
**Meaningful Consultation in Canada:
The
Alternative to Forced Aboriginal Assimilation**

September 24, 2009

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Preface:

Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation was written as a submission to the Government of Canada. As such, the terminology used may be offensive to Indigenous Peoples. We apologize profusely for this. However, we needed to maintain the terminology used by the federal government. We have used the word Aboriginal because Aboriginal People are defined in the *Constitution Act* (1982). We have avoided the derogatory use of the word Indian wherever possible. There is no doubt that truly Meaningful Consultation of Indigenous Peoples provides the only path out of Canada's dark legacy of Aboriginal displacement and forced assimilation; and, the only valid definition of Meaningful Consultation is that which is defined by each respective Indigenous Nation. There is a place for First Nations, Innu, Inuit and Métis, whether urban or land-based, or status or non-status, in Meaningful Consultation.

Yes, Meaningful Consultation may have a profound effect on Canada. But given the choice between Meaningful Consultation and change versus the status quo and forced assimilation, anyone who believes in truth, justice and the realization of rights will choose Meaningful Consultation. Canada is not perfect, but it can be.

Dr R. G. Herbert

Submitted to:

Right Honourable Stephen Harper, Prime Minister of Canada;

Honourable Chuck Strahl, Minister of Indian Affairs and Federal Interlocutor for Métis and Non-Status Indians.

Honourable Bruce Stanton, Chairman of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development; and,

Honourable Gerry St. Germain, Chairman of the Senate Standing Committee on Aboriginal Peoples.

Shared with:

First Nations, Inuit, Innu and Métis of Canada; and,

United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People

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Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation

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Overview

Canada's *Constitution Act* (1982) recognized and affirmed existing Aboriginal and treaty rights. In doing so, a chain of events was set in motion:

1. Aboriginal rights, denied since Canada's confederation, needed full expression;
2. Neglected relationships between the Crown and Aboriginal Peoples needed to be strengthened or redefined;
3. Dismantled Aboriginal infrastructures needed to be rebuilt and included into Canada; and,
4. Canada needed to understand and respect Aboriginal cultures it had denied for over a century.

Unfortunately, the entire fabric of Canada was built upon a policy of forced Aboriginal assimilation. This policy in turn was based on what we now know to be profound racism towards Aboriginal Peoples.¹ This racism is illustrated by a quote from testimony given before the Special Committee of the House of Commons examining the *Indian Act* amendments of 1920,

“Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department²...”

Canada adopted many laws whose goals were,

“the piecemeal but complete destruction of distinct social and political entities within the broader Canadian community ... the continuous and deliberate subversion of Aboriginal nations — groups whose only offence was their wish to continue living in their own communities and evolving in accordance with their own traditions, laws and aspirations.¹”

Since the 1982 *Constitution Act* came into force until the writing of this document:

• There has been no government initiative to screen legislation, regulation, services and programs to remove barriers that prevent the realization of Aboriginal rights in Canada;

- Canada has not introduced legislation to protect or empower Aboriginal rights; and,
- Canada has consistently fought the realization of Aboriginal rights using the Canadian judicial system.

There is an alternative to forced Aboriginal assimilation. That alternative is Meaningful Consultation. Meaningful Consultation provides the process Canada needs to move forward from the constitutional recognition of Aboriginal and treaty rights.

This document is meant as an overview and guide to develop and embark on Meaningful Aboriginal Consultation processes for distinct Aboriginal Peoples in Canada.

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1. Introduction

In 1982, section 35(1) of the *Constitution Act* in Canada recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada. This recognition and promise of affirmation changed the course of Canada.

The nation of Canada was build upon a base that did not recognize a place in Canada's future for Aboriginal Peoples. Canada was colonized with polices that both forced Aboriginal assimilation to non-Aboriginal societal constructs and displaced Aboriginal Peoples from their lands. These policies, and their enforcing legislation, regulations and programs, created two paths in Canada,

“... one for non-Aboriginal Canadians with full participation in the affairs of their communities, province and nation; and one for the people of the First Nations, separated from provincial and national life, and henceforth to exist in communities where their traditional governments were ignored, undermined and suppressed, and whose colonization was as profound as it would prove to be immutable over the ensuing decades³.”

Now that Canada recognizes the rights of its Aboriginal Peoples, Canada needs a process to affirm those rights by:

1. Accommodating Aboriginal rights;
2. Providing a new legal basis for its relationship to Aboriginal Peoples;
3. Reconciling with Aboriginal Peoples; and,
4. Providing an Aboriginal culture database for all Canadians to respect.

The 2004 United Nations report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in Canada called for new federal and provincial legislation in Canada to affirm Aboriginal rights⁴. Legislation that would:

1. **Be Accountable:** In line with the 1996 *Report of the Royal Commission on Aboriginal Peoples*;
2. **Consult:** Adapt the department of Indian and Northern Affairs Canada (INAC) to use a participatory development approach in dealing with Aboriginal issues;
3. **Respect:** Adapt INAC to use a human rights centred approach in dealing with Aboriginal issues;
4. **Honour:** Fully implement and renew existing treaties to protect Aboriginal rights and interests; and,
5. **Accommodate:** Reconcile the interests of Canadian society with the terms of renewed treaties.

The process Canada needs to affirm Aboriginal rights and comply with recommendations made by the United Nations is Meaningful Consultation.

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1.1 Need to Accommodate Aboriginal Rights:

From the time the Dominion of Canada was federated in 1867 until the *Constitution Act* (1982) came into force, Canada consciously chose a path of Aboriginal displacement and forced assimilation. Aboriginal rights were not considered and treaty rights were disregarded. Canadian policy and its legislation, regulations, services and programs were designed and enacted to,

“... do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion⁵.”

This Canadian policy of Aboriginal assimilation was given to Canada by Canada's first Prime Minister, Sir John A. Macdonald. It was put into action by creating legislation that designed and forced non-Aboriginal educational systems, social policies and economic developments on Aboriginal Peoples to extinguish Aboriginal rights, culture, and infrastructure. The purpose of forced Aboriginal assimilation was the extensive annexation of Aboriginal lands and resources; the colonization of Canada.

By 1982, legislation, regulation, services and programs developed by the policy of forced assimilation were embedded within the entire political, social, educational and economic infrastructure of Canada. The now embedded policy of forced assimilation had systematically destroyed culture-based Aboriginal economic, educational, political and social infrastructures. However, the policy of forced assimilation failed to completely remove Aboriginal Peoples from their lands and left them with the traditional foundation of their culture.

After the *Constitution Act* came into force in 1982, nothing changed for Canada's Aboriginal Peoples. Their Aboriginal and treaty rights were now considered recognized and affirmed but the same laws, regulations, services and programs that had done the work for the policy of forced assimilation were still embedded in the fabric of Canada and had now become barriers, embedded forced assimilation barriers (EFABs), to the rebuilding of culture-based Aboriginal economic, educational, political and social infrastructures. Aboriginal people then took rights afforded to them on paper, by the *Constitution Act*, and began to challenge embedded forced assimilation barriers in the Canadian court system.

Since 1982, Common Law derived from court rulings in Canada has created a Rule of Law that has begun to protect Aboriginal rights. On June 11, 2008, Prime Minister Stephen Harper and the leaders of every major federal political party in Canada denounced Canada's policy of forced Aboriginal assimilation, promising it would never happen again. Unfortunately, legislation has not changed in Canada and so EFABs are still actively preventing the rebuilding of culture-based Aboriginal infrastructure; the policy of forced Aboriginal assimilation is very much alive.

Canada recognized Aboriginal rights but battles within the Canadian judicial system have stripped the facade off Canadian hypocrisy revealing Canada has little or no respect for Aboriginal rights. Respect for recognized Aboriginal rights will be accorded to Aboriginal Peoples when Canada adopts an accountable mechanism for the accommodation of Aboriginal rights. The measure of Canada's accommodation of Aboriginal rights will be the rebuilding of

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what forced Aboriginal assimilation destroyed; modern culture-based Aboriginal economic, educational, political and social infrastructures. The transparent, accountable mechanism for the accommodation of Aboriginal rights is Meaningful Consultation.

1.2 Need for a New Legal Basis in the Relationship:

The *Report of the Royal Commission on Aboriginal Peoples* (1996) demanded the creation of a process that will lead to a new legal basis for the relationship between Aboriginal Peoples and Canada.¹ The Government of Canada has not provided that process to the date of this writing. Legal issues that must be addressed include:

- a. Unfulfilled treaties;
- b. Non-recognition;
- c. The *Indian Act*;
- d. Cultural genocide;
- e. Selective funding;
- f. The *United Nations Declaration on the Rights of Indigenous Peoples* (2007);
- g. Recognition of the Innu Nation
- h. Department of Indian and Northern Affairs Canada; and,
- i. The policy of assimilation.

The process for the resolution of each of these legal issues includes Meaningful Consultation.

a. Unfulfilled Treaties:

Canada's early treaties with Aboriginal Peoples remain unfulfilled. These treaties cover vast areas of the Canadian landscape but were never incorporated into Canadian legislation and implemented. Rights and promises recognized in these treaties can only be upheld by an act of legislation. They remained unsanctioned executive actions of the Crown. As a result, treaty rights and guarantees have been eroded and undermined by Canadian laws⁶.

For almost all intents and purposes, these early treaties have been broken⁷. They, are however, still Memorandums of Understanding between two nations⁸. These treaties denote the intent of two sovereign nations to share the land and its resources in mutual respect⁹. It is the view of the Royal Commission on Aboriginal Peoples that:

“... the Crown is under a fiduciary obligation to implement such measures as are required to reverse this colonial imbalance and help restore its relationship with treaty nations to a true partnership. This will require the Crown to take positive steps toward this end as well as to refrain from taking actions that will frustrate it¹⁰.”

Because of unfulfilled early treaties, treaty rights have yet to be affirmed in Canada. Canada needs a process to lay a foundation of understanding upon which to restore its treaty relationships with treaty nations. That process is Meaningful Consultation.

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b. Non-Recognition:

Prior to the Dominion of Canada federation in 1867, there existed a tripartite relationship in Canada between the British Empire, colonies and Aboriginal Nations. This relationship was unilaterally changed by legislation in two steps: In 1860, the *Indian Lands Act* transferred authority over Aboriginal people and Aboriginal lands from the British to the colonists. Second, the 1867 *Constitution Act* shuffled authority over Aboriginal people and lands from colonists into the new federal government of the Dominion of Canada. At that time, colonies became provinces under the new Dominion. The new tripartite relationship created in 1867 was between British, federal, and provincial governments. No mention of Aboriginal nations, rights or treaties was included within the constitution of Canada. Aboriginal Peoples were not recognized¹¹.

The *Constitution Act* of 1867 began what could be called a policy of “non-recognition.” Aboriginal rights were not recognized and therefore were not, and did not need to be, included into legislation. Later, the *Constitution Act* in 1982 recognized and affirmed existing Aboriginal and treaty rights. In doing so, Aboriginal and treaty rights need to be incorporated into Canadian legislation, both federal and provincial. All legislation in Canada was written to the exclusion of Aboriginal rights prior to 1982. Now, all legislation must be written to include Aboriginal rights. Unfortunately, virtually no legislation in Canada has been re-written since 1982 to include Aboriginal rights. Legislation must change to recognize Aboriginal rights by their inclusion into Canadian legislation.

Legislation that limits Aboriginal rights by exclusion has been found to be *prima facie* unreasonable and has been struck down by the Canadian judicial system on a number of occasions. Canada must accommodate constitutionally enshrined rights of Aboriginal Peoples in legislation.^{12 13} Canada must affirm Aboriginal and treaty rights in legislation.

Canada needs a new relationship to include Aboriginal Peoples and their rights into Canada. The current tripartite relationship does not recognize Aboriginal Peoples or their rights. Canada needs to define a new relationship to affirm the recognition of Aboriginal and treaty rights now afforded in the *Constitution Act*. Canada needs a mechanism to identify, understand and accommodate Aboriginal rights for this new relationship. That mechanism is Meaningful Consultation. Meaningful Consultation will result in the affirmation of Aboriginal rights by their inclusion into Canadian legislation.

c. The Indian Act:

The sole purpose of the *Indian Act* was to displace and assimilate Canada’s Aboriginal Peoples. It was consolidated from other legislation meant to force assimilation and displacement. To understand the intent of the *Indian Act*, one needs only look at the intent of legislation from which it was consolidated.

- The *Gradual Civilization Act* (1857) was drafted from the premise that by gradually removing distinctions between Aboriginal and non-Aboriginal people through enfranchisement, it would be possible to fully absorb Aboriginal Peoples into colonial society¹⁴. This act provided a mechanism for assimilation.
- The *Indian Lands Act* (1860) formalized procedures for surrendering Aboriginal lands and gave authority over Aboriginal people and Aboriginal lands to the

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colonial legislature; authority was removed from the British Parliament¹¹. This act provided a mechanism to annex Aboriginal lands. Aboriginal People were no longer in a mutual relationship with colonists.

- Section 91(24) of the *Constitution Act* (1867) transferred legislative authority over Indians and lands reserved for Indians to the new federal Parliament. Aboriginal Nations no longer existed under the Crown and were not recognized in Canadian legislation. Aboriginal rights and treaties were also not recognized¹⁵. This act removed all Aboriginal rights.
- The *Gradual Enfranchisement Act* (1869) was the first legislation adopted by Parliament to force Aboriginal assimilation. It continued “gradual civilization” through enfranchisement but gave the superintendent general of Indian Affairs power to force Aboriginal Peoples to adopt a municipal-style government. This act undermined Aboriginal culture and forced the assimilation of Aboriginal government¹⁶.

The first *Indian Act* was passed in 1876. It created a legislated regulatory framework from laws that empowered displacement and assimilation. The *Indian Act* has remained essentially unchanged to the day of this writing¹⁷. Control over Aboriginal political structures, lands, resources and economic development through today’s *Indian Act* (1985) continues the unfinished policy of forced displacement and assimilation. In the words of the *Royal Commission on Aboriginal Peoples* (1996),

“A royal commission cannot make laws. It can inform and recommend, however. In that role, we can call attention to the factors, attitudes and continuing assumptions that brought about the *Indian Act* and that continue to prevent progress in moving away from the restrictive *Indian Act* vision. Those factors are to be found in past assumptions and the shadows they have cast on present attitudes. **They must be recognized for what they are and cast away as the useless legacy of destructive doctrines that are inappropriate now as they were when first conceived.** If this review of the foundations of the *Indian Act* has shown these assumptions for what they are, it will have succeeded as the first step in entering a new era of partnership between governments and Indians. Paradoxically, this new partnership is also a very old partnership, indeed, older than the *Indian Act* and what it represents¹⁸.”

The *Indian Act* (1985) is the centrepiece of legislation against Aboriginal Peoples in Canada. It:

- Violates Aboriginal rights guaranteed in the *United Nations Declaration on the Rights of Indigenous Peoples* (2007)¹⁹;
- Validates legislation that placed and maintains EFABs against Aboriginal rights in direct opposition to the *Constitution Act* (1982); and,
- Recently²⁰, sections 6(1)(a) and 6(1)(c) of the *Indian Act* were found by Canadian courts to violate Aboriginal women’s rights.

The time to remove the *Indian Act* and provide legislation that affirms the rights of Aboriginal Peoples is at hand. Canada will need a Meaningful Consultation process to develop new legislation that respects Aboriginal Peoples.

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d. Cultural Genocide:

The Indian Act (1876) included an enfranchisement process by which Aboriginal people could become full citizens, when they qualified. It did not provide a process through which a former Aboriginal person could once again become Aboriginal. Clearly, assimilation was the policy objective behind the *Indian Act*²¹.

The policy of forced Aboriginal assimilation in Canada^{1 2 5} came into full force through the *Indian Act* (1876, 1880 and 1886) and the *Indian Advancement Act* (1884). Methods of forced assimilation included²²:

The abolition of Aboriginal status as independent, self-governed peoples;

- Legislated rules for band membership;
- Abolition of traditional political systems;
- Imposition of federally-controlled election systems;
- Banning spiritual Aboriginal activities;
- Formal creation of residential and industrial schools administrated by religious clergy; and,
- Mandatory school attendance for Aboriginal children with the later imposition of fines and jail sentences for parents who failed to comply.

The death toll of Aboriginal children in residential schools averaged approximately twenty-five percent²³ but at the beginning of the twentieth century it was as high as fifty percent²⁴.

The removing of children from their parents with the goal to change a people or their culture formally became the crime of genocide with the adoption of the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* in 1948²⁵. Article 2 of the United Nations declaration states:

Article 2: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.”

Prior to 1948, the term genocide did not exist. The recognition of the crime of genocide and the development of international law against it was the direct result of world reaction to the Jewish holocaust and other Nazi extermination policies. However, Hitler's sterilization and

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extermination policies were modelled on the treatment of Aboriginal Peoples in Canada and the United States²⁶. Genocide may not have existed prior to 1948,

“... however, the actions of Britain and the settler governments in Australia and Canada clearly demonstrated that the practice of genocide did²⁷.”

Provincial child welfare agencies succeeded residential schools as the preferred care system for Aboriginal children²⁸. Started in the 1950's, they gained support from recommendations made in the federal government's 1966 Hawthorne Report²⁹. Aboriginal children were removed from their homes and placed into non-Aboriginal foster care or adopted into non-Aboriginal homes without voluntary parental consent. Children taken from Aboriginal communities were not necessarily placed in homes within Canada. Provincial child welfare agencies were introduced to accomplish some of the residential school purposes and were subject to some of the same types of internal child abuse problems as residential schools. As many as one in four Aboriginal children were removed from native communities and spent at least some part of their childhood away from their parent's home.

“In many ways, the child welfare system put First Nations children under more pressure to assimilate than did the residential school system ... And, with all this pressure, assimilation may have succeeded had it not been for mainstream Canadians' racist attitude towards people who were visibly of First Nations descent. It was their visibility which prevented many First Nations peoples from being accepted in mainstream society and which, consequently, made it impossible for them to assimilate.³⁰”

The forced assimilation of Aboriginal Peoples in Canada tends to be referred to as both cultural genocide and genocide^{27 31 32 33}. In 2008, Canada's Prime Minister, Stephen Harper, apologized to Aboriginal Peoples in Canada for the Canadian policy of Aboriginal assimilation, forced removal of Aboriginal children and residential schooling³⁴. However, Canada does not interpret its policies on forced Aboriginal assimilation as cultural genocide.

“For purposes of Canadian law, we believe that the definition of genocide should be drawn somewhat more narrowly than in the international Convention so as to include only killing and its substantial equivalents ... The other components of the international definition, viz, causing serious bodily or mental harm to members of a group and forcibly transferring children of one group to another group with the intent to destroy the group we deem inadvisable for Canada- the former because it is considerably less than a substantial equivalent of killing in our existing legal framework, the latter because it seems to have been intended to cover certain historical incidents in Europe that have little essential relevance to Canada where mass transfers of children to another group are unknown³⁵.”

There is no distinction between genocide and cultural genocide in Article 2 of the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide*³⁶. Enough circumstantial evidence exists that Canada engaged in each of the acts of genocide as set out in the United Nations Convention to warrant, at least, the suspicion that cultural genocide was a national policy in Canada²⁷.

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Canada needs Meaningful Consultation as a new policy in its relationship with Aboriginal Peoples. The continued destruction in part or in whole of Aboriginal Peoples in Canada has been a crime of genocide since 1948 and a violation of Canadian constitutional rights since 1982.

e. Selective Funding:

One perception of the policy of forced Aboriginal assimilation was as a duty to civilize Aboriginal people. Federal legislation was created that purposely designed educational systems, social policies and economic developments to assimilate Aboriginal Peoples into a better way of life. As a direct consequence of Canada's policy on forced Aboriginal assimilation, two paths were laid out at confederation:

“... one for non-Aboriginal Canadians with full participation in the affairs of their communities, province and nation; and one for the people of the First Nations, separated from provincial and national life, and henceforth to exist in communities where their traditional governments were ignored, undermined and suppressed, and whose colonization was as profound as it would prove to be immutable over the ensuing decades³.”

Aboriginal Peoples simply had to choose enfranchisement, becoming non-Aboriginal, to enjoy full participation in the affairs of Canada.

While the *Indian Act*, and the administration it produced, had the objective of displacement and assimilation for enfranchising Aboriginal Peoples, most policy makers and individuals working with Aboriginal people knew nothing about that objective by the 1950's. Non-Aboriginal Canadians simply believed that mainstream, non-Aboriginal Canada was the only worthwhile way to live in Canada; they truly wanted the best for Aboriginal individuals³⁷. The Hawthorne Report (1966)²⁹ and its recommendations still guide much of the federal policy derived from this benevolence towards Aboriginal Nations. In this policy, help is only available for Aboriginal Peoples if the non-Aboriginal path is chosen. Examples of this can be seen in the following recommendations from the Hawthorne Report:

- **Volume 1, Recommendation 3:** “The main emphasis on economic development should be on education, vocational training and techniques of mobility to enable Indians to take employment in wage and salaried jobs. Development of locally available resources should be viewed as playing a secondary role ...”
- **Recommendation 22:** “Community development should be viewed as playing a distinctly secondary role for most Northern and isolated, small communities ...”
- **Recommendation 32:** “The general policy of extending provincial services to Indians should be strongly encouraged ...”
- **Recommendation 33:** “Where it is desirable to extend provincial services to Indians, this should be undertaken as expeditiously as possible. Otherwise, as a consequence of the growth in Indian population, the temptation to establish or maintain separate services will become more pronounced ...”
- **Recommendation 35:** “Provincial governments should be encouraged to make the policy decision that Indians are, in reality, provincial citizens ...”

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- **Recommendation 56:** “All possible efforts should be made to induce Indians to demand and to accept provincial welfare services.”
- **Recommendation 69:** “At the present time, the Indian Act, suitably modified where necessary, constitutes the most appropriate legislative vehicle for the development of Indian local government.”
- **Recommendation 74:** “Reserves should be treated as municipalities for the purpose of all provincial and federal acts which provide grants...”
- **Volume 2, Recommendation 1:** “The principle of integrated education for all Canadian children is recommended without basic question. The integration of Indian children into the public school system should proceed...”
- **Recommendation 2:** “The Indian Affairs Branch should recognize a responsibility to see that integrated schooling, once embarked upon, is as successful as possible...”

The Hawthorne Report supported its policy recommendations for non-Aboriginal education, economic development, government and social welfare with recommendations for 100's of millions of dollars in funding. Federal and provincial authorities applied many of the Hawthorne Report's recommendations and provided funding for education, economic development, government and social welfare systems. Unfortunately, all funding was for non-Aboriginal-based streams of education, economic development, government and social welfare. No funding was provided for culture-based Aboriginal education, economic development, government and social welfare.

The Hawthorne Report paved the way for a new era in forced Aboriginal assimilation in Canada. Provincial and federal governments now provide funding to Aboriginal Peoples only if their request falls within government funding models. Funding models invariably provide funds for non-Aboriginal solutions to Aboriginal problems; problems that arose from the policy of forced assimilation. All funding for culture-based Aboriginal solutions to Aboriginal problems is denied because these solutions fall outside government program funding models. Canada is currently forcing the assimilation of Aboriginal Peoples by selectively funding only non-Aboriginal solutions for education, economic development, government, social welfare and more.

Canada needs Meaningful Consultation to provide a foundation for a new policy in its funding relationships with Aboriginal Peoples. The machinery that underlays poverty and third world conditions in today's Aboriginal communities is the withholding of funds by federal and provincial governments for culture-based Aboriginal solutions coupled with the refusal of Aboriginal people to assimilate under the extreme financial pressure.

f. United Nations *Declaration on the Rights of Indigenous Peoples*:

Canada formally announced an end to its policy of Aboriginal assimilation in June of 2008. Unfortunately, the policy of assimilation is still continued through the functioning of embedded forced assimilation barriers (EFABs). EFABs are active policies, laws, regulations and services that were created within the policy framework of forced Aboriginal assimilation to do the work

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of assimilation. EFABs have not been identified and removed from the legislative framework of Canada³⁸.

In September 2007, the United Nations passed resolution 61/295, the *Declaration on the Rights of Indigenous Peoples*¹⁹. Canada's EFABs cause basic Aboriginal rights guaranteed in resolution 61/295 to be withheld from Canada's Aboriginal Peoples. Canada has and is withholding inherent rights to:

- Self-determination and self-government;
- Pursue economic, social, and cultural development;
- Own and manage lands and resources; and,
- A nationality.

The withholding of these rights prevents Aboriginal Nations from rebuilding traditional culture-based infrastructures needed to end the cycle of poverty and forced assimilation. Closed doors to Aboriginal rights coupled with open doors to non-Aboriginal, enfranchised rights are the hallmark of today's expression of the policy of forced Aboriginal assimilation in Canada.

Canada is in apparent violation of Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 18, 19, 20, 21, 23, 25, 26, 27, 28, 29, 32, 33, 34, 35, 37, 38, 39 and 40 of the *Declaration on the Rights of Indigenous Peoples*. Canada continues to withhold these international Aboriginal rights, through EFABs, while vast amounts of Canada's land mass, rich in natural resources, is land occupied by impoverished Aboriginal Peoples. Canada presents Aboriginal Nations with only two alternatives, assimilate or maintain the status quo of poverty.

Under United Nations resolution 61/295, Articles 1, 3, 6, 9, 40 and 41, and resolution 217A(III) the *Universal Declaration of Human Rights*³⁹ Article 15, Aboriginal Nations in Canada may now have four choices before them:

1. Assimilate;
2. Maintain the status quo with Canada;
3. Choose another nationality and another nation as a partner; or,
4. Choose to take their place as a nation directly under the protection of the United Nations.

With options three and four, large regions of land and resources will succeed from Canada. The continuing of Canada's forced Aboriginal assimilation policy by EFABs leaves Canada with only two choices:

1. **Change:** This will result in the removal of EFABs, affirmation of Aboriginal rights recognized in the *Constitution Act* (1982), reconciliation, and a new relationship between Canada and its Aboriginal Peoples.
2. **Refuse to Change:** This will result in the continued and escalating enforcement of the policy of forced assimilation, the separation of Aboriginal Nations from Canada, and violation of the *United Nations Convention on the Prevention and*

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Punishment of the Crime of Genocide (1948), *United Nations Universal Declaration of Human Rights* (1948), *Constitution Act* (1982) and the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).

To some, the notion of Aboriginal Peoples separating from the body politic of Canada is extreme and alarmist. However, on July 25, 2008, a small group of Saskatchewan First Nations signed a memorandum of understanding with Taiwan's state-owned Chinese Petroleum Corporation to develop tarsands⁴⁰. Chinese Petroleum pledged up to \$800 million towards the venture.

The United Nations *Declaration on the Rights of Indigenous Peoples* contains a process within Articles 19 and 27 for resolving and preventing conflict between Indigenous Peoples and colonizing nations. That process is consultation.

Canada needs another relationship with Aboriginal Peoples for equitable sharing and managing of land and resources in Canada. Meaningful Consultation is an essential part of developing that new relationship. It gives Aboriginal Peoples in Canada a new, fifth, option.

g. Recognition of the Innu Nation:

The United Nations Human Rights Committee noted in 1999 the situation with Canada's Aboriginal Peoples was the most pressing human rights issue facing Canada⁴¹. In 2004, a report from the United Nations' Special Rapporteur on the situation with Canada's Aboriginal Peoples indicated Aboriginal people were still justifiably concerned over continuing inequalities and the slow pace of their constitutional Aboriginal and treaty rights recognition⁴². One of the most profound failures in Canada's recognition of Aboriginal rights is with the Innu Nation in Labrador⁴³. Canada's treatment of the Innu raised a rallying cry from around the world^{44 45}.

The Innu were the original fur-trading allies of the French. The Innu of Northern Québec and Labrador never signed a treaty with the French or British during Canada's early colonization. With confederation in 1867, the Innu Nation was geographically divided between Northern Quebec and Labrador. Newfoundland and Labrador (N-L) remained under British rule until 1949 when they entered confederation. At the time of union, N-L's Aboriginal people included Innu, Mi'kmaq and Métis. N-L had no concept in law or legislation for Aboriginal rights at the time of union and no mention of N-L's Aboriginal Peoples was placed in the terms of union⁴⁶; N-L's Aboriginal Peoples were not recognized. A very truncated history of Canada's recognition of N-L's Innu follows:

- **1867:** The *Constitution Act* gives the federal government jurisdiction over Indians and lands reserved for Indians. The Innu of N-L are not within Canada and so are not recognized in the Constitution Act. They remain a sovereign nation.
- **1876:** The *Indian Act* comes into force. It has no application to the Innu of N-L.
- **1947-1949:** Officials decide that after union, responsibility for N-L's Aboriginal Peoples will fall to the federal government and the *Indian Act* will apply. However, no agreement was reached on defining responsibility for the Aboriginal Peoples of N-L⁴⁷.

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- **1948:** The United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* and the *Universal Declaration of Human Rights* are resolved and signed by Canada. The sovereign Innu Nation acquires the rights afforded to them by the United Nations' resolutions.
- **Prior to 1949:** The Innu were not recognized by N-L and were a sovereign nation of Indigenous Peoples with international rights under the United Nations. There is no government department or agency responsible for Aboriginal affairs in N-L.
- **1949:** The Union of N-L with Canada occurs with no mention of Aboriginal Peoples. The Innu of Labrador remain a sovereign nation with rights under the United Nations. Provincial laws and regulations are forced on the Innu.
- **1951:** A national census of Aboriginal people is held but N-L is excluded. Canada introduces the concept of band lists and establishes *Indian Act* bands. The Innu are not included.
- **1956:** Section 9 of the Citizenship Act was amended to grant formal citizenship to Aboriginal people eligible under the *Indian Act* and Inuit. The 1956 amendment to the Citizenship Act is made retroactive to January 1947, before Canada signed the *Universal Declaration of Human Rights* and the *Convention on the Prevention and Punishment of the Crime of Genocide*. The Innu of N-L are not recognized by Canada and the *Indian Act*. They remain a sovereign Indigenous people protected by the United Nations and its resolutions.
- **1960:** Aboriginal people recognized by the *Indian Act* and Inuit in Canada are fully enfranchised as citizens and given the right to vote without loss of Aboriginal or treaty rights (rights recognized and affirmed later in 1982). The Innu are not recognized by Canada and maintain sovereign rights guaranteed to their nation by the United Nations.
- **1970s:** The Upper Churchill hydro-electric development floods approximately 6,000 square miles of Innu land and Innu graves without prior consent.
- **1982:** The *Constitution Act* recognizes Aboriginal Peoples as Indian, Inuit and Métis. The Aboriginal Peoples of N-L, including the Innu, are not recognized. The Innu remain a sovereign Indigenous People.
- **1989:** United Nations *C169 Indigenous and Tribal Peoples Convention*⁴⁸ is adopted. Canada refused to sign the convention. Innu of N-L fall under the umbrella of C169.
- **1990:** Canada and the Innu Nation of N-L begin land claims negotiation but to the date of this writing there has been no agreement.
- **1997:** Canada-Innu Transfer Agreement is signed in principle. A federal Order-in-Council authorizes Minister of Indian Affairs and other ministers to treat Innu "as if they were registered Indians living on reserves" but Innu are to continue paying tax, unlike other First Nations. Provincial programs, including education, social services, and policing, are exempt from the agreement. There is an impasse over jurisdiction and funding responsibility and the Transfer Agreement fails. The Order-in-Council placed restrictions on the Innu, not fully recognizing

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them as Aboriginal people under the *Indian Act* and did not include the Innu into the *Constitution Act* (1982).

- **2002:** Innu begin registering for the partial implementation of the *Indian Act* in their communities and the creation of reserves. Innu families begin moving from Davis Inlet to Natuashish, which will be an *Indian Act* reserve.
- **2003:** Recommendation is made to the *N-L Royal Commission on Renewing and Strengthening Our Place in Canada* for N-L to officially recognize all the Aboriginal Nations of N-L since they constitute nations consisting of people holding Aboriginal rights⁴⁶.
- **2007:** United Nations *Declaration on the Rights of Indigenous Peoples* is adopted. Canada refuses to sign the declaration. The Innu Nation of N-L continues under the umbrella of the United Nations without recognition from Canada.
- **2008:** Prime Minister Stephen Harper apologizes to Aboriginal Peoples in Canada for the policy of forced assimilation and residential schools. Prime Minister Harper refuses to recognize the suffering of Inuit and Innu of Labrador in residential schools⁴⁹.
- **2008:** The Innu sign the Tshash Petapen agreement with the Government of N-L and the Energy Corporation of Newfoundland and Labrador. It is an agreement in principle for the development of the Lower Churchill River hydro-electric project and compensation to the Innu Nation for the project's impact. To the date of writing, the details for this agreement have not been finalized and it has not been ratified by the Innu Nation of N-L.

The Innu of N-L are a nation that was not conquered and did not relinquish its land to colonization. The rights of the Innu are protected by the United Nations from a time before the union of N-L with Canada. At the time of union in 1949, Canada and Innu were separate nations. Since that time, Canada has consistently refused to recognize and receive the Innu Nation into Canada. The fact the Innu are not recognized as Aboriginal People under the *Constitution Act* (1982) was evidenced by the need for an Order-in-Council to extend nominal benefits under the *Indian Act* to the Innu. Without constitutional recognition, the Innu have no existing Aboriginal and treaty rights in Canada to recognize and affirm. The rights of the Innu are still recognized and affirmed by international law through the United Nations. The Innu are a non-extinguished, non-enfranchised nation upon whom the full force of the Canadian policy of forced assimilation has fallen. The United Nations conventions that are in full play with the Innu include:

- *Universal Declaration of Human Rights* (1948)
- *Convention on the Prevention and Punishment of the Crime of Genocide* (1948)
- *C169 Indigenous and Tribal Peoples Convention* (1989)
- *Declaration on the Rights of Indigenous Peoples* (2007)

There is no retroactive amendment to the *Citizens Act* regarding the Innu. As a nation, they have the right to file claim or charges with international courts for the dire treatment they have endured, and are enduring, as a nation within the nation of Canada. There is no time limitation on

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the prosecution of the crime of genocide except the death of individuals to be prosecuted. Articles 3 and 4 of the convention on genocide read:

Article 3: “The following acts shall be punishable:

- a. Genocide;
- b. Conspiracy to commit genocide;
- c. Direct and public incitement to commit genocide;
- d. Attempt to commit genocide;
- e. Complicity in genocide.”

Article 4: Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

There is enough circumstantial evidence documented by the media and the United Nations to warrant an international investigation into Canada’s actions against the Innu.

Canada needs a Meaningful Consultation process to recognize the Innu Nation, affirm their Aboriginal rights and to reconcile for its treatment of the Innu.

h. Department of Indian and Northern Affairs Canada:

Section 91(24) of the *Constitution Act* (1867) transferred legislative authority over Aboriginal people and lands reserved for Aboriginal people to the federal government. The earliest predecessor of the current department of Indian and Northern Affairs Canada was established in 1868. In 1876, all legislation on Aboriginal people and their land was consolidated into the *Indian Act* and placed under the control of INAC, in its early morphology. Principal features of INAC’s early administration were the⁵⁰:

1. **Superintendent of Indian Affairs and his in-community Indian Agents** who governed Aboriginal people using extensive powers provided by the *Indian Act*. Aboriginal people were not citizens and so INAC exercised the power of citizenship for them. Aboriginal People were children (wards) over whom INAC had absolute authority.
2. **Indian band** which was a non-traditional form of government created by the *Indian Act*. It was imposed on Aboriginal people and controlled by INAC.
3. **Church Mission** which focussed on teaching colonial morality so that adult Aboriginal people would become Christian, civilized and educated; assimilated and ready for enfranchisement into Canada. The mission work was administered by INAC.
4. **Residential schools** used to force the assimilation of Aboriginal children. They were administered for INAC by other, usually religious, organizations.

The *Report of the Royal Commission on Aboriginal Peoples* (1996) revealed that INAC’s authority over Aboriginal people and their lands was laid on a foundation of four false assumptions; assumptions that were racist, or at best ignorant⁵¹. These four assumptions are⁵²:

1. Aboriginal people are inherently inferior and incapable of governing themselves;

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2. Treaties and other agreements are not covenants of trust and obligation, and, are less expensive and more acceptable tools than armed conflict. They are bureaucratic Memorandums of Understanding to be formally acknowledged but ignored when convenient. Policy, legislation, regulations and programs can run roughshod over treaty obligations;
3. Wardship is appropriate for Aboriginal peoples. Actions deemed to be of benefit for Aboriginal people can be taken unilaterally without their consent or involvement in design or implementation; and,
4. Concepts of development are defined for Aboriginal people by non-Aboriginal values. This applies to the individual, community and nation. This concept of development is equally applied whether to civilization and assimilation, or, resource development and exploitation of the land.

These prejudiced assumptions are a reflection of the time in which they were formed, a time of ignorance, displacement and forced assimilation. Under these conditions, bigoted assumptions prospered and became incorporated into government policies. These policies were an abuse of Canada's fiduciary responsibility to Aboriginal Peoples enabling INAC to abuse its power over Aboriginal people and their land.

“We also draw attention to the abuse of power that took place — not just periodic unfairness, but excessive and systematic political dominance, reflected in both the processes and the outcomes of governance ... Once the cycle has begun, however, cause and effect can be, and often are, interactive; abuse of power produces new ideas that are false.”⁵¹

INAC's abuse of power reveals itself by virtue of its actions. The power abuse has two telltale attributes⁵³:

1. The crude, unjust intrusiveness of the instruments used by INAC against Aboriginal Peoples. These policy tools were not designed to guide and influence Aboriginal people. They were tools meant to invade lands, lives, families, and homes. These tools included:
 - a. *The Indian Act*;
 - b. Forced Residential Schooling;
 - c. Forced Relocations; and,
 - d. Wardship.
2. The unimpeded exercise of INAC's authority and its accompanying bureaucratic refusal to change. INAC has often administered in a punitive fashion or with unconscionable use of bureaucratic power. The department should be guided by Ministerial authority but the institution that is INAC maintains its own status quo, refusing to change.

No amount of recent Ministerial or Prime Ministerial delegation has changed INAC's policies or direction; including, the public apology given to Aboriginal Peoples by Prime Minister Harper in 2008.

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“... the more intrusive the agencies and instruments of policy were, the harder they were to unravel and change. The exercise of unbridled authority leads inevitably to resistance to change and to a perverse inertia ...⁵⁴”

For the last 141 years INAC has had control over Aboriginal lives and lands. INAC was founded on racist assumptions which bred policies of displacement and assimilation. Some tools INAC used have changed, others have not. Until founding attitudes are removed from the institution that is INAC by removing policies, legislation, regulation, services and programs (EFABs) bred from these attitudes, INAC is incapable of working in the best interest of Aboriginal Peoples and Canada. Canada has renounced its policy of forced assimilation. INAC needs to change to meet that new policy objective. Canada can not change its relationship with Aboriginal Peoples unless INAC changes.

INAC will need to redefine its mission and responsibility within Canadian bureaucracy. The United Nations recommended⁴ that INAC focus on human rights and use a participatory development approach in dealing with Aboriginal issues. In essence, INAC should respect national and international Aboriginal rights using a consultation process to accommodate Aboriginal rights. INAC has two choices:

- **Change:** INAC can become the agency Canada needs to forge new, equitable partnerships between Canada and its Aboriginal Peoples; an agency that empowers and respects Aboriginal rights through Meaningful Consultation; or,
- **Maintain the Status Quo:** INAC can continue to refuse change becoming ultimately accountable for hardships Aboriginal Peoples have endured through its policy of assimilation and abuse of power.

The *Report of the Royal Commission on Aboriginal Peoples*' recommendation 2.3.45 states the Government of Canada should present legislation to abolish and replace INAC⁵⁵. INAC needs a Meaningful Consultation process capable of respecting and reconciling Aboriginal rights with non-Aboriginal rights.

i. The Policy of Assimilation:

The essence of the policy of Aboriginal assimilation is that Aboriginal Peoples in Canada have no rights unless they assimilate and become Canadian (enfranchisement). Canada apologized for and renounced this policy of Aboriginal assimilation on June 11, 2008. However, nothing has improved for Aboriginal Peoples, their rights have not advanced. This is because the policy of assimilation has become deeply embedded into the fabric of Canada since confederation. In practical terms, the policy of assimilation gave rise to other policies. These secondary policies, whether individually conceived or functional derivatives, dictated legislation, regulations, and services from which programs, or a lack thereof, were created. This paper has just examined eight of these policies that must change to provide a new legal basis in legislation. There are more. These secondary assimilation policies can be referred to as the “assimilate-by” policies. They are assimilate-by:

- a. **Breach of Promise:** Unfulfilled treaties deny Aboriginal rights.
- b. **Exclusion:** Creating legislation that does not recognize Aboriginal rights.

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- c. **Legislation:** Creating legislation against Aboriginal rights and culture, the *Indian Act*.
- d. **Cultural Destruction:** Cultural genocide from residential schools and provincial child welfare agencies, the *Indian Act*, forced relocation and provincial education systems.
- e. **Attrition:** Selective funding and infrastructure development to support non-Aboriginal definitions of development and civilization.
- f. **Acquisition:** Crown ownership versus inherent and international Aboriginal rights to land and resource ownership.
- g. **Apathy:** Indifference to adversity caused by the refusal to recognize the Innu Nation and Aboriginal Peoples of Newfoundland and Labrador.
- h. **Abuse of Power:** INAC's refusal to change maintaining embedded forced assimilation barriers, blocking Meaningful Consultation and preventing reconciliation.

Legislation, regulation, services, and programs, or a lack thereof, created from these secondary assimilate-by policies are the EFABs that prevent the advancement of inherent, international and constitutionally guaranteed Aboriginal rights in Canada. Many of these EFABs will be found in INAC but many others will be found dispersed throughout the legislative framework of Canada. Canada's policy of assimilation will remain active until assimilate-by policies are identified and EFABs removed. Assuming INAC changes, one of its primary responsibilities will be the removal of EFABs through the screening of all current and future government legislation, regulations, services and programs.

Meaningful Consultation will be an essential part of the process for removing EFABs and accommodating Aboriginal rights in Canadian legislation, regulation, services and programs.

1.3 Need to Reconcile:

The *Report of the Royal Commission on Aboriginal Peoples* made a number of recommendations to the Government of Canada regarding residential schools⁵⁶. Canada consequently made a Statement of Reconciliation to residential school survivors in 1998 and created the Aboriginal Healing Foundation. In 2003, the Government of Canada launched a Dispute Resolution plan to compensate survivors that fell far short of the expectations of Aboriginal Peoples in Canada. In response, the Assembly of First Nations, with Grand Chief Phil Fontaine, launched a class action lawsuit in 2005 against the federal government. As a settlement in that case, the Government of Canada signed the Indian Residential Schools Settlement Agreement (IRSSA) in 2006⁵⁷.

The IRSSA was implemented on September 19, 2007. Included within the IRSSA was schedule "N", the mandate for a truth and reconciliation commission (TRC)⁵⁸. The TRC began its work on June 1, 2008. Prime Minister Stephen Harper announced the start of the work for the TRC when he, and leaders for every major political party in Canada, apologized to Aboriginal Peoples for the residential schooling system. They decreed there was no place left in Canada for the policy of forced Aboriginal assimilation.

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The TRC ran into trouble within a few short months of its commencement with the staggered resignation of appointed commissioners and INAC's replacement of its executive director. In testimony before the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, the new bureaucratic executive director of the TRC, Aideen Nabigon, admitted that \$3.4 million in funds would be used before the TRC would start its work and that there was no mandate for a final report from the TRC. If a final report was prepared, it and a mandated interim report would be subject to revision by the Minister of INAC before presentation to Parliament. Ms. Nabigon indicated that the TRC's goal was solely to lay a foundation for reconciliation, there was no goal for reconciliation⁵⁹.

Reconciliation is the act of reconciling where, in this instance, to reconcile is to restore, repair or make good again to achieve a settlement. The TRC's mandate does not include reconciliation but Aboriginal Peoples need a process of reconciliation to achieve settlement. There is no mechanism currently in place that will result in the change needed to restore lives destroyed by the policy of forced Aboriginal assimilation and its residential schooling tool. Nothing has changed since the IRRSA was signed to the date of this writing.

Aboriginal People need to be given back tools taken from them through which solutions can be built; tools destroyed by the policy of forced assimilation. These tools are normally found within societal infrastructure. Unfortunately, poverty and despair were created in Aboriginal Nations because the policy of forced assimilation destroyed the evolution of Aboriginal infrastructure, preventing today's solutions from coming through culture-based Aboriginal infrastructure. Core Aboriginal infrastructures that have been completely or partially destroyed include:

- Trade and commerce;
- Traditional Food;
- Resource Management;
- Justice;
- Education;
- Health;
- Government; and,
- Community.

Now that Canada has acknowledged the carnage caused by the policy of forced Aboriginal assimilation, Aboriginal Peoples are left with absent, insufficient or inappropriate infrastructure in each of the areas that Aboriginal infrastructures should have developed to keep pace with the changing needs of Aboriginal citizens. Nothing will change for Canada's First Nation, Inuit, Innu and Métis Nations until missing culture-based Aboriginal infrastructures are restored and harmonized into both the Canadian and global systems⁵⁸. When this is done, reconciliation in Canada with Aboriginal Peoples will be achieved. Traditional, culture-based Aboriginal infrastructure can be reconciled through Meaningful Consultation.

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1.4 Need for an Aboriginal Culture Database:

To affirm Aboriginal rights, Canada needs to:

1. Recognize Aboriginal law, regulation and roles; and,
2. Respect Aboriginal law, regulation and roles in Canadian law and regulation.

To recognize and respect Aboriginal law and regulation, Canada needs to know and understand Aboriginal culture. Unfortunately, Canada's policies have been centred on forcing assimilation and not on learning Aboriginal culture. Canada needs a focussed database on Aboriginal law and regulation as part of the process to affirm Aboriginal rights.

Recommendations 1.7.1 and 1.7.2 in the *Report of the Royal Commission on Aboriginal Peoples*⁵⁶ called for Canada to fund and create a historical database by 2016 that reflected Aboriginal Nations in Canada. The commission recommended that creation of the database respect:

- The right of Aboriginal Peoples to represent their culture and history; and,
- The diversity of Aboriginal Peoples, regions and communities.

To accomplish this, Canada will need a consultation process that can facilitate Aboriginal Peoples' sharing of their culture and history across the country.

The database called for by the *Royal Commission on Aboriginal Peoples* would include generalities of Aboriginal law and regulation but without specific tasking, it would not provide enough detail on Aboriginal law and regulation to affirm Aboriginal rights in Canadian law and regulation. Canada needs a consultation process that can also provide detailed meaning to Aboriginal law and regulation.

A nation can be functionally defined by its laws and regulations (Nation = Law + Regulation). For simplicity, a nation is a body of people sharing a common culture. A nation's culture is defined by its traditions and customs (Culture = Tradition + Custom). If one steps out of the twenty-first century's political vernacular and uses the terminology of an oral history-based nation, traditions are laws and customs are regulations. In this context, a nation can be defined by its traditions and customs. Connecting the dots, one sees that, Nation = Culture = Tradition + Custom = Law + Regulation. In practical terms, for Canada to respect:

- **Aboriginal Nations**, Canada must respect culture;
- **Aboriginal Culture**, Canada must respect Aboriginal law and regulation; and,
- **Aboriginal Law and Regulation**, Canada must respect tradition and custom.

With these simple equations, the functional key to a consultation process is defined. Canada must focus consultation with Aboriginal Peoples on culture, tradition and custom, to obtain an understanding of Aboriginal law and regulation. With a database on Aboriginal tradition and custom, Canada can ensure its laws and regulations respect Aboriginal laws and regulations.

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With mutual respect of law and regulation, Canada can affirm Aboriginal rights, reconcile with Aboriginal Peoples and respect Aboriginal culture.

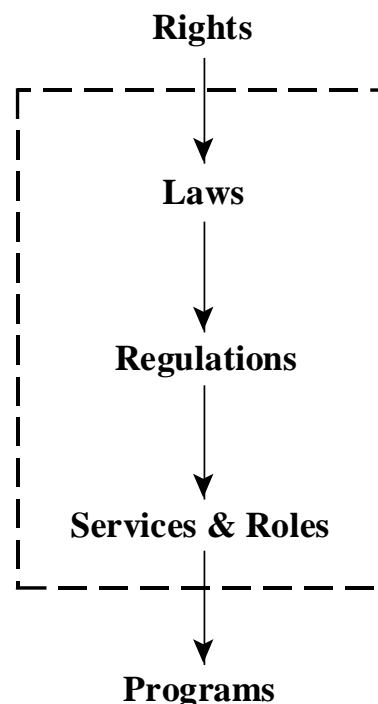
A database on Aboriginal culture will provide the knowledge base necessary for governments and industry to build infrastructure that respect Aboriginal rights. Respectful infrastructure will reconcile Aboriginal rights with the interests of government, industry and other Canadians.

2. Nation Building

Rights are the foundation of a nation's identity. Rights are embodied within a nation through an aggregate of its laws and regulation. But, the fulfilled expression of rights only occurs when laws and regulations are utilized to create services whose programs respect rights of the nation's citizens.

Functional respect for a right comes from a two step process. First, rights must be recognized. Rights are foundational truths. To be recognized, rights must be seen for what they are, truth. Rights are recognized when they are accepted as truth. Second, rights must be affirmed. To be affirmed, they must be supported. Recognized national rights are supported by an infrastructure of laws, regulations, and services. A right is literally reconciled with the nation, and its culture, through infrastructure. So then, in practical terms $\text{Respect} = \text{Truth} + \text{Reconciliation}$, and, in constitutional terms $\text{Respect} = \text{Recognition} + \text{Affirmation}$.

Section 35 of the 1982 *Constitution Act* recognized and affirmed Aboriginal and treaty rights. To do this, these truths need to be reconciled through infrastructure that fulfills their expression. National infrastructure is the framework of rights, laws, regulations, services, and roles that are fundamental in building programs to protect or express citizens' rights (diagram 1). National infrastructure is founded on rights; rights are guaranteed by laws; laws define regulations; regulations define services and roles; and, services and roles provide programs. Programs are not infrastructure. They are tools created from infrastructure.



Daigram 1: The Framework of Infrastructure. The boxed area represents the infrastructure for affirmation of rights. © Reserved March 2006 CAID.

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Aboriginal rights were not included in the 1867 *Constitution Act* but rights to assimilate Aboriginal Peoples and their land were. Canada's national infrastructure supported this imbalance of rights and created tools such as the residential school system, forced relocation, the *Indian Act* and wardship to fulfill this expression of non-Aboriginal rights. Aboriginal rights have been recognized in Canada for twenty-seven years but Canadian national infrastructure (the fabric of Canada) has not been altered to reconcile with them. By definition, Canada does not respect Aboriginal rights.

Until Canada functionally recognizes Aboriginal rights through reconciliation, Canada's infrastructure will continue to develop programs that are tools for Aboriginal displacement and assimilation. Canada must grow as a nation and allow Aboriginal rights to be expressed. Canada needs to become the nation the 1982 *Constitution Act* says it is; a nation that respects both Aboriginal and non-Aboriginal rights. At first glance, this seems like an overwhelming task. It is not. Canada simply needs to begin. Canada is not perfect, but it can be. Meaningful Consultation has the ability to reconcile Aboriginal rights with Canadian infrastructure. The goal of Meaningful Consultation under Section 35 is the reconciliation of the preexistence of Aboriginal societies with the sovereignty of the Crown⁶⁰. For reconciliation to occur, barriers (EFABs) to Aboriginal rights must be removed and Aboriginal rights must be included within Canada's national infrastructure.

2.1 Pre-Recognition:

Many legislators and bureaucrats are too close to the system to see the simplistic flow of national infrastructure. The most expeditious manner to gain functional understanding of national infrastructure is strip it down to its most basic form and follow it through Canada's constitutional history.

After confederation in 1876 and prior to the recognition of Aboriginal and treaty rights in Section 35, Canada's approach to Aboriginal Peoples was as if they never existed. The land that is now Canada was *terra nullius*⁶¹, unclaimed. The 1867 *Constitution Act* gave control over Aboriginal people and ownership of their land to the federal government. All of Canada became Crown land and Aboriginal people became wards of the Crown. The new Dominion of Canada then went on to develop its national *Terra Nullius* Infrastructure to the complete exclusion of Aboriginal Peoples and their rights. (Diagram 2).

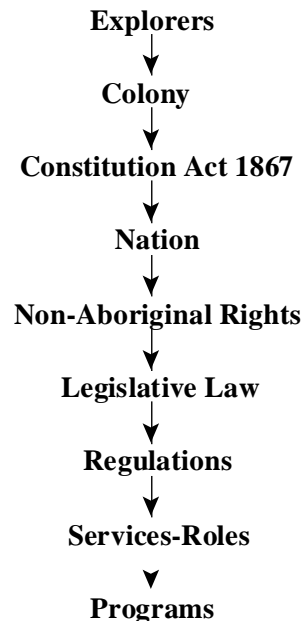


Diagram 2: *Terra Nullius* Infrastructure. Canadian infrastructure developed without any recognition of Aboriginal Peoples prior to 1982. © Reserved CAID May 2009.

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2.2 Recognition:

Canada was not *terra nullius* in any way⁶², but Canada's national infrastructure in 1982 was. As a consequence of the *Terra Nullius* Infrastructure, the only path Aboriginal rights could follow when they were recognized and affirmed under Section 35 was to create their own Divergent Infrastructure (Diagram 3). This began to create a dichotomy of rights and infrastructures within Canada; Aboriginal and non-Aboriginal peoples living in the same country with separate, exclusive rights and infrastructures. These two infrastructures, one which excludes Aboriginal rights and the other which excludes non-Aboriginal rights, must be reconciled to avoid two legislatively separate Canadas.

The key to solving the "two Canadas" dichotomy is through the reconciliation of Aboriginal rights and it hinges around the 1982 *Constitution Act*. Were Aboriginal rights created by Section 35 making an exclusive Aboriginal minority in Canada, OR, did Aboriginal rights exist before

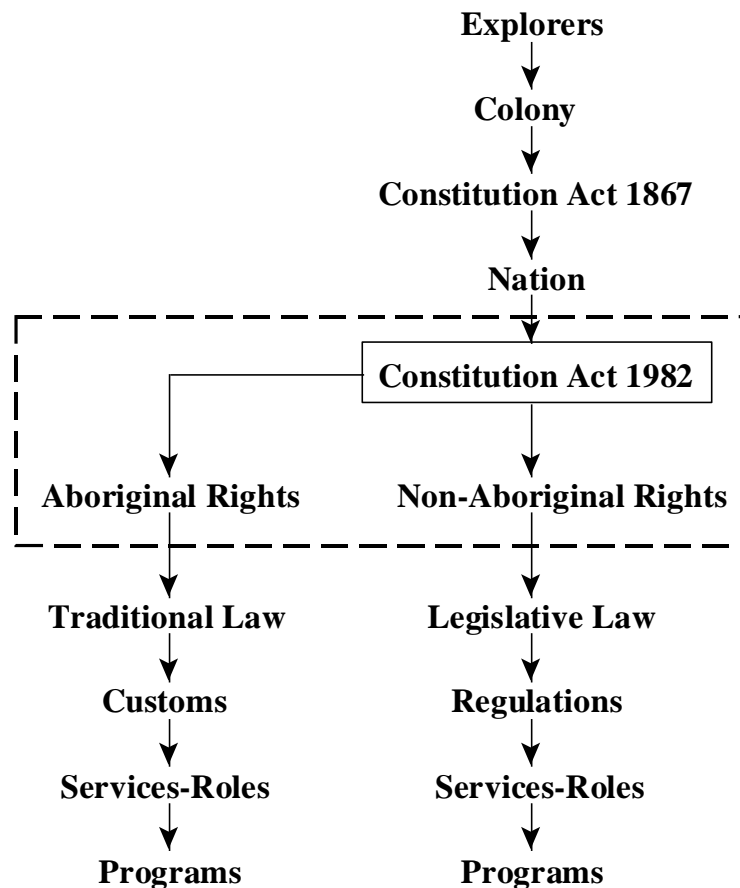


Diagram 3: Divergent Infrastructure. Canadian Infrastructure developed without recognition of aboriginal rights until 1982. Here there is no change in *Terra Nullius* Infrastructure to reconcile aboriginal rights causing two separate infrastructures to emerge. The hatched box represents a hinge (see text). © Reserved CAID May 2009.

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1982 and Section 35 simply recognize and affirm Aboriginal and treaty rights extending from Canada's original nation-to-nation relationship with its Aboriginal Peoples? This dilemma was clearly answered by the Supreme Court of Canada:

“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 ⁶³.”

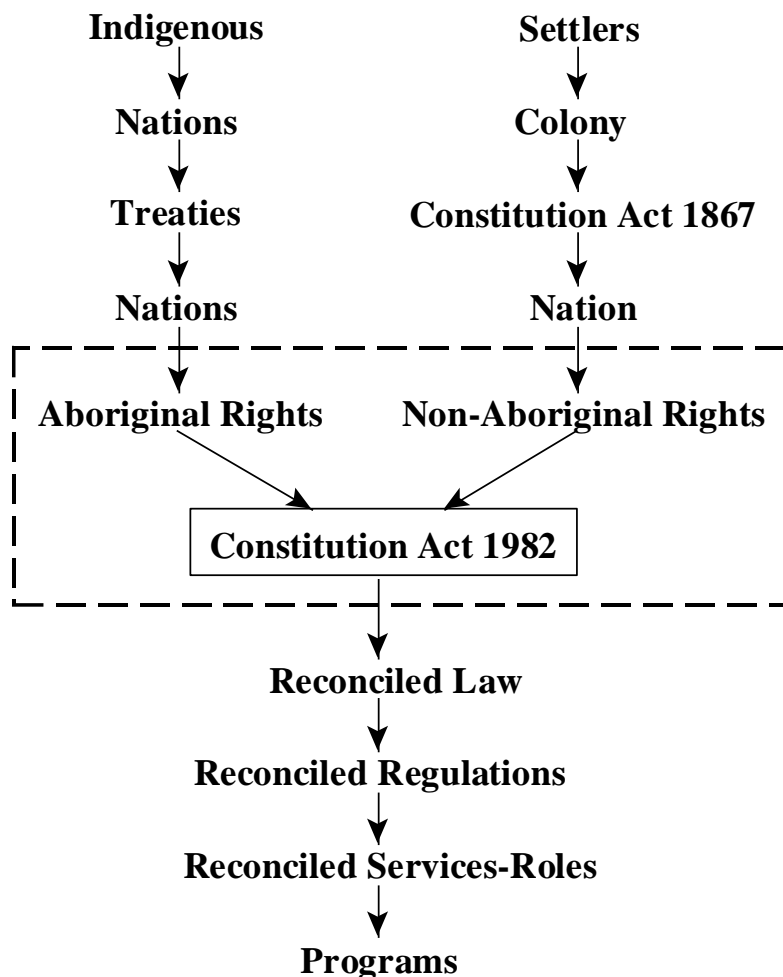


Diagram 4: Convergent Infrastructure. Reconciled infrastructure recognizing both aboriginal and non-aboriginal rights. Here the *Constitution Act* is used to reconcile pre-existing aboriginal rights with non-aboriginal rights to form one reconciled national Canadian infrastructure. The hatched box represents a hinge (see text). © Reserved CAID May 2009.

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Aboriginal rights pre-existed the sovereignty of the Crown in Canada and must be reconciled to the Crown. Aboriginal rights pre-date both the 1867 and the 1982 *Constitution Act*. If racist assumptions had not prevailed in Canada through the policy of forced assimilation, Canada would have emerged as a nation with a Convergent Infrastructure (Diagram 4) in which Aboriginal and non-Aboriginal rights are respected in one “reconciled” infrastructure.

The “one” reconciled infrastructure in Diagram 4 does not indicate that culture-based Aboriginal infrastructure has no place in reconciled infrastructure. On the contrary, it means that culture-based Aboriginal infrastructure and non-Aboriginal infrastructure will co-exist, harmonized to work together as national infrastructure capable of respecting the rights of both Aboriginal and non-Aboriginal citizens.

2.3 Post-Recognition:

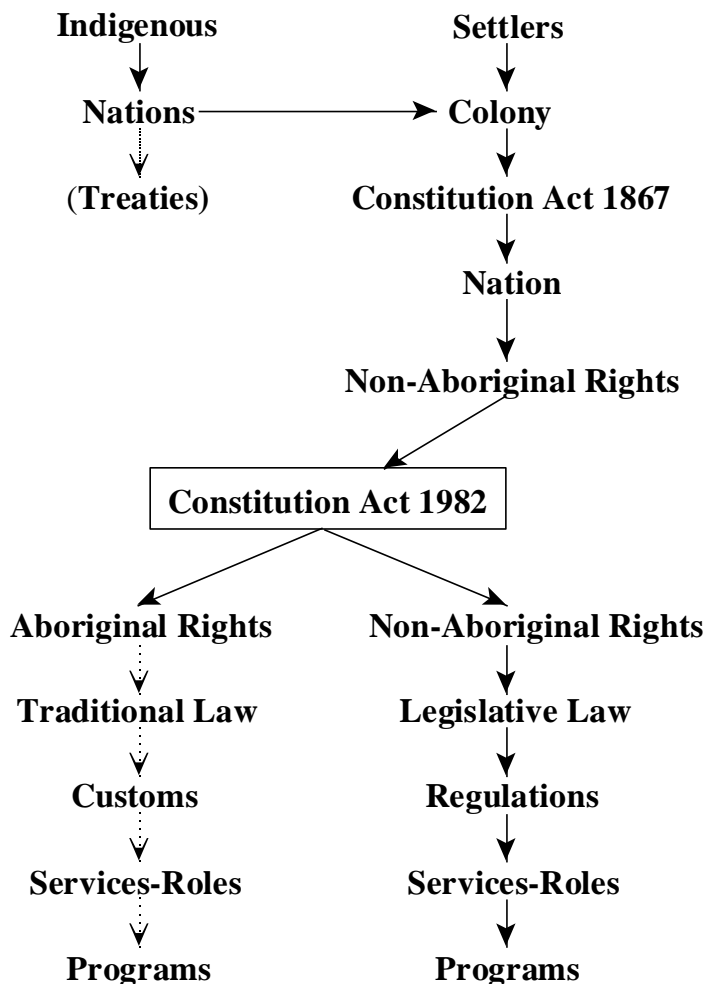


Diagram 5: Current Infrastructure with EFABs present. The reconciliation of Canada’s national infrastructure with aboriginal rights has been stalled for 27 years because of EFABs. © Reserved CAID May 2009.

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Now that Canada has recognized Aboriginal and treaty rights, where is it in developing reconciled national infrastructure? Federal, provincial and territorial governments have not been able to reconcile Aboriginal rights to the sovereignty of the Crown because of EFABs; legislation, regulations, services and roles generated in the *Terra Nullius* infrastructure from assimilate-by policies that continue to support the defunct policy of forced Aboriginal assimilation. To reconcile Aboriginal rights with Canadian infrastructure, EFABs must be removed allowing the truth, recognition, to replace them. The second step in respecting Aboriginal rights can then occur, reconciliation with Canadian infrastructure to affirm Aboriginal rights. Meaningful Consultation can remove EFABs and reconcile Canada's infrastructure to recognize and affirm Aboriginal and treaty rights providing national respect to Aboriginal Peoples.

The current status of Canada's national infrastructure with EFABs present and with EFABs removed is illustrated in Diagrams 5 and 6 respectively.

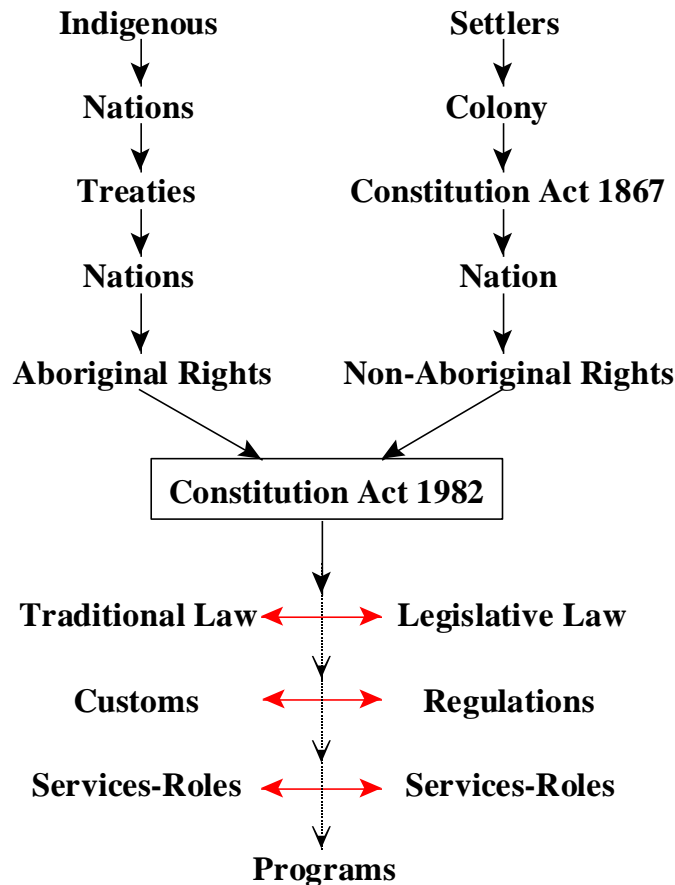


Diagram 6: Current Infrastructure with EFABs removed. The status of Canada's national infrastructure reconciliation with aboriginal rights becomes clear when EFABs are removed. Canada needs to reconcile laws, regulations and services-roles. © Reserved CAID May 2009.

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3. Meaningful Consultation

Canadian courts have established that Meaningful Consultation is an Aboriginal right in Canada guaranteed by Section 35 of the *Constitution Act* (1982)^{64 65 66 67 68}. The goal of Meaningful Consultation is the reconciliation of the pre-existence of Aboriginal societies, Aboriginal rights, with the sovereignty of the Crown^{60 63}. The *Report of the Royal Commission on Aboriginal Peoples* (1996) set out four principles to guide the process of renewing the relationship between non-Aboriginal and Aboriginal rights. They are:

1. Mutual recognition;
2. Mutual respect;
3. Sharing; and,
4. Mutual responsibility⁶⁹.

3.1. Criteria for Meaningful Consultation:

Meaningful Consultation is not about turning the clock back for Aboriginal Peoples, it is about bringing Canada's relationship with Aboriginal Peoples and their rights forward to where they should have been if forced assimilation had never occurred.

Meaningful Consultation provides a process through which:

- Aboriginal rights can be accommodated;
- A new legal basis for Canada's relationship with Aboriginal Peoples can be formulated;
- Reconciliation can occur between Canada and its Aboriginal Peoples; and,
- An Aboriginal culture database can be prepared for Canada;

Meaningful consultation must be defined by both objective-based criteria with functional criteria. A Meaningful Consultation process that affirms the right to consultation, the goal for reconciliation and the Royal Commission's guiding principles will have the ability to provide:

- Canada with a deep understanding of Aboriginal culture and rights;
- Definition for Aboriginal law and regulation;
- Framework definition for culture-based Aboriginal infrastructure;
- Definition for modern culture-based roles for Aboriginal Peoples in Canada;
- Definition for new roles for federal, provincial and territorial governments with Aboriginal Peoples;
- Definition for framework on shared land and resource management;
- Definition for a shared destiny in Canada through a legislative base;
- Reconciliation of Aboriginal infrastructure with non-Aboriginal infrastructure;

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- Reconciliation of Aboriginal and treaty rights with non-Aboriginal rights; and,
- Respectful partnerships.

These above objective-based criteria for Meaningful Consultation provide a platform through which the success of a specific Meaningful Consultation process can be measured. Functional criteria provide the working framework for the process. Functional criteria for Meaningful Consultation include that it:

- Is firmly founded in respect and sharing;
- Can accommodate the Aboriginal right to consultation;
- Is cultural in nature and able to accommodate the culture of different Aboriginal Peoples;
- Can be adapted to provide consultation and accommodation for any Aboriginal right or issue;
- Respects Aboriginal law, Canadian law, and the United Nations definition of Meaningful Consultation;
- Can define and attain an appropriate depth for any needed Meaningful Consultation process.
- Is comprised of consultation and accommodation components;
- Can provide both Aboriginal Nation and nation-to-nation components;
- Can identify and remove EFABs;
- Can identify and create legislation needed to accommodate Aboriginal rights;
- Can identify and create services through which new Aboriginal and non-Aboriginal roles can function;
- Has clear measures of success; and,
- Is transparent and accountable.

The Canadian federal government has rudimentary guidelines for Aboriginal consultation⁷⁰. These guidelines do not meet objective-based or functional criteria standards for Meaningful Consultation. This was recently evidenced with INAC's Aboriginal engagement process on economic development⁷¹ and its engagement for drinking water and wastewater management⁷². These engagement processes did not meet criteria for Meaningful Consultation and they fell well short of Aboriginal expectations for consultation of their rights to land and resource management. INAC's engagement processes also failed to respect Canada's Rule of Law. Aboriginal rights fell victim to EFABs because one or both of the engagements broke Common Law when they:

- Used a public consultation process;⁷³
- Failed to reconcile traditional Aboriginal law and regulation on land and resource management with the sovereignty of the Crown;⁷⁴

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- Did not provide deep consultation on rights of high significance to Aboriginal Peoples or when the risk of non-compensable damage was high;⁷⁵
- Failed to consult Canada's individual Aboriginal Nations on matters affecting Aboriginal land and resources;⁷⁶
- Failed to provide a consultation process that recognized distinct features of the distinct Aboriginal Peoples engaged in consultation;⁷⁷
- Failed to recognize collective and communal Aboriginal rights and provide required community consultations;⁷⁸
- Did not meet the Crown's duty to consult when meetings occurred with Aboriginal leaders in lieu of community and nation consultations;⁷⁹ and,
- Provided legislation or regulations that make no attempt to accommodate constitutionally enshrined Aboriginal rights^{12 13}.

3.2 Defined by Aboriginal Law:

Meaningful Consultation can not be defined for Aboriginal Peoples, it must be defined by them. Each nation will have its own traditional law and customs to define the cultural nature and measures of success for Meaningful Consultation. However, the starting place is the same for the definition of Meaningful Consultation in Aboriginal law in all Aboriginal Nations, it starts with Elders.

The Royal Commission on Aboriginal Peoples spoke to many Aboriginal leaders and Elders through an extensive, recorded process. From that testimony, Commissioners were clearly shown the role of Elders as national guides and keepers of traditional knowledge⁸⁰. They carry oral traditional law for the nation and have a lead role in re-establishing culturally appropriate frameworks for infrastructure. Meaningful Consultation on any and all Aboriginal rights and issues starts in every Aboriginal Nation with Elders.

The *Report of the Royal Commission on Aboriginal Peoples'* recommendation 4.3.1 states ⁸¹,

“Aboriginal, federal, provincial and territorial governments acknowledge the essential role of Elders and the traditional knowledge that they have to contribute in rebuilding Aboriginal nations and reconstructing institutions to support Aboriginal self-determination and well-being. This acknowledgement should be expressed in practice by:

- a. Involving Elders in conceptualizing, planning and monitoring nation-building activities and institutional development;
- b. Ensuring that the knowledge of both male and female Elders, as appropriate, is engaged in such activities;
- c. Compensating Elders in a manner that conforms to cultural practices and recognizes their expertise and contribution;
- d. Supporting gatherings and networks of Elders to share knowledge and experience with each other and to explore applications of traditional knowledge to contemporary issues; and

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- e. Modifying regulations in non-Aboriginal institutions that have the effect of excluding the participation of Elders on the basis of age.”

The commission concluded that Aboriginal Elders, First Nation, Métis and Inuit, are the source and teachers of the North American intellectual tradition⁸².

The Canadian federal government’s guidelines for Aboriginal consultation⁷⁰ do not meet the standards set out in the *Report of the Royal commission on Aboriginal Peoples* for inclusion of Aboriginal Elders; Meaningful Consultation does.

3.3 Defined by Common Law:

The Crown has a duty to consult Aboriginal Peoples⁶⁴ that arose from the recognition of its fiduciary duty toward Aboriginal Peoples⁶³. The Crown also has a more general duty to consult Aboriginal Peoples arising out of the honour of the Crown^{66 67 68}. The Crown’s duty to provide Meaningful Consultation to Aboriginal Peoples applies to both federal and provincial governments⁸³. The Crown’s duty to meaningfully consult is triggered when the Crown has knowledge of an Aboriginal right or title and considers an action that might adversely affect it⁸⁴. 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.”⁸⁵”

The nature of Meaningful Consultation is:

1. It can not occur if the Crown unilaterally exploits the resource under consultation⁸⁶; and,
2. It includes both the duty to consult and the duty to accommodate Aboriginal Peoples⁸⁷.

The nature of the duty to consult will vary with circumstances^{76 88} and includes:

- a. Deep consultation 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 high⁷⁵;
- b. The full consent of an Aboriginal Nation in some cases, particularly with hunting and fishing regulations⁷⁶;
- c. A process which recognizes distinct features of the Aboriginal Peoples engaged in consultation⁷⁷;
- d. Consultation on issues involving Aboriginal and treaty rights⁶³;
- e. The right to be consulted on matters affecting wildlife conservation and natural resource management⁷⁴;

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- f. The right to be consulted on matters affecting hunting and fishing rights^{76 88};
- g. Aboriginal Elders as the oral repository for historical knowledge of culture, pre-contact practices, and for the values and morals of their culture to be used in consultation to define Aboriginal rights for pre-contact practices⁸⁹;
- h. Both community and nation consultations for Aboriginal rights that are collective or communal⁷⁸;
- i. Aboriginal rights to hunt and fish as collective rights⁹⁰;
- j. Meetings with Aboriginal leaders do not meet the Crown's duty to consult in situations of high significance⁷⁹;
- k. The duty to consult cannot be met by giving Aboriginal Peoples a short period of time to respond⁹¹;
- l. The duty to consult cannot be fulfilled by giving a general internet notice to the public inviting comments⁹¹;
- m. A public consultation process cannot meet the Crown's duty to consult⁷³;
- n. The Crown is obliged to establish a reasonable consultation process to meet its duty to consult⁹²;
- o. A Memorandum of Understanding can be used to define a Meaningful Consultation framework⁹³ but is not itself consultation; and,
- p. 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 Peoples⁹⁴.

The duty to accommodate:

- 1. First begins when the honour of the Crown demands recognition and accommodation of the distinct feature(s) in Aboriginal society that need to be respected in the consultation process⁹⁵; and,
- 2. Ends when the Crown's effort to fulfill its duty to meaningful Aboriginal consultation is assessed and found to be adequate by the overall offer of accommodation weighed against the potential impact of the infringement on the Aboriginal right under consultation⁹⁶.

The nature of the duty to accommodate includes:

- a. The Crown is not negotiating in good faith and a willingness to accommodate Aboriginal interests when the Crown does not make reasonable concessions⁹⁷;
- b. The provision of technical assistance and funding to carry out the consultation when necessary⁹⁸;
- c. Accommodation before final resolution to avoid irreparable harm to the Aboriginal claim and in situations of high significance to Aboriginal Peoples⁹⁹;
- d. 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 Peoples¹⁰⁰;

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- e. Crown legislation and regulations are unreasonable when they make no attempt to accommodate the constitutionally enshrined rights of Aboriginal Peoples^{12 13}; and,
- f. 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 realized¹⁰¹.

The Canadian federal government's guidelines for Aboriginal consultation⁷⁰ do not meet the standards set out in the above Rule of Law defined by Common Law; Meaningful Consultation does.

3.4 Defined by the United Nations:

In 2007, the United Nations Committee on the Elimination of Racial Discrimination reviewed Canada's progress on removing all forms of racial discrimination¹⁰². The committee recommended:

- Canada consult Aboriginal Peoples on a legislative solution to the discriminatory effects of the *Indian Act* against Aboriginal women and children;
- Wherever possible, Canada engage in good faith negotiations based on recognition and reconciliation to settle Aboriginal land claims; and,
- Canada engage in effective consultations with Aboriginal communities to develop mechanisms to ensure application of the *Canadian Human Rights Act*.

The United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people released recommendations on the duty to consult in July 2009¹⁰³. Recommendations include:

- a. States have a duty to consult with Indigenous Peoples through special, differentiated procedures in matters affecting them, with the objective of obtaining their free, prior and informed consent;
- b. The duty to consult applies whenever a legislative or administrative decision may affect Indigenous Peoples in ways not felt by the State's general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected and in regard to their particular interests;
- c. States should develop mechanisms for determining and analysing if, and the extent to which, proposed legislative or administrative measures, including those for natural resource extraction or other development activities, affect Indigenous Peoples' particular interests, in order to determine the need for special consultation procedures well before the measures are taken;
- d. The specific characteristics of the required consultation procedures will vary depending on the nature of the proposed measure, the scope of its impact on Indigenous Peoples, and the nature of the indigenous interests or rights at stake;
- e. The objective of the consultation should be to obtain the consent or agreement of the Indigenous Peoples concerned;

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- f. Consultations should occur early in the stages of the development or planning of the proposed measure, so that Indigenous Peoples may genuinely participate in and influence the decision-making;
- g. The principle that indigenous consent should be the objective of consultation does not mean that obtaining consent is an absolute requirement for all situations;
- h. States should define into law consultation procedures for particular categories of activities, such as natural resource extraction activities in, or affecting, indigenous territories;
- i. Consultation procedures that are included into laws or regulations, as well as ad hoc mechanisms of consultation, should themselves be developed in consultation with Indigenous Peoples;
- j. States should make every effort to allow Indigenous Peoples to organize themselves and freely determine their representatives for consultation proceedings, and should provide a climate of respect and support for the authority of those representatives;
- k. Indigenous peoples should work, when needed, to clarify and consolidate their representative organizations and structures in order that they may function effectively in relation to consultation procedures;
- l. States should develop adequate analyses and impact assessments of proposed legislative or administrative measures, and make them available to the Indigenous Peoples concerned along with all relevant information well in advance of negotiations;
- m. States should endeavour to ensure that Indigenous Peoples have adequate technical capacity and financial resources in order to effectively participate in consultations, without using such assistance to leverage or influence indigenous positions in the consultations;
- n. Relevant agencies and programmes within the United Nations system, as well as concerned NGOs, should develop ways to provide Indigenous Peoples with access to the technical capacity and financial resources they need to effectively participate in consultations and related negotiations;
- o. Even when private companies, as a practical matter, are the ones promoting or carrying out activities, such as natural resource extraction, that affect Indigenous Peoples, States maintain the responsibility to carry out or ensure adequate consultations;
- p. Private companies should conform their behaviour at all times to relevant international norms concerning the rights of Indigenous Peoples, including those norms related to consultation;
- q. Private companies that operate or seek to operate on or in proximity to indigenous lands should adopt codes of conduct that bind them to respect Indigenous Peoples' rights in accordance with relevant international instruments, in particular the United Nations *Declaration on the Rights of Indigenous Peoples*;

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- r. States should develop specific mechanisms to closely monitor company behaviour to ensure full respect for Indigenous Peoples' rights, and to ensure that required consultations are fully and adequately employed;
- s. States should take measures to improve the mediation capacity of government agencies, in partnership with companies if applicable, to deal with potentially conflicting interests in relation to indigenous land and resources; and,
- t. States should work with all stakeholders to implement mechanisms of company monitoring and ensure protection from discrimination and equal opportunities to Indigenous Peoples.

The Canadian federal government's guidelines for Aboriginal consultation⁷⁰ do not meet the standards set out in the United Nations recommendations on the duty to consult; Meaningful Consultation does.

3.5 Depth of Consultation:

Canadian Common Law and United Nations recommendations define a variation to the depth of the Meaningful Consultation process depending on the significance of the issue under consultation. The functional definition to this depth of consultation can be found in the framework of infrastructure.

Meaningful consultation literally takes rights and reconciles them with rights, laws with laws, regulations with regulations, services with services and roles with roles (Diagram 6) until programs produced by the infrastructure are reconciled. If one takes the framework of infrastructure and inverts it to reflect the adding on of infrastructure layers, one can see that rights are a deeper layer than laws, which are deeper than regulations on so on up the line. When finished, programs are the most superficial and rights the deepest part of the framework of infrastructure (Diagram 7).

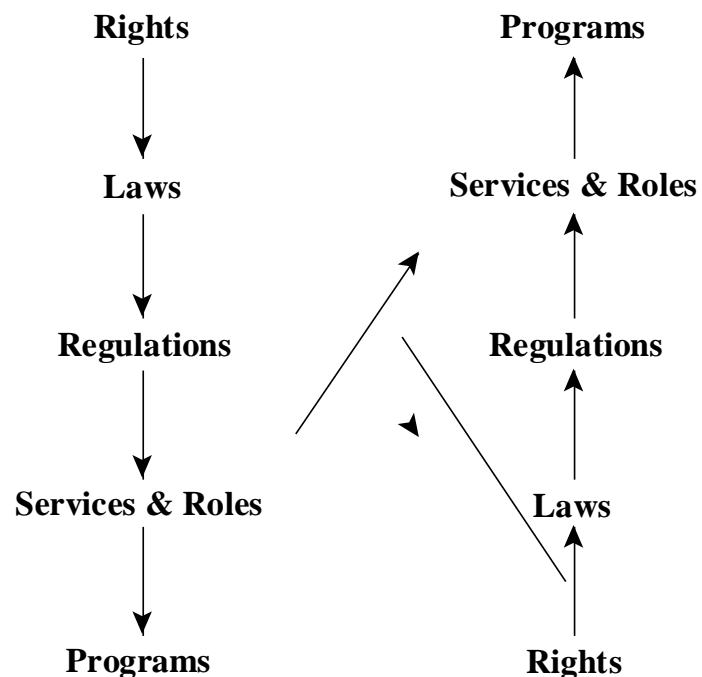


Diagram 7: The framework of infrastructure (left) is inverted (right) to reflect the progressively superficial layers of infrastructure. © Reserved January 2009 CAID.

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The inverted layers of the framework of infrastructure more adequately reflect the ease of accessibility one has to layers within national infrastructure. Programs are the most accessible and therefore the lightest depth of consultation. In fact, since programs are not infrastructure but tools of infrastructure, by nature they require very little formal consultation when all parties act in good faith. As one can see in Diagram 8, the deepest depth of consultation is consultation on rights. Canada has done very little work with the reconciliation of Aboriginal rights. Because of this, every Meaningful Consultation will need to start at the deepest level for the Aboriginal right under consultation.

3.6 Four Step Process of Meaningful Consultation:

Common Law in Canada has divided Meaningful Consultation into two components:

1. Consultation; and,
2. Accommodation.

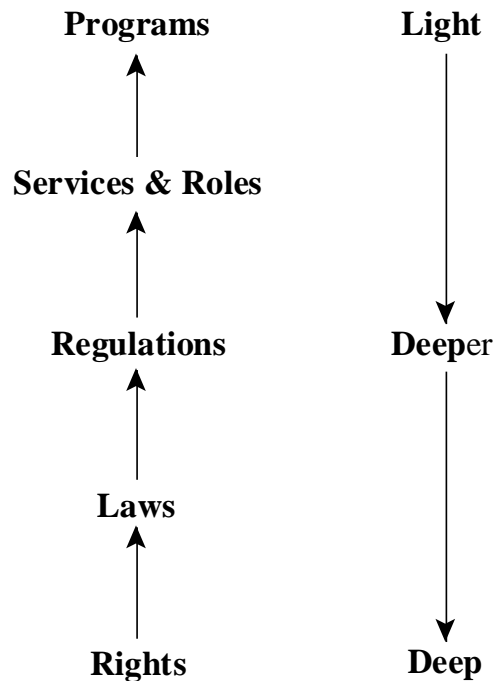


Diagram 8: The Depth of Consultation: On the left are the progressive layers of infrastructure. On the right is the depth of consultation. © Reserved January 2009 CAID

These two steps might suffice in a different scenario but not for the Meaningful Consultation of pre-existing Aboriginal rights in Canada. In Meaningful Consultation, Aboriginal rights expressed in an Aboriginal framework of infrastructure must reconcile with non-Aboriginal rights expressed in the Canadian framework of infrastructure. The problem is two-fold:

- The policy of forced assimilation all but destroyed the Aboriginal framework of infrastructure confounding consultation; and,
- EFABs are present throughout the Canadian framework of infrastructure preventing the accommodation of the Aboriginal framework.

To overcome this dysfunctional state, each of the two components in Meaningful Consultation must themselves be separated into two parts. The resultant four steps of a Meaningful Consultation process are:

1. Nation Consultation;
2. Nation-to-Nation Consultation;
3. Harmonization; and,
4. Restoration.

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a. Nation Consultation:

The Nation Consultation step is an Elder-defined consultation of an Aboriginal Nation¹⁰⁴. It has two distinct steps:

1. Consultation of Elders for definition of the cultural process of Nation Consultation. The cultural process would become the culturally-sensitive procedure used for the consultation of the Aboriginal Nation. The procedure may vary depending on the right under consultation.
2. Consultation of the Aboriginal Nation on a specific right using the Elder-defined consultation procedure. The Nation Consultation will start with Elders.

There are two distinct goals for the Nation Consultation:

- To define the framework of infrastructure for an Aboriginal right: This framework can then be used in the reconciliation of Aboriginal rights with non-Aboriginal rights; and,
- To acquire a database on Aboriginal culture: This database can then be drawn on by non-Aboriginal institutions as a base to their understanding and respect of Aboriginal culture, law and regulation, and rights.

The Nation Consultation will need to be facilitated with unconditional funding and unencumbered expertise. Given the magnitude and number of Aboriginal Nation consultations that need to be undertaken across the country, a consultation infrastructure should be put in place using a non-governmental organization (NGO).

The need for a Nation Consultation step is a direct consequence of the destruction of culture-based Aboriginal infrastructures by the policy of forced assimilation.

b. Nation-to-Nation Consultation:

The Nation-to-Nation Consultation step must occur after the Nation Consultation has finished. It has two distinct steps:

1. Political leaders of the Aboriginal Nation are contacted by the federal, provincial or territorial government requesting consultation. They in turn seek guidance from Elders and the nation's infrastructure framework concerning the necessary depth for consultation; and,
2. Political leaders of the Aboriginal Nation, with technical support from their infrastructure framework, define what:
 - a. Aboriginal laws, regulations, services or roles must be respected in the issue under consultation;
 - b. Roles and partnerships the Aboriginal Nation will have in the devolution of services for the issue under consultation; and,
 - c. Aspect of the issue under consultation the Aboriginal Nation will own, share or be compensated for.

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The goal of the Nation-to-Nation Consultation is to produce three comprehensive lists that can be used to accommodate the Aboriginal Nation, and right, under consultation. These lists are the:

1. **Infrastructure List:** This list will contain the Aboriginal Nation's laws, regulations, services and roles that are affected by the issue under consultation. This list will be used in the accommodation component's Harmonization step;
2. **Roles list:** This list will contain the role(s) the Aboriginal Nation will have in services within the reconciled infrastructure for the issue under consultation. This list will be used to define respectful partnerships between the Aboriginal Nation and the consulting government in the accommodation component's Restoration step;
3. **Programs List:** This list will contain the part(s) of the reconciled infrastructure and its dividends the Aboriginal Nation will have built within their nation. This step defines the destroyed culture-based Aboriginal infrastructure that will be rebuilt in the accommodation component's Restoration step. It will also provide the Aboriginal Nation's Impact and Benefit Assessment for issues requiring compensation to the nation.

The Nation-to-Nation Consultation will need to be facilitated with:

- A Nation Consultation if it has not occurred previously. The Nation Consultation must proceed first to define any missing parts to the culture-based Aboriginal infrastructure framework;
- Technical expertise if the Aboriginal Nation's existing Aboriginal infrastructure framework does not have the technical expertise to support the nation's political leaders. Given the number of Nation-to-Nation Consultations that must occur and the overt lack of professional technical expertise currently available within Aboriginal Nations, a technical expertise infrastructure should be put in place using an NGO unfettered by conflict of interest; and,
- Funding.

The Nation-to-Nation Consultation step produces defined parameters that need accommodation.

c. Harmonization:

The infrastructure list produced in the Nation-to-Nation Consultation is used in the Harmonization step. The goal of Harmonization is the removal of EFABs³⁸ that prevent the expression of Aboriginal infrastructure. Any, and all, legislation, regulation, services or roles in non-Aboriginal infrastructure that prevent the expression of laws, regulations, services or roles found on the infrastructure list are identified and removed.

The Harmonization step is performed by the consulting federal, provincial or territorial government. One government office should be responsible for screening legislation and regulation to identify EFABs. The same group should oversee EFAB removal but individual departments, ministries and agencies should be responsible for removing EFABs found in their respective jurisdictions.

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The need for a Harmonization step arises from the 1867 exclusion of Aboriginal rights from the *Constitution Act*.

d. Restoration

Restoration has two steps:

1. **Legislative:** The roles list acquired in the Nation-to-Nation Consultation is realized through the introduction and enactment of legislation. Aboriginal roles are created within reconciled infrastructure services and function in partnership with non-Aboriginal roles.
2. **Operative:** The programs list formulated in the Nation-to-Nation Consultation is used to build the Aboriginal component of the reconciled infrastructure. Aboriginal roles are enabled by establishing the Aboriginal infrastructure service and its related programs. This step includes Impact and Benefit Assessment compensation.

The Legislative step is overseen by the same single office used in the Harmonization step. The Operative step is a coordinated effort between the same overseeing office and the Aboriginal Nation under consultation.

The goal of the Restoration step is the reconciliation of the Aboriginal right under consultation to the sovereignty of the Crown. Reconciliation will be achieved when the paper, legislative, step in Restoration becomes functional, operative³⁸.

3.7 Clear Measures of Success:

Canada recognized and affirmed Aboriginal and treaty rights in 1982 but nothing has changed. Meaningful Consultation is the process of change that will:

- Accommodate Aboriginal rights;
- Provide a new legal basis for Canada's relationship with Aboriginal Peoples;
- Reconcile Canada with Aboriginal Peoples; and,
- Provide an Aboriginal culture database for all Canadians to respect.

Meaningful Consultation has distinct steps each with clear goals. Each goal's attainment is a clear measure of success. Goals are:

1. **Nation Consultation:**
 - a. To define the cultural process for Nation Consultation;
 - b. To define the framework of infrastructure for an Aboriginal right; and,
 - c. To acquire a database on Aboriginal culture.
2. **Nation-to-Nation Consultation:**
 - a. To define the depth of consultation required;

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- b. To identify Aboriginal rights, laws, regulations, services and roles that need to be harmonized with non-Aboriginal infrastructure;
 - c. To identify role(s) the Aboriginal Nation will have in services within reconciled infrastructure; and,
 - d. To identify services and their programs that will be built to provide Aboriginal components of reconciled infrastructure.
3. **Harmonization:**
- a. To remove EFABs in non-Aboriginal legislation and regulation that prevent the expression of Aboriginal infrastructure.
4. **Restoration:**
- a. To create legislation that facilitates partnered Aboriginal roles; and,
 - b. To create the Aboriginal service and programs component of reconciled infrastructure.

3.8 Transparency and Accountability:

Meaningful Consultation needs five groups to move forward:

1. The consulting government;
2. The Aboriginal Nation;
3. An NGO to facilitate the Nation Consultation and generate the Aboriginal culture database in Meaningful Consultation step 1;
4. An NGO for Aboriginal Nation technical support in Meaningful Consultation step 2; and,
5. A dedicated government office for Meaningful Consultation steps 2, 3 and 4.

Common Law in Canada has identified the requirement of federal, provincial and territorial governments to provide technical assistance and funding to Aboriginal Peoples during consultation⁹⁸. The United Nations has also called for ways to provide Indigenous Peoples with access to technical and financial resources to effectively participate in consultation, including through NGOs¹⁰⁵. In the Meaningful Consultation process presented here, NGOs are used to facilitate Aboriginal Nations both to create a culture database, and, to provide professional technical support for Aboriginal leaders and nations. NGOs are used since they:

• Are not guided or limited by EFABs in the quality of work they can do for Aboriginal Nations;

- Can not profit from the results of their work;
- Are not controlled politically by Aboriginal leaders or the consulting government;
- Will provide consistent professional facilitation and support to Aboriginal Nations;

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- Will provide consistent data collection and processing for Aboriginal Nations;
- Can be transparent for both Aboriginal Nations and consulting governments; and,
- Can be accountable to both Aboriginal Nations and consulting governments.

Each consulting government will need a dedicated department, ministry or agency for Meaningful Consultation. That office will need a mandate to:

- Engage Aboriginal Nations in Nation-to-Nation Consultation of behalf of the government;
- Screen existing and proposed legislation and regulation for EFABs;
- Coordinate legislative and regulatory cleansing of EFABs;
- Create new legislation for partnered Aboriginal roles; and,
- Create reconciled services and programs for Aboriginal Nations.

4. Concluding Remarks

National infrastructure is a framework of laws, regulations, services, and roles that are used to create programs in fulfilment of rights; rights are guaranteed by laws, laws define regulations, regulations provide blueprints for services and roles, and services provide programs. Programs created from an infrastructure framework respect rights the infrastructure was created to express. Canadian national infrastructure was created without the recognition of Aboriginal rights to express non-Aboriginal rights. It is a non-Aboriginal infrastructure framework incapable of respecting Aboriginal rights in its current state.

In 1982, the *Constitution Act* recognized and affirmed Aboriginal and treaty rights. Since that time a number of important events have occurred involving Aboriginal rights. They include:

- The last Indian Residential School was closed;
- The United Nations passed the *Indigenous and Tribal Peoples Convention* (1989);
- The *Report of the Royal Commission on Aboriginal Peoples* (1996) was released;
- The Government of Canada signed the Indian Residential Schools Settlement Agreement (2006);
- The United Nations passed a resolution on the *Declaration on the Rights of Indigenous Peoples* (2007);
- The Truth and Reconciliation Commission began its work in Canada (2008);
- The Prime Minister of Canada apologized for Indian Residential Schools and the policy of Aboriginal assimilation (2008);

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- The release of the United Nations recommendations on the duty to consult (2009); and,
- A myriad of cases that have been processed by the Canadian judicial system to support Aboriginal rights.

Unfortunately in the 27 years since the *Constitution Act* recognized and affirmed Aboriginal rights, nothing has changed for the expression of Aboriginal rights in Canada. Aboriginal rights have not been included into Canadian national infrastructure. The Canadian policy of forced Aboriginal assimilation was discontinued in 2008 but secondary policies, legislation and regulation that provided services and programming tools for Aboriginal assimilation still exist in Canada's national infrastructure. These are now embedded forced assimilation barriers (EFABs) in Canada's infrastructure that block the advancement of Aboriginal rights. As a consequence, Canada's national infrastructure framework is incapable of recognizing Aboriginal rights unless EFABs are removed. Canada needs a process that can remove EFABs and include Aboriginal rights in its national infrastructure. That process must include mechanisms to:

1. Accommodate Aboriginal rights;
2. Provide a new legal basis for its relationship with Aboriginal Peoples;
3. Reconcile Canada with Aboriginal Peoples; and,
4. Provide an Aboriginal culture database so that all Canadians can understand and respect Aboriginal rights.

The process Canada needs to reach these four objectives is Meaningful Consultation. A process for Meaningful Consultation has been described that is able to meet standards set out in Aboriginal law, Canadian Common Law, and by the United Nations. The process has four steps:

1. Nation Consultation;
2. Nation-to-Nation Consultation;
3. Harmonization; and,
4. Restoration.

Canada must accommodate Aboriginal rights in a "reconciled" national infrastructure framework. To accomplish this, Canada must include Aboriginal law, regulation and roles into national infrastructure, and, then provide services that allow Aboriginal roles to be fulfilled. This is accomplished by first harmonizing culture-based Aboriginal infrastructure with existing non-Aboriginal Canadian infrastructure and then building parts missing in Aboriginal Nations. To reconcile Aboriginal infrastructure with non-Aboriginal infrastructure, Canada needs a working definition of culture-based Aboriginal infrastructure.

Most Aboriginal infrastructure was destroyed by Canada's policy of forced assimilation. However, a diffuse remnant remains in Aboriginal Nations with a focal point through Aboriginal Elders. Consultation of Elders and Aboriginal Nations provides the knowledge and understanding of Aboriginal infrastructure needed to generate a working definition for culture-

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based Aboriginal infrastructure. This Nation Consultation process is the first step in Meaningful Consultation. Canada needs the database created by Nation Consultation to fulfill all four Meaningful Consultation objectives. But, the objective to build a database on Aboriginal culture is fully satisfied in the Nation Consultation step.

The second step in Meaningful Consultation, Nation-to-Nation Consultation, is a communicative platform between Canada and the Aboriginal Nation. It enables Aboriginal Nations to provide Canada with detail necessary for Canada to:

- Accommodate Aboriginal rights in national infrastructure;
- Create a new legal basis for roles through which an Aboriginal Nation will express their rights in a new relationship with Canada; and,
- Reconcile the expression of Aboriginal rights by building infrastructure services necessary for Aboriginal Nations to function in their new relationship roles.

The Harmonization step removes remnants of the policy of forced assimilation, EFABs, that block the advancement of Aboriginal rights into a reconciled national infrastructure framework. After EFABs are removed, the final Restoration step can occur.

Aboriginal law, regulation and roles must be legislatively placed into Canadian infrastructure and then infrastructure services must be operatively restored into Aboriginal Nations to complete the Restoration step. The Restoration step produces reconciled national infrastructure that respects both Aboriginal and non-Aboriginal rights.

The policy of forced assimilation left most Aboriginal Nations with shells of their former institutions. These shells function as non-Aboriginal Canadian infrastructure utilizing Canadian law and regulation. Culture-based Aboriginal infrastructure roles were lost from these national institutions because Canada purposefully undermined Aboriginal law and regulation destroying the expression of these institutional culture-based roles. When Canada undertakes Meaningful Consultation with Aboriginal Nations to include Aboriginal law, regulation and roles into a reconciled national infrastructure, the pre-existence of Aboriginal societal roles will be reconciled with the sovereignty of the Crown.

The Nation Consultation step is a pre-requisite step to all aspects of the Meaningful Consultation process. It is the only part of the process that can be separated and initiated on its own without triggering a full Meaningful Consultation process with an Aboriginal Nation. This is because the Nation Consultation utilizes the same work to fulfill a dual mandate to:

- Acquire a database on Aboriginal culture; and,
- Define the culture-based framework of infrastructure for an Aboriginal right.

It is recommended that Nation Consultations be initiated post-haste and performed by an NGO as part of the general mandate given by the *Report of the Royal Commission on Aboriginal Peoples*

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to develop a database on Aboriginal history and culture by 2016⁵⁶. This will remove political overtones from initiating Nation Consultations while extending a firm promise for future reconciliation.

Two follow-up papers to this work entitled *Working Papers on Meaningful Aboriginal Consultation: Overview*¹⁰⁶ and *Working Papers on Meaningful Aboriginal Consultation in Canada: Step 1 - Nation Consultation*¹⁰⁷ are available.

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