Agreement.

10. The Lheidli T'enneh right to harvest Wildlife will be exercised in a manner that does not interfere with other authorized uses or dispositions of Crown Land existing as of the Effective Date or authorized in accordance with paragraph 9.

11. Prior to the Final Agreement, the Parties will negotiate and attempt to reach agreement on the factors to be considered in determining whether the reasonable opportunity to harvest Wildlife would be denied under paragraph 9.

These provisions in the LTAIP provide only a broad outline of the potential structure of Crown land use decisions, environmental impact reviews and consultation requirements which would be applicable under a final agreement reached within the British Columbia Treaty Commission process. Generally similar provisions appear in other agreements-in-principle.

(a) The Definition of Consultation

All of the existing AIPs include a definition of consultation. The AIPs of the Lheidli T'enneh, Maa-nulth First Nation and Sliammon essentially duplicate the definition found in the Nisga'a Final Agreement (reproduced above). The Tsawwassen First Nation Agreement-in-Principle contains a definition that is only slightly revised from that found in earlier agreements:

> "consult" and "consultation" mean provision to a Party of:
>
> a. notice of a matter to be decided;
>
> b. sufficient information in respect of the matter to permit the party to prepare its views on the matter,
>
> c. a reasonable period of time to permit the party to prepare its views on the matter,
>
> d. an opportunity for the party to present its views on the matter, and
>
> e. a full and fair consideration of any views on the matter so presented by the Party.

In addition, the four AIP's all contain a limiting provision similar to that in the Nisga'a Final Agreement. The Tsawwassen AIP states:

> CONSULTATION
>
> 50. Where Canada and British Columbia have Consulted or provided information to Tsawwassen First Nation as required by the Final

> Agreement, Canada and British Columbia will have no additional Consultation obligations under the Final Agreement.

While there are still no final agreements under the BC Treaty Commission process, the above definitions of consultation and attendant limiting language appear to be becoming standard features of AIP's.

V. THE PARALLELS BETWEEN CONSULTATION UNDER MODERN LAND CLAIMS AGREEMENTS AND THE NUMBERED TREATIES

The numbered treaties differ dramatically in form from modern land claims agreements. This is not surprising given the lengthy period of time separating their creation and the widely differing social and legal context.

However, there seems to be the beginnings of a convergence in the requirements for consultation under these very different agreements. The modern land claims agreements identified above expressly define consultation to generally require:

- Notice
- Adequate information
- Time and an opportunity to express concerns
- Serious consideration of concerns

This definition of consultation incorporated into modern land claim agreements (and contemplated by the Agreements in Principle under the BC Treaty Commission process) appears, at first blush, to stand in sharp contrast to the silence of the numbered treaties. However, the Supreme Court has now clarified that the numbered treaties contain a similar requirement. In *Mikisew*, the Supreme Court agreed with the following statement of Finch J.A. (now C.J.B.C.) in *Halfway River* at paras. 159-160:

> "The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
>
> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, whenever, possible, demonstrably integrated into the proposed plan of action."

The ultimate resulting consultation may not appear as different as the treaties that require it.

VI. SUMMARY AND CONCLUSION

Earlier case law (*Haida* and *Taku*) confirmed that the Crown has a duty to consult, if necessary, accommodate aboriginal interests when it has knowledge, real or constructive, of the *potential* existence of an Aboriginal right or title and contemplates conduct that might adversely affect it.

The numbered treaties, concluded between 1871 and 1923, did not expressly incorporate the concepts of consultation, accommodation and justification in relation to land that is "required or taken up." The recent decision from the Supreme Court of Canada in *Mikisew Cree* clarifies that the duty of consultation is triggered when Crown decisions or land use authorizations permit a potential interference with treaty rights.

Modern land claims agreements (and agreements currently under negotiation) opt to expressly identify the circumstances in which consultation is required and to define the requirements of consultation. These agreements generally include limiting language to clarify that, once the consultation requirements of the agreements have been met, the federal, provincial or territorial government will have no additional consultation obligations under the agreements.

Thus, the concept of consultation will continue to apply with respect to land and resource decisions on Crown land in the post-treaty context—whether historic numbered treaties or modern land claim agreements. While the numbered treaties differ dramatically in form from modern land claim agreements, there appears to be convergence on the requirements of the Crown's duty to consult.

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