
Meaningful Aboriginal Consultation In Canada

**A Review of the First Nation, Inuit, and Métis Right to
Consultation and Accommodation on
Wildlife Resource Management and Hunting as
Defined by Common Law**

February 2, 2009

CAID

Preface:

Meaningful Aboriginal Consultation in Canada: A Review of the First Nation, Inuit, and Métis Right to Consultation and Accommodation on Wildlife Resource Management and Hunting as Defined by Common Law was written as a submission to the Government of Ontario. As such, the terminology used may be offensive to Indigenous Peoples. We apologize profusely for this. This was prepared as supporting documentation for requests to halt the advancement of proposed changes in Ontario's wildlife management that fail to include First Nations' rights to manage wildlife resources and hunt for both sustenance and economic purposes

Dr R. G. Herbert

Submitted to:

Patrick Hubert and Christie Curley of the Ontario Ministry of Natural Resources,
Wildlife Section, on February 2, 5, and 10, 2009

Shared with:

First Nations, Inuit, Innu and Métis of Canada.

© Reserved 2009

Meaningful Aboriginal Consultation in Canada: A Review of the First Nation, Inuit, and Métis Right to Consultation
and Accommodation on Wildlife Resource Management and Hunting as Defined by Common Law
Prepared by Dr. Richard G. Herbert B.Sc., D.V.M.

Christian **A**boriginal **I**nfrastucture **D**evelopments
A Not-for-profit, Charitable NGO
Suite 203-1, 4109 Fourth Avenue, Whitehorse, YT Y1A 1H6
Canada
info@caid.ca www.caid.ca

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

Overview:

Laws embody the moral values of society. They impose limits on conduct to ensure that our rights are protected. The principle that laws limit what we do to protect the greater good is called the “rule of law”. No one in Canada is above the law and it applies equally to everyone; including those who enforce the law and those with governmental power. Laws that protect people in Canada can be legislative, common law, or civil law (as in the Province of Québec). Legislative laws are those enacted by three levels of government in Canada (federal, provincial, or municipal). Common laws are those created by judges on a case by case basis as they make their rulings. Civil law in Québec is a system where judges primarily apply legal principals written in Québec’s Civil Code and legislation. Canada’s Aboriginal Peoples had their own law before the arrival of colonizing nations. These traditional laws still exist. Unfortunately, Aboriginal law still has not been given legal status in Canada and so is not respected under the Canadian rule of law.

Constitutional rights in Canada are protected by the rule of law. Canada recognized Aboriginal rights (First Nation, Inuit, and Métis) in Section 35 of the *Constitution Act* in 1982. However, Canada has not included Aboriginal rights into federal or provincial legislation. The rule of law in Canada for Aboriginal rights is therefore determined on a case by case basis in court. This can occur in both federal and provincial court systems. As a consequence, Aboriginal rights in Canada are currently protected by common law. **To know the law protecting any particular Aboriginal right, you must know court rulings for that right from previous court cases.**

What follows is an overview of common law for the Aboriginal right to meaningful consultation on fish, wildlife, water, and land management policies, legislation, regulations, and programs in Canada. We have not tried to be exhaustive or all inclusive when writing this overview. There are more cases examples than have been cited and more detail to common law governing meaningful consultation than we have presented. This overview was written specifically towards provincial governments in Canada. However, the Crown is both provincial and federal in Canada and so this overview on meaningful consultation applies to both levels of government.

The brief was written as supporting documentation for written requests to the Ontario Ministry of Natural Resources to halt its public Environmental Bill of Rights consultation process on proposed wildlife management changes. Changes in question failed to include rights for Ontario’s First Nations within proposed regulations. This brief is written in a format using numbered paragraphs but was not prepared through legal council. Should you wish to use this brief, or any part of it, in support of rights guaranteed by Section 35 of the *Constitution Act*, seek legal advice. We do not accept civil or criminal responsibility for individual, group, or corporate use of information contained within this document.

© Christian Aboriginal Infrastructure Developments Corporation (2009)

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

Table of Contents:

| | |
|---|---|
| Issues | 1 |
| Right to Consultation | 1 |
| The Duty to Meaningful Consultation | 3 |
| The Nature of Meaningful Consultation | 3 |
| The Duty to Consult | 4 |
| The Duty to Accommodate | 6 |
| Summary | 7 |
| Conclusions | 8 |

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

Issues:

1 Can a public provincial consultation process for proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs facilitate and provide meaningful Aboriginal consultation?

2 Should First Nation-specific consultations for proposed changes to fish, wildlife, water, and resource management policies, legislation, regulations, and programs be utilized to fulfill the Crown's duty for meaningful Aboriginal consultation?

3 Have provincial governments upheld the Crown's honour and met their duty to consult and accommodate Canada's Aboriginal Peoples on current and changing provincial fish, wildlife, water, and resource management policies, legislation, regulations, and programs when regulations and proposed regulations contain no written accommodation for the rights of Canada's Aboriginal Peoples?

Right to Consultation:

4 The Crown has a duty to consult its Aboriginal Peoples (*R. v. Sparrow*, [1990] 1 S.C.R. 1075). This duty arose from the recognition of the Crown's fiduciary duty toward Aboriginal Peoples (*Guerin v. Canada*, [1984] 2 S.C.R. 335).

5 The Crown also has a more general duty to its Aboriginal Peoples arising out of the honour of the Crown. This duty also includes the duty to consult Aboriginal Peoples (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69).

6 In *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, at para. 81, the major difference between the fiduciary duty and the honour of the Crown is that the honour of the Crown:

“...can be triggered even where the Aboriginal interest is insufficiently specific to require that the Crown act in the Aboriginal group's best interest (that is, as a fiduciary). In sum, where an Aboriginal group has no fiduciary protection, the honour of the Crown fills in to insure the Crown fulfills the section 35 goal of reconciliation of “the preexistence of aboriginal societies with the sovereignty of the Crown.”

7 Section 35 (1) of the *Constitution Act* (1982) recognizes and affirms the constitutional character of Aboriginal treaty rights:

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

8 Section 35 of the *Constitution Act* (1982) also recognizes and affirms the constitutional character of Aboriginal rights. In *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 at para. 31:

“More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”

9 Aboriginal Peoples have a right to be consulted on matters affecting their hunting and fishing rights (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para 168; *Haida Nation v. British Columbia* (Minister of Forests), [2004] 3 S.C.R. 511, at para 40).

10 Aboriginal Peoples have collective rights to hunt and fish (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para.134).

11 Aboriginal hunting rights include the right to hunt for livelihood (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at para 29 and 30; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para.169 and 200; *R. v. Badger*, [1996] 1 S.C.R. 771, at para 39; and *R. v. Marshall*, [1999] 3 S.C.R. 456, at para 7).

12 Aboriginal fishing rights include the right to fish for livelihood (*R. v. Gladstone* [1996] 2 S.C.R. 727, at para. 146 and 165; *R. v. Marshall* [1999] 3 S.C.R. 456, at para, 7 and 66).

13 In *R. v. Badger*, [1996] 1 S.C.R. 771, at para 90:

“ This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty.”

14 Aboriginal Peoples have the right to be consulted on matters affecting wildlife conservation and natural resource management. (*R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771, at para 97).

15 Aboriginal hunting and fishing rights are subject to limitation for justifiable conservation purposes (*R. v. Sparrow*, [1990] 1 S.C.R. 1075).

16 Provincial governments have no authority to extinguish Aboriginal and Treaty rights. (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para 180).

17 Provincial legislation cannot restrict Treaty rights under Section 88 of the *Indian Act* (1985). If conflict arises, the terms of the Treaty prevail (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at para.60).

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

18 Aboriginal and Treaty rights are protected from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para 181 and 182).

19 Provincial Governments have a duty to provide meaningful consultation to Aboriginal Peoples. (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para 59).

20 Changes to provincial fish, wildlife, water, and land management policies, legislation, regulations, and programs will affect Aboriginal Treaty, fishing, hunting, wildlife conservation management, and natural resource management rights.

21 Aboriginal Peoples in Canada have a clear constitutional right to meaningful consultation by provincial governments on proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs.

The Duty to Meaningful Consultation:

22 In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para 35 and 38, the Crown's duty to meaningfully consult is triggered when:

“...the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”

23 The Crown's proposal of changes to provincial fish, wildlife, water, and land management policies, legislation, regulations, and programs will affect Aboriginal Treaty, fishing, hunting, wildlife conservation management, and natural resource management rights and trigger the Crown's duty to meaningful consultation of Aboriginal Peoples.

24 Provincial governments have a clear duty to meaningfully consult Aboriginal Peoples on proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs.

The Nature of Meaningful Consultation:

25 The goal of meaningful Aboriginal consultation under Section 35 is the reconciliation of the preexistence of aboriginal societies with the sovereignty of the Crown (*Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, at para. 82).

26 The nature of meaningful consultation includes both the duty to consult and the duty to accommodate (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para 60, 61, 62 and 63).

27 Meaningful consultation can not occur if the Crown unilaterally exploits the resource under consultation. That is not honourable (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para 27).

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

28 Provincial Governments have a duty to consult and accommodate Aboriginal Peoples (*Haida Nation v. British Columbia* (Minister of Forests), [2004] 3 S.C.R. 511, at para 59).

29 Changes to provincial fish, wildlife, water, and land management policies, legislation, regulations, and programs will affect Aboriginal Treaty, fishing, hunting, wildlife conservation management, and natural resource management rights and trigger the Crown's duty to consult and accommodate Aboriginal Peoples.

30 Provincial Governments have a clear duty to consult and accommodate Aboriginal Peoples on proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs.

The Duty to Consult:

31 The nature of the duty to consult will vary with circumstances (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para 168; *Haida Nation v. British Columbia* (Minister of Forests), [2004] 3 S.C.R. 511, at para 40).

32 Deep consultation is required when the Aboriginal right and the potential infringement on the right is of high significance to Aboriginal Peoples; or, the risk of non-compensable damage is high (*Haida Nation v. British Columbia* (Minister of Forests), [2004] 3 S.C.R. 511, at para 44).

33 In *Haida Nation v. British Columbia* (Minister of Forests), [2004] 3 S.C.R. 511, at para 40:

“...In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”

34 The process used to discharge the Crown's duty to consult must recognize the distinct features of the Aboriginal people engaged in consultation. In *Wii'litswx v. British Columbia* (Minister of Forests), [2008] B.C.S.C. 1139, at para. 247:

“...Dismissing such recognition as impractical, without discussion or explanation, fell well below the Crown's obligation to recognize and acknowledge the distinctive features of aboriginal society, and reconcile those with Crown sovereignty...”

35 Aboriginal Elders must be consulted on issues involving Aboriginal and Treaty rights. Aboriginal Elders are the oral repository for historical knowledge of culture, pre-contact practices, and for the values and morals of their culture. These histories and practices play a consultation role in the assertion of Aboriginal rights given that Aboriginal rights recognized and affirmed under Section 35 are defined by pre-contact practices (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para 84, 85, 86 and 87).

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

36 Aboriginal Peoples have rights that are collective and communal requiring both community and nation consultations (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para 115).

37 Aboriginal rights to hunt and fish are collective rights (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para.134).

38 Meetings with Aboriginal leaders do not meet the Crown's duty to consult in situations of high significance to Aboriginal Peoples (*Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, at para. 118).

39 The Crown's duty to consult cannot be met by giving Aboriginal Peoples a short period of time to respond (*Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, at para. 116).

40 The Crown's Duty to consult cannot be fulfilled by giving a general internet notice to the public inviting comments (*Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, at para. 116).

41 A public consultation process cannot meet the Crown's duty to consult. In *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, at para. 115:

“...Public consultation processes cannot be sufficient proxies for Aboriginal consultation responsibilities...”

42 The Crown is obliged to establish a reasonable consultation process to meet its duty to consult Aboriginal Peoples (*Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*, [2005] B.C.S.C. 697, at para. 123).

43 A Memorandum of Understanding can be used to define a meaningful consultation framework (*Gitanyow First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734, at para. 58).

44 The Crown cannot meet its duty to consult Aboriginal Peoples when it fails to follow its own process for consultation as set out in its policy for consultation with Aboriginal Peoples (*Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*, [2005] B.C.S.C. 697, at para. 123).

45 Changes to provincial fish, wildlife, water, and land management policies, legislation, regulations, and programs will affect collective Aboriginal Treaty, fishing, hunting, wildlife conservation management, and natural resource management rights demanding a deep consultation to fulfill the Crown's duty to consult.

46 As part of their duty to deeply consult Aboriginal Peoples on proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs, provincial governments must consult Aboriginal Peoples with tailored, culturally-appropriate consultation processes that include Elders, communities, and the Aboriginal nation (national councils).

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

47 Provincial governments must provide a reasonable time period for the consultation (at para. 45 and 46) to be completed.

The Duty to Accommodate:

48 The adequacy of the Crown's effort to fulfill its duty to meaningful Aboriginal consultation is assessed by its overall offer of accommodation weighed against the potential impact of the infringement on the Aboriginal right under consultation (*Gitanyow First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734, at para. 63).

49 The Crown is not negotiating in good faith and a willingness to accommodate Aboriginal interests when the Crown does not make reasonable concessions (*Gitanyow First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734, at para. 50).

50 The duty to accommodate first begins when the honour of the Crown demands recognition and accommodation of the distinct features in Aboriginal society that need to be respected in the consultation process (*Wii'litswx v. British Columbia (Minister of Forests)*, [2008] B.C.S.C. 1139, at para 7).

51 The duty to accommodate may include the provision of technical assistance and funding to carry out the consultation (*Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, at para. 134).

52 The duty to accommodate may include an amendment to Crown policy or practice to reconcile the Aboriginal right under consultation with the sovereignty of the Crown in situations of high significance to Aboriginal Peoples (*Wii'litswx v. British Columbia (Minister of Forests)*, [2008] B.C.S.C. 1139, at para 10).

53 The duty to accommodate may require accommodation before final resolution to avoid irreparable harm to the Aboriginal claim and in situations of high significance to Aboriginal Peoples (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para 47).

54 The negotiation of a Memorandum of Understanding (MOU) does not provide accommodation of the Aboriginal claim under consultation when conditions negotiated in the MOU process are not realized (*Gitanyow First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734, at para. 62).

55 Provincial regulations are unreasonable when they make no attempt to accommodate the constitutionally enshrined rights of Aboriginal Peoples (*R. v. Goodon*, [2008], M.B.P.C. 59, at para. 81; *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43, at para. 55).

56 Existing provincial regulations that make no attempt to accommodate constitutional Aboriginal rights on fish, wildlife, water, and land management are unreasonable.

57 Provincial governments must effectively accommodate Aboriginal Peoples regarding current and proposed changes to provincial fish, wildlife, water, and land management policies, legislation, regulations,

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

and programs to ensure collective Aboriginal Treaty, fishing, hunting, wildlife conservation management, and natural resource management rights are reconciled with the Crown.

58 To give full effect to the Crown's duty to accommodate the reconciliation of Aboriginal Peoples with the Crown on proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs, provincial governments must accommodate consultation with provisions to Aboriginal people for cultural consultation processes, necessary time, missing technical expertise, needed funding, changes in Crown policy, changes in Crown practice, and preservation of the Aboriginal claim prior to final resolution.

Summary:

59 Aboriginal Peoples in Canada have a constitutional right to meaningful consultation on current proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs.

60 Provincial governments have a duty to meaningfully consult Aboriginal Peoples on current and proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs.

61 Meaningful consultation includes both the Crown's duty to consult and its duty to accommodate Aboriginal Peoples on current and proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs.

62 The honour of the Crown is given full effect in its duty to consult and accommodate Aboriginal Peoples when consultation results in the reconciliation of the pre-existing Aboriginal society with the sovereignty of the Crown for the Aboriginal claim at issue.

63 Provincial governments cannot provide meaningful Aboriginal consultation through a public consultation process. Provincial governments are obliged to establish reasonable consultation processes that recognize and accommodate distinct features of each Aboriginal society and the Aboriginal right engaged in meaningful consultation.

64 Accommodation is required from provincial governments for both the facilitation of the meaningful consultation process and for the enactment of changes or amendments to government policy, law, or programs identified within the consultation process that prevent the reconciliation of the Crown's desire with the Aboriginal right or title under consultation.

65 The duty of provincial governments to accommodate the reconciliation of Aboriginal Peoples with the Crown on current and proposed changes to provincial fish, wildlife, water, and land management policies, legislation, regulations, and programs, includes making provisions available to Aboriginal Peoples for cultural consultation processes, necessary time, missing technical expertise, needed funding, changes in Crown policy, changes in Crown practice, and preservation of the Aboriginal claim prior to final resolution.

Right to Consultation and Accommodation on Wildlife Resource Management and Hunting

Dr. Richard G. Herbert

66 Regulations and proposed changes to provincial regulations on fish, wildlife, water, and land management policies, legislation, regulations, and programs are unreasonable if they make no attempt to accommodate the constitutionally enshrined rights of Aboriginal Peoples.

67 Regulations and proposed changes to provincial regulations on fish, wildlife, water, and land management policies, legislation, regulations, and programs demonstrate a failure to meaningfully consult Aboriginal Peoples if they make no attempt to accommodate the constitutionally enshrined rights of Aboriginal Peoples.

Conclusions:

68 Public provincial consultation processes for current and proposed changes to fish, wildlife, water, and land management policies, legislation, regulations, and programs cannot suffice to provide meaningful Aboriginal consultation.

69 Provinces must have culturally-based, First Nation-specific consultations for current and proposed changes to fish, wildlife, water, and resource management policies, legislation, regulations, and programs to fulfill the Crown's duty for meaningful Aboriginal consultation.

70 Provincial governments have failed to accommodate constitutionally enshrined rights of Aboriginal Peoples in both current and proposed provincial fish, wildlife, water, and resource management policies, legislation, regulations, and programs because they contain no written accommodation for the rights of Canada's Aboriginal Peoples.

71 Provincial governments are not upholding the Crown's honour to meet its duty to consult and accommodate Canada's Aboriginal Peoples on fish, wildlife, water, and resource management policies, legislation, regulations, and programs.

72 Provincial governments must stop advancing fish, wildlife, water, and resource management policies, legislation, regulations, and programs until they fulfill their duty to consult and accommodate the rights of Canada's Aboriginal Peoples.

Prepared by,

Dr. Richard G. Herbert B. SC., D.V.M.

Christian **A**boriginal **I**nfrastructure **D**evelopments
A Not-for-profit, Charitable NGO
info@caid.ca www.caid.ca

© Christian Aboriginal Infrastructure Developments Corporation (2009)