



Kla-soms Kwuth Tooqen

"answer with strength"
a toolbox for responding to Crown Land Referrals

WELCOME!

The purpose of this site is to provide some useful information to First Nations land and resource practitioners in managing and responding to Land Referrals. This consultation toolbox takes a practical approach and presents a series of tools intended to help increase the efficiency and effectiveness of dealing with referrals.

We are grateful to the [Law Foundation of British Columbia](#) for funding the review and update of the Toolbox. The Toolbox includes:



How to use the Toolbox



Response Letter Guide



The Legal Basis for Consultation



Consultation Policy



Accommodation



Case Studies of how some First Nations manage Land Referrals (not reproduced in this document)



Useful **Contacts** (not reproduced in this document)



Software Advice for Referrals (out-of-date reviews removed; not reproduced in this document)



Who we are

If you have any questions, comments or other materials you think we should include, please contact either:

	The Sliammon First Nation: Phone: (604) 483-9646		The Aboriginal Mapping Network (c/o Ecotrust Canada): <ul style="list-style-type: none">Phone: (604) 682-4141, extension 240E-mail: info@nativemaps.org
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Nothing on this website should be considered legal advice. Readers should not act on information in the website without first seeking specific legal advice on the particular matters which are of concern to them.



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How to use the Toolbox

The Toolbox is a source for ideas that may help you, the referrals practitioner, to improve your effectiveness and efficiency in responding to Crown land referrals. The Toolbox is not, however, a substitute for a referrals response strategy developed with community leaders in consultation with community members and, where appropriate, legal counsel. Nor is it a substitute for a comprehensive claim of Aboriginal Rights and Title. Ideally, particular referral responses build on a platform of general information already provided to the Crown as formal notice of your asserted Aboriginal Rights and Title within your traditional territory.

A detailed response to every referral that comes in the door may not be the most effective way for your Nation to achieve its goals and protect your Nation's Aboriginal Rights and Title. Consider the value of developing protocols, agreements or procedures that allow government or development interests to fulfill their duty to consult with your Nation on mutually acceptable terms.

Only your Nation can decide what the best approach is for your Nation.

The Toolbox, therefore, should be used with **caution**. Please read the following tips on how to get the most out of the tools provided on this website:

- The Toolbox is **NOT** intended to provide legal advice. It is prudent to seek advice on any particular matters that are of concern to you, especially in cases where a development proposal is significant and has potential to impact your Aboriginal rights and title claims. To minimize legal fees, consider drafting referral responses yourself, and having them reviewed by a lawyer to ensure your legal interests are protected. Wherever possible, seek advice of lawyers who work in the field of aboriginal law. Not all referrals will require you to rally the troops in developing a response - choose your battles. Focus on the issues that matter most to your community.
- Don't use the guide for developing a response as a template. This may sound contradictory. However, the response letter guide is provided to be more of a check-list, to offer suggestions on language and to help you reflect on possible content for your own responses. Please don't use it as a "fill in the blank" letter for all your responses - in so doing you may weaken your position.
- Network to build on what has worked elsewhere. This includes talking with neighbouring Nations, networking through existing alliances, and developing a dialogue with other referrals practitioners throughout the province to help leverage the success of other people's work.
- On key issues which may end up going to court, provide as much information to the governments as possible to show evidence of your rights or title. Be strategic and do not send out confidential information, but provide enough information to allow the courts to conclude the governments should have known the area was important to your Nation and could be the subject of a rights and title claim.

- On key issues consider asking the governments to respond in writing as to whether or not they accept your Nation has evidence of rights and title. The more decisions the governments put in writing, the more opportunities there are to challenge these decisions in court.
- Track all correspondence and communications and maintain a good filing system. You may need documentation to resolve disputes later or as evidence in court.
- Every referral is unique, requiring a unique approach in responding. However, consistency in your position is important. Develop similar responses to similar issues.
- Develop the skills and capacity in your community to be able to effectively evaluate development proposals. Where necessary seek expertise outside of your community.
- Continually work to develop a good information base to help in decision making. This may include gathering traditional use and occupation evidence, oral histories or baseline wildlife and resource data.
- Establish a referral flowchart to document a clear internal process for action and decision making on referrals that is appropriate to the governance structures of your First Nation. A clear process will improve your response time and effectiveness, while still maintaining good consultation with your community. (For a sample referral response procedure flowchart, see Appendix F of the [Response Letter Guide](#))
- Realistically assess and plan for the human resources required to properly respond to referrals. For an average-sized First Nation, this may be a full time position. In all forums, request capacity funding from the Crown to support your participation in consultations.
- Consider developing protocol agreements with the licensees operating in your territory. These agreements may include a financial contribution agreement to help cover your costs in responding to referrals.
- Don't get discouraged. It can be a frustrating exercise to work in this field. Yet it still provides a good opportunity to make your First Nation's voice and concerns heard.

Strategies For Consultation With Limited Capacity

By Krista Robertson, Woodward & Company, November 7, 2007

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Introduction

A common experience of First Nations engaging with government and private companies about resource use decisions is a lack of adequate human and financial resources to fully participate. This is a serious concern because First Nations have a strong interest in being able to be adequately involved in consultation. Information that comes to light in the consultation process has important outcomes with respect to the government's legal obligations to accommodate a First Nation's Aboriginal rights.

It has been less than a decade since the courts have begun to strongly enforce the government's legal duty to consult and accommodate. Although this enforcement is a positive development in the law, the reality is that within a short period of time, First Nations have experienced a significant increase in demands placed on their land and resource departments and their governments to process a very high volume of resource use 'referrals'.¹ Hopefully, First Nations' capacity to meaningfully participate will continue to develop to meet to this increased demand. Ideally, high-level government policy reform and funding programs, as well as First Nations' economic growth and development through fair resource benefit sharing, will aid in the process. However, there currently remains a problematic gap between the demands on First Nations to participate in consultation and accommodation processes to keep pace with development, and the limited resources available to do so. This section of the toolkit does not provide a solution, but some strategies that may help to address this ongoing problem.

1. Make a Preliminary Response Requesting a Budget to Support Consultations

Before responding to the proposed decision in a substantial way, a First Nation might make a preliminary written response to the initial referral, expressing a wish to participate and setting out the costs of participating, with a request that the government and/or proponent contribute to the costs. The letter may state, where applicable, that the First Nation has rights that may be impacted by the proposal, and that it has insufficient resources to adequately respond. Funding support is more likely to be provided by government and private parties where the costs are clearly defined. For example, the letter might set out: standard costs for travel if meetings take place outside the community, meeting room rates if the meetings take place in the community, hourly rates for land and resource department staff, cultural advisors, legal advisors, and costs of community meetings. Some First Nations have a General Consultation Policy that can be attached to an initial response letter setting out such details and other expectations for the process, such as a communication protocols. If the government and/or the company seeking approvals are willing to cover the costs of consultations, but require the First Nation to

¹ Referral is a common term used to describe a document from a government department or a private company notifying a First Nation of a proposed decision and requesting information from the First Nation about any potential impacts of the decision on Aboriginal rights.

enter into a contribution agreement to receive the funds, the agreement should make it clear that acceptance of money does not indicate support for the project. The purpose of a consultation funding contribution is to enable negotiation, and should not in any way pre-determine outcomes.

2. A First Nation Should Not Refuse to Participate if Funding is Not Provided

In several cases, the courts have recognized participation funding for First Nations as one factor in determining that the government has met its duty to consult. However, no court has gone so far as to declare that the government's common law duty to consult includes a positive obligation to provide First Nations with participation funding.² Further, the courts have generally held that consultation is a 'two way street' and that First Nations have a responsibility to participate in the process. Therefore, a First Nation should be very cautious about making general declarations that it will not participate in consultations without funding, as this may compromise its legal position. However, if capacity is an issue, First Nations should consider making it clear in writing that without proper funding, the ability to meaningfully engage in the process will be seriously compromised, which may result in an unjustified infringement of Aboriginal rights. This will be important evidence if a First Nation seeks court intervention in a case where a consultation process has been seriously compromised by a lack of resources.

3. Refer the Government to Information that Has Already Been Provided in Previous Consultations or is Publicly Available

A First Nation may not need to provide the government with general information about its Aboriginal rights for every referral. For example, if a First Nation is engaged in treaty negotiations, it may point to statements of intent and other information previously provided to the government and state that the government is aware, or should be aware, of the First Nation's rights. If a First Nation has provided traditional use studies, territorial maps, statements from elders or other information in other consultation processes with the government, it may be able to refer to these to avoid the time and expense of having to reproduce the same documents for a similar referral. Further, a First Nation should strive to hold the government accountable to inform itself about the potential impacts of a decision. General evidence of a First Nation's rights may already be publicly available, such as historical documents, ethnographies, and archaeological reports. In responding to a referral, a First Nation may first ask the government to identify what research it has done to assess whether or not a First Nation's rights may be impacted. This does not replace the First Nation's obligation to provide more specific information where required, but it can save precious resources.

4. If New Information is Required, Put the Ball in the Government's Court

Wherever possible, a First Nation should put the onus on the government to provide required information to assess the impact of the proposal on its Aboriginal rights. Naturally, some information will be known only by the First Nation; in such cases, the onus is on the First Nation to bring it forward.

² In some circumstances, legislation requires the government to provide funding for participation costs, which may be enforced by the courts.

It can be a matter of dispute whether the First Nation has the onus to demonstrate that the right would be infringed by the proposed activity, or whether the onus is on the government and/or proponent to demonstrate that activity will not have an adverse effect. Often, the matter requires detailed study and scientific or other expertise. If a First Nation does not have the resources to carry out this assessment, it should clearly communicate its concerns and assert that the government has an obligation in this regard. For example, it may state that it has fisheries interests in or near a proposed project area, and request an assessment by a professional biologist on how the project might impact the fishery. A First Nation should ensure that all requests for studies or other information are recorded, and insist on having a say in who does the study and how it is carried out, to ensure that the research is independent and properly thorough. A First Nation will be in better legal position if it makes reasonable, direct requests for the information required to assess potential impacts, rather than simply stating it doesn't have capacity to assess the impacts.

5. Time Extensions May Be Required

Referrals from government and companies may state that the First Nations must respond prior to a specified time, such as forty-five days from the date of the letter. There is no legal basis for a government or private party to set a deadline for a First Nation's response time, unless the First Nation has previously agreed to a timeline. A First Nation should not hesitate to request more time if required. A simple letter requesting more time should suffice. Adequate time to respond cannot be unreasonably denied. However, a First Nation should be aware that it cannot unreasonably frustrate the consultation process; therefore, excessive delay could work against a First Nation. This is particularly true where further investment and approvals for a project may be advancing. If a First Nation is aware that the project is advancing in the preliminary stages of consultation, it should put the government and the proponent on written notice that irreversible activity should cease pending consultation.

6. Seek Funding and Partnerships with Other Agencies to Boost Capacity

In addition to seeking contribution funding on a referral-by-referral basis, a First Nation should take steps wherever possible to develop its general capacity, such as full-time land and resource staff, office and field equipment and data. Annual government funding programs may be helpful in this regard. Collaborating with environmental organizations and other First Nations to share information and resources on a general or a project-by-project basis can also help a First Nation to build capacity. In some cases, evidence of such efforts may be relevant in a judicial review to show that the First Nation made all efforts to participate in consultations.

7. Try to be Create Efficiencies Wherever Possible

The case studies section of this toolkit offers practical strategies from a number of First Nations for establishing efficient systems to process referrals. However, even the best systems can break down due to sheer overload. If a First Nation becomes aware that a response had been significantly delayed because it is simply 'buried' by other referrals and demands, it should communicate as soon as practical with the government advising of a backlog and an intention to respond at a later time. If capacity is fundamentally strained, a First Nation may have to consider prioritizing responses to proposals that may

have significant impacts over proposals that are unlikely to have an impact. In these circumstances, if possible, a First Nation might consider sending a short letter stating that a lack of response should not be deemed to be consent to any impacts on Aboriginal rights. The letter might also request notice of any developments or changes in the proposal, so at least the project can be monitored.

Conclusion

It is difficult to reconcile a First Nation's right to meaningful participation in consultations about land and resource use with the fact that many First Nations lack enough resources to do so. Firm recognition by the courts of the government's legal duty to consult is a positive legal development to enhance protection of Aboriginal rights, but the volume, pace, and complexity of consultation processes First Nations are expected to participate in may come as yet another burden on a First Nation's administration and government. As all parties adjust to the new reality in Canada that consultation is required for virtually every decision that may have an impact on Aboriginal rights, the situation will hopefully improve. In cases where a lack of resources is a barrier to adequate participation, a First Nation should document the problem so both the government and the courts can be made aware of it.

Response Letter Guide

The information provided on these pages is not a substitute for legal advice, but a few tools that you may find useful in developing your response to referrals.

First Nation guide for developing response letters

Before writing your response letter, it is important to form a clear position about the proposed project, as this will affect how your First Nation should respond to the referral. The purpose of a response letter may range from finding out more about the project, to ensuring that certain conditions are met if the project is to be approved, to complete opposition to the project, regardless of the details.

For example, if your First Nation could in principle support the project, but your support depends on how it will be carried out, the letter will serve the purpose of initiating a process for dialogue, studies, etc. Or, if your First Nation is completely opposed to the project, the purpose of the letter is to convince government that they should not approve it, and that if they approve it, their decision may be legally vulnerable.

Once your First Nation is clear about your goals, you will be clear about the purpose of the letter. In all cases, but especially for referrals where you are opposed to the project and want to prevent its approval, it is advisable to have your lawyer review your response letter before submission.

DON'T use the following guide for developing response letters as a template. This may sound contradictory. However, we think this is good advice for two reasons:

- 1) The guide is provided to be more of a check-list, to offer suggestions on language and to help you reflect on possible content for your own responses. Please don't use it as a "fill in the blank" letter for all your responses - in so doing you may weaken your position.
- 2) Remember, a detailed response to every referral that comes in the door may not be the most effective way for your Nation to achieve its goals and protect your Nation's Aboriginal Rights and Title. Consider carefully where to devote the time and energy required to develop a response - choose your battles. Focus on the issues that matter most to your community.

How to use this response letter guide:

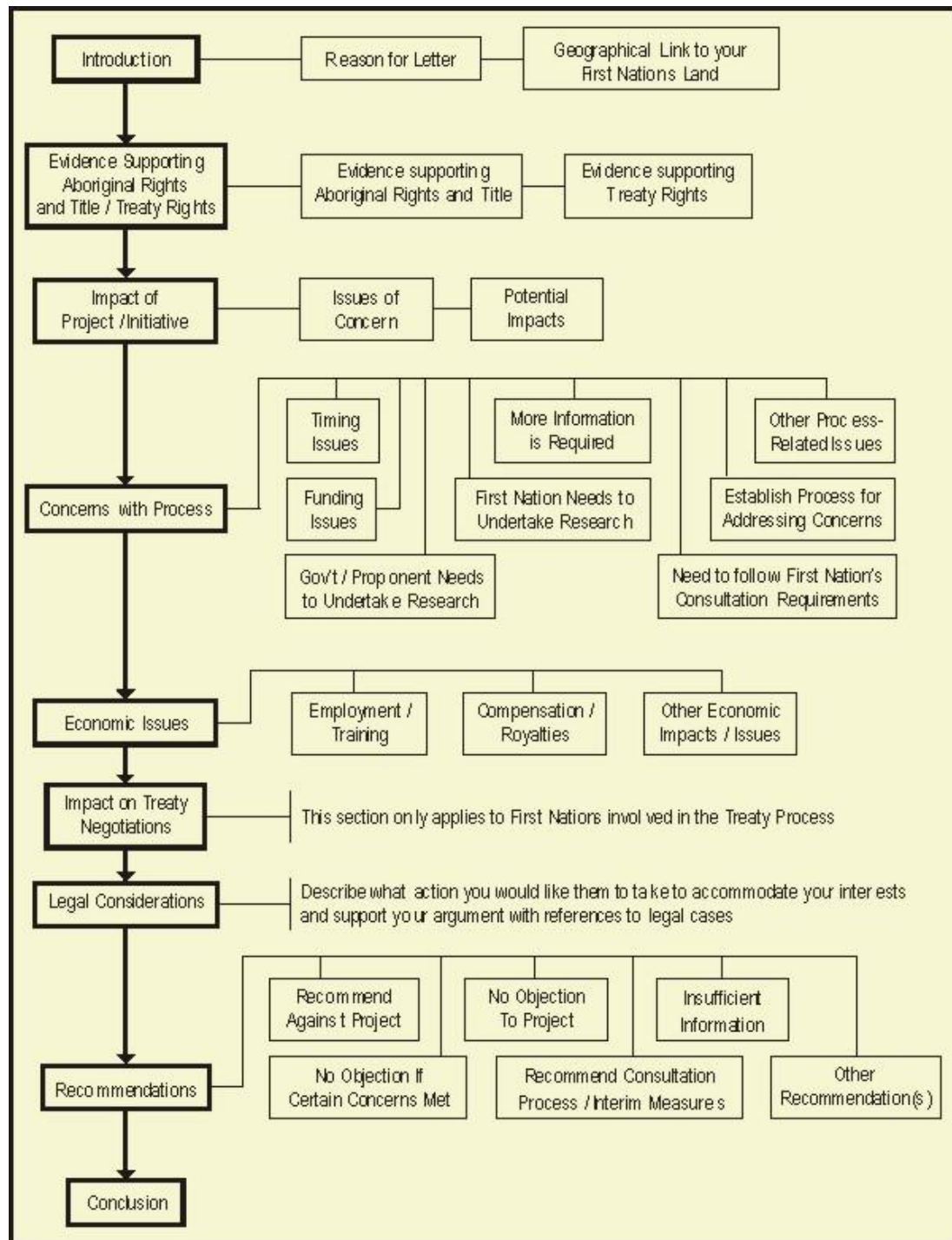
Here are **examples** of what you will see throughout this response letter guide.

Sample	Description
Bolded Text	These are instructions of what you may choose to provide for each section you are working on. This text should NOT be included in your letter.
<a sacred site / cultural area>	These are "Wording Alternatives" that you can choose from. They may not be

	relevant to your needs, but will give you some ideas to think about. Consider replacing these with your own wording!
[<i>name of project</i>]	These provide an "Explanation" of what type of information is required.

Components of a Comprehensive Response Letter

The response letter guide is divided into nine discreet sections, which are set out in the flowchart below. You may click on the headings or subheadings to find out more information or begin your letter at the "[Introduction](#)" section and work through to the "Conclusion" section.



Introduction

[Date]

[Name and address of person to whom you are writing]

Note to writer:

This response letter guide is written on the assumption that you are responding to a referral sent to you by a Crown agency. In light of the Supreme Court of Canada's finding in *Haida Nation* that the duty to consult rests primarily with the Crown, ensure you engage in formal consultation with the Crown even where a referral is received directly from the proponent. At the stage of further information gathering and accommodation negotiation, it may be useful to engage in discussions directly with third party proponents. It is likely that the government agency will provide your response to the proponents and ask them to address your concerns. However, when you are asserting a right to consultation and accommodation based on your Aboriginal rights, it is important that you put your concerns on record with the Crown to secure your legal position.

Dear [name of person]:

Re: [name of project / initiative]

Identify the reason for writing your letter, for example:

I am writing on behalf of the [name of your First Nation] in response to your letter of [date] that we received on [date] to express our concerns about the proposal by [name of company / proponent] to [describe project / initiative].

Describe geographical link to your First Nation's territory, for example:

(1) [name of project / initiative] falls within our **traditional territory** as described in <the map provided to the BC Treaty Commission in our statement of intent> <the map of our traditional territory> <attached to this letter> <previously provided to the Crown>.

(2) [name of project / initiative] falls within < > our **treaty lands** as described in the map of our treaty lands attached to this letter.

(3) [name of project / initiative] <falls within><has the potential to impact> on our **reserve lands** which are located [describe location in relation to project / initiative].

(4) [name of project / initiative] <falls within> <has the potential to impact> on <our hunting areas> <our fishing sites / areas> <our trapping

areas> <our berry-picking areas> <a sacred site / cultural area><our economic development areas>.

(5) [*name of project / initiative*] has the potential to impact on [*describe any other land it will impact on and your First Nation's connection to it*].

Evidence of Aboriginal Rights and Title / Treaty Rights

If you have stated that you have *Aboriginal Rights and Title* that may be affected, describe the general evidence that is available to support that conclusion, for example:

(1) Evidence from our elders provided through <interviews> <community meetings> <oral history projects> <traditional use and occupancy studies> confirms that we have always <lived in> <hunted / trapped / fished> <used> the area in question.

(2) <Archaeological> <anthropological> <ethnographic> <historical> <documentary> evidence confirms the advice provided to us by our elders. We expect that your department has informed itself of these studies. Should you not have this information in your records, we are willing to develop a process with you to compile and exchange this information.

Note to writer:

- **To demonstrate Aboriginal title you need to show:**

a. proof of occupation of the land at the time the Crown asserted sovereignty – in BC, as of 1846; and

Note: occupation of land on the date the Crown asserted sovereignty may be proved by showing a continuity of present day occupation with pre-sovereignty occupation.

b. at the time of Crown sovereignty, the occupation of land by your First Nation or your First Nation together with another First Nation was exclusive of others (if joint occupation was the case, the First Nations should attempt to work something out together as you may otherwise defeat each other's positions).

- **To demonstrate other Aboriginal rights you need to show that:**

the activity in question must be part of a practice, tradition or custom that was

integral to your First Nation's distinctive culture (e.g. that it was and is something that makes your First Nation who it is.) prior to European contact, and there has been reasonable continuity between this pre-contact activity and current practices, traditions or customs.

- **Confidentiality:**

Some information or items which could be presented as proof may be considered to be of a confidential nature, therefore, a community may choose not to divulge all relevant information (particulars). For example, you may identify a larger polygon area on a map and label it “cultural site”, rather than pinpointing the site and describing the activities that take place at that site.

- **Drawing on information already provided to government:**

Where possible, in order to save valuable time and resources in your department, refer to information already provided to the Crown that supports your assertion of Aboriginal rights, such as through the treaty process, filed land claims, consultation policies, land use plans, and other referral processes. ***If your First Nation has never compiled information and maps documenting your historic occupation of your traditional territory, or provided this kind of information to the Crown in any forum, we strongly recommend you contact a lawyer who practices in the area of Aboriginal rights law to work with you to submit a package to the Crown notifying them of your asserted claims.**

(3) [*Describe any other evidence to support Aboriginal rights or title. Ideally, particular referral responses build on a platform of general information already provided to the Crown as formal notice of your asserted Aboriginal rights and title within your traditional territory.*]

If you have stated that you have *treaty rights* that may be affected, describe the general evidence that is available to support that conclusion, for example:

(1) [*Name / description of treaty*] provides that we have treaty rights to [*describe nature of rights and area to which they apply*]. These rights are <set out in paragraph ____ of our treaty> <described in [*name treaty-related documentation that confirms the treaty rights in question*]>.

(2) [*Refer to any other evidence you have to support treaty rights*]

Note to writer:

In the case of an older treaty, you may wish to refer to the oral terms and promises of the treaty in order to show what the true intent of the signatories was, particularly where the First Nation

signatories did not read or write English.

Impact of the Project or Initiative

Note to writer:

The *Impact of Project or Initiative* section is the most important component for consideration. Please take the time to think about and clearly articulate how the proposed project or initiative impacts your Nation. It is important to draw the link between the proposed activities and the impact they are likely to have on your First Nation's rights and interests.

In identifying potential impacts at this early stage of the referral response/consultation process, a First Nation cannot know the precise impacts of a development project, particularly where technical studies may be required. It is important for First Nations to identify potential concerns about impacts, but to the greatest extent possible, maintain a position that the Crown and the project proponent are responsible—with First Nations' involvement—to carry out assessments and studies to ensure the project will not have unacceptable impacts on First Nations interests. For an excellent resource on First Nations participation in environmental assessments, see <http://www.fneatwg.org/>

[Name of project / initiative] is of concern to us for the following reasons. [Describe activities related to the project / initiative and their potential impacts that are of concern (see [Appendices](#) below for a list of such activities and impacts). With respect to each issue of concern, describe how it may affect your First Nation's rights and interests, such as:

- *harvesting activities: such as harvesting of wildlife, birds, fish, shellfish, timber, non-timber forest resources (e.g. berries, mushrooms, roots, floral greens, other edible and medicinal plants) and trapping;*
- *traditional and community activities: such as cultural ceremonies, rediscovery and spiritual development camps, social and family gatherings and recreational activities;*
- *cultural sites: such as sacred sites, archaeological sites,*
- *commercial activities: such as commercial hunting, trapping, fishing, tourism (e.g. ecotourism);*
- *limiting or degrading lands subject to land claims*
- *potential for development of commercial activities;*
- *drinking water;*
- *other rights and interests.*

*Also note any issues related to **access** to carrying out such activities (e.g. access to harvesting areas, sacred sites).*

Note to Writer - These two fictitious examples are provided to demonstrate the value of linking the impact of the proposed activity to your Nation's rights or interests. These examples cite just one reason why X First Nation is concerned with the development proposal. You may have many concerns with a project. Where possible cite any studies or assessments that support your position.

Example 1:

The terrain along the east side of Fred Creek is too unstable to allow the construction of the road marked 3M. Roads built on similar terrain in the lower reaches of Fred Creek have resulted in landslides. Fred Creek has always been an important river to our Nation. We use the river for salmon harvesting and there is a fishing camp located just downstream of the proposed road construction that is used by two families in our community. Accumulation of sediment in the river caused by landslides along the road may damage the fish habitat of this important community resource.

Example 2:

Locating the Jane Lake Fishing & Hunting Lodge on Jane Lake will lead to increased harvesting pressure on lake trout and other fish species, and harvesting pressure on both bear and goat species in the area. Our people have always relied on the fish from Jane Lake for sustenance purposes. In addition, we have always used Jane Lake as a base for hunting bear and goat which we rely on for both sustenance and spiritual purposes. The Ministry of Land, Water and Air Protection, along with the Ministry of Sustainable Resource Management, has already placed restrictions on the number of bear and goat hunting licenses that are issued. A recent study of the fish stocks in the lake, commissioned by our Nation, has also raised some concerns as to the long term sustainability of fishing on Jane Lake (study attached). We are concerned that locating a hunting and fishing lodge on Jane Lake will compromise the ability of our people to rely on these invaluable resources. In addition, two people in our community operate part-time guide and outfitting excursions to Jane Lake. Locating a hunting and fishing lodge at the proposed site will limit their ability to run financially successful operations.

Establishment of a Workable Consultation Process

You may want to identify some of the concerns of your band relating to the process of consultation, for example:

- **More information required**

Before we can provide you with further information on our concerns with [*name of project / initiative*], we require further information about [*describe any information you require, such as copies of studies, data, etc.*].

- **<Government / Proponent> needs to undertake research**

We cannot fully engage in a consultation process with respect to [*name of project / initiative*] unless we are satisfied that there will not be any unacceptable impact on our rights and interests and [*describe potential issues of concern*] have been addressed. We therefore request that [*name appropriate department or proponent*] carry out [*describe nature of research*] in order to assist us in determining whether our concerns are warranted.

- **First Nation needs to undertake research**

We also must carry out an <archaeological impact assessment> <archaeological inventory> to determine the nature and extent of cultural resources in the area that may be affected.

In addition, we must conduct research to determine the <ecological / environmental effects> <economic impacts> of [*name of project / initiative*].

Furthermore, we must <conduct interviews> <conduct oral history interviews> <hold a community meeting> with community members and, in particular the elders, to determine the potential impact of [*name of project / initiative*] on [*describe issue requiring further research*].

- **Timing issues**

We cannot respond to you <by><within> [*fill in date or time period*] because [*provide reason, e.g. department workload, council or community meeting schedules, etc.*]. We therefore request that you postpone the deadline and refrain from making any decisions with respect to [*name of project / initiative*] until [*date by which First Nation can respond*]. **Funding issues**

In order to respond to your request regarding [*describe nature of referral request*], we will require funding to cover our costs connected

with [*describe the expenses for which the First Nation requires funding - such as costs of studies, interviews, holding meetings, hiring experts, legal costs, staff time, administration & overhead*]. Our First Nation does not receive funding to cover these types of expenses and we are unable to engage in a consultation process in a timely fashion without such funding.

Note to writer:

At the present time, there is arguably no established legal duty on the part of the government to provide funding to First Nations to participate in consultation. It is therefore a legal risk to refuse to provide information with respect to your Aboriginal rights if funding is not provided. However, it is commonly recognized that capacity funding is part of the consultation process, and many levels of government are providing such funding in practice. In all cases, First Nations should make every effort to secure capacity funding to ensure full participation in consultations.

- **Requirement to follow First Nation's consultation guidelines**

[*The following paragraph should only be used where the First Nation has established its own consultation guidelines or other similar process*]

We will be reviewing this proposal in accordance with our [*name document containing your First Nation's guidelines or process*]. In accordance with these, we require that you [*describe what action must be taken in accordance with these guidelines or process*].

Please note that our participation in such a process does not define or amend Aboriginal rights, or limit any priorities afforded to Aboriginal rights, including Aboriginal title, nor does it limit the positions that we may take in future negotiations or court actions.

Note to writer:

You should be aware that inclusion of this clause in your referral response may not guarantee the protection of your rights. By consenting to a project or entering into an agreement such as a joint venture agreement, an impact benefit agreement or an employment and training agreement you may be limiting your ability to enforce your aboriginal or treaty rights at a later time.

Furthermore, if a First Nation seeks judicial review of a decision to approve a project in their territory, the consultation record will be part of the evidence the Courts will consider in determining whether there has been adequate consultation. In this sense, all

consultations that have taken place, including phone calls, correspondence and meetings, may affect the outcome of a judicial review, as the Crown can be expected to use such records to demonstrate it has fulfilled its duty to consult. However, since the Courts have ruled that First Nations also have a duty to participate in consultation, it is to your advantage to ensure that your efforts to engage in consultation are also on record. If your First Nation is considering making a formal settlement offer that may have an adverse impact on your aboriginal rights claim or on a legal challenge to a decision, you should consult a lawyer on whether or not a “without prejudice” clause on correspondence may be employed to prevent the offer from being used against you in a court proceeding.

- **Establish a specific process for addressing concerns**

[Only use the following paragraph if you have not used the previous one]

We have concerns with [*name of project / initiative*]. We believe that the best way to address <these concerns> <our concerns with respect to this project / initiative and other similar projects / initiatives> is for us to work together to come to a common understanding of what needs to be done to address these concerns. We therefore suggest that we

- <set up a meeting between [*X*] and [*Y*]>
- <establish a joint review team to review this [*project / initiative*] or similar projects / initiatives in [*defined geographic area*]>
- <enter into an agreement to jointly review this [*project / initiative*] or similar projects / initiatives in [*defined geographic area*]>
- <negotiate an interim measure with respect to this [*project / initiative*] or projects / initiatives that would [*describe nature of agreement that is being proposed*]>.

Please note that our participation in such a process does not define or amend Aboriginal rights, or limit any priorities afforded to Aboriginal rights, including Aboriginal title, nor does it limit the positions that we may take in future negotiations or court actions.

Note to writer:

You should be aware that inclusion of this clause in your referral response may not guarantee the protection of your rights. By consenting to a project or entering into an agreement such as a joint venture agreement, an impact benefit agreement or an employment and training agreement you may be limiting your ability to enforce your

aboriginal or treaty rights at a later time.

Furthermore, if a First Nation seeks judicial review of a decision to approve a project in their territory, the consultation record will be part of the evidence the Courts will consider in determining whether there has been adequate consultation. In this sense, all consultations that have taken place, including phone calls, correspondence and meetings, may affect the outcome of a judicial review, as the Crown can be expected to use such records to demonstrate it has fulfilled its duty to consult. However, since the Courts have ruled that First Nations also have a duty to participate in consultation, it is to your advantage to ensure that your efforts to engage in consultation are also on record. If your First Nation is considering making a formal settlement offer that may have an adverse impact on your aboriginal rights claim or on a legal challenge to a decision, you should consult a lawyer on whether or not a “without prejudice” clause on correspondence may be employed to prevent the offer from being used against you in a court proceeding.

- **Note any other process-related issues**

[Elaborate in more detail if possible]

Economic Issues

You may want to identify some of the economic issues relating to the proposed development and how it will affect your organization, for example:

- **Compensation / royalties**

Subject to the conclusion that the [*name of project / initiative*] will not have unacceptable impacts on our Aboriginal rights, we advise you that we may be seeking <a share of resource revenues> <compensation> to recognize our economic interest in development activities in our territories.

- **Employment and Training**

Subject to the conclusion that the [*name of project / initiative*] will not have unacceptable impacts on our Aboriginal rights, we have an interest in employment and training in relation to [*name of project / initiative*]. We believe that our First Nation and our members should benefit from business ventures that are located on our lands. We therefore request that [*name of proponent*] engage in discussions with our First Nation regarding training and employment opportunities. We also think that

this initiative should be supported <financially> <through direct training> by [*name of appropriate government agency*].

- **Note any other economic impacts / issues**

[*Elaborate if possible*]

Impact on Treaty Negotiations

This section only applies to First Nations in the treaty process. You should only use this section if you can draw a link between the proposal under consideration and your treaty negotiations.

[*Name of project / initiative*] is located <within the area set out in our "statement of intent to negotiate a treaty"> <within the area we have selected as our settlement lands>. [*Describe nature of activity in relation to project / initiative and explain how it will prejudice your negotiations, e.g. land or resources will not be available for the treaty process.*]

Furthermore, we wish to remind you that once your government agreed to participate in the treaty negotiation process, you are bound to negotiate with us in good faith. This includes addressing issues, such as this one, that may have an impact on treaty negotiations. [*Include only if appropriate* - Recommendation 16 of the BC Claims Task Force, which was accepted by your government, stated that the parties should negotiate interim measures agreements whenever an interest was being affected that could undermine the process. As we believe this <project> <initiative> potentially undermines our treaty negotiations, we request that we begin negotiations towards an interim measure agreement at once.]

Legal Considerations

The following two paragraphs should be used by First Nations that have not signed a Treaty. They may also be used by First Nations that have signed a Treaty if that Treaty does not address the Aboriginal right in question.

The Supreme Court of Canada confirmed in *Haida Nation* that both the provincial and the federal Crowns owe First Nations a legal duty of meaningful consultation in respect of Crown decisions that could affect our Aboriginal rights, including Aboriginal title. Good faith consultation may in turn lead to an obligation to accommodate our concerns.

We therefore request you to advise us in writing:

- a) whether or not you agree that there is evidence of our rights in the area, and
- b) whether you require further information to assess our rights and, if so, precisely what information you require.

This paragraph should be used only by First Nations that have signed a Treaty.

The Supreme Court of Canada confirmed in *Haida Nation* and *Mikisew Cree* that both the provincial and the federal Crowns owe First Nations a legal duty of meaningful consultation in respect of Crown decisions that could affect our treaty rights. Good faith consultation may in turn lead to an obligation to accommodate our concerns.

Recommendations

Use this section to identify recommendations and to conclude your letter, for example:

- **Recommend against <project> <initiative>**

We are opposed to [*name of project / initiative*] and strongly urge you not to approve it. As noted above, we are particularly concerned about [*summarize key issues of concern and how the project will interfere with your rights*].

OR

- **No objection if certain concerns are met**

We have concerns about [*name of project / initiative*] that could be addressed by [*describe terms and conditions under which you would not object to the project / initiative e.g. environmental mitigation measures, measures to avoid infringement of Aboriginal or treaty rights, employment and training, economic benefits, etc.*] We also reserve the right to raise objections if any cultural use, archaeological sites or environmental impacts are identified when the <project> <initiative> is being carried out, or if we discover impacts on our rights or interest that we had not foreseen.

OR

- **No objection to <project> <initiative>**

At this time, we have no objection to [*name of project / initiative*]. We may choose in the future to address the issues of <Aboriginal rights and title> <treaty rights> infringement and compensation with respect to this <project> <initiative> through the treaty process, the courts or other dispute resolution process. We also reserve the right to raise objections if any cultural use, archaeological sites or environmental impacts are identified when the <project> <initiative> is being carried out, or if we discover impacts on our rights or interest that we had not foreseen.

OR

- **Recommend consultation process / interim measure**

We have concerns about [*name of project / initiative*] that could be addressed by <negotiating an interim measure as described above> <establishing a consultation process as described above> that would [*describe how an interim measure or consultation process might help to address your concerns.*]

OR

- **Insufficient information**

We do not have sufficient information to provide you with any final recommendations at this stage. Once we have <received [*describe requested information*]> <gathered the necessary information regarding [*describe information to be gathered*]>, we will forward our comments on [*name of project / initiative*] to you.

OR

- **Other Recommendation**

[*Note any other recommendations (instead of or in addition to the recommendations above).*]

AND (if appropriate)

In addition, we request an extension until [*specify time period*] in order to [*specify reason you need the extension e.g. to gather information or carry out discussions with community members*].

Conclusion

Please provide us with a written response to this letter.

AND (if appropriate)

Please contact [*name of contact person for First Nation and contact details*] <to discuss this matter further> <to set up a meeting so we can discuss these matters further>.

We look forward to your response.

Yours truly,

[*Position*]

[*Name of your First Nation*]

Note to writer:

Where the referral relates to a matter that that has potential to impact your Aboriginal rights, it is advisable to have your lawyer review your response letter before submission to the Crown agency. Consider also sending copies to the proponent, other government departments, the federal government (if they are not the initiator of the referral) and potential supportive First Nation or environmental organizations.

Appendices

Note to writer:

The lists of potential impacts provided with each type of development are meant simply as useful examples. It is important to review the project and evaluate the real risk of any of these impacts occurring. Also, there may be potential impacts that we have not listed - these should be included in your response. It is not useful to simply provide a list of all impacts that might occur for a given type of project. It is important to seek professional expertise to verify the validity of potential impacts for each related activity.

Appendix A: Forestry Impacts

Examples of some FORESTRY-RELATED ACTIVITIES	Examples of some POTENTIAL IMPACTS
Road building	<ul style="list-style-type: none">• increased probability of landslides on steep or unstable terrain may cause sediment to enter streams and damage fish habitat,• increased access,• damage to wildlife habitat,• spread of invasive or exotic plants,• etc.
Stream crossing	<ul style="list-style-type: none">• sediment accumulation in fish-bearing streams,• culverts can block fish access,• etc.
Timber harvesting	<ul style="list-style-type: none">• loss of old growth forests,• loss of wildlife and fisheries habitat,• damage to cultural sites,• decreased access to cedar, medicinal plants, or other forest resources,• destruction of high visual quality sites,• interference with First Nations' involvement in non-compatible traditional or commercial activities,• etc.
Restoration or silviculture	<ul style="list-style-type: none">• restoration of ecosystem values,• potential employment,• use of herbicides contaminates water sources and medicinal or food plants,• replanting a single species may cause/lead to long-term loss of

	plant and animal diversity, • etc.
Booming/log dumps	• loss of terrestrial and aquatic wildlife habitat, • bark and wood waste can damage tidal areas and traditional food sources, • wildlife disturbances from industrial activity, • etc.

See '[What Lies Beneath](#)' publication for more details

Appendix B: Mining Impacts

Examples of some MINING-RELATED ACTIVITIES	Examples of some POTENTIAL IMPACTS
Exploration (surveys, prospecting, claim staking, drilling, trenching, road/trail building, bulk sampling, etc.)	<ul style="list-style-type: none"> • land alienation, • camp garbage, • road/trail erosion from trenching, • access issues for hunting or fishing, • habitat destruction, • noise pollution, • acid mine drainage, • etc.
Mining and Milling (construction, removal of soil and vegetation, ore extraction, crushing/grinding, chemical concentration of ore, mine and surface water treatment, storage of waste rock and tailings, etc.)	<ul style="list-style-type: none"> • wildlife and fisheries habitat loss, • changes in local water balance, • sedimentation resulting in damage to aquatic habitats, • containment of toxins or leaching in tailings ponds, • potential acid generation from waste rock and pit walls, • heavy metal leaching, • cyanide solution containment, • etc.
Smelting and Refining (processing of mineral concentrate by heat or electro-chemical processes)	<ul style="list-style-type: none"> • sulphur dioxide emissions contribute to acid rain, • toxic chemical (e.g. ammonia, sulphuric acid) use for processing, • high energy requirement, • etc.
Mine Closure (recontouring pit walls and waste dumps, covering reactive tailings dumps, decommissioning roads, dismantling buildings,	<ul style="list-style-type: none"> • seepage of toxic solutions into ground and surface water, • water contamination from acid mine drainage, • wildlife and fisheries habitat loss, • revegetation failure,

replanting disturbed areas, ongoing monitoring and possible water quality treatment, etc.)	<ul style="list-style-type: none"> • wind borne dust, • slope and tailings impoundment failure, • etc.
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See [Environmental Mining Council of British Columbia](#) website for more details.

Appendix C: Oil & Gas Development Impacts

Examples of some OIL & GAS RELATED ACTIVITIES	Examples of some POTENTIAL IMPACTS
Exploration (seismic testing, etc.)	<ul style="list-style-type: none"> • damage to marine life by destroying eggs and larvae, • rupturing fish swim bladders (especially rockfish), • disrupting traditional migratory paths of marine mammals, • causing some species of fish to leave an area, thereby reducing the overall fish catch, • land and water alienation, • etc.
Extraction and transport	<ul style="list-style-type: none"> • oil spills can harm seabird, marine mammal, fish, and invertebrate populations, • can mean significant job loss for people in the fishing industry, • etc.
Industrial production	<ul style="list-style-type: none"> • drilling muds and waste water from production discharge poisonous fluids and metal cuttings into the ocean, harming marine animal populations and toxifying marine habitats, • etc.

See [Living Oceans Society](#) websites for more details

Appendix D: Fisheries Impacts

Examples of some FISHERIES RELATED ACTIVITIES	Examples of some POTENTIAL IMPACTS
Foreshore leases for sports fishing lodges or other developments	<ul style="list-style-type: none"> • limited access to harvesting sites, • damage to terrestrial and aquatic wildlife habitat, • interference with First Nations' involvement in traditional and commercial activities, • over-harvesting fish stocks, • water contamination from inappropriate waste disposal, • etc.

Aquaculture tenures	<ul style="list-style-type: none"> • waste from open finfish netcages empty into ocean, pollute water column, destroy habitat, and contaminate nearby sealife, • escaped Atlantic salmon jeopardize native Pacific salmonid stocks, • antibiotics in food pellets can lead to long-term resistant strains of bacteria that are harmful to human health, • potential harm to economic viability of recreational and commercial fisheries, • etc.
Fisheries management (quotas, gear restrictions, closures, openings, etc.)	<ul style="list-style-type: none"> • infringement of First Nations' fisheries conservation and allocation plans, • infringement of First Nations' priority right (especially if sports or commercial fisheries catch fish before First Nations) • interference with First Nations' involvement in traditional and commercial fishing activities, • over-harvesting fish stocks, • etc.

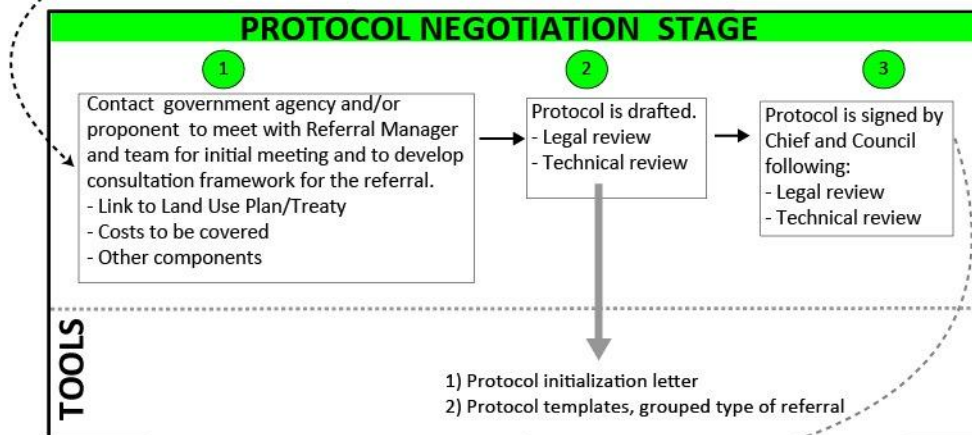
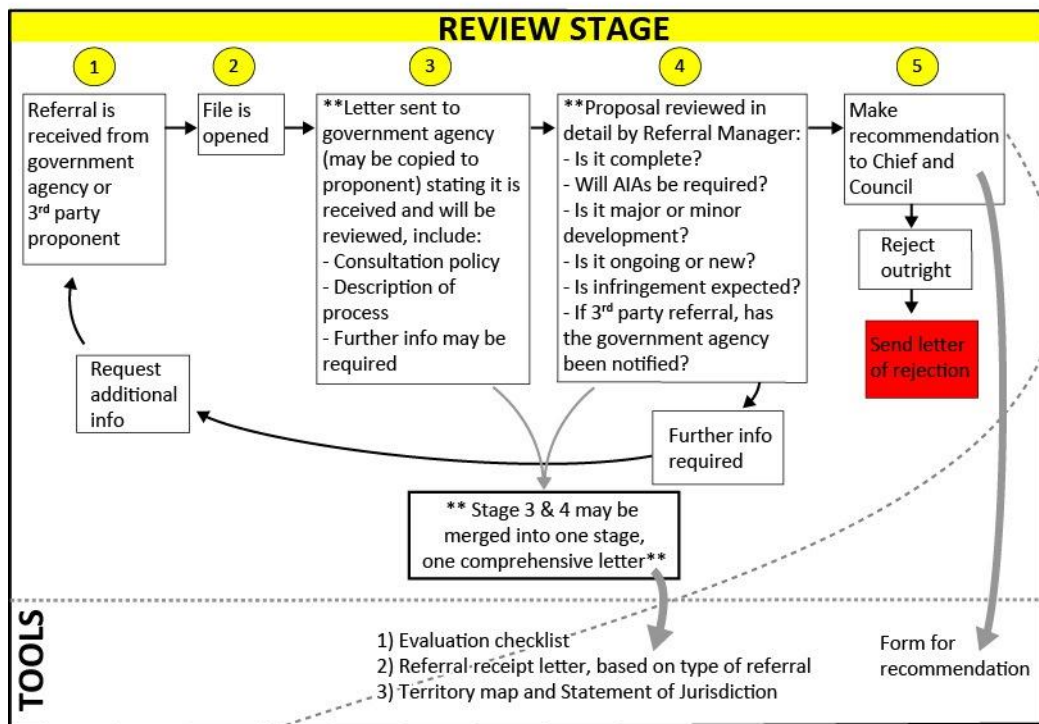
See [Living Oceans Society](#) website for more details

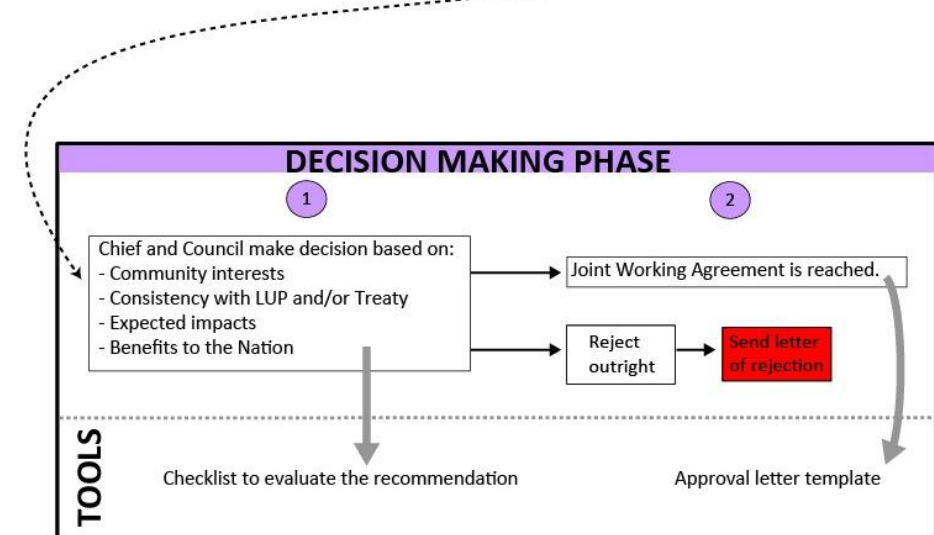
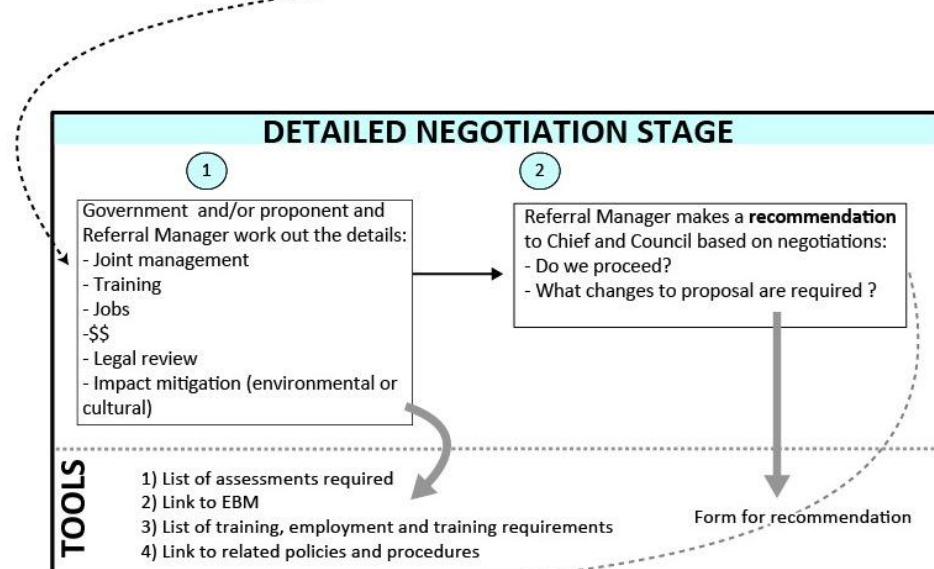
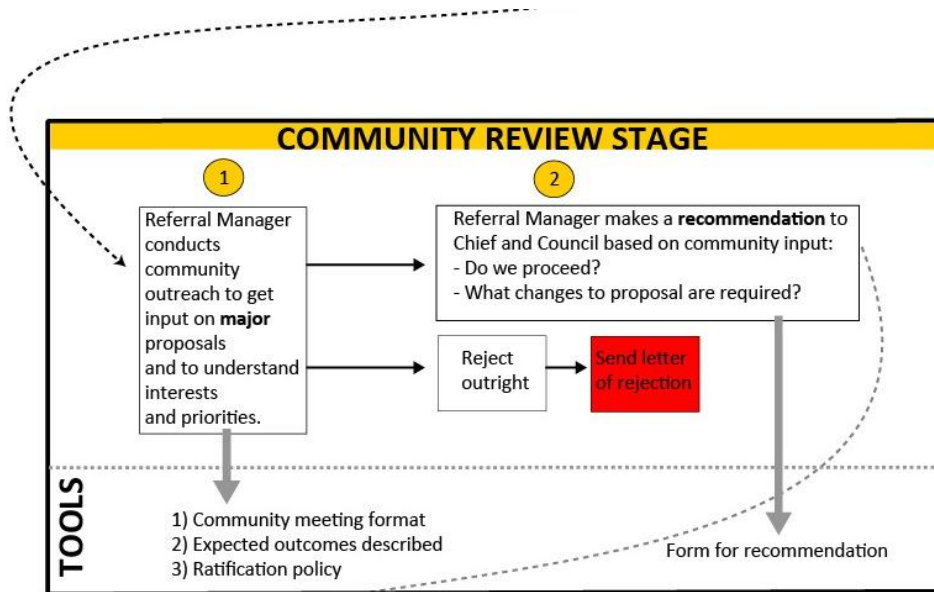
Appendix E: Lease and Development of Land Impacts

Examples of some LEASE AND DEVELOPMENT RELATED ACTIVITIES	Examples of some POTENTIAL IMPACTS
Sale/Lease	<ul style="list-style-type: none">• parcels of land that are sold or leased for long periods may not be available for settling treaties,• limit to access to traditional food gathering, hunting, recreational, or cultural sites,• interference with First Nations' involvement in non-compatible traditional or commercial activities,• etc.
Property development	<ul style="list-style-type: none">• destruction of wildlife habitat,• increased air or water pollution,• garbage,• destruction of high visual quality sites,• destruction of cultural sites,• loss of natural resources,• contamination of traditional food harvesting sites,• etc.

Appendix F: Sample Referral Flowchart

SAMPLE REFERRAL FLOWCHART





Legal Basis for Consultation

For a short review of the current state of the law on the obligation to consult with First Nations read the paper prepared by Jeanie Lanine of Woodward & Company (October 2006).

Case Law Summaries - Summaries of important and precedent setting cases regarding First Nations consultation.

If you are looking for legal papers concerning consultation, or links to other useful websites please visit the [Legal](#) page.

Remember that the law is constantly changing and that many of these resources may be out of date or may be written for an audience other than referrals practitioners.

The information provided on these pages is not a substitute for legal advice.

State of the Law on the Obligation to Consult with and Accommodate First Nations

by Jeanie Lanine, Woodward & Company ^[1] (October, 2006)

Citation: Lanine, Jeanie, 2006. "State of the Law on the Obligation to Consult and Accommodate First Nations". Vancouver: Ecotrust Canada & Aboriginal Mapping Network. October 6, 2006.

The purpose of this short paper is to provide those working for First Nations on Crown referrals with a brief overview of the current state of the law of consultation and accommodation. However, as the law is always developing, it is recommended that you obtain regular updates from legal counsel.

Who has the legal obligation to consult with First Nations?

The Supreme Court of Canada recently considered this issue in the Haida case.^[2] The Court held that it is the federal and provincial Crown governments, and not third parties (e.g. businesses), which must consult with First Nations about potential infringements of Aboriginal rights and title.

In Haida, the Court described the basis of the Crown's legal obligation to consult with First Nations as follows:

"Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by section 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult, and where indicated, accommodate Aboriginal interests."

That said, the Crown governments may delegate some procedural aspects of the consultation process to third parties. For example, a forest company may have requirements in their forest licences to inform/consult with First Nations in the forest licence region.

Although third parties may participate in consultation and accommodation measures, the ultimate legal responsibility to consult First Nations always remains with the provincial and federal governments and their agents, such as Crown corporations.

When is consultation required?

A Crown government must consult with First Nations whenever it knows, or ought to have known, about a credible claim to Aboriginal rights or title that could be affected by government decision-making. A First Nation does not have to prove the right first in court. The First Nation does not have to show that the claim will succeed if the claim went to court. The First Nation claim need only have some evidentiary basis that government is, or ought to have been, aware of.

In addition, consultation must occur before any activity begins and not afterwards, or so late in the decision-making process that there is no opportunity for the parties to engage in meaningful negotiation.

A Crown government's knowledge of credible claims of Aboriginal rights and/or title may come from many sources including:

- Information provided to government by First Nations in response to consultation letters
- Submissions made in statements of intent filed with the BC Treaty Commission
- Traditional Use Studies
- Regional planning processes
- Published information about traditional use and occupation readily available upon reasonable enquiry
- Previous responses provided to government by a First Nation regarding rights and title
- Previous litigation of Aboriginal rights or title by a First Nation or its members

Crown government decisions about the sale or leasing of Crown land, forest development, aquaculture, sport or commercial fishing, hunting, mining, and oil and gas activities commonly require consultation.

If a Crown government exercises significant decision-making power over private lands subject to an Aboriginal rights and/or title claim, and there is potential for infringement of these interests, this may also trigger the duty to consult.

What kind of consultation is required?

The level of consultation required is on a spectrum and depends upon the strength of the First Nation's Aboriginal rights and/or title claim and the potential negative impacts of the proposed activity. The level of consultation required may also change as the consultation process goes on and information is exchanged.

At one end of the spectrum, where a claim to title or rights is weak or the potential for negative impacts minor, the government may only be required to give notice, disclose information, and discuss any issues raised in response to the notice. At the other end of the spectrum, where there is a strong Aboriginal claim and the risk of damage is high, deep consultation may be required.

Deep consultation generally requires government to fully inform itself of the practices and views of the First Nation, and to undertake meaningful and reasonable consultation with the First Nation with the goal of reaching negotiated interim accommodation pending final determination of the Aboriginal interest. For meaningful consultation to take place, a Crown government must act in good faith and with the intention of substantially addressing the concerns of the First Nation. The First Nation must also act in good faith in negotiations and will not generally have a veto over the proposed activity.

Factors that indicate a need for deep consultation include:

- The right is particularly important for the First Nation
- The right is protected by treaty
- The proposed activity involves a high rate of resource extraction
- The proposed activity significantly impacts lands selected for treaty settlement
- The proposed activity will cause permanent harm which cannot be compensated by money
- The proposed activity may lead to future development in the area
- The proposed activity involves a Crown grant of fee simple ownership to a private party
- Previous accommodation agreements have been reached with government in the same area

How does the Crown breach its duty to consult?

Whether a Crown government has breached a duty to consult with a First Nation will depend on the level of consultation required in the circumstances (see above). A breach may not be the result of a single incident, but could arise from a combination of several failings. The following incidents may suggest that the Crown has breached its duty to consult:

- The Crown failed to follow its own process for consultation.
- The Crown has treated the First Nation like any other stakeholder group or individual.
- The Crown ended previous accommodation arrangements without consultation.
- The Crown refused to deviate from its uniform policies designed for all First Nations and, thereby, refused to appreciate the specific First Nation's interests.
- No effort was made to offer or even consider alternatives/options if the First Nation rejected the Crown's initial proposals.
- The Crown allowed the infringement of a credible claim to continue without consultation.

When does a duty to accommodate arise?

The duty to accommodate arises if the consultation process suggests that government policy should be changed to accommodate the Aboriginal interest. For example, the duty to accommodate may arise if a First Nation's claim is strongly supported by the evidence, or the proposed activity involves serious or

permanent harm. The duty to accommodate does not mean the Crown must agree with the First Nation's proposals. Instead, this duty implies a compromise between the two sides.

For many First Nations, accommodation will also include an economic component. Commonly negotiated items in interim measures or accommodation agreements between First Nations, the Crown, and the private sector, include:

- Land grants or tenures
- Cash payments
- Access agreements
- Cultural protection
- Environmental assurances
- Co-management of projects
- Revenue sharing
- Business ownership interests
- Employment opportunities
- Training
- Long-term business opportunities

Before a First Nation agrees to proposed accommodation measures it is very important that the First Nation fully understands the financial, legal, cultural, political, and environmental consequences of the agreement. In most cases this will require professional financial and legal assistance.

Are First Nations required to respond to consultation referrals?

First Nations have a duty to express their interests and concerns once they have had an opportunity to consider the information provided by Crown government officials about a proposed activity. First Nations must also consult in good faith and must not frustrate the process by refusing to participate.

When responding to consultation referrals, First Nations should:

- Specifically set out the affected Aboriginal rights and the manner in which the proposed activity will infringe those rights. Always refer to those rights in future correspondence.
- Refer to sources of information available to government about the affected Aboriginal interests. Sources may include treaty negotiation information, published documents (e.g. anthropological, archaeological), historical documents, traditional use studies, prior litigation, and prior interim measures agreements.
- Avoid showing an unwillingness to negotiate and potentially compromise in correspondence with the Crown. Be ready to invite further discussion.
- When rejecting government proposals ask for or suggest options/alternatives.
- If possible, clearly emphasize the irreversible nature of the rights infringement.

For more information about how to draft consultation response letters, please refer to the [Response Letter Guide](#).

First Nations are not required to reach an agreement with representatives of a Crown government; they are only required to negotiate in good faith. Although a goal of consultation and accommodation is to avoid litigation, this will not always be possible. First Nations should therefore prepare for the possibility of litigation by keeping copies of all responses to Crown referral correspondence and accurate records of consultation meetings and telephone conversations.

Who pays for consultation?

In order to be able to provide meaningful input during the consultation process, most First Nations will require funding to ensure that they have the ability to retain and pay administrative staff, legal counsel, scientific experts, researchers, and, when required, translators.

At the present time, there is arguably no established legal duty on the part of the Crown to provide funding to First Nations to participate in consultation. It is therefore a legal risk to refuse to provide information with respect to your Aboriginal rights if funding is not provided. However, it is commonly recognized that capacity funding is part of the consultation process, and many levels of federal and provincial governments are providing such funding in practice. In all cases, First Nations should make every effort to secure capacity funding to ensure full participation in consultations.

In order to secure capacity funding, a First Nation should identify the resources they will require to participate in consultation, as well as the time frame for response. A funding request should then be made to the relevant Crown government agency and third party proponent. Some First Nations have developed specific consultation policies, processes and fee structures to deal with consultation referrals. For more information please refer to the [Case Studies](#) section of the Toolbox.

[1] The author wishes to acknowledge the contributions to this paper made by Tony Price, law student, Woodward & Company.

[2] *Haida Nation v. B.C. (Minister of Forests et al)*, 2004 SCC 73.

Case Law: General Principles

Mikisew Cree First Nation v (Minister of Canadian Heritage), 2005 SCC 69

By Jeanie Lanine, Woodward & Company

In this important decision, the Supreme Court of Canada confirmed that the duty of Crown governments to consult and accommodate First Nations when making land and resource use decisions extends to decisions that negatively affect their treaty rights.

In this case, the Crown proposed to build a winter road through Treaty 8 surrendered lands of the Mikisew Cree. The Court held that all the parties to Treaty 8 contemplated that, from time to time, portions of the surrendered land over which the Mikisew had hunting, trapping and fishing rights would be “taken up” for other purposes. The authority for the “taking up” of lands in Treaty 8, did not, however discharge the Crown’s duty to act honourably. Where, as in this case, the “taking up” would adversely impact treaty hunting and trapping rights, the duty to consult was triggered.

Given that the winter road was built on surrendered lands and not permanent in nature, the Court held that the duty to consult was on the lower end of the spectrum. The federal Crown was required to provide notice and information to the Mikisew, and to engage directly with to respond to their concerns. The Crown had, instead, merely provided the Mikisew with notice. The Court unanimously set aside the road approval on the basis that the Crown had not adequately consulted with the Mikisew.

***Mikisew Cree First Nation v. Canada* [2001] FCC**

***Gitanyow v. Canada* [1999] BCSC**

***Delgamuukw v. British Columbia* [1997] SCC**

Delgamuukw v. British Columbia (1996), 153 D.L.R. (4th) 189 (S.C.C.)

By Braker and Company and Hutchins, Soroka & Grant from the BC Aboriginal Fisheries Commission, First Nations and Water Use Planning Committee Legal Analysis (Chapter 15 - Summary of Major Cases)

This is a decision of the Supreme Court of Canada. The Court confirmed that aboriginal title is protected as a constitutional right of First Nations within section 35 of the Constitution Act, 1982. In this case, the Court set out a test for proof of title, and it discussed in general terms the content of title, as well as how the Sparrow test for infringement and justification would apply to aboriginal title. The Court did not decide that the Gitksan and Wet'suwet'en peoples had aboriginal title -that issue was sent back to trial.

The significance of the case is in terms of the Court's recognition of the nature and scope of aboriginal title as a section 35 right, if it is proven in court or settled and defined through negotiations. The Court said that aboriginal title gives First Nations broad rights to manage their lands, the right to "choose to what uses lands may be put," and that title has an "inescapable economic component." The right to choose how lands can be used may be a hint that the Court is prepared, in the right case, to recognize self-government rights related to title.

The Court expanded the test for infringement and justification of rights, saying that title, like commercial fishing rights, required the Sparrow priorities and test for justification to be modified. The Court set out a number of bases upon which, in the right circumstances, infringement of title could be justified, such as in relation to certain types of economic development and other bases such as settlement of foreign populations, regional and economic fairness, etc.

The Court also held that the Crown must consult in a meaningful way with respect to infringement of title and that, in some instances, the consent of a First Nation may be required, such as where the province passes legislation or regulations affecting hunting or fishing. The idea of consent is related to title, and does not appear to form part of the analysis for infringement of rights short of title.

Case: *R. v. Sparrow* [1990] SCC

R. v. Sparrow (1990), 70 D.L.R. (4th) 385 (S.C.C.)

By Braker and Company and Hutchins, Soroka & Grant from the BC Aboriginal Fisheries Commission, First Nations and Water Use Planning Committee Legal Analysis (Chapter 15 - Summary of Major Cases)

This was the first decision of the Supreme Court of Canada to interpret section 35 of the Constitution Act, 1982. In this case, the Court applied the principles of fiduciary duty developed in *Guerin* to section 35 to say that the honour of the Crown is at stake in dealings between government and First Nations and that where a law or regulation infringes an aboriginal right, the Crown must meet a test to justify that infringement. A number of principles of law were developed by the Court:

- Section 35 protects "existing" aboriginal rights - those rights still in force and not extinguished prior to 1982, when the provision came into force;
- In order to show that an aboriginal right has been extinguished, the Crown must prove a "clear and plain intention" to extinguish - regulations over a long period of time, or non-exercise of a right, will not meet this test;
- Aboriginal rights are not "frozen" in time and can be exercised in a modern form, and not only in the way they were exercised prior to European contact;
- Aboriginal rights are collective in nature and are sui generis (of their own kind) and must be interpreted as such, and not by referring to common law property concepts;
- The Court developed a test to determine if a right has been infringed, and whether the infringement can be justified. Once a First Nation proves a right (see *Van der Peet* for requirements to prove a right and *Delgamuukw* for proof of title), and the Crown fails to prove that the right has been extinguished, the onus is on the First Nation to show infringement of the right. They can do this by proving one or more of the following: (1) Is the limitation on the right unreasonable? (2) Does the regulation impose undue hardship? (3) Does the regulation deny to the holder of the aboriginal right their preferred means of exercising that right? If infringement is proven, the onus shifts to the Crown to justify the infringement. Here, the honour of the Crown is at stake. The Crown must meet all of the following requirements to justify an infringement of the right: (1) There is a valid legislative objective for the interference; (2) In the case of fishing, the allocation of priorities after conservation measures have been taken, gives

top priority to the Indian right to fish for food, social and ceremonial purposes; (3) That there has been as little infringement as possible to effect the desired conservation result; and (4) That, where required, there has been compensation, and that the aboriginal group in question has been consulted with respect to the conservation measures being taken. Consultation has been expanded in other cases to deal with any action which can infringe rights or title.

Case Law: Crown Lands

Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management), 2005 [B.C.C.A. 128](#)

By Jeanie Lanine, Woodward & Company

In this case, the British Columbia Court of Appeal considered the Province's duty to consult and accommodate the Musqueam prior to authorizing the sale of Crown lands, used as a golf course, to the University of British Columbia. The Musqueam asserted that they had a strong case to title over the lands, that their current land base was inadequate to meet the needs of their growing membership, and that few alternative parcels of Crown land were available to satisfy any treaty settlement.

The Court found that the duty owed to the Musqueam was at the higher end of the consultation spectrum, the consultation had come too late, and the provincial Crown breached its constitutional duty to accommodate the Musqueam Indian Band's rights when it authorized the sale of the lands. The government could not sell Crown lands subject to Aboriginal title without consultation and accommodation if exercising such power would leave little, if any, public land available to be granted to the band as part of a treaty settlement.

The operation of the Order in Council authorizing the sale of the land to the university was suspended for a period of two years in order to allow the parties time to attempt to negotiate an accommodation agreement.

Musqueam Indian Band v. Richmond (City), 2005

[BCSC 1069](#)

By Jeanie Lanine, Woodward & Company

At issue in this case was the decision of the B.C. Lottery Corporation (a Crown corporation) to move a casino to Crown lands subject to an Aboriginal title claim by the Musqueam.

The Court held that government was aware of the title claim through previous consultation processes and placing the casino on the lands could negatively impact the Musqueam's Aboriginal title interests. The Court referred to the limited amount of Crown land available to meet the Musqueam First Nation's title claims, and held that the Crown had a duty to consult and accommodate. Government could not rely on the limited consultation requirements set out in the *Gaming Control Act* to discharge this duty. The Court concluded that it was not appropriate to set aside the decision to move the casino, as it would result in the closing of the casino and consequential damage. The harm suffered by the Musqueam could be compensated for in other ways. The Court issued a declaration that the Crown had a duty to consult and suggested that the parties could assess the strength of the claim and the appropriate scope and content of the duty to consult and accommodate. If the parties could not reach agreement they would be able to return to Court.

Case Law: Fisheries

Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries), 2005 B.C.S.C. 283

By Jeanie Lanine, Woodward & Company

The Homalco Indian Band applied for judicial review of a provincial decision approving an amended aquaculture licence to allow the farming of non-native Atlantic salmon. The Homalco asserted that the government had failed to consult adequately and that the farming of Atlantic salmon posed a significant health risk to wild salmon and, consequently, to their Aboriginal fishing rights.

The British Columbia Supreme Court found that the government had actual knowledge of the claims of the Homalco, in part based on information provided through the treaty process. The Court held that there was reasonable probability that the Homalco would be able to establish Aboriginal title to a portion of the coastal waters, and a strong probability that the Homalco had an Aboriginal right to fish for wild salmon in the area. Faced with conflicting scientific reports, the Court declined to rule on the potential negative impact posed by the farming of Atlantic salmon. The Court found that the level of consultation required was in the middle of the spectrum, and that government ought to have met with the Homalco to determine the possibility of reasonable accommodation of the Homalco's concerns.

The Court granted the Homalco a partial injunction preventing the stocking additional Atlantic salmon smolts to allow time for the parties to engage in consultation, but did not require the removal of existing Atlantic salmon smolts from the fish farm.

Case: *R. v. Marshall* [1999] SCC *R. v. Marshall*, [1999] 4 C.N.L.R. 161 (S.C.C.)

By Braker and Company and Hutchins, Soroka & Grant from the BC Aboriginal Fisheries Commission, *First Nations and Water Use Planning Committee Legal Analysis (Chapter 15 - Summary of Major Cases)*

This was a decision of the Supreme Court of Canada interpreting a 1760-61 treaty signed with the Mi'kmaq. The major points decided by the Court were that:

- "Extrinsic" evidence of the historical and cultural context of a treaty (evidence beyond the words of the treaty) can be used to interpret the meaning and understanding of the parties. This is so even where there is no "ambiguity" on the face of the treaty;
- The Crown cannot ignore the oral terms of the treaty and the understanding of the Indians and simply rely on the written treaty language;
- The honour of the Crown requires that a treaty be interpreted in a way which would allow for meaningful exercise of the rights in the treaty; and
- In the context of the facts of this particular case, there was a treaty right to obtain "necessaries" or a "moderate livelihood" through hunting and fishing by trading the products of those

traditional activities, subject to any restrictions that can be justified by the Crown under the Sparrow test.

Case: *R. v. Gladstone* [1996] SCC

R. v. Gladstone (1996), 137 D.L.R. (4th) 648 (S.C.C.)

By Braker and Company and Hutchins, Soroka & Grant from the BC Aboriginal Fisheries

Commission, *First Nations and Water Use Planning Committee Legal Analysis (Chapter 15 - Summary of Major Cases)*

This was a decision of the Supreme Court of Canada where the issue was whether section 20(3) of the Pacific Herring Fishery Regulations, which prohibited the sale of any herring spawn on kelp without a proper license, was invalid, because it violated the aboriginal rights of the appellants. The majority decision of the Court recognized and endorsed the findings of the trial judge that commercial trade in herring spawn on kelp had been an integral part of the distinctive culture of the Heiltsuk people prior to European contact. The evidence presented at trial established that such trade was not an incidental activity for the Heiltsuk but rather a central and defining feature of their society.

Besides recognizing a commercial right of sale, what is most important about this case is that the Court modified the test in Sparrow for justifying an infringement of aboriginal rights. The Court said that because the right in this case had no internal limitation like the right to fish for food, ceremonial and social purposes in Sparrow, that the priority developed in Sparrow could be altered where commercial fishing rights were at stake. The Court set out a number of bases upon which the Crown could justify an infringement, or at least alter the priorities, such as on the basis of the pursuit of economic and regional fairness, and the historical reliance upon, and participation in the fishery by non-aboriginal groups. The Court said that the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interests of aboriginal rights holders in the fishery.

Case: *R. v. Van der Peet* [1996] SCC

R. v. Van der Peet (1996), 137 D.L.R. (4th) 289 (S.C.C.)

By Braker and Company and Hutchins, Soroka & Grant from the BC Aboriginal Fisheries

Commission, *First Nations and Water Use Planning Committee Legal Analysis (Chapter 15 - Summary of Major Cases)*

This is a decision of the Supreme Court of Canada. The Court held that a member of the Sto:lo First Nation, who was charged with illegally selling fish, did not have an aboriginal right to sell fish. The Court said that the right to exchange fish for money or other goods had not been proven. The main significance of the case is that, for the first time, the Court set out a test for proving the existence of aboriginal rights protected by section 35 of the Constitution Act, 1982.

The Court said that, in order to be recognized as an aboriginal right, an activity must be "an element of a custom, practice or tradition integral to the distinctive culture of the aboriginal group claiming the right." The Court set out a number of factors which must be considered in terms of proof of the right. The main factors are the following:

- Courts must take into account the perspective of aboriginal people themselves-but the perspective must be framed in terms cognizable to the Canadian legal and constitutional structure;
- Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right. In order to characterize the claim properly, the nature of the action which the applicant is claiming was done pursuant to an aboriginal right must be considered, the nature of the government regulation, statute or action being impugned must be considered, and the tradition, practice or custom being relied on to establish the right must be considered;
- In order to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question;
- The practices, customs or traditions which constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed prior to European contact;
- Claims to aboriginal rights must be adjudicated on a specific rather than a general basis; and
- For a custom, practice, or tradition to constitute an aboriginal right, it must be of independent significance to the aboriginal culture in which it exists.

Case Law: Mining

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) 2004 SCC 74

By Jeanie Lanine, Woodward & Company

This case, released at the same time as *Haida*, involved the Taku River Tlingit's challenge to a Project Approval Certificate issued by British Columbia as part of its Environmental Assessment process for a mine.

The Supreme Court of Canada found that acceptance of the Tlingit title claim for negotiation under the B.C. Treaty Commission Process established a credible basis for a claim to Aboriginal rights and title, and that the potential for negative impact on these rights was high. The Court held that meaningful consultation was required but found that the Environmental Assessment process followed by government was sufficient to meet this standard. In so finding, the court noted that:

- The Tlingit were part of the project committee and received some funding to participate.
- Traditional Use Studies were funded.
- The project was modified to try to take accommodate some of the First Nation's concerns.
- The Certificate was only one stage in the process and was granted on the basis of that further specific steps would be taken to accommodate the Tlingit's interests.

Case: *Taku River Tlingit v. Ringstad et al.* [2002] BCCA

Case Law: Forestry

Haida Nation v. B.C. (Minister of Forests) and Weyerhaeuser, 2004 SCC 73

By Jeanie Lanine, Woodward & Company

In this landmark case the Haida sought judicial review of the Minister of Forests' decision to replace and approve the transfer of a tree farm licence in Haida Gwaii. The Supreme Court of Canada clarified the law of consultation in the following manner:

- Crown governments, and not third parties, have the legal duty to consult with and accommodate any potential Aboriginal rights or title of First Nations.
- The legal duty to consult and accommodate is based on the principle that the "honour of the Crown" is at stake when the Crown is dealing with First Nations.
- The duty to consult and accommodate arises where a proposed Crown government decision may negatively affect the Aboriginal rights or title that a First Nation has credibly claimed.
- Legal proof of the Aboriginal interest is not required.
- The goal of consultation and accommodation is to reach negotiated interim agreements pending final determination of Aboriginal interests through treaty negotiation or trial in court.
- The scope and content of the duty to consult and accommodate depends on the strength of the claim and the seriousness of the infringement. This results in a "spectrum" of required consultation.
- Government must, at a minimum, initiate a meaningful process of consultation, facilitate good information exchange, and negotiate with the intention of substantially addressing the concerns of the affected First Nation.
- Both parties must negotiate in good faith.
- First Nations should outline their claimed rights, setting out the nature and scope of their asserted rights and any potential infringements.
- A First Nation does not have a veto over government decision-making prior to final determination of its Aboriginal interests through treaty negotiation or trial in court.

Cases:

Haida Nation v. B.C. and Weyerhaeuser [2004] Supreme Court of Canada

Haida Nation v. B.C. and Weyerhaeuser [2002] BCCA re-hearing

Haida Nation v. B.C. and Weyerhaeuser [2002] BCCA

More Information: [Environmental-Aboriginal Guardianship through Law and Education](#)

Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests), 2005 B.C.S.C. 697

By Jeanie Lanine, Woodward & Company

In this case, the Huu-Ay-Aht challenged the British Columbia government's population-based formula for allocating forest tenures and revenue sharing to First Nations as accommodation for infringement by forestry operations. The Huu-Ay-Aht claimed that a population-based formula breached the obligation of the government to consult with First Nations in good faith.

The British Columbia Supreme Court agreed with the Huu-Ay-Aht and held that the provincial government had failed to engage in meaningful consultation with them. The government was required to consider both the strength of the claim and the degree of the infringement in determining the level of consultation and accommodation required. A population-based approach failed to achieve this.

Hupacasath First Nation v British Columbia (Minister of Forests), 2005 BCSC 1712

By Jeanie Lanine, Woodward & Company

The Hupacasath sought to quash the Minister of Forests' decision to remove privately owned timberlands from a Tree Farm Licence.

The Province argued that the Crown's duty to consult First Nations and accommodate their Aboriginal rights and title claims was limited to Crown lands. The Court disagreed, finding that Aboriginal rights could co-exist with fee simple ownership, and that:

“The Crown's honour can be implicated in this kind of decision-making affecting private land. Here, the Crown's decision to permit removal of the lands from the TFL 44 is one that could give rise to a duty to consult and accommodate.”

The Court held that the Hupacasath had a prima facie case for Aboriginal rights and title for the portion of the privately owned lands not subject to overlapping claims from other Aboriginal groups. However, based on existing case law, the Court held that the claimed Aboriginal rights were limited by private ownership interests, and the claim to title unlikely to succeed. Despite this, the Crown exercised significant and specific decision-making powers over the lands. Government's decision to remove the lands from the TFL could result in increased development and logging of the private lands, which would likely have a serious impact on adjacent Crown lands, also subject to Aboriginal claims.

The Court found that the Crown had a moderate duty to consult with the Hupacasath which required government to have informed discussion with the Hupacasath and to consider their opinions in deciding whether to approve the removal of the lands. The Court ordered British Columbia to consult with the Hupacasath and imposed the following time-limited conditions:

- all current wildlife areas on the Removed Lands be maintained
- current access for Aboriginal groups to the Removed Lands be maintained
- the Hupacasath to receive seven days' notice of any intention to conduct
- activities on the land which may interfere with the exercise of Aboriginal rights asserted by the HFN
- the Crown and the Hupacasath shall attempt to agree on a consultation process
- the Crown and the Hupacasath shall exchange positions as to what kinds of activities might interfere with the exercise of Aboriginal rights
- the Crown and the Hupacasath shall provide each other such information as is reasonably necessary for the consultation to be completed.

The Court also ordered that if the parties failed to find agreement on any of these matters they would be required to attend mediation.

Husby Forest Products v. Ministry of Forests, 2004 BCSC 142

By Jeanie Lanine, Woodward & Company

This case confirms that government decision-makers must follow the *Haida* consultation process carefully.

The case involved a challenge by a forest company to the decision of the District Manager to refuse to grant a cutting permit which would have allowed the company to cut certain culturally modified trees on the Queen Charlotte Islands. The District Manager stated that the issuance of the permit would infringe the Aboriginal rights based on consultation response information received from the Haida.

The British Columbia Supreme Court held that statutory decision-makers must follow the three-stage process set out in the *Haida* decision when determining whether accommodation of an asserted Aboriginal interest is required. These steps are:

- (1) Identify the nature and scope of the Aboriginal right in issue in relation to the potentially conflicting use.
- (2) Determine if the asserted right may be infringed by the contemplated government action and determine the strength of the claim.
- (3) If there is infringement, determine if it is justified.

The Court held that the District Manager had failed to both identify clearly the nature and scope of the Aboriginal claim, and to identify the extent of the infringement. The Court also stated that the Haida also had an obligation to clearly define the nature and scope of the Aboriginal right they claimed was being infringed, which they had also failed to do.

The Court ordered that the application for the cutting permits be remitted to the District Manager for reconsideration.

Case: *Halfway River First Nation v. BC* [1999] BCCA

Halfway River First Nation v. British Columbia (Ministry of Forests) (1999), 64 B.C.L.R. (3d) 206 (C.A)

By Braker and Company and Hutchins, Soroka & Grant from the BC Aboriginal Fisheries

Commission, *First Nations and Water Use Planning Committee Legal Analysis (Chapter 15 - Summary of Major Cases)*

This was a decision of the British Columbia Court of Appeal. At issue was a challenge by a First Nation to a decision of a District Manager of the Ministry of Forests approving the application of a forest company (Canfor) for a cutting permit. Many of the issues involved relate to administrative law principles. Of relevance is the Court's decision in respect of the duty to consult. The Court of Appeal confirmed that

the provincial government and the First Nation were in a fiduciary relationship and that since the tree cutting could significantly affect the First Nation's way of life, both consultation with and notice to the First Nation of the permit application were inadequate.

The Court said that the Sparrow requirement of consulting with a First Nation prior to making decisions which may affect treaty or aboriginal rights was not met. In particular, the Ministry failed to make all reasonable efforts to consult with the First Nation, and it failed to properly inform itself with respect to aboriginal and treaty rights and the impact the Ministry's decision would have on those rights. The Ministry also failed to provide the First Nation with information relevant to the approval of the license.

Another aspect of the Court's decision is that it appears that a majority of the Court were of the view that it is not within the jurisdiction of the District Manager to make legal determinations about the existence and scope of aboriginal and treaty rights. That aspect of the Court's decision is significant, as it raises the question of whether tribunals, as opposed to courts, can decide issues about the existence and scope of aboriginal and treaty rights. Since many decisions about land and resource use are made by provincial tribunals, this has large implications.

Consultation Policy

Unless otherwise noted, the information is current as of the original publication date: 2002. While we have tried to keep the links up-to-date, you may find some are broken.

On this page you will find the policy positions regarding First Nations consultation as developed by the following:

- Federal statements on First Nations consultation for various departments.
- Provincial consultation policy and various ministerial versions.
- International policy on indigenous peoples and land and resource rights.
- Examples of Consultation Policy

Provincial Policy

Listed below are the current policies used by line ministries for consultation with First Nations. For Provincial government bodies not listed here please refer to the [Ministry of Aboriginal Relations and Reconciliation website](#). *links current as of July 9, 2008*

Ministry of Aboriginal Relations and Reconciliation

Updated Procedures for Meeting Legal Obligations When Consulting First Nations (April 2010)

http://www.gov.bc.ca/arr/reports/down/updated_procedures.pdf

Ministry of Energy and Mines

Mandate:

<http://www.em.gov.bc.ca/subwebs/AboriginalAffairs/mandate.htm> (broken) or

<http://142.32.76.167/MACR/MarketingAbCommunityRelations/Pages/Mandate.aspx> (broken)

Ministry of Forests

Aboriginal Consultation Policy & Guidelines for M.O.F.

<http://www.for.gov.bc.ca/tasb/manuals/policy/resmngmt/rm15-1.htm>

Ministry of Tourism, Sport and the Arts

Links to relevant sections of the Heritage Conservation Act:

Cultural Heritage Resource Management in Provincial Forests

http://www.tsa.gov.bc.ca/archaeology/policies/cultural_heritage_resource_management.htm

Recording Culturally Modified Trees

http://www.tsa.gov.bc.ca/archaeology/policies/recording_culturally_modified_trees.htm

Environmental Assessment Office

Guidance Documents

Proponent Guide for providing First Nation Consultation Information - Non-Treaty First Nations (2010)

Proponent Guide for providing First Nation Consultation Information - Treaty First Nations (2010)

Federal: Canadian Heritage Statement

Written by Laurie Flahr in consultation with Canadian Heritage.

Canadian Heritage doesn't have one specific standard policy for consulting First Nations. In practice the department personnel are committed to devolving program areas that they fund to First Nations. Examples of such funded program areas include friendship centres, language programs, and sports and cultural centres. Similarly, funding for aboriginal political organizations occurs via the Aboriginal Representative Organizations Program.

Recently, in response to the Royal Commission and Gathering Strength, new initiatives such as the Urban Multipurpose Aboriginal Youth Centres Program were developed. For this and other initiatives, consultation with aboriginal organizations occurs in designing and guiding programs and processes.

A more detailed description of Canadian Heritage's Aboriginal Peoples' Program is available on their web site at http://www.pch.gc.ca/progs/pa-app/index_e.cfm

Federal: Department of Fisheries and Oceans (DFO)

Written by Laurie Flahr in consultation with the Department of Fisheries and Oceans.

Fisheries and Oceans Canada consults with First Nations (FNs) primarily through two channels: co-management arrangements under the Aboriginal Fisheries Strategy (AFS), and through the BC Treaty Commission, led by the Federal Treaty Negotiations Office. Additionally, there are approximately 20 First Nation groups, principally in the interior of BC, who are not involved in either the AFS or Treaty process. DFO consults with these groups directly on their fisheries and matters which may affect those fisheries.

Generally, the departmental approach is to conduct consultations in circumstances where management decisions may result in limitations on the fishing activity the Aboriginal group has practiced historically.

An introduction to the Aboriginal Fisheries Strategy:

<http://www.dfo-mpo.gc.ca/fm-gp/aboriginal-autochtones/afs-srapa-eng.htm>

Aboriginal Fishing and Treaties in the Pacific Region (2012):

<http://www.pac.dfo-mpo.gc.ca/abor-autoc/index-eng.htm>

Federal: Indian and Northern Affairs Canada

Written by Laurie Flahr in consultation with Indian and Northern Affairs Canada.

Indian and Northern Affairs Canada (INAC) does not have a specific policy for consulting with First Nations. Instead, the department takes a flexible approach, the process of which is dependent on the task at hand.

INAC engages in a wide range of consultation initiatives, where at one end of the scale First Nations are consulted as general stakeholders on a similar basis as other public stakeholders. Further along the scale, a partnership approach as outlined in *Gathering Strength* has been applied. Such a partnership has been developed with British Columbia First Nations for the purpose of INAC departmental planning and policy development (see the Joint Planning and Policy Development Forum: <http://www.aadnc-aandc.gc.ca/eng/1100100021728> [broken]). And, further along the spectrum, First Nations may actually take the lead in guiding and identifying priorities for a consultation process, as was the case for the AFN/INAC Joint Initiative for Policy Development (Lands and Trust Services).

In summary, the range of consultation processes that INAC uses reflects the diversity of First Nations and specific issues that the department deals with.

Federal: Department of Justice Canada

The following is an excerpt from *Justice Echo*: a publication of the Department of Justice Canada, and outlines the department's position on Delgamuukw.

*by Loree Young Counsel
Federal Treaty Negotiation Office
Legal Services. Department of Justice*

There have been a number of decisions rendered by the Supreme Court of Canada on Aboriginal issues since the coming into force of section 35 of the *Constitution Act* 1982, which recognizes and affirms existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. One of the most important cases in recent years is the decision of the: Supreme Court of Canada in *Delgamuukw v. British Columbia*, released on December 11, 1997.

Background

Hereditary chiefs on behalf of the Gitksan and Wet'suwet'en First Nations advanced claims against British Columbia and Canada for ownership and jurisdiction over territory comprising 58,000 km of north western B.C. For procedural reasons the Court ordered a new trial on the question of whether the appellants had established Aboriginal title. However, the Court also gave the trial judge guidance on the general nature and content of Aboriginal title.

Scope and content of Aboriginal title

Delgamuukw is the first Supreme Court of Canada case that deals with the nature of aboriginal title to land. The court made a number of general comments on the scope and content of Aboriginal title. It confirmed that Aboriginal rights fall along a spectrum with respect to the degree of connection to the

land. These range from practices, customs, and traditions that are not linked to specific areas of land, to "site specific" rights, to aboriginal title. The Court stated that Aboriginal title is a right to exclusive use and occupation of land for a variety of purposes and that these are not limited to traditional uses. However, the use to which the land may be put cannot be irreconcilable with the nature of the group's attachment to the land. It should be noted that Aboriginal title is held communally by the Aboriginal group and can be transferred, sold or surrendered only to the federal Crown.

Ability to extinguish Aboriginal title

Section 91 (24) of the *Constitution Act* 1867, gives the federal Crown exclusive power to extinguish Aboriginal rights including title. The Court confirmed that the federal Crown must demonstrate a clear and plain intention to extinguish

*The Court confirmed that Aboriginal title,
like other Aboriginal rights, is not absolute.*

Aboriginal rights. Provincial laws and actions cannot extinguish Aboriginal rights. And the federal Crown could extinguish Aboriginal rights only prior to the entrenchment of section 35 in the *Constitution Act* 1982. After 1982 the federal Crown may infringe Aboriginal rights if the infringement is justified in accordance with the legal test laid down by the Court in *Sparrow*.

Test for proof of Aboriginal title

An Aboriginal group that claims Aboriginal title bears the legal burden of proving its existence. To establish Aboriginal title a group must meet three criteria. First, the claimed area must have been occupied by the group before sovereignty. The Court provided only general guidance on the definition of occupation for this purpose. Second, the group must have continuously occupied the land if present occupation is relied on as evidence of pre-sovereignty occupation. Third, at sovereignty the occupation must have been exclusive, although the Court recognizes the possibility that if there were historically more than one Aboriginal group in the area they may be able to establish that they jointly exclusively occupied the land and therefore had joint title.

Test for justifying infringements of Aboriginal title

The Court confirmed that Aboriginal title like other Aboriginal rights is not absolute, and that the federal or provincial Crown may infringe Aboriginal title where infringement is justified, as laid down in *Sparrow*. Justification is a two-part test:

- First, the infringement must be in furtherance of a compelling and substantial legislative objective.
- Second the Crown must take steps to fulfill its fiduciary responsibility - the court took an expansive view of what may amount to "a valid legislative objective," to include such matters as the general economic development of the region.

To fulfill its fiduciary responsibility, the Crown should give appropriate priority to aboriginal title holders which may require involving Aboriginal people in the development of resources on their lands. As well governments should involve aboriginal title holders in decisions taken with regard their lands. There

is *always* duty of consultation and, in most cases, something deeper than mere consultation is required. Some cases may require the full consent of the aboriginal title holder.

Finally, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation will depend upon the nature and severity of the infringement, and the extent to which Aboriginal interests were accommodated.

Scope of federal jurisdiction under 91 (24)

The Court held that the federal Crown has jurisdiction over the whole range of section 35 rights. The jurisdiction conferred on the federal Crown over "lands and lands reserved for Indians" encompasses the power to legislate in relation to Aboriginal title, and to other Aboriginal rights related to land that fall short of Aboriginal title. The jurisdiction conferred on the federal Crown over "Indians" encompasses the power to legislate in relation to Aboriginal rights that are not tied to the land.

Proof of Aboriginal rights

The court held that the laws of evidence must be adapted so that oral histories and similar types of evidence can be accommodated and placed on an equal footing with other recognized types of historical evidence. This process must be undertaken on a case-by-case basis, in a manner that does not strain "the Canadian legal and constitutional structure."

Self-government

Due to errors by trial judge, the generality of the claim and lack of evidence, the court declined to determine whether the claimed right to self-government had been established. The Court did note that self-government raises many difficult conceptual issues, and confirmed that if rights to self-government exist, they cannot be framed in excessively general terms.

Negotiation versus litigation

The Court did not deal with the merits of the Aboriginal litigants' claim to Aboriginal title in Delgamuukw. The Court sent the matter back for

...reconcile the prior occupation of lands by Aboriginal people with the Crown's sovereignty over Canada

trial but indicated that it is through negotiated settlements that the purpose of section 35(1) of the Constitution Act 1982 will be achieved, namely to reconcile the prior occupation of lands by Aboriginal people with the Crown's sovereignty over Canada.

Conclusion

Delgamuukw has implications for many regions of the country particularly where Canada has not entered into land cession treaties with Aboriginal groups, i.e., in British Columbia, southern Quebec

The case has implications not only for the Department of Indian and Northern Affairs, but also for other government departments.

and the Atlantic provinces. In those areas it is unclear where Aboriginal title exists. The case has implications not only for the Department of Indian and Northern Affairs, but also for other government

departments that have programs or policies that affect Aboriginal people. Dispositions or other activities in respect of federal Crown land, as well as Aboriginal consultation processes or guidelines, are two obvious areas where *Delgamuukw* may raise policy and operational implications for federal departments.

However, the Court's decision does not provide all of the answers to these and other issues that government must address. The Department of Justice is actively involved with its client departments in seeking appropriate and innovative solutions to address the legal and policy challenges that arise from *Delgamuukw*.

Federal: Environment Canada

Written by Laurie Flahr in consultation with Environment Canada.

Environment Canada's policy on consultation is available on-line at:

<http://www.ec.gc.ca/consultation/default.asp?lang=En&n=A7FB732A-1>. The department is in the process of developing regional and general policies specific to First Nations consultation, but until they have been completed the principles outlined in the general consultation policy above apply.

The spectrum of Environment Canada's (EC) mandate is very broad, and includes responsibilities to preserve and enhance the quality of the natural environment, including water, air and soil quality; conserve Canada's renewable resources, including migratory birds and other non-domestic flora and fauna; conserve and protect Canada's water resources; carry out meteorology; enforce the rules made by the Canada - United States International Joint Commission relating to boundary waters; and coordinate environmental policies and programs for the federal government. A description of organizations and programs that fall within EC's operations can be viewed online at: <http://www.ec.gc.ca/default.asp?lang=En&n=BD3CE17D-1>.

Perhaps the area of EC's operations that has the highest potential of impacting on First Nations rights and interests is in wildlife management and conservation. In the Pacific and Yukon region, the Canadian Wildlife Service (CWS), a division within Environment Canada, has developed a [strategy to work closely with First Nations on conservation priorities](#). An example of how this strategy has been applied is the formation of [multi-agency wildlife internship programs](#).

At the national level of CWS, an Aboriginal Working Group was involved in consultations regarding Bill C33, the proposed Species at Risk Act (SARA). Although the Bill "died" with the November 2000 election, it was important in that it represented the first time that First Nations were invited to review and provide input on the content of legislation before tabling. Input from First Nations resulted in changes to the proposed legislation to include Traditional Ecological Knowledge (TEK) along with scientific knowledge in the determination of species at risk.

More information about the CWS is available online at http://www.cws-scf.ec.gc.ca/other_e.cfm.
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Federal: Environment Canada (Building Conservation Partnerships with First Nations)

Written by Laurie Flahr in consultation with Environment Canada.

Environment Canada, Pacific and Yukon Region, has adopted an innovative strategy to address the need to work more closely with First Nations on conservation priorities. This document outlines the essence of that strategy.

Environment Canada's Vision:

Environment Canada is committed to strengthening relationships with First Nations, through partnerships based on conservation of migratory birds and the maintenance of diverse and healthy ecosystems. Treaties will strengthen the foundations required for co-operation in pursuit of common objectives.

Effective conservation programs in BC's post treaty environment will require that jurisdictions be compatible and mutually supportive. Environment Canada will develop Conservation Agreements with First Nations to coordinate efforts and thereby maximize efficiencies and minimize inconsistencies and duplications.

Treaties will empower First Nations with tools for effective participation in conservation programs, while retaining the Minister's authority to act for conservation. The Department will support this process through recognition of First Nations rights and law-making powers in treaties, with priority in specific areas, balanced by active partnership building through Conservation Agreements, which focus on achieving practical common objectives.

Background:

A fundamental shift is underway in British Columbia regarding Aboriginal participation in decision-making and management programs on traditional territories. Court decisions have affirmed the existence, and defined the scope, of aboriginal rights and title, and given clear direction on upholding the honour of the Crown.

Environment Canada's mandate to conserve migratory birds is continental in scale, with primary focus on total populations and entire ranges. All local and regional actions must integrate into this strategic commitment to continental management.

Canadian Wildlife Service has a finite internal capacity. Judicious planning will be necessary to ensure the success of partnerships undertaken, and avoid unattainable expectations. To meet the new challenges posed by court decisions and government policy, the CWS approach will be innovative, incremental, flexible and pragmatic.

The Policy Foundation:

The **Parksville Protocol amended the Migratory Birds Convention** to be consistent with the constitutionally protected aboriginal and treaty rights of Canadian Aboriginal peoples. Cooperation through partnerships is a key conservation measure identified in the Protocol.

The Convention on Biological Diversity, underlines the role of indigenous peoples in maintaining biodiversity, and stresses the importance of a partnership approach focused at the community level.

Gathering Strength - Canada's Aboriginal Action Plan, commits federal departments to build partnerships with Aboriginal peoples. Conservation partnerships based on important local priorities, are an effective means of meeting this objective.

Canada's Aboriginal Self Government Policy states: *Government views the scope of aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct aboriginal culture, and essential to its operation as a government or institution.* The policy categorizes *hunting, fishing and trapping on aboriginal lands* as activities over which aboriginal governments should have substantial law-making powers.

Canada's Self Government Policy identifies other activities, including *wildlife co-management*, that may go beyond matters integral to aboriginal culture, where law making authority would remain primarily with federal or provincial governments, with federal or provincial laws prevailing in event of a conflict.

Conservation Partnerships and Agreements:

CWS will endeavor, where conservation priorities warrant, to develop Conservation Agreements with First Nations which reflect a partnership approach to managing migratory birds and maintaining diverse and healthy ecosystems. Agreements will strive to harmonize the exercise of concurrent jurisdictions, making them compatible and mutually supportive to the greatest degree possible. They may be periodically updated to reflect changing priorities and the dynamic nature of biological systems. Contents of Agreements would reflect local conditions and priorities, and may include: details of information sharing systems; steps to be taken to jointly identify and address conservation issues; local management of migratory birds and habitats; population, harvest and habitat monitoring; reciprocal enforcement arrangements; and licence/permit procedures.

Several conservation partnerships are currently being developed in BC. The most advanced of these is with the Ktunaxa Kinbasket Tribal Council, where CWS is facilitating development of a wildlife internship pilot, involving the Tribal Council, CWS, the BC Ministry of Sustainable Resource Management and Parks Canada.

Conservation Agreements and the BC Treaty Process.

Where the parties are willing, treaty agreements can reference Conservation Agreements, as flexible mechanisms for the parties to jointly address conservation priorities as they emerge over time.

Federal: Environment Canada (First Nations - Wildlife Capacity Building)

CWS STATUS REPORT - Submitted by T. Wood, July 26, 2000.

Objective:

To build resource management technical capacity within Aboriginal communities, while improving inter-agency working relationships, through multi-party partnerships based on significant regional conservation priorities.

Background:

- Environment Canada is guided by an innovative strategy to strengthen relationships with First Nations communities, and empower First Nations governments with the tools to become effective partners in addressing local conservation priorities.
- One way in which CWS is advancing this strategy is providing leadership in the implementation of multi-agency wildlife internship programs aimed at building technical capacity within First Nations communities.
- Funding was secured for fiscal 2000-01 from the Canada-BC Capacity Secretariat (administered by DIAND) to pay salaries and support costs of interns in three Intern Programs in BC. Continued funding will be sought for 2001-02, for a total intern period of two years. Participating First Nation contribute significant funding and in kind support to the interns.
- Partner agencies provide a rich diversity of work experience and mentoring to the interns, in preparation for interns assuming larger technical and management responsibilities within aboriginal governments and organizations.

Progress to Date:

- Formal intern programs are currently underway in the Kootenays (Ktunaxa Tribal Council), West Chilcotin (Ulkatcho Nation) and Fraser Estuary (Tsawwassen First Nation).
- Partner agencies currently involved with intern initiatives include:
 - Canadian Wildlife Service;
 - regional offices of BC Fish and Wildlife, BC Parks, BC Forest Service;
 - Parks Canada;
 - Creston Valley Wildlife Management Authority;
 - Ducks Unlimited Canada;
 - biological researchers from SFU and UBC.

Discussion:

- Experience to date is very encouraging. Partner First Nations are particularly enthusiastic. There have been some start-up glitches. However, all participants have demonstrated the commitment and enthusiasm necessary for long term success.
- The technical experience gained, and the increased appreciation of government and agency resource management processes will be highly significant. In the final analysis, the real benefits of these initiatives may well be the relationship building and understanding that will develop between and among the partners.

Federal: Environment Canada (CEAA - Canadian Environmental Assessment Agency)

Written by Laurie Flahr in consultation with the Canadian Environmental Assessment Agency, with updates from Clint Kuzio.

The Agency reports to the Minister of the Environment, but operates separately from Environment Canada. A five year review of the Act in 2000 involved extensive public consultation, which some representative Aboriginal organizations participated in. The consultations were undertaken to serve as input to assist the Minister of the Environment in developing recommendations for improvement to federal Environmental Assessment.

For additional information about the Act or the Agency, see their website: <http://www.ceaa.gc.ca/>.

The renewed CEEA Act was proclaimed into law on October 30, 2003 and can be found at: <http://laws-lois.justice.gc.ca/eng/acts/C-15.2/>

More information on the renewed act can be found at: <http://www.ceaa.gc.ca/>

Federal: Department of Natural Resources Canada

Written by Laurie Flahr in consultation with the Department of Natural Resources Canada.

Natural Resources Canada (NRCan) deals with natural resource issues, specializing in energy, minerals and metals, forests and earth sciences. Departmental activities include research, data management, policy development, and promotion of Canada's resource related interests at the international level. For more detailed information, the NRCan web site can be viewed at <http://www.nrcan.gc.ca/>.

NRCan does not currently have formal guidelines/policy for consultations with Aboriginal people. NRCan does recognize however, that special consideration would be needed if the development of a policy, program or service involves:

- legal obligations to consult on matters that may have an impact on Aboriginal or treaty rights;
- potential infringement on Aboriginal government jurisdiction;
- the development of Aboriginal-specific policies; or
- the development of other policies that are not specific to Aboriginal people, but may have a significant/unique impact on them, as compared to other Canadians.

NRCan's mandate to develop an integrated approach to policy, science and knowledge for sustainable development of natural resources frames the department's contribution to *Gathering Strength, Canada's Aboriginal Action Plan*. Advancing the tenets of sustainable development in turn underpins the department's involvement in sustainable communities across Canada, including Aboriginal communities. NRCan is involved in a variety of initiatives that support the sustainability of Aboriginal communities by facilitating the development of their capacity for land and resource management and related economic opportunities, and promoting integrated knowledge-based decision-making.

Aboriginal participation in the resource-based economy is an NRCan priority that delivers in three areas for action, namely:

- partnerships for sustainable development;
- knowledge for good governance and decision-making; and
- Aboriginal science and technology capacity for sustainable resource-based development.

The NRCan's relationship with Aboriginal people can best be described as one of partnership. For example, the national consultations leading to the current National Forest Strategy (2003-2008) reflects this inclusive approach. Partnership underscores NRCan programs, some Aboriginal specific and some universal (many rural and remote in orientation), of particular interest to Aboriginal people, e.g., the award winning First Nation Forestry Program (<http://www.aadnc-aandc.gc.ca/eng/1100100034721>), Legal Surveys, Community Energy Systems, Model Forests and the Geomatics Professional Development Program. Other innovative initiatives include the Sustainable Communities Initiative, the Canadian Communities Atlas, the Geomatics Sector Skills Study, Renewable Energy for Remote Communities, S&T Youth Internships, Métis Forestry Pilot Projects and the NWT/ NRCan Training Program for Aboriginal people in Land Surveying and Land Administration.

Sustainable development cannot occur without a stable, robust and effective property rights infrastructure, which includes land survey, registration and management systems. In this regard, the Legal Surveys Division plays a significant and non-discretionary role in NRCan's relationship with Aboriginal people. Ninety percent of the Division's activities are related to Aboriginal/First Nation lands. The Canada Lands Survey System is the basis for the property rights infrastructure on most First Nations' lands, including the Indian Lands Registry and for the territorial land titles systems.

The department is also building an Aboriginal portal on its web site that will provide:

- on-line access to an inventory of NRCan programs and services to Aboriginal people;
- a connection point to the Connecting Aboriginal Canadians initiative;
- a map series of Aboriginal communities near minerals and metals activities, and
- a link to the National Atlas.

Federal: Department of Natural Resources Canada (Canadian Forest Service)

Written by Laurie Flahr in consultation with the Canadian Forest Service, with updates from Clint Kuzio.

The Canadian Forest Service (CFS) has published documents that address the issue of increasing the level of First Nations involvement in forest management.

In *Defining Sustainable Forest Management in Canada: Criteria and Indicators 2003*, a report prepared by the Canadian Council of Forest Ministers that is available on the Internet at <http://publications.gc.ca/pub?id=250498&sl=0>, Criteria 6.1 and 6.2 address the role of First Nations in forest management. Similarly, the document *National Forest Strategy (2003-2008)*, *A Sustainable Forest: The Canadian Commitment* addresses relationships with Aboriginal Peoples and Aboriginal Forestry in Objective 3, and is available on the Internet at http://nfsc.forest.ca/strategy_e.htm.

The First Nations Forestry Program (FNFP) promotes the active involvement of First Nations in forestry. The website for the program is located at: http://www.pfc.cfs.nrcan.gc.ca/programs/fnfp/index_e.html. Note: this link is BC specific; to view the national program website visit: www.fnfp.gc.ca (Note: This program might have been replaced by the [Aboriginal Forestry Initiative](#).)

The FNFP is managed by a management board, whose membership is comprised of nine First Nations representatives who have expertise in areas of relevance to operating the program, and three government representatives from program related agencies. The FNFP utilizes extensive communications networks to solicit applications, as well as a newsletter and success stories, to ensure that First Nations are aware of the program.

Federal: Parks Canada

Written by Laurie Flahr in consultation with Parks Canada, with updates by Clint Kuzio.

[Parks Canada](#), as outlined in their 1994 *Guiding Principles and Operational Policies*, addresses consultation with First Nations as follows:

"Where Aboriginal interests have not been previously dealt with by treaty or other means, it is the Government of Canada's policy to negotiate comprehensive claims based on traditional and continuing use and occupancy of land. Claims settlements may include particular Aboriginal rights and benefits in relation to wildlife management and the use of water and land and may provide for these through participation on advisory or public government bodies. Such arrangements would recognize the government's responsibility to protect the interests of all users, including the general public and third parties, to ensure resource conservation, to respect international agreements, and to manage renewable resources within its jurisdiction. Where existing Aboriginal or treaty rights occur within protected heritage areas, the principles set out in court decisions, which may serve to clarify these rights, such as *Regina v. Sparrow*, will be respected.

When establishing new national parks or reserves and national marine conservation areas, or acquiring national historic sites, Parks Canada works within Canada's legal and policy framework regarding

Aboriginal peoples' rights, as recognized and affirmed by Section 35 of the *Constitution Act, 1982*. Accordingly, Parks Canada will consult with affected Aboriginal communities at the time of new park establishment and historic site acquisition, or as part of an Aboriginal land claim settlement."

Canada National Parks Act

Approval of the Canada National Parks Act came in October of 2000. This Act includes several new provisions which directly address Aboriginal interests and, at the same time, ensures that Aboriginal and treaty rights are not affected by the Act. For example, Canada's longstanding practice of establishing national park reserves in areas subject to land claim or treaty processes is now formalized in the Act. The Act provides in section 10.(1) that "The Minister may enter into agreements with ... aboriginal governments ... for carrying out the purposes of this Act", thereby facilitating cooperative management arrangements. In national parks, a regulation under section 16. (1)(w) now permits "the authorization of the use of park lands, and the use or removal of flora and other natural objects, by aboriginal people for traditional spiritual and ceremonial purposes." Guidance is also provided in the Act on the exercise of traditional renewable resource harvesting activities. Of note is that five new national parks have been established through agreements with Aboriginal people and park descriptions are now included in the schedules to the Act. In short, the Act has been substantially rewritten to take into account the interests of Aboriginal people in Canada's national parks.

The Canada Marine National Conservation Areas Act:

This act came into force June 13, 2002. The Act provides clarity on many issues, including Aboriginal interests in marine conservation areas. In the preamble, for example, there is now reference to involving "affected aboriginal organizations ... in the effort to establish and maintain the representative system of marine conservation areas." Also, the Act contains a clause that reaffirms protection of existing Aboriginal or treaty rights. As for national park reserves, there are provisions relating to the establishment of "reserves for marine conservation areas" and clauses which will enable cooperative management arrangements with Aboriginal organizations. Specific reference is made in section 8.(3) to enable the conduct of "studies based on ... traditional ecological knowledge, in relation to marine conservation areas."

Federal: Public Works and Government Services Canada (PWGSC)

Written by Laurie Flahr in consultation with Public Works and Government Services Canada.

Public Works and Government Services Canada (PWGSC) does not have a formal policy for consulting First Nations. In practice personnel are generally recommended to advise First Nations when they are planning to sell a property, to see if there are concerns regarding aboriginal rights or title.

Treasury Board issued the following directive to PWGSC personnel:

"Before entering into an agreement to transfer title of any real property, departments should consult Justice Canada as to the possible existence of aboriginal title on the property in question. Where the

property is also subject to a land claim, the advice of the Department of Indian Affairs and Northern Development should also be sought."

Federal: Transport Canada

Written by Laurie Flahr in consultation with Transport Canada.

Prior to the disposal of federal real property under the management of Canada Port Authorities, **Transport Canada** investigates the possible existence of aboriginal title to the subject property. This process includes contacting the Department of Indian and Northern Affairs to determine if there are claims, treaties or pending negotiations or litigation which may affect the property and to obtain the names of aboriginal groups in the area who may have an interest in the property. The process also includes an examination of the possible extinguishment of aboriginal title.

In those cases in which Transport Canada determines that it is possible that there is unextinguished aboriginal title on the subject property, Transport Canada will ensure that affected First Nations have been appropriately informed of the proposed transaction and have been provided an opportunity to voice any concerns. Where circumstances warrant, Transport Canada may conduct historical and/or archaeological research to assist the Department in determining the existence of unextinguished aboriginal title and to guide officials conducting consultations with the relevant First Nations.

International

Posted September 21st, 2002

International Law Consultation with indigenous peoples has been addressed in various forms at the international level. Here we present brief descriptions of some of the most relevant ones, and provide links to specific documents and sources of more detailed information.

United Nations

Agenda 21

Agenda 21 is the action plan underlying the Rio Declaration, a nonbinding statement of principles produced at the 1992 Earth Summit. [Chapter 26 of Agenda 21](#), which focuses on recognizing and strengthening the role of indigenous peoples and their communities, specifies some actions that pertain to consultation. Specific measures recommended for governmental and non-governmental implementation include:

- 26(p) involve indigenous peoples at national and local levels in resource management, conservation strategies and planning processes;
- 26(q) development of national governmental arrangements for consultation with indigenous peoples to reflect indigenous knowledge and other knowledge in resource management, conservation and development programs;
- 26(r) cooperate at regional levels where appropriate to address common indigenous issues in order to strengthen participation in sustainable development;

Convention on Biological Diversity

(came into force in 1993, ratified by 175 countries, including Canada) Parties to the Convention on Biological Diversity (CBD) recognize national obligations to indigenous and local communities, in their endeavor to maintain biodiversity. Relevant articles on the theme of consultation include:

- Article 8(j)- "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".
- Article 15(5)- Addresses the utilization of indigenous knowledge outside of indigenous communities, stipulating "prior informed consent" over information flow.
- Also relevant: Article 10 (Sustainable Use of Components of Biodiversity); Article 17 (Exchange of Information); and Article 18 (Technical and Scientific Cooperation).

ILO Convention 169- Convention concerning Indigenous and Tribal Peoples in Independent Countries (adapted from ILO Convention 107 which was initiated in 1957, revised 1989, and has not been ratified by Canada) Articles from this convention that are relevant to consultation include:

- Article 6(1) and (2)- Address consultation and consent.

- Articles 13 and 14- Address lands and territories, including occupancy, use and ownership.
- Article 15- Addresses use, management and conservation of natural resources, and compensation for same.

UN Draft Declaration on Indigenous Peoples

Given the context of decolonization, features of this draft declaration include: a rejection of the "doctrine of discovery"; promotion of self-determination and bestowing international legal personality on indigenous peoples; a requirement of "informed consent" of indigenous people in matters that affect them; and affirmation of rights to lands and resources.

Presentations to the United Nations Working Group on Indigenous Populations, 18th Session, Geneva, July 24th-28th, 2000 are provided [here](#). (broken)

Indigenous Rights Forum

(Announced July 2000)

United Nations member states created a permanent U.N. forum on indigenous rights, that gives native peoples high-level representation in the United Nations. The forum, a standing 16-person committee, is a subsidiary body of the U.N. Economic and Social Council. The Economic and Social Council is one of the main organs of the United Nations after the Security Council and General Assembly.

My interpretation is that the Indigenous Rights Forum will amalgamate with the UN Working Group on Indigenous Populations, which was formerly established by the UN Commission on Human Rights.

Non United Nations

Organization of American States Draft Declaration on Indigenous Rights:

The assembly of the Organization of American States (OAS) has been working on a Draft Declaration on Indigenous Rights. The OAS Working Group has committed to consult with indigenous representatives to frame the wording of the Declaration on Indigenous Rights (after getting off to a poor start, where-in an indigenous caucus was to have limited participation). The declaration will not bind the signatories to specific actions, but will set an important benchmark for all member states in North, Central and South America.

Articles of interest include:

- Article XIII- Addresses participation in activities to protect the environment in traditional territories; also, consultation and informed consent, with "effective participation" in actions and policies that may impact territories.
- Article XVIII- Addresses rights to lands, territories and resources.

Forest Stewardship Council

The Forest Stewardship Council (FSC) is an international body that certifies forest products that have been developed in accordance with acceptable principles of sustainable forest management. The

certification process is guided by regionally developed standards, which are developed in accordance with internationally shared Principles and Criteria. The FSC Principles and Criteria are not targeted towards sovereign states, but rather are oriented towards informing choice for individual consumers, and guiding practices of companies in a market environment.

Principle #3 and associated Criteria are relevant to the topic of consultation, as follows:

The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.

3.1 Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.

3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.

3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.

3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.

Web Resources

Sources of international information that pertains to consulting with aboriginal peoples, available on-line:

- Assembly of First Nations web site, featuring the Indigenous Statement of Principles for the World Conference Against Racism: http://www.afn.ca/splash/indigenous_statement_of_principles.htm
- Centre for World Indigenous Studies: <http://www.cwis.org/>
- Convention on Biological Diversity: <http://www.cbd.int/>
- Ecological Applications 10/5: Article: "Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives" by Francesco Mauro and Preston D. Hardison.: <http://www.esajournals.org/> (Subscription required)
- Forest Stewardship Council's Principles and Criteria: <http://www.fsc.org/principles-and-criteria.34.htm>
- International Institute for Sustainable Development: <http://www.iisd.ca/>
- International Labor Organization, Conventions: <http://www.ilo.org/ilolex/english/>
- United Nations Permanent Forum on Indigenous issues: <http://social.un.org/index/IndigenousPeoples.aspx>
- Union of British Columbia Indian Chiefs web site, featuring various related publications: <http://www.ubcic.bc.ca>

Accommodation

Legal Guidelines for the Duty to Accommodate

By Krista Robertson, Woodward & Company, November 7, 2007

Citation: Robertson, Krista, 2007. "Accommodation Guidelines". Vancouver: Ecotrust Canada & Aboriginal Mapping Network. November 7, 2007. Available online at the Aboriginal Mapping Network web site: <http://www.nativemaps.org/>

Introduction

The government's duty to consult with First Nations about decisions that may impact Aboriginal rights is well established in law and in practice. The threshold of the duty to consult is very low: in any circumstance where there may be an Aboriginal right that might be infringed by a proposed course of action, the legal duty to consult is triggered. The duty of consultation is process oriented. In essence, it is a duty on the part of the government, and on First Nations whose rights may be affected, to share information.

The key companion of the government's legal duty to consult is the duty to accommodate. The government's duty to accommodate is what gives meaning and purpose to the duty to consult; without it, consultation is mere talk. The process of consultation determines what, if any, accommodations will be required. As stated by the Supreme Court of Canada in *Haida Nation v. British Columbia* ("*Haida Nation*"): "when the consultation process suggests an amendment of Crown policy, we arrive at the stage of accommodation".³ This section of the toolkit is focused on the key legal principles that guide the duty to accommodate.

1) The Duty to Accommodate Varies with the Circumstances

It is impossible to define categorically the duty to accommodate, because a fundamental principle of the duty is that it varies with the circumstances. The scope and nature of the duty to accommodate is situation specific, and depends on what information is brought forward in the consultation process. The strength of the evidence the government is provided with about the Aboriginal right at issue, and the extent to which it would be harmed or interfered with by the proposed government action, determines the strength of the duty to accommodate. Therefore, it is very important that First Nations fully participate in the consultation process in demonstrating their rights and identifying the ways in which the right could be impacted, in order to ensure a high bar for accommodation that the government must reach.

2) First Nations Interests Must be Put Forward in Terms of Aboriginal Rights

A First Nation may have a range of concerns or interests in relation to a proposed decision or development. For example, a First Nation may object to a proposed government decision to issue a logging licence to a third party because the First Nation itself has an interest in logging that area on a commercial basis, or because the area may contain culturally modified trees or archaeological sites that the First Nations wishes to protect. While these are valid and important interests, with very limited

³ *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 at para. 47.

exceptions they are not Aboriginal rights. The duty to accommodate is only triggered when an authorization is likely to interfere with constitutionally protected Aboriginal rights, (which include Aboriginal title). Therefore, First Nations should be sure to communicate and record the potential impact of proposed decisions in terms of their Aboriginal rights. In the case of title, the courts have defined this as land that the First Nation exclusively occupied at 1846. In the case of rights, the courts had defined these as practices integral to the distinctive culture of the First Nation at the time of contact with Europeans.

In the logging example, the First Nation may assert that the land parcel at issue is subject to Aboriginal title due to its prior occupation, and/or subject to an Aboriginal right to harvest cedar and/or other resources as a component of its cultural practices. To ensure a strong legal position, it is wise to seek legal advice to precisely articulate the Aboriginal rights at stake. At the accommodation stage, the First Nation still has a range of accommodation options open to it, such as the securing of a logging licence or protection of archaeological sites. However, in the consultation process, the bar for accommodation is set by clearly articulating the Aboriginal rights that may be at stake, rather than interests that may not be unique to a First Nation, and therefore do not enjoy constitutional protection.

3) The Duty Requires the Government to Take Concrete Steps to Change its Plans

The key concept of accommodation is that the government must demonstrate that it has taken concrete steps to change its course of action to avoid or minimize interference with the exercise of Aboriginal rights. The courts have adopted the plain meaning of accommodate in terms such as “to adapt, harmonize, reconcile...an adjustment or adaptation to suit a special or different purpose...a convenient arrangement, a settlement or compromise”.⁴ In its strongest language, one Court stated that the duty to accommodate requires the government “to ensure [aboriginal people’s] representations are seriously considered, and wherever possible, demonstrably integrated into the proposed plan of action”.⁵ Examples of types of accommodation have not typically been identified by the courts, but may include changing of boundaries of a development, adding special terms or conditions on a permit, or not proceeding at all with a project or undertaking. For a more detailed list of accommodation examples, please see the Accommodation Agreements section of the toolkit.

4) Courts are Reluctant to Interfere in Determining Appropriate Accommodation

When a court is called upon to review government conduct at the stage of assessing whether an Aboriginal right exists and whether the right is infringed, it will apply a high standard of ‘correctness’. This standard reinforces the importance of First Nations articulating their interests and concerns on the record in terms of Aboriginal rights, rather than as an interest that a non-Aboriginal person may share, as set out in section #2 above. However, in assessing whether the government has conducted itself properly at the accommodation stage, the courts are more deferential and will apply a lower standard of ‘reasonableness’.

As a result, in virtually all decided cases, courts have avoided making any findings on the adequacy of accommodation as the outcome of a given consultation process. This is consistent with the direction of

⁴ *Haida Nation* at para. 49.

⁵ *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 at para. 160.

the Supreme Court of Canada in several leading aboriginal rights cases where the Court stated that the reconciliation of aboriginal rights and government jurisdiction is a matter for negotiation, not litigation. Courts have therefore focused on the adequacy of the consultation process, such as whether the government provided enough notice and information to the First Nation. When courts have found that the process was lacking, they typically send the matter back to the decision maker to begin the consultation process anew. In some cases, the court has maintained a supervisory jurisdiction over the new process.

5) First Nations Do Not Generally Have a Veto

Only in rarest of circumstances, such as where a First Nation has a proven right or a treaty right that will be significantly and unjustifiably infringed by a proposed government action, does the duty to accommodate dictate that a First Nation has the right to full consent to a development, or to a 'veto' power. The Courts have made it clear that consultation is a 'two way street', that the government duty involves balancing competing interests, and that both the government and First Nations have a duty to act reasonably in negotiating accommodations. If possible, a First Nation should avoid a flat out refusal of a proposed government action. Rather, the First Nation should attempt to identify a range of possible accommodations with respect to the proposed decision and put them forward to government in good faith, with a goal to reaching a compromise. In cases where the record demonstrates that the First Nation simply rejected a proposal outright and would not consider alternatives, the courts have not interfered with the government's decision to proceed despite the First Nation's position.

6) There is No Duty to Reach an Agreement

While the courts have imposed a broad general duty on the government to consult with First Nations and accommodate their Aboriginal rights, they have not gone so far as to impose an obligation to actually reach an agreement. As stated by the Supreme Court of Canada in *Haida Nation*: "[t]he accommodation that may result from pre-proof [of aboriginal rights] consultation is just this—seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them."⁶

This judicial language signals to both government and First Nations that the negotiating parties have the responsibility to reach an agreement through fair compromise, with both parties recognizing and respecting the other's interests. The government may bargain hard, but cannot engage in sharp dealing. The sooner the First Nation tables potential accommodations in the process the better, as it is harder to change a project or development in more advanced stages.

7) An Offer of Money May Not Discharge the Duty in all Cases

Where an adverse effect on an Aboriginal right cannot be avoided, and where there is a broader public interest in a project proceeding, compensation may be an appropriate form of accommodation. However, a unilateral offer of money will not satisfy the duty to accommodate. In some cases, a unilateral offer of monetary compensation may be seen as an indication that the consultation process

⁶ *Haida Nation* at para. 49.

was inadequate because the government did not approach it with an open mind to address the First Nation's interests and concerns. In the case of *Musqueam Indian Band v. British Columbia*, the Musqueam opposed the sale of a portion of land that was part of ongoing land claim settlement negotiations. The government stated it intended to proceed with the sale, but offered cash compensation. The Musqueam objected to the cash offer on the basis that the loss of land was irreparable and not compensable, in light of the diminishing land base required for a treaty settlement. The Court of Appeal agreed, and suspended the Order-in-Council authorizing the sale for a two-year period, in order to give the parties more time to negotiate appropriate accommodations. The Court told the government "it is only fair that the consultation process seeking to find a proper accommodations should be open, transparent and timely".⁷ If the government does not negotiate accommodation in accordance with those principles, a First Nation may consider taking the matter to Court.

8) One Size of Accommodations Will Not Fit All

Just as the government cannot 'buy off' its duty to accommodate, nor can it arbitrarily develop an accommodation agreement and impose it on the other party. In *Huu-ay-aht First Nation v. The Minister of Forests* ("*Huu-ay-aht*"), the government was considering the issuance of logging approvals in Huu-ay-aht territory and offered a pre-developed template agreement with specific accommodations (cash and a logging licence). The amount of cash and timber was to be calculated on a set, population-based formula. The government refused to move off the template and the calculation formula on the rationale that it wished to be consistent in its forestry accommodation agreements with First Nations across British Columbia. The Huu-ay-aht First Nation secured expert evidence that the projected profit and stumpage from the logging plans was disproportionately high relative to the compensation offered in the accommodation agreement. When the Huu-ay-aht sought judicial review of the process, after considering the consultation record, the Court found that a generic accommodation package was inadequate:

*While a population-based approach may be a quick and easy response to the duty to accommodate, it fails to take into account the individual nature of the Huu-ay-aht's claim...in this case, the government did not misconceive the seriousness of the claim or the impact of the infringement. It failed to consider them at all. The government acted inappropriately and must begin anew a proper consultation process based upon consideration of the appropriate criteria.*⁸

The Court directed that the appropriate criteria for the consultation and accommodation process is: (1) a consideration of the strength of the individual First Nation's claim, and (2) the seriousness of the impact of the infringement. Although the Court rejected a population-based formula to determine an appropriate level of accommodation, it avoided giving an opinion on an appropriate value of benefits due to the Huu-ay-aht on the facts before it:

⁷ *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* (2005), 251 D.L.R. (4th) 717 at para. 98.

⁸ *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.* (2005) 33 Admin. L.R. (4th) 123 at para 126.

This is not to comment at all on the appropriateness or adequacy of the accommodation that might be achieved at the end of the consultation process. It may be that the substance of the offer of accommodation contained in the [accommodation agreement] may be sufficient accommodation. However, that would have to be determined not by a population formula, but by a strength of claim and degree of infringement assessment. That question is deferred until proper consultation takes place.⁹

The *Huu-ay-aht* case reinforces that the government must approach accommodation negotiations with flexibility and an open mind, and cannot dictate outcomes to First Nations.

9) Accommodations Can Encompass a Number of Decisions

Major projects often require a number of authorizations and permits. In such cases, the issuance of one such permit may not pose a significant infringement to Aboriginal rights. But taken together with a several other associated permits, several impacts on Aboriginal rights may well ensue. For example, the issuance of tenure to put an open net pen in the ocean may not have a significant impact on an Aboriginal right to fish (assuming it does not restrict a First Nation's access to a preferred fishing ground). However, the tenure is the basis for another government department to issue a licence to densely stock the cages with a foreign species of fish, which may pose risks to local wild fish. In the consultation process, a First Nation may wish to address several related decisions simultaneously so that appropriate accommodations are developed to address the cumulative effect of government plans. If that is a reasonable approach in the circumstances, a First Nation can avoid having to negotiate multiple agreements that may not address the ultimate issues.

10) Third Parties Do Not Have a Legal Duty to Accommodate

In *Haida Nation*, the Supreme Court of Canada stated that the duty to consult and accommodate rests solely with the government, and does not apply to private companies who are seeking to use resources in First Nation's territories.

To be in the best legal position, a First Nation should always ensure that it could demonstrate to a Court that it made the government aware of all Aboriginal rights that might be impacted by the decision. This is not to say that private companies should not be involved in consultations, and in providing accommodations. Often, the first notice received by a First Nation about a proposed development will come from the private proponent, particularly when the government permit application processes require the proponent to document its efforts to consult with potentially affected First Nations.

Practically speaking, a company who is seeking licences for resource use or development may need to be involved in finding appropriate accommodations. There are many examples of accommodation agreements between First Nations and private companies, as well as 'three-way' agreements between First Nations, government and companies. This may be a good strategic approach to reach successful accommodation in many cases. However, First Nations should be mindful that it is the government who must ultimately account for any infringements of aboriginal rights, notwithstanding a tendency on the part of government to 'download' consultation responsibility onto third party companies. Depending on

⁹ *Huu-Ay-Aht* at para. 128.

the circumstances, it may be strategic for a First Nation to keep consultations with government ‘on the record’ and require that parallel negotiations with the private proponent are kept confidential or ‘without prejudice’. This way, if a permit is approved and the First Nation believes it has not been properly consulted and accommodated, the lines between negotiations with the government and negotiations with the company will not be blurred on the record put before a court.

11) Accommodation is an Interim Step in Most Cases

Unless a First Nation has an established treaty right or a right that has been declared by a Court to be protected under s. 35 of the *Canadian Charter of Rights and Freedoms*, consultation and possible accommodations are only interim steps to avoid irreparable harm or to minimize an infringement, pending final resolution of the underlying claim.

The government has a legal duty to consult if there is likely to be a provable Aboriginal right affected. If the consultation process reveals that the right is likely to be affected, there is a duty on the government to seek reasonable means to accommodate. All of the principles in this summary have been drawn from cases where the Aboriginal rights at issue have not been proven in Court or enshrined in a treaty. Where the rights have been proven or secured in a treaty, the duty to consult and accommodate may be more onerous, and may even require, in the words of the Supreme Court of Canada in *Delgamuukw v. British Columbia*, “the full consent of an aboriginal nation”.¹⁰ Thus, the legal framework for accommodation suggests that it is not a substitute for a longer term, broader reconciliation of Aboriginal rights, including title rights. In negotiating accommodations, keep in mind that the preservation of longer-term interests is an important principle. A First Nation should not agree to any activity that significantly compromises its broader land claim and self-governance objectives. Further, since legally securing Aboriginal title and rights through a court declaration or treaty will serve to create a higher bar for accommodation, a First Nation should take care not to allocate all its resources to interim consultations and accommodations at the expense of pursuing constitutional status for its rights through treaty negotiations or proving them in court.

12) The Duty to Accommodate is Ongoing, Even After a Decision is Made

The accommodation process is a living process. Although certain agreements may be reached with respect to a government decision to permit or authorize an action, there may be a need to continue consultations and accommodations as a development grows and progresses. For example, a logging plan may be approved by the government in the territory of a First Nation based on the understanding that the First Nation’s concerns with the plan were considered in a consultation process and addressed through changes to the plan. The First Nation then becomes aware that a river has meandered and that a significant fish stock may be at risk under the plan, or that a road plan has been adjusted and may encroach on a significant site for cultural practices. Unless the government could show that that information could have reasonably been available at an earlier date and that the First Nation was acting in bad faith, the government is obligated to ensure that further consultation takes place with respect to outstanding or emerging issues, and that appropriate accommodations are made to protect Aboriginal

¹⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 168.

rights. The duty to consult and accommodate is evolutionary and may be triggered even after a permit is issued. Where new information comes to light, further accommodations may be required.

Conclusion

The legal principles guiding consultation and accommodation are frequently intertwined, but as the case law develops, some distinctive principles with respect to accommodation are emerging. In some ways, consultation processes are more legalistic, while accommodation processes are more practical. For this reason, the courts play a larger role in overseeing consultation processes and lesser role in supervising accommodation negotiations. A First Nation's awareness of key legal principles with respect to accommodation can help to ensure that consultation and accommodation processes work together, so that it can secure appropriate accommodations that protect its Aboriginal rights and provide sufficient benefits from resource development.

Accommodation Agreements

By Krista Robertson, Woodward & Company, November 7, 2007

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Introduction

"[A]ccommodation negotiations are about the distribution of value that is being created through some economic development activity. Each of the parties – the province, the private sector proponent, and the First Nation—bring something to the table, and the synergy contained in this dynamic only adds to the value being created... Successful accommodation negotiations create the much sought after scenario where everyone is a winner."

-Harold G. Calla, Squamish Nation¹¹

'Accommodation agreement' is a general term to describe a written agreement that results from a consultation process about a government decision that has the potential to impact Aboriginal rights. Other common terms for accommodation agreements are 'impact benefit agreements', 'interim measures agreements', 'project support agreements' or 'cooperation agreements'.

Accommodation agreements span a huge range of form and content. Generally, the key objectives of a First Nation in negotiating an accommodation agreement are (1) to reduce the impact of a proposal on Aboriginal rights; (2) to secure benefits from a project or development; and (3) to clarify the roles and expectations of the parties as a development unfolds. The purpose of this section of the toolkit is to identify some basic components of an accommodation agreement and strategies for First Nations to achieve accommodation agreements that meet the three key objectives cited above. There is no formula for drafting an accommodation agreement; every negotiation is different and this outline is intended to provide general information only. This outline is not a substitute for legal advice and should not be relied on as such. In almost all cases, First Nations should seek legal advice in drafting a proposed accommodation agreement, or at least a legal review of a draft agreement, before the terms are finalized.¹²

1. Negotiations May be Staged

Negotiations about First Nation participation in a development may be premature if the First Nation has insufficient information to be assured that the impact of the development will not have unacceptable impacts on Aboriginal rights. This section of the toolkit assumes that a consultation process has already taken place, all available information has been exchanged and the parties are at the point of negotiating

¹¹ Harold G. Calla, CGA, CAFM, "Sea-to-Sky Accommodation" (Paper presented at the Pacific Business & Law Institute Conference "Bringing Certainty to Aboriginal Rights and Title Through Accommodation Agreements", June 9 and 10, 2005).

¹² In particular, the sample agreement clauses in this paper are samples only, and will not be appropriate in all circumstances.

an accommodation agreement on the basis of that information. However, in more complex negotiations, the parties may wish to develop a memorandum of understanding or an agreement in principle that sets out issues that need to be addressed before negotiations on impacts and benefits proceed. For example, a First Nation may want to secure a commitment that a government will put the permitting process on hold, or timelines will be extended, to allow for further environmental or cultural impact assessments that it may require before engaging in accommodation agreement negotiations. The purpose of this approach would be to set out a framework for negotiations and to allow time for the parties to actually negotiate once the relevant assessments have been concluded.

2. Negotiation Budget

Another important example of what might be in a preliminary agreement at the early stages of accommodation agreement negotiations is an agreement that the project proponent and/or the government will cover the First Nation's costs of negotiation.

The process of negotiation can be time-consuming and costly. Costs include travel expenses, per diem rates for negotiators, community meetings, cultural advisors, technical experts, and legal advice.

Regardless of whether up-front cost contributions are formalized in an agreement, it is important for a First Nation to secure negotiation costs in advance wherever possible to level the playing field and ensure sufficient capacity to negotiate a good deal. Where the company or government requires a First Nation to sign a contribution agreement to secure up-front negotiation funds, the First Nation should ensure that the funds only obligate the First Nation to engage in good faith negotiations, not to actually agree to reach an agreement about how the development might proceed. Negotiation funds are just that, and should not have any strings attached. Like other assessments a company must undertake in deciding whether to carry out a business proposal, assessing whether or not the proposal will cause unacceptable impacts to a First Nation is a cost of business.

3. The Parties to the Agreement

Some accommodation agreements are between First Nations and government, others are between First Nations and private companies, and some are tri-partite, involving all three parties. If the project spans two or more traditional territories, then the agreement may have more than one First Nation signatory. In these cases, the participating First Nations may first consider developing protocol or cooperation agreements amongst themselves. Some First Nations are represented in agreements through tribal councils or aboriginal development corporations. In all cases, First Nations signatories should ensure they can demonstrate that they have the legal authority to enter into legal agreements.

There are various strategic considerations for a First Nation in deciding whether to seek an agreement with a government, a private company, or both, and whether these will be separate agreements or one combined agreement. The types of accommodations a First Nation is seeking, and who has the ability to provide them, will generally dictate whether there will be a joint or separate agreements. While the government may be in a better position to provide capacity and research funds, royalty sharing, tenures or other commercial resource access rights, or legal land use designations, the company is likely to be in

a better position to offer training and employment, service contract opportunities and financial interests in the development.

While companies often have a strong business incentive to reach fair accommodation agreements so as to facilitate a project, it is important for First Nations to be mindful that the legal duty to consult and accommodate lies solely with the government. At the end of the day, if accommodation negotiations break down, the legal remedies for a First Nation are against the government. Therefore, a First Nation should always keep the government ‘on notice’ of its efforts to reach agreement(s) with a company, and should continually use the government’s legal duty to put pressure on companies to negotiate. Ideally, when a company indicates a wish to participate in an accommodation agreement, the government should make the company aware that it will not approve any of the necessary permits until First Nations interests have been properly accommodated. Although it is more time consuming, ideally a First Nation will reach accommodations with both the government and the company, as each brings different benefits to the table.

4. Preamble

After setting out the parties, agreements typically start with a preamble, also known as recitals or the ‘whereas’ clauses. The preamble is generally not legally binding, but it plays an important role in setting out the background of the agreement and the motives and intentions of the parties to enter into the legally binding clauses. For example, “*Whereas Company X is seeking a logging licence within the traditional territory of X First Nation*”. The preamble may also be the appropriate place to give a more detailed description of the project.

In some accommodation agreements, the preamble takes on a political dimension and includes statements of each party’s view of its jurisdiction. For example:

Whereas the X First Nation asserts that it holds existing Aboriginal rights, including title and other interests, to the Traditional Territory as outlined in the map in Appendix “A”, including the right to stewardship of lands, waters and resources therein;

Whereas the Province asserts that the lands, waters and resources included in the X area are Crown lands, waters and resources, and are subject to the sovereignty of Her Majesty the Queen and the legislative jurisdiction of the Province of British Columbia.

Other statements may be appropriate for inclusion in the preamble. For example, a reference to broader, related processes, such as treaty or other land claims settlement negotiations or court actions to identify the accommodation agreement as an interim measure until a broader claim is resolved. The preamble may also contain statements about the parties’ intentions to work together in a spirit of cooperation.

5. Benefits

The range of possible benefits that could be negotiated into an accommodation agreement is limitless. What follows are the more common examples, with some commentary on strategies to ensure the benefits will be realized on a practical level.

a) Royalties, Revenue Sharing or Equitable Interests in the Project: There are many examples of cash benefits. Where the government is collecting royalties from the private party, such as stumpage fees in the forestry sector, the government is in a better position to provide revenue sharing. Where the company is not paying large royalties to government, the company is in a better position to share profit. Royalties may only be relevant in cases where the First Nation has legally established a proprietary right to the lands at issue. There are many different formulas to arrive at a fair sharing of revenues and so far the Courts have given very little guidance on the matter. A First Nation's research into the profit expectations of a project and the expected impacts is very important to assess whether the financial components of an agreement are fair.

b) Employment: Terms about employment and business opportunities for a First Nation are common in accommodation agreements. If members of a First Nation do not have appropriate training to be employed in a development, training and apprenticeship provisions are important. A hiring policy that gives preference to First Nation candidates and sets targets in numbers or percentages for First Nations employment in a project, or in the broader business of a company, is one means to secure employment opportunities. In the case of lay-offs, special provisions should be made for First Nations employees who may not have seniority. Where the company anticipates using a number of sub-contractors, specific provisions should be made to ensure employment of First Nations is a criterion of all sub-contracts. In addition, policies that address cultural barriers to successful First Nations employment, such as flexible work hours to accommodate traditional seasonal hunting, fishing and gathering activities, should be considered. Cultural sensitivity training for existing company employees can create a more supportive work atmosphere for First Nations, as can access to personal and career counseling. Specific positions may be created for a project for First Nations members to act as liaisons or cultural advisors to the company.

c) Business Opportunities: Business opportunities, such as construction and service contracts, may be a benefit for First Nations as they can provide both revenue and capacity building. Agreements may include terms providing that First Nation businesses will have a right of first refusal on service contracts, or at least advance notice of a tender and priority contract awards. Capacity funding and other support from the government or company may be required to ensure a First Nation has the ability to secure and, more importantly, to deliver contracts.

d) Fee Simple Land Grants and Resource Tenures: Although a company may have private land holdings and may be in a position to transfer a parcel of land to a First Nation, land grants and resource access tenures are generally benefits that can only be provided by governments. While First Nations have rights to harvest resources for food, social and ceremonial purposes, commercial harvest licences are harder to secure and can provide First Nations with long-term economic opportunities. Grants of land are more rare, and if the government is unwilling to provide land, it

may be possible to negotiate designations of Crown land to ‘reserve’ the certain parcels for future negotiations.

e) Community Infrastructure and Social Programs: Employment and other benefits may provide opportunities for some members of a First Nation, but not to all members. To balance impacts and benefits in the wider community, accommodation agreements may have provisions for funding for community resources such as parks, recreation centres, daycares, transition houses and social programs.

6. Impacts

The types of accommodation under this heading address impacts to Aboriginal rights. As with the benefits section, the examples below are only some of many considerations that may be addressed in an accommodation agreement.

a) Completion of Studies: If a use and occupancy study, an environmental impact assessment, socio-economic impact assessment, or a baseline study is required or incomplete, the agreement may expressly provide for its completion, including how the study is to be managed and who pays the cost. If further information is required with respect to the development, it is important to have a section in the agreement to address what will be done with the information, especially if unforeseen impacts come to light.

b) Joint Management Committees: An environmental assessment for a project may indicate measures that should be taken to minimize anticipated environmental impacts. A First Nation may require even more stringent environmental protection measures for a development than those recommended in an assessment, or as required by government regulations, because of a unique reliance on natural food sources and spiritual values related to a pristine environment. For example, a pesticide management plan that meets government requirements may still endanger First Nations who gather food in affected areas, or the use of a lake to dispose of mine waste may destroy the spiritual practices of the First Nation.

A joint management committee or an environmental stewardship committee involving representatives of the First Nation, the company and the government can play a key role in developing and implementing environmental protections that are appropriate to the importance of the resources at risk. A joint committee can also oversee the completion and integration of impact studies into management plans, direct further studies where required, and ensure that management is responsive to ongoing environmental and cultural site monitoring. When unforeseen impacts or new circumstances arise, a joint committee can play an invaluable role in ongoing consultations and provide the First Nation with input into decision-making. Where a management committee is established in an agreement, the agreement should set out the details of composition and rules governing their powers and meetings.

c) Ongoing Site Monitoring: An important aspect of environmental protection, especially where government regulations and compliance mechanisms are weak, is ongoing site monitoring. Various

arrangements can provide a First Nation, or an independent monitoring agency, with access to a site, data and other information so that the First Nation can ensure that environmental standards are being maintained. Ideally, such provisions will provide funding for First Nations participation in monitoring, including technical expertise, as well as mechanisms that make it clear what steps are to be taken if concerns arise.

d) Site Protection and Access Arrangements: An accommodation agreement may include provisions for the protection of important cultural or harvesting sites. For example, an agreement may specify that logging cannot take place in key hunting areas, or that certain tree stands used for bark harvesting remain untouched. Where a development may cut off access to a site of importance to a First Nation, an agreement can set out right of way or access arrangements to ensure ongoing accessibility.

e) Terms and Conditions on Permits: A good strategy to create legal security that a development will not go forward without adequate protection for Aboriginal rights, is for appropriate terms and conditions to be directly inserted into the licences and other permits issued by the government. For example, a licence to farm salmon in open net cages may require the farmed fish to be removed from the cages in the event of a disease outbreak to reduce the risk of transmission to wild stocks. As another example, a logging licence may grant less than the proposed volume of allowable cut in order to maintain sufficient ecosystem biodiversity. In some cases, if restrictions are put directly into a permit, they need not be addressed in an accommodation agreement, as they will be enforceable through the permit. However, such conditions may form an important part of accommodation negotiations, and they may be reinforced through provisions in an accommodation agreement, such as an ongoing monitoring arrangement.

7. Without Prejudice Clause

In order to protect underlying legal claims to Aboriginal rights, including title, it is very important that all accommodation agreements have strong “without prejudice” clauses. There are a variety of possible terms; therefore, it is advisable to seek legal advice to ensure there is sufficient protection in the agreement. Sample clauses are as follows:

Nothing in this Agreement shall be construed so as to prejudice or derogate from any Aboriginal Interests of the X First Nation arising from their asserted traditional use and occupancy of their Traditional Territory, nor from any treaty or land claim agreements that may be negotiated;

This Agreement, and the processes set out herein, is not a treaty or land claims agreement within the meaning of sections 25 and 35 of the Constitution Act, 1982;

For greater certainty, this Agreement is not intended and shall not be construed to create, define, recognize, affirm, suspend, limit, deny, derogate or abrogate any Aboriginal rights or title of the X First Nation which may exist or be acquired in the future within the meaning of sections 25 and 35 of the Constitution Act, 1982;

Except in proceedings directly related to the enforcement of this Agreement, the contents of this Agreement and any record created pursuant to it is not intended to limit any position any party may take with respect to future negotiations, and is without prejudice to any legal position that has been or may be taken by any party in any court proceeding, process or treaty negotiations or otherwise, and nothing in this Agreement shall be construed as an admission of fact or liability in any such proceeding or process;

Nothing in this Agreement, or any decision taken pursuant to it, will derogate from any existing legal obligations the Province or Canada may have to consult with the X First Nation relating to any decisions that may impact the Aboriginal rights of the X First Nation.

Notwithstanding the inclusion of such “without prejudice” clauses, a First Nation should be aware that if it has entered into an accommodation agreement, the government will attempt to rely on the agreement to demonstrate that it has discharged its legal duty to consult and accommodate, so to that extent, the agreement may not be entirely without prejudice. Further, while such clauses will protect the underlying legal claims of a First Nation, there is the unavoidable reality that a resource extraction or development project will inevitably impact aboriginal rights in practice to some extent. For example, an accommodation agreement with respect to a logging plan may be declared to be without prejudice to an underlying Aboriginal title claim, but in the long run, the land base the First Nation may acquire under a land claims settlement or court declaration will be very different in character if it has been logged. For this reason, it is important that First Nations take the ‘long view’ of their interests in negotiating accommodation agreements, such as ensuring that appropriate environmental and cultural protections are in place to protect their territory.

In addition to these standard clauses, a First Nation should pay particular attention to any clauses the government or a company may be seeking, which indicate that in exchange for the accommodations set out in the agreement, the First Nation consents to a development. It is ideal if the agreement contains no clause of this nature. An accommodation agreement should not be a ‘blank cheque’ for a development to proceed, particularly in light of the fact that accommodation agreements are typically negotiated at the beginning of a project, when all of the potential impacts are not yet realized. For example, a First Nation should not agree to a clause that provides a blanket approval of a development. Where the government or company insists on a term regarding consent, the First Nation should strongly negotiate to have the clause limited as much as possible; for example, there may be a statement that the agreement is intended to address the government’s duty to consult and accommodate, but where new information or requirements for further authorizations arise, the First Nation is entitled to full consultation and accommodation. Seeking legal advice with respect to these types of clauses is strongly recommended.

8. Dispute Resolution

Given that one of the purposes of an accommodation agreement is to avoid litigation, it makes sense for an agreement to contain dispute resolution provisions in the event of a disagreement with respect to the interpretation of the agreement. There are a number of options in this regard. The provisions can oblige both parties to appoint representatives to meet as soon as practical and to exercise all reasonable efforts to resolve the dispute; if these efforts fail, the parties can agree to mediate the dispute with the assistance of an independent mediator. Generally, there are associated provisions that the mediator must be acceptable to both parties, that the parties will share the cost equally, and that the mediation is non-binding. If mediation fails, either party could proceed to court.

Dispute resolution provisions can go another step beyond non-binding mediation and include a right by either party to submit the matter to an arbitrator, whose decision shall be binding on both parties. While arbitration is less costly than litigation, First Nations should approach this option with caution because an arbitrator with a general orientation in commercial arbitration may not be equipped to consider the unique Aboriginal rights aspects of an accommodation agreement.

9. Amendments and Termination

An accommodation agreement may be in force for a long period of time, during which the positions of the parties and the circumstances underlying the agreement may change. Although it goes without saying that any agreement can be amended at any time by mutual agreement of the parties, ideally an accommodation agreement will contain provisions that establish a process for the parties to periodically evaluate whether the agreement is working. All agreements should have provisions whereby either party can terminate the agreement, typically with notice in writing and a specified notice period, such as ninety days.

10. Confidentiality

In some cases, a company may require that confidentiality provisions form part of an accommodation agreement. This may apply to the whole agreement (except in the course of legal proceedings about the agreement itself), or only to confidential business information received in connection with the agreement, such as financial and technical data. Although trade secrets may not be negotiable, depending on the circumstances, a First Nation may or may not agree with more general confidentiality provisions. In an agreement between a First Nation and a private company, it may be advantageous to the First Nation that the agreement be kept confidential so that the First Nation can continue to press the government for accommodations and the agreement cannot be put 'on the record' in the event that the First Nations needs to go to court to seek a remedy for the government's failure to consult. Further, a First Nation may not want a company to publicize the agreement and promote a public impression that the particular industry is generally acceptable to First Nations, or risk misinterpretation or misinformation that may cause political damage to a First Nation government. In some cases, accommodation agreements are entered into by First Nations, not because they support the project, but because the development is likely to go ahead in any event, and an accommodation agreement functions to at least mitigate or minimize the impact.

For First Nations as a collective, the downside of confidentiality provisions are that the First Nations are not at liberty to share information and work together to strengthen their bargaining position with a particular company or a particular industry. Further, if a First Nations signatory agrees to keep the agreement confidential, it may face challenges in balancing transparency to its membership with its obligations under the agreement.

11. Ratification

The process for ratifying an accommodation agreement is generally a matter of internal governance. At the outset of the consultation and accommodation negotiation processes, First Nation negotiators may be given a broad mandate to reach an agreement. Alternatively, they may have a narrower mandate that requires going back to the First Nation's government and/or the membership to ratify an agreement in principle before the agreement can be legally binding. Either way, a First Nation's negotiators should make it clear to the other parties what the scope of their authority is and nature of the anticipated ratification process.

Conclusion

Regardless of the ultimate ratification process, the key goals of First Nations in reaching an accommodation agreement are more likely to be achieved when the negotiation process is perceived to be open and transparent by the membership who will be impacted by a development. In providing information to the broader leadership and/or membership about the negotiation process, it may be useful for negotiators to explain that the agreement is an interim measure and the intent of accommodations are to protect rights, not to extinguish them. However, this does not change the fact that accommodation agreements can pose difficult trade-offs, and a community may struggle with divisions as a result. While there is no easy answer, the identification of objective criteria—such as the number of jobs created, the First Nation's share of the profit margin relative to the total expected profit, comparison to other agreements and the relative strength of environmental protections—can go a long way in helping a First Nation to assess the gains and risks of the agreement in order to determine whether or not it offers a net benefit. In the event that government or private parties are unwilling to act reasonably in reaching accommodations, court action may be considered. Going back to first principles, if a First Nation puts its Aboriginal rights at the forefront of negotiations, it should be able to rely on a court to intervene if those rights are not adequately accommodated.

Who we are

The referrals toolbox project is a joint initiative of the **Sliammon First Nation** and Ecotrust Canada's **Aboriginal Mapping Network (AMN)**. This toolbox came out of a "wish list" generated at a workshop hosted by the Sliammon First Nation and Ecotrust Canada on Crown Land Referrals. Both the Sliammon First Nation and Ecotrust Canada saw the need to develop these tools. We hope you find the Toolbox useful.

Sliammon's and Ecotrust Canada's Rationale

Sliammon and Ecotrust Canada Partnership Deemed a Good Fit

Sliammon First Nation first established its Crown Land Referrals Department as an arm of its treaty research office. The completion of a Traditional Use Study(TUS) and establishment of a TUS database by the Sliammon Treaty Society laid the necessary groundwork for Sliammon involvement in the Crown Land Referrals process. Maynard Harry, Manager of the Sliammon Crown Lands Referrals and Resources Department (SCLRRD), recognized that "with the TUS complete and the GIS department established we recognized that this information needed to be employed." The TUS database is an integral element of Sliammon's participation in the Crown Land Referrals process, as it provides Maynard with a good baseline of information required to meaningfully respond to a referral.

The department broke away from the treaty umbrella in late 1999 when Sliammon leaders in the area of Crown Land Referrals identified referrals as a Nation issue to be dealt with by Band administration. While there is some overlap between the Treaty Society's goals in hammering out interim measures agreements and the SCLRRD role in securing meaningful involvement in land and resource decision making, Harry asserts that: "This is really a Nation issue. The Treaty Society's role is to negotiate a treaty and work out the details of that treaty. This is a rights issue and a rights issue is a Nation issue." The *Delgamuukw* decision in December of 1997 was heralded as a great victory for First Nations across British Columbia in the area of rights and title. The message from the highest court in Canada was clear: Aboriginal title has not been extinguished, and the reconciliation of Aboriginal title with crown title is to be worked out through negotiation not litigation.

In the wake of the decision, many Delgamuukw workshops were held to discuss the legally expanded definition of Aboriginal rights and title as well as to strategize future approaches in dealings with all levels of government. The *Delgamuukw* decision triggered the province's legal duty to consult with First Nations on land and resource developments which occurred on First Nations traditional territories. Attending these workshops, Maynard Harry noticed a persistent complaint, that is, in the wake of *Delgamuukw* band offices were being flooded by land and resource referrals, and, that many nations lacked the infrastructure and capacity to deal with these referrals. Recognizing that Sliammon already had an effective system in place to deal with referrals Maynard conceptualized a Crown Land Referrals Workshop which would bring nations together to discuss this issue.

"I saw a lot of people reinventing the wheel at these workshops," said Harry. "There was a real need to streamline the process, and for a venue for First Nations to network with each other about the issues facing us in the Crown Land Referrals Process." And so a partnership was born, Sliammon First Nation teamed up with Ecotrust Canada to deliver a two-day workshop on the referrals issue in Sliammon territory. Maynard had a vision for the workshop: To network with other nations about their involvement in the referrals project, and to produce some tangible results, be it another workshop, or an effective information sharing mechanism.

David Carruthers, Director of Information Services for Ecotrust Canada, saw the workshop as fitting the mandate of the Aboriginal Mapping Network. The AMN was established to facilitate discussion of common concerns facing First Nations in mapping, GIS, and information management. Carruthers states: "We saw the referrals issue bubbling to the surface all over the province yet there wasn't a forum for sharing First Nations experiences in dealing with these external pressures. We saw a role for the AMN to address the collective concerns." The workshop was initially conceptualized to be an intimate gathering of First Nations Crown Land Referrals practitioners, a venue to open a dialogue addressing common concerns. Eventually the workshop grew to include lawyers, consultants, and technical experts. The first day of the workshop included a series of presentations by lawyers, consultants and technical experts, and the second day was reserved for a discussion between the practitioners themselves.

An outcome of the strategizing session on the second day of the workshop was a list of action items. The idea for a Crown Land Referrals Toolbox was among those action items tabled. It was agreed that Ecotrust Canada and Sliammon would continue their partnership to tackle this initiative.

Acknowledgements

Please note: Acknowledgements have not yet been updated to reflect the work Woodward & Co. and Ecotrust Canada have contributed to the Toolbox update; nor to reflect the financial assistance the BC Law Foundation has provided.

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We would also like to note that any errors in the content contained in the referrals toolbox are the responsibility of the project coordinator and staff that worked on the various components of the toolbox.

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Legal reviewers: David R. Boyd (Senior Associate, Eco-Research Chair of Environmental Law and Policy, University of Victoria Faculty of Law), Cheryl Sharvit (Staff Lawyer, EAGLE- Environmental-Aboriginal Guardianship through Law and Education), Terri-Lynn Williams-Davidson (Director & General Counsel, EAGLE) and Nancy A. Morgan, Morgan & Associates (Barrister and Solicitor).

Forest referrals checklist reviewers: Alan Hopwood, Laurel Brewster (SLDF, Silva FF), Will Horter (Forest Futures), Dennis Morgan (Fishery biologist, Huu-ay-aht FN and RAMS), Sharon Hadway (MoF), L. Maynard Harry (Sliammon), Tawney Lem (Hupacasath) and Simon Fraser University Resource and Environmental Management Forest Ecology lab members: Ken Lertzman, Lori Daniels, Josie Hughes, Claire Hutton, Emily Heyerdahl, Audrey Roburn, Holgar Sandman, Saleem Dar, and Brigitte Dorner.

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