

ABORIGINAL PRACTICE POINTS

Meaningful consultation: reconciliation through an honourable process

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Key Points

- The duty to consult with respect to Crown activities that may infringe Aboriginal title or rights arises from the honour of the Crown and the goal of reconciling the Crown's rights with prior existing Aboriginal rights, as evidenced by the entrenchment of Aboriginal and treaty rights in s. 35(1) of the *Constitution Act*
- The Crown has a duty to consult with a First Nation where the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.
- Infringement of Aboriginal rights must be minimized.
- Consultation should:
 - occur at the earliest stage;
 - be open, transparent and timely;
 - be conducted according to a reasonable process. A time constraint does not relieve the Crown from the duty to consult;
 - be based on full information provided by the Crown, which must fully inform itself of the practices and views of the First Nation;
 - address the substance of the First Nation's concerns, and wherever possible, demonstrably integrate them into the proposed plan of action; and
 - where appropriate, seek an accommodation and explore, in good faith, the issue of compensation. A take-it-or-leave-it offer, made without considering the strength of the First Nation's claim or the degree of infringement, does not amount to meaningful consultation;
- The state of the land at issue, or the availability of land for a potential treaty settlement, may be relevant to the scope of the consultation.
- The First Nation must engage actively in consultation and should delineate its claim(s) and potential impacts. It must not seek to frustrate the process.
- A meaningful consultation process will contain both procedural and substantial elements. The procedural elements are required to ensure the process is reasonable, and the substantive elements are the steps required to engage in good-faith bargaining.
- Through the process of consultation, the Crown and the First Nation will define the asserted rights and the potential impacts of the proposed decision. If those impacts are unavoidable, consultation should shift to whether the impacts can be addressed through accommodation.
- Accommodation can take a wide variety of forms, including minimization of impacts, alteration of plans to avoid impacts, limitation, halting of plans, or compensating for impacts through the provision of employment, economic participation, profit-sharing, or other benefits.
- In 2002, British Columbia developed a *Provincial Policy for Consultation with First Nations*, to be adhered to by all provincial decision-makers prior to making a decision that has the potential to affect a First Nation right. Thus, once a First Nation puts forward a reasonable *prima facie* case of Aboriginal title, the Crown is legally obliged to consult with the First Nation with respect to almost all activities on Crown land.
- In addition, a number of ministries have developed their own consultation guidelines, which are generally described as being consistent with the Provincial Policy. For example, the Integrated Land Management Bureau, which operates within the Ministry of Agriculture and Lands, has developed its own procedures for addressing Aboriginal interests.
- The Provincial Policy sets out a process for consultation and provides guidelines for decision-makers who are consulting. As a result, there has been a dramatic increase in

- notices of pending Crown decisions. However, First Nations and provincial Crown decision-makers have expressed frustration with the consultation processes due to lack of capacity, funding and resources.

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I. Introduction

Consultation that excludes from the outset any form of accommodation is meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.

This statement by Binnie J., writing for the unanimous Supreme Court of Canada in *Mikisew Cree v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (at para. 54), is our highest court's most recent pronouncement on the nature of the Crown's duty to consult with First Nations. This statement confirms the role of accommodation in the consultation process and reminds us that consultation is a means to an end and not an end in itself.

This paper will provide an introduction to the duty to consult, look at what is meant by meaningful consultation, discuss procedural and substantive aspects of consultation, describe how consultation and accommodation are linked, and assess how BC's *Provincial Policy for Consultation with First Nations* is meeting the requirements for consultation emerging from the case law.

II. When is consultation meaningful?

A. An introduction to the duty to consult

The duty to consult with respect to Crown activities that may infringe Aboriginal title or rights arises from the honour of the Crown and the goal of reconciling the Crown's rights with prior existing Aboriginal rights, as evidenced by the 1982 entrenchment of Aboriginal and treaty rights in s. 35(1) of the *Constitution Act, 1982*.

Pursuant to the s. 35 protection of Aboriginal and treaty rights, any interference with these rights must be justified. Where the Crown has "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it", the Crown has a duty to consult with the First Nation (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 35).

The concept of consultation as a means to reconcile prior existing Aboriginal rights with Crown sovereignty finds its origins in the *Sparrow* and *Delgamuukw* decisions, in which the Supreme Court of Canada addressed the Aboriginal right to fish and Aboriginal title, respectively (R. v. *Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010).

In *Sparrow*, the court determined that in order for an Aboriginal right, protected under s. 35 of the *Constitution Act, 1982*, to be infringed in a way that upholds the Crown's honour, that infringement must be justified. The court pronounced a two-stage test for assessing the infringement of Aboriginal rights and whether that infringement is justified, which has become known as the *Sparrow* test.

The *Sparrow* test requires that the following questions be asked:

1. Does the legislation in question have the effect of *prima facie* interfering with an existing Aboriginal right?
 - a. What are the characteristics or incidents of the rights at stake?
 - b. Is the limitation on that right reasonable?

- c. Does the limitation impose undue hardship?
 - d. Does the limitation deny the users their preferred means of exercising the right?
2. If *prima facie* interference is found, is that interference justified? In other words, is the interference a legitimate regulation of a constitutional Aboriginal right?
- a. Is there a valid legislative objective?
 - b. If the objective is valid, is the nature and extent of infringement justified?

It is under the assessment of whether the infringement is justified that the question of consultation arises. This assessment requires asking whether the manner in which the legislative objective is implemented upholds the honour of the Crown.

In *Sparrow*, the court (at p. 1119) elaborated on the analysis of justification of an infringement by examining factors that might be considered in justifying an infringement:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been *consulted* with respect to the conservation measures being implemented [emphasis added].

After all, it is only through consultation that the Crown could properly assess whether the appropriate priority was given to the Aboriginal right, or whether infringement was minimized.

In *Delgamuukw*, which addressed infringements of Aboriginal title, Lamer C.J. (at para. 168) set out the requirement for consultation prior to Crown decisions relating to Aboriginal title lands:

... aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. ... This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. ... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

Consultation is thus considered a factor in determining whether the infringement of an Aboriginal right is justified.

The Supreme Court of Canada has confirmed, in *Haida* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, that the Crown has a duty to consult with and, where appropriate, accommodate First Nations with regard to decisions that have the potential to infringe upon asserted, yet unproven, Aboriginal rights and title.

In discussing the foundation of the duty to consult, McLachlin C.J. wrote in *Haida* (at para. 20):

Section 35 represents a promise of rights recognition, and ... [this] promise is realized and sovereignty claims reconciled through a process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

The source of the Crown's duty to consult was addressed extensively in *Haida*. The court identified the need to reconcile the Crown's rights with prior existing Aboriginal rights. McLachlin C.J. wrote (at paras. 16-17):

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, [[1996\] 2 S.C.R. 507](#)], at para. 31.

The fact that First Nations people occupied what is now known as Canada prior to the arrival of European settlers with their claims of sovereignty requires that their rights be taken seriously, especially prior to a final determination of their claims. McLachlin C.J. wrote (at paras. 25-27):

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

Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

In *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, Koenigsberg J. (at para. 75) set out the questions to be asked in assessing the existence and nature of the duty to consult:

1. Will the proposed decision grant rights, in enforceable terms, either actual or conditional, that would be inconsistent with the asserted Aboriginal title or rights?
2. Will the decision impose obligations or fetter or restrict Crown discretion over lands that are subject to the duty to consult?
3. Will the decision fundamentally affect the use of Aboriginal title lands (including as a result of the identity of the future holder of rights)?
4. Is the decision a statutory decision under a legislative or administrative scheme that itself has the potential to infringe Aboriginal rights or title?
5. Is there a strong potential that the decision will affect the asserted rights?

In summary, where the Crown is contemplating a decision that it knows may affect potential Aboriginal rights, including title, it must consult with and, where appropriate, accommodate the First Nation claiming the Aboriginal rights before making a decision.

B. An overview of meaningful consultation

Despite judicial acceptance of the requirement for meaningful consultation, determining whether consultation is meaningful is one that the Supreme Court of Canada has left to be determined on a case-by-case basis.

One of the earliest pronouncements on what consultation must entail in order to be meaningful is found in *Halfway River First Nation v. B.C. (Min. Forests)*, 1999 BCCA 470, where Finch J.A. wrote (at para. 160):

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated in to the proposed plan of action ...

If we break apart this sentence, we identify the following components of meaningful consultation:

1. The Crown has a positive obligation. In other words, it must initiate consultation and information exchange; it cannot wait to be approached by a First Nation. This includes ensuring that communication is consistent. For example, once a referral has been sent to the First Nation, if the application is withdrawn or placed on hold, this should be communicated to the First Nation.
2. The Crown must reasonably ensure the First Nation is provided with the necessary information. This may entail requesting the proponent to send information to the First Nation or requiring the proponent to provide a list of information provided to the First Nation. Asking the proponent to provide information is not the end of the Crown's duty, however, and should be followed by an offer to help the First Nation to understand this information where necessary.
3. This information must be provided in a timely way.
4. The First Nation must have an opportunity to express its interests and concerns. This raises the question of whether a First Nation that does not have the capacity to understand technical information and cannot afford to hire a consultant can ever have a real opportunity to express its interests and concerns without assistance.
5. The Crown must ensure the First Nation's representations are seriously considered.
6. The Crown must, wherever possible, demonstrably integrate the First Nation's representations into the proposed plan of action. This could be through alteration, mitigation, compensation, or some other form of accommodation.

More recent case law on the duty to consult tells us that all the components set out above may not be required in each case where the Crown must consult with a First Nation. The scope of consultation required has been found to vary, depending on the degree to which a First Nation's rights may be infringed.

In *Haida*, McLachlin C.J. (at paras. 43-45) elaborated on the scope of the duty to consult, and described it as a spectrum:

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice ...

... At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and the potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal

participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case ...

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake.

While consultation at the lower end of the spectrum described by McLachlin C.J. may require providing information, a reasonable opportunity for the First Nation to express interests and concerns, and a discussion of those interests and concerns, it may not require any integration of the First Nation's comments into the decision, depending on the circumstances. Even this spectral approach to consultation is qualified by a requirement to be alive to a change in the nature of the consultation as a result of the consultation. As McLachlin C.J. stated, "the level of consultation required may change as the process goes on and new information comes to light".

McLachlin C.J. also made the following comments on what is required to ensure that consultation is meaningful (at para. 33):

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

And further:

While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted (paras. 41-42).

In conclusion, the scope of the consultation required will vary on a case-by-case basis. Therefore, what is meaningful in one situation may not be meaningful in another. As the issue of whether there is a duty to consult has wound its way through our courts, the content of meaningful consultation has been examined in each case, providing us with some insight of what meaningful consultation is, or more often what is not meaningful consultation. Judgments issued both before and since *Taku River* and *Haida* provide an ever-clearer image of meaningful consultation. As new case law emerges, this image will become even more clear.

The case law to date identifies the following principles:

- consultation must occur at the earliest stage in order to be meaningful (*Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320);
- consultation must be “open, transparent and timely” (*Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2005 BCCA 128](#));
- the consultation with a First Nation must be conducted according to a reasonable process, which *may* require at least a “distinct process, if not a more extensive one” than consultation with other stakeholders (*Taku River, Mikisew Cree, Gitksan First Nation v. British Columbia (Minister of Forests)*, [2002 BCSC 1701](#));
- the Crown must provide the First Nation with “full information” and must fully inform itself of the practices and views of the First Nation (*Halfway River*);
- the First Nation’s interests and concerns must be “considered and, wherever possible, demonstrably integrated into the proposed plan of action” (*Halfway River*);
- consultation must address the substance of the First Nation’s concerns (*Taku River*);
- infringement must be minimized (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2001 FCT 1426, reversed [2004 FCA 66](#), restored [2005 SCC 69](#) (“*Mikisew FCT*”));
- consultation must, where appropriate, seek an accommodation (*Haida*) and explore, in good faith, the issue of compensation (*Mikisew FCT*);
- operating under a time constraint does not relieve the Province of its duty to consult (*Gitksan*);
- the state of the land at issue, or the availability of land for a potential treaty settlement, may be relevant to the scope of the consultation (*Musqueam, Squamish*);
- a take-it-or-leave-it offer, made without considering the strength of the First Nation’s claim or the degree of infringement, does not amount to meaningful consultation (*Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, [2005 BCSC 697](#));
- the First Nation must engage actively in consultation, and must not seek to frustrate the process (*Heiltsuk Nation v. British Columbia (Minister of Sustainable Resource Management)*, [2003 BCSC 1422](#) ; and
- the First Nation must clearly delineate its claim(s) and potential impacts (*Husby Forest Products Ltd. v. British Columbia (Minister of Forests)*, 2004 BCSC 142; *Saulteau First Nations v. British Columbia (Oil and Gas Commission)*, 2004 BCSC 92, affirmed 2004 BCCA 286.

Perhaps the most critical point to keep in mind is why consultation is taking place. The purpose of consultation confirms its content. It is not an end in itself. It is part of what the Supreme Court of Canada has said is required in "ensuring [Aboriginal] rights are taken seriously" (*Sparrow*), and to provide a process for reconciliation of Crown interests with prior existing Aboriginal rights (*Haida*, at para. 26). As stated by McLachlin C.J. (*Haida*, at para. 45), the "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples".

What we see, therefore, is that, in order to be meaningful, consultation should follow a reasonable process and be conducted in good faith. Consultation as part of justification is not just a step; it is a process. Consultation should be a way to identify, and where appropriate accommodate, Aboriginal rights, including title. This accommodation should include canvassing and implementing all available options to mitigate damage and to infringe Aboriginal and treaty rights as little as possible. Consultation should openly explore and implement, where appropriate, the option of compensating the First Nation for the damage to its rights and the option of not proceeding with the proposed activity if the harm would simply be too great.

C. A more detailed analysis of some consultation principles

Some of the major principles that emerge from consultation are that consultation should occur as early as possible, that the process for consultation should be reasonable, that consultation should be conducted in good faith, and that consultation is a two-way street, requiring reasonable participation by both parties.

1. First things first—the timing of consultation is important

In order to be meaningful, consultation should occur in a timely manner. This principle is clearly enunciated in the case law.

The timing of consultation and information exchange was addressed in *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, [2005 BCSC 283](#). There, the decision-maker provided an extensive response to the First Nation's concerns after the decision had been made. Powers J. (at para. 108) described the response as a "good foundation for the face to face meetings consultation requires" and wrote (at para. 108):

Consultation, in some cases, may include the parties educating each other as to their concerns and responses to those concerns. The concerns raised may not necessarily be accepted, but they may still lead to some reasonable accommodation of those concerns. This type of consultation should have occurred before the amendment of the existing licence was approved.

The requirement that consultation be timely in order to be meaningful was confirmed by the British Columbia Court of Appeal in *Musqueam*. The Musqueam Indian Band challenged a decision by Land and Water British Columbia Inc. ("LWBC") to sell land that had been under lease as a golf course to the University of British Columbia. After LWBC had decided to proceed with the sale without consulting with the Musqueam, LWBC offered compensation for any infringement of Musqueam rights, in the amount of \$5,000,000. The British Columbia Supreme Court found the post-decision offer to amount to adequate accommodation. The Court of Appeal, issuing its decision after the Supreme Court of Canada decisions in *Haida* and *Taku River* had been rendered, disagreed. Hall J. wrote (at paras. 94-98):

In my view, the duty owed to the Musqueam by LWBC in this case tended to the more expansive end of the spectrum. The Crown conceded the

Musqueam had a *prima facie* case for title over the Golf Course Land, and the report of the archaeological firm noted that the Musqueam had the strongest case of the bands in the area. Potential infringement is of significance to the Musqueam in light of their concerns about their land base. If the land is sold to a third party, there will likely be no opportunity for the Musqueam to prove their connection to this land again. The Musqueam were therefore entitled to a meaningful consultation process in order that avenues of accommodation could be explored.

In light of my view of the consultation required in this situation, I consider that the consultation process was flawed. If this was only a case where notice was required, the consultation may have been sufficient. However, in the present case, I consider the consultation was left until a too advanced stage in the proposed sale transaction. As McLachlin C.J. observed in *Haida*, there is ultimately no obligation on parties to agree after due consultation but in my view a decent regard must be had for transparent and informed discussion. Of course, legitimate time constraints may exist in some cases where the luxury of stately progress towards a business decision does not exist, but such urgency was not readily apparent in the present case. These lands have been used as a public golf course for a long time, and the *status quo* is not about to change having regard to the extant lease arrangements. The Musqueam should have had the benefit of an earlier consultation process as opposed to a series of counter-offers following the decision by LWBC to proceed with the sale.

... [I]t is only fair that the consultation process seeking to find proper accommodation should be open, transparent and timely. As I have said, that could not be said to have occurred here because the consultation came too late and was to a degree time constrained because the sale was virtually concluded before any real consultation occurred.

Not only do the courts reject as meaningless attempts at consultation and accommodation that occur after the decision has been made; the case law indicates that consultation should occur as early as possible.

In *Squamish*, the British Columbia Supreme Court addressed a claim by the Squamish Nation that the Crown had breached its constitutional and fiduciary duties to the Squamish Nation as a result of its failure to consult with the Squamish Nation about its claim to Aboriginal title and rights in the Mt. Garibaldi area prior to making significant decisions that advanced a ski and golf resort development project. The development project started out as a commercial ski resort development, proposed by Garibaldi Alpine Resorts under an interim agreement with the Province, and proceeded to the environmental assessment stage before it was placed on hold for financial reasons. The Squamish Nation had signaled its intent to participate in the environmental assessment. The interim agreement was subsequently modified, which involved a reinstatement decision, a modification decision, and a change-of-control decision by Crown. The Crown did not consult the Squamish Nation on any of these decisions.

Upon the revival of the project, the Squamish Nation sought to be consulted by the Crown prior to any further decisions being made. LWBC, the government entity dealing with the project, informed the Squamish Nation that consultation was not required until a later stage in the project. LWBC subsequently issued a decision allowing for a significantly expanded project, which triggered the Squamish Nation's action. In discussing the timing of consultation, Koenigsberg J. wrote (at paras. 73-74):

The duty to consult is triggered whenever there is the potential for impact of third party interests on claimed aboriginal lands. In this case—there can be no issue about how or why that duty arises at the earliest stages. The Crown knew of the aboriginal claims and knew before it reinstated the Interim Agreement and approved the Change of Control that the Squamish Nation had defined and confirmed interests in the area and a concern about the negative impact on their interests (which were then and still are the subject of treaty negotiations) of any commercial development specifically including a ski hill development. *Mikisew Cree Nation v. Canada (Minister of Canadian Heritage)*, [2002] 1 C.N.L.R. 169 at 211-213—a recent decision of the Federal Court Trial Division discusses the importance of consultation at early stages of planning.

The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions. Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project. This case illustrates the importance of *early* consultations being an essential part of meaningful consultation. At this point, and for some time, GAS has asserted legally enforceable rights to pursue the expansion agreement even though it is aware that there has been no consultation. There is thus, the clear appearance of bias in favour of GAS's expansion plans, as GAS has issued a warning of legal proceedings against the Crown should rights they believe they now have not be realized.

The timing of consultation is therefore important. If consultation occurs after the decision has been made, there may be little the Crown can offer in the way of real accommodation, such that only compensation may be available. Compensation will not be an appropriate accommodation in all instances. Further, if consultation occurs too late, third parties may have developed expectations that place the decision-maker in a difficult position. Consultation must therefore take place as early an opportunity as possible.

2. The consultation process must be reasonable

The scope of the duty to consult is “proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (*Haida*, at para. 39). A reasonable consultation process must always be meaningful, be conducted in good faith, and include a “willingness on the part of the Crown to make changes based on information that emerges during the process” (*Taku River*, at para. 29).

The process that was followed in *Taku River* provides us with some indication of what the courts will consider when assessing whether the consultation process was reasonable. The First Nation had objected to a consultation that was conducted pursuant to a process set out under the *Environmental Assessment Act*, which included a requirement for inviting First Nations to participate in the Environmental Assessment Project Committee. The First Nation participated fully as a committee member, and was provided with funding to participate. In addition, the environmental assessment office commissioned a “traditional use study” conducted by an expert selected by the First Nation, and also provided funding for an additional report. Ultimately, mitigation strategies identified by the First Nation were adopted into the terms and conditions of the certification. This included requirements for the development of baseline information and recommendations regarding future management and closure of the road.

In *Gitksan*, the British Columbia Supreme Court examined the impugned consultation process that took place between the Minister of Forests and the Gitksan, Lax Kw'alaams, Metlakatla, and Gitanyow First Nations prior to the transfer of control of Skeena Cellulose.

Tysoe J. found that the consultation process that the Ministry of Forests entered into with all four First Nations was inadequate, because:

1. The Crown's communication with the First Nations was not substantially different from its communication with other stakeholders;
2. The Crown did not provide all the necessary information in a timely way; and
3. The Crown did not consult with a genuine intention to substantially address the First Nation's concerns, as the Crown considered Skeena's change in control to be neutral with respect to the First Nations' asserted rights.

The Crown tried to rely on time constraints to justify its failure to meet its obligations, but Tysoe J. (at para. 91) rejected that as justification:

In his submissions, counsel for the Crown made reference to the time constraints facing the Minister in view of the April 29 deadline and he argued that the Minister acted reasonably striking a balance between the concerns of the First Nations and the interests of creditors, employees and contractors of Skeena. On a factual basis, I observe that the Crown did not initiate any communication with the First Nation groups until over a month after it entered into the sale agreement with NWBC. ... the Crown itself contributed to the short length of the time constraints. On a legal basis, the shortness of time and economic interests are not sufficient to obviate the duty of consultation: see *R. v. Noel*, [1995] 4 C.N.L.R. 78 (N.T.T.C.) at p. 95, *Mikisew* at para. 132 and *Haida No. 1* at para. 55.

Tysoe J. stated (at para. 113) that the first step in the consultation process should be a discussion of the process itself:

I agree that the first step of the consultation process is to discuss the process itself, and the discussion in that regard would logically include the provision of relevant information.

A discussion of the process to be engaged in between the Crown and the First Nation would certainly be valuable in ensuring that the process is reasonable from the viewpoint of both parties. The reasonableness of the process has recently been determined to be an issue in and of itself. In the recent decision in *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 307, the Federal Court addressed a request by Canada to stay a judicial review initiated by the First Nation to challenge the establishment of the process to deal with approvals for the Mackenzie Gas Project. This process was developed without consultation with the First Nation. Canada asserted that the issues raised by the First Nation should be addressed through processes underway before the National Energy Board, the Joint Review Panel, and the Crown Consultation Unit, and that the court could deal with whether the process was adequate after the review of the project was complete. Phelan J. denied Canada's stay application, writing (at paras. 25-27):

The subject matter of the Dene Tha's judicial review, being the creation of the processes for the review of the MGP, is largely completed. It is a discreet issue separate from what may be the outcome of those reviews. Therefore, it is a matter which can be dealt with without disrupting the existing and future proceedings. There is nothing in the judicial review process which precludes efforts at consultation and accommodation.

The Court is also concerned that delay in resolving these issues is to no one's legitimate advantage. Waiting until the end of the various proceedings may make an effective remedy either difficult to implement or extraordinarily disruptive to a massive project with issues of costs, efficiency, and financing all at play in any determination which would undermine the legitimacy of the various proceedings.

In my view, it is fairer and more efficient, and potentially more effective, to the parties and all persons interested in this project, that any legal infirmities with the creation of the mechanisms to approve this project be dealt with fully and expeditiously.

Crown decision-makers and First Nations should consider the importance of developing a meaningful process for consultation prior to embarking on consultation. Once this foundation is laid, the meaningful consultation expected by the case law is more likely to follow. Unfortunately, the more typical process is one where the Crown seeks to address its legal obligations through a fixed process that it seeks to impose on First Nations with little flexibility to tailor this process to particular situations. Worse yet, on occasion the Crown still skips the consultation process entirely (*Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712).

3. Consultation must be conducted in good faith

In addition to the requirement that the Crown create a reasonable process for consultation, the Crown must participate in that process in good faith.

The *Huu-Ay-Aht* decision provides some insight into the good-faith aspect of consultation. The Huu-Ay-Aht First Nation was negotiating a Forest and Range Agreement (FRA) with the Province, as many First Nations have done. These agreements provide revenue sharing and timber to First Nations in return for their agreement that the economic component of infringement of their rights by forestry decisions has been addressed and that the process for consultation on administrative and operational plan decisions set out in the agreement is an adequate process. The economic and timber component of the benefits that British Columbia has been willing to provide to First Nations under these agreements has been determined by a formula based on population. The Huu-Ay-Aht First Nation attempted to negotiate with the Crown over these figures, but was unsuccessful, and appealed to the Court for an order directing the Crown to negotiate in good faith, which would preclude strict adherence to population-based formulas.

Dillon J. wrote (at paras. 126-127):

To fail to consider at all the strength of claim or degree of infringement represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation. While a population-based approach may be a quick and easy response to the duty to accommodate, it fails to take into account the individual nature of the [Huu-Ay-Aht First Nation (HFN)] claim. In *Musqueam* at para. 91, a practical interim compromise failed to meet the tests enunciated by the Supreme Court of Canada when it was not informed or conditioned by the strength of claim and degree of intervention analysis. In this case, the government did not misconceive the seriousness of the claim or impact of the infringement. It failed to consider them at all. The government acted incorrectly and must begin anew a proper consultation process based upon consideration of appropriate criteria.

A proper consultation process considering appropriate criteria must involve active consideration of the specific interests of HFN. The conduct of the Crown from February 2004 through to the end of negotiations was intransigent. Although the government gave the appearance of willingness to consider HFN's responses, it fundamentally failed to do so. This is

particularly apparent in correspondence of February 25, April 7, April 19, and April 26 and in the immediate aftermath of those correspondences. The government never wavered from its position as expressed in the FRA policy. The policy was always intended to be a form of [Interim Measures Agreement (IMA)] so changing the name on the HFN's FRA was within the policy. The amounts offered in revenue and tenure were always within the policy guidelines with the government starting at the lowest offer available. No effort was made to work with other ministries, particularly the Ministry of Sustainable Resources, to consider what options might be available throughout government to accommodate HFN concerns. No alternative was offered to the HFN despite repeated requests by the HFN for consideration of their specific situation. No formal consultation process was ever suggested. No continuing consultation occurred when the HFN did not accept the FRA. Logging continues. The government has failed to accord the HFN the status that a treaty level 5 First Nation should receive. Presumably, this conduct would be considered in determining whether the infringement of HFN title and rights was justified.

It should be noted that a number of facts specific to the Huu-Ay-Aht First Nation's relationship with the Ministry of Forests were relevant to the Court's decision. The principle that emerges from the decision, however, is that a take-it-or-leave-it offer, without specific consideration of the strength of the First Nation's claim or the nature of the asserted rights and the degree of infringement, does not amount to good-faith, meaningful consultation. The Ministry of Forests appealed this decision but has since dropped its appeal.

Good-faith participation in consultation does not mean that the Crown cannot engage in hard bargaining. Chief Justice McLachlin wrote: "Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted" (*Haida* at para. 42).

Good-faith participation, however, does not mean that the Crown can just go through a process for the sake of completing the process without considering the information it receives from a First Nation. Good-faith consultation requires the Crown to be receptive to the possibility that the contemplated decision or activity may have to be altered, substantially altered, or even abandoned, as a result of consultation. Going through the motions is not good enough.

4. Consultation is a two-way street

Although the duty to consult is an obligation of the Crown, a First Nation cannot frustrate the process by not participating and then hope to obtain relief from the courts for a meaningless process.

In *Heiltsuk*, in assessing the claim of the Heiltsuk that they had not been consulted prior to the issuance of licences for a fish hatchery, Gerow J. reviewed some cases that address the duty of the First Nation to avail itself of consultation. In particular, Gerow J. referred to *Ryan v. British Columbia (Minister of Forests)*, [1994] B.C.J. No. 2642 (S.C.), where Macdonald J. wrote (at paras. 23 and 26):

I accept that the Gitksan are entitled to be consulted in respect of such activities. They do not need the doctrine of legitimate expectations to support that right, because the *Forest Act* itself and the fiduciary obligations toward Native Indians discussed in *Delgamuukw*, establish that right beyond

question. However, consultation did not work here because the Gitksan did not want it to work. The process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met.

...

I accept the submission that the M.O.F. more than satisfied any duty to consult which is upon it. It was the failure of the Petitioners to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute.

Gerow J. also (at para. 161) cited Finch J.A. in *Halfway River*:

There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan et al v. Fort St. James Forest District (District Manager)* (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

Gerow J. concluded that the proponent, Omega, had attempted to meet with and consult with the Heiltsuk on numerous occasions, but that the Heiltsuk consistently took the position that they had zero tolerance for Atlantic salmon aquaculture and that they did not deem the meetings to be consultation. Gerow J. wrote (at paras. 112-115):

The Heiltsuk have remained firm in their position that they are opposed to any type of Atlantic salmon aquaculture in the territory over which they are asserting a claim. I find on the evidence that prior to the petition the Heiltsuk have been unwilling to enter into consultation regarding any type of accommodation concerning the hatchery. This is apparent both from the position they have taken throughout the meetings where they have clearly indicated that they do not consider the meetings to be consultation and from correspondence between counsel in which the Heiltsuk have continued to express the view that no consultation has taken place (para. 108).

...

The conduct of the Heiltsuk both in stating their position as one of zero tolerance to Atlantic salmon aquaculture and in attending meetings at which they stated they did not consider the meeting to be consultation indicates, in my view, an unwillingness to avail themselves of the consultation process.

On all of the evidence, it is clear that the Heiltsuk seek a veto over Omega's operations. They "want it removed". While saying they want to consult, their position has reflected an unwillingness to consult.

The Heiltsuk's apparent unwillingness to participate in the consultation process was seen by Gerow J. to be fatal to any complaints about the process, who said (at paras. 115-118):

Although the Crown took the position that consultation was not required regarding the initial two licences, the evidence is that the Crown changed its

position and attempted to consult with the Heiltsuk prior to the issuance of the dock and pipe licence of occupation and the Link Lake water licence. There is evidence that there are ongoing opportunities for consultation and accommodation with respect to the hatchery.

Additionally, the evidence is that Omega has made and is making ongoing efforts to provide information to the Heiltsuk about the impact of discharge from the hatchery on the marine environment and to consult in relation to the procedures that are in place to prevent escapes from the hatchery. Omega has expressed a willingness to work with the Heiltsuk to create jobs and establish a wild salmon enhancement facility in the area.

The Heiltsuk have not disclosed their position about the terms they would find acceptable to withdraw their objection to the issuance of the licences to Omega. They have not suggested any terms that should be added to the licences or identified any specific impacts the licences have had on their rights.

In the circumstances, I find that the duty of the Crown to consult was adequately discharged by the Crown and Omega. The process has been frustrated by the Heiltsuk's failure "to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute". *Ryan*, at ¶ 6, 24 and 26.

In addition to participating in the consultation process, it is important that First Nations set out their claims in a way that can be understood by government decision-makers. In *Husby*, a forestry company challenged a decision by the Ministry of Forests to refuse to issue a cutting permit on the grounds that it would infringe the Aboriginal rights of the Haida Nation. The court considered the basis for the Ministry of Forests decision, and in particular the lack of consultation between the Crown and the Haida Nation to delimit the nature of the Haida Nation's claim.

Garson J. wrote in *Husby* (at paras. 100-101):

In my view the duty to consult, which *Haida Nation* (B.C.C.A.) No. 1 and other cases have clearly established, is meaningless unless the parties know precisely what aboriginal right or claim is alleged to be infringed and the scope of that claim.

In conclusion, there is nothing else in the District Manager's decision that could be taken to be a statement of what aboriginal right he had determined would or could be infringed. On the evidence before me there was no consultation between the Haida and Husby in order to delineate the aboriginal right that was of concern. I do not see how the District Manager can make a decision that a cutting permit applied for under a forest licence ought to be granted or denied without a clear delineation of the nature and scope of the aboriginal right asserted and I would remit the matter to the District Manager to reconsider the application in accordance with these reasons.

This judgment suggests that information previously provided by a First Nation cannot be considered without further submissions contextualizing that information in terms of each particular decision. It is important to note that no court before or since has made such a pronouncement. To so find would be contrary to the *Provincial Policy on Consultation with First Nations*, which requires the decision-maker to avail himself or herself of all reasonably available information.

The requirement that a First Nation must carefully define its claimed right, however, is not a new one. In *Halfway River*, Huddart J. (at para. 182) described the First Nation's duty in participating in consultation as one to:

... offer the relevant information to aid in determining the exact nature of the right in question. The first nation must take advantage of this opportunity as it arises. It cannot unreasonably refuse to participate. ... [A] first nation should not be permitted to provide evidence on judicial review it has had an appropriate opportunity to provide to the decision-maker, to support a petition asserting a failure to respect a treaty right. The Supreme Court of Canada confirmed the importance of characterizing the right claimed, in *R. v. Mitchell*, [2001] 1 S.C.R. 911 (at para. 14)

Before we can address the question of whether an aboriginal right has been established, we must first characterize the right claimed. The event giving rise to litigation merely represents an alleged exercise of an underlying right; it does not, in itself, tell us the scope of the right claimed. Therefore it is necessary to determine the nature of the claimed right. At this initial stage of characterization, the focus is on ascertaining the true nature of the claim, not assessing the merits of this claim or the evidence offered in its support.

And again in *Haida* (at para. 36)

This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall, supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

This does not mean that a First Nation has to abide by any process that the Province attempts to dictate. In *Gitsan*, Tysoe J. found it to be reasonable for a First Nation to demand a written response to a letter before agreeing to meet, saying (at para. 89):

There was no consultation of any sort with the Lax Kw'alaams. It was not unreasonable for the Lax Kw'alaams to decline to meet until they had received a response to their April 9 letter (although I am not suggesting that the Crown was required to accept the positions expressed by the Lax Kw'alaams in the letter)....

The Crown is under an obligation to create a meaningful process by which a First Nation's rights and the potential impact of a Crown decision on those rights can be assessed. The Courts will review that process on a standard of reasonableness. Where that process is not reasonable (that is, where it does not result in meaningful consultation), the outcome of that process will not be accepted by the courts.

Where the process is reasonable, in the circumstances, it may be dangerous for a First Nation to focus on the absence of information as a reason for not engaging in the process. In *Apsassin*, the Saulteau First Nations failed to make any submissions to the Oil and Gas Commission about the potential impacts of the pending decision on their rights or about

how these impacts could be mitigated. The Saulteau First Nations took the position that the Oil and Gas Commission should withhold its approval of an exploratory well until a cumulative effects study of potential impacts on wildlife was conducted. Cohen J. wrote (at paras. 154-156):

In my opinion, upon an application of this test to the Commission's decision I am satisfied that the Commission was correct in law by granting the Well Authorization.

First, I am mindful that the SFN did not categorically object to the Application. Their objection was based on the ground that the Application should not be granted until the Commission had first undertaken a cumulative effects assessment. However, I am also mindful of the principle that the duty on the Crown to consult and accommodate is informed by the level of interference with the First Nation's treaty rights. In the instant case, the factual context in which the Decision Maker concluded that, notwithstanding the SFN's concerns, the Commission should grant the Application is, as follows:

1. At no time during the consultation process leading up to the Well Authorization did the SFN identify to the Commission any direct or indirect impacts that the activities associated with the Application would or might have upon plants, fish, birds or wildlife.
2. Commission staff reported that there was no concern with the activities associated with the Application from the land and habitat point of view.
3. Commission staff reported that the Commission, through consultation with the SFN, the Ministry of Water Land and Air Protection and the MSRM, was entering into an agreement to produce pilot studies of wildlife and habitat capability in the area, and that site specific conditions would be considered to mitigate some of the cumulative effects.
4. Many of the SFN's concerns expressed throughout the consultation process leading up to the Well Authorization were about the potential effects of large scale oil and gas development on the exercise of their treaty rights. The purpose of the Well is to locate potential hydrocarbons. Thus, activities associated with the development of Vintage's oil and gas holdings in the area if a successful well is drilled will necessarily engage a further approval process with the Commission, including a process of consultation with the SFN.

In my opinion, to accept the petitioner's position on this issue, in light of the above circumstances, would be contrary to the fundamental principles reflected in the authorities. I am satisfied that faced with the evidence available to him, in the absence of any contradictory information from the SFN, the Decision Maker took into account all of the relevant factors: he considered the consultation process; he clearly set his mind to the direct and

indirect environmental, cumulative and socio-economic effects flowing from the Application; he recognized the importance of the ongoing ability of the SFN to undertake and practice their Treaty 8 rights; he recognized that it was vital to protect the SFN's treaty rights through the establishment of a planning process; and, finally, he imposed conditions on the Well Authorization.

In summary, just as there is a duty on the part of the Crown to consult meaningfully, there is a requirement for First Nations to participate in the consultation process in good faith. A First Nation's failure to participate will not be looked upon favourably by the courts. First Nations would be well advised to participate in a consultation process of questionable reasonableness if for no reason other than to identify the shortcomings of the process.

III. The procedural and substantive aspects of consultationⁿ

A recent article on the consultation issue has suggested that the duty to consult is procedural rather than substantive (T. Isaac, T. Knox and S. Bird, "The Crown's Duty to Consult and Accommodate Aboriginal People: The Supreme Court of Canada Decision in *Haida*" (2005), 63 Advocate 671). This conclusion may be based in the Supreme Court of Canada's discussion in *Haida* (at paras. 62-63) that consultation is a process:

The process [of consultation] itself would likely fall to be examined on a standard of reasonableness ... What is required is not perfection, but reasonableness.

...

The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

The fact, however, that consultation entails a process does not mean it is limited to procedure. Despite its discussion of the process of consultation, the Supreme Court of Canada also made it clear in *Haida* (at paras. 41-42) that consultation requires more than just going through the motions:

In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (Delgamuukw, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. ... Mere hard bargaining, however, will not offend an Aboriginal peoples' right to be consulted.

In *Haida*, the court summarized (at para. 25) the source of the duty to consult:

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected.

This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

Further, the court ratified (at paras. 46-48) the government of New Zealand's approach to consultation, which identifies consultation as entailing substantive information exchange and bargaining:

Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Māori* (1997) provides insight (at pp. 21 and 31):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ...

... genuine consultation means a process that involves ...:

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Māori opinion on those proposals
- informing Māori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Māori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

In *Mikisew Cree*, the court suggested a distinction between procedural and substantive consultation. Binnie J., writing for the unanimous court, stated (at para. 57):

As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g.

hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

And (at para. 59):

Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.

Meaningful consultation likely will include both procedural and substantive aspects. For example, the following consultation activities may be considered procedural:

- providing information;
- providing opportunity to be heard; and
- facilitating meetings.

The following activities, on the other hand, are substantive:

- listening to a First Nation's concerns;
- engaging in problem-solving or negotiation;
- modifying plans; and
- addressing concerns through mitigation, accommodation, or compensation.

A meaningful consultation process will therefore contain both procedural and substantial elements. The procedural elements are required to ensure the process is reasonable, and the substantive elements are the steps required to engage in good-faith bargaining.

IV. How consultation and accommodation are linked

Much of the debate in the appeal of the *Haida* decision focused on when the duty to consult arises. The Crown argued that the duty to consult does not arise until an Aboriginal right has been established. In this argument, the Crown relied on the discussion of justification of the infringement of an Aboriginal right in *Sparrow*. The First Nation, on the other hand, argued that the duty to consult finds its origins in the protection of Aboriginal rights pursuant to s. 35 of the *Constitution Act, 1982*, and that if the duty did not arise until a right was formally established, that protection would be hollow.

The test for infringement set out in *Sparrow* requires first determining whether the impugned legislation or action amounts to a *prima facie* infringement of a constitutionally protected right. Determining whether a *prima facie* infringement exists requires examining whether the limitation of the right imposed by the impugned legislation is reasonable, whether it imposes undue hardship, and whether it denies the preferred means of exercising the right.

If, as a result of the above analysis, it is determined that there is a *prima facie* infringement, we must determine whether that infringement is justified. First, is there a valid legislative objective? Conservation of wildlife and resource management have been identified as valid legislative objectives, as their long-term goals are the preservation of the wildlife that supports the right. The next question to ask is whether the manner in which the legislative objective is implemented upholds the honour of the Crown. To answer this question, the following factors might be considered. Does the method allocate the appropriate priority to the Aboriginal or treaty right? Does it result in minimal infringement? In the case of expropriation, is fair compensation available? Was the First Nation consulted with respect to the legislation?

In *Haida*, the Supreme Court of Canada concluded that in order to be able to reconcile prior existing Aboriginal rights with Crown sovereignty, consultation must occur even before those prior existing rights have been established in a court of law. Further, the court recognized (at paras. 47-50) that this consultation may result in a requirement for accommodation:

When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this - seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sionis*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of

reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

The fact that accommodation flows from consultation, where appropriate, was confirmed by the Supreme Court of Canada in *Mikisew Cree*. The court (at paras. 61-66) ratified a number of prior decisions on the content of consultation and how accommodation relates to that duty:

The question is whether the Minister and her staff pursued the permitted purpose of regional transportation needs in accordance with the Crown's duty to consult. The answer turns on the particulars of that duty shaped by the circumstances here. In *Delgamuukw*, the Court considered the duty to consult and accommodate in the context of an infringement of aboriginal title (at para. 168):

In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. [Emphasis added.]

In *Haida Nation*, the Court pursued the kinds of duties that may arise in pre-proof claim situations, and McLachlin C.J. used the concept of a spectrum to frame her analysis ...

The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. ... Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty

lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

...

Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections. We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

What emerges from these decisions is that through the process of consultation, the Crown and the First Nation define the asserted rights and the potential impacts that the proposed decision will have on those rights. If those impacts are unavoidable, the discussion should move on to whether the impacts can be addressed through accommodation, and, if so, what that accommodation should look like.

Hall J. of the British Columbia Court of Appeal speculated in *Musqueam* (at paras. 97-98) what form accommodation could take:

The core of accommodation is the balancing of interests and the reaching of a compromise until such time as claimed rights to property are finally resolved. In relatively undeveloped areas of the province, I should think accommodation might take a multiplicity of forms such as a sharing of mineral or timber resources. One could also envisage employment agreements or land transfers and the like. This is a developing area of the law

and it is too early to be at all categorical about the ambit of appropriate accommodative solutions that have to work not only for First Nations people but for all of the populace having a broad regard to the public interest.

I should think there is a fair probability that some species of economic compensation would be likely found to be appropriate for a claim involving infringement of aboriginal title relating to land of the type of this long-established public golf course located in the built up area of a large metropolis.

The case law has not set out any restrictions on the form that accommodation could take. Given the case-by-case approach to consultation that is dictated by the case law, it stands to reason that accommodation should be approached on a case-by-case basis, as well.

One example of accommodation that has been reached is the agreements between First Nations and the Province known as Forest and Range Agreements. In these agreements, the Province has provided revenue and timber as accommodation of the economic component of the impacts of Ministry of Forests and Range decisions on Aboriginal rights. This accommodation has been set prior to the assessment of the right or the impacts, through an agreement that deviates from the consultation process that is dictated by the case law, where accommodation would logically flow from consultation.

In summary, consultation will, in the appropriate circumstances, lead to accommodation. Accommodation can take a wide variety of forms, including minimization of impacts, alteration of plans to avoid impacts, limitation, tweaking or halting of plans to reduce impacts, or compensating for impacts, through the provision of employment, economic participation, profit-sharing, or other benefits.

V. British Columbia's consultation policy—what works and what does not

A. The policy

In 2002, as a result of the British Columbia Court of Appeal decisions in *Haida* and *Taku River*, British Columbia developed a *Provincial Policy for Consultation with First Nations* (the “Provincial Policy”), to be adhered to by all provincial decision-makers prior to making a decision that has the potential to affect a First Nation right. In addition, a number of ministries have developed their own consultation guidelines, which are generally described as being consistent with the Provincial Policy.

The stated purpose of the Provincial Policy is to

describe the provincial approach to consultation with First Nations on aboriginal rights and/or title that have been asserted but have not been proven through a Court process.

The Provincial Policy, which applies to provincial ministries, agencies, and Crown corporations, requires the decision-maker to assess whether there is a potential that the proposed activity would have an impact on Aboriginal rights. If the answer to that question is yes, the decision-maker is supposed to assess the soundness of the affected First Nation's claimed Aboriginal rights, including title, and then to consult with the First Nation on the basis of the soundness of its claim.

Thus, the Provincial Policy, consistent with current case law, requires that once a First Nation puts forward a reasonable *prima facie* case of Aboriginal title, the Crown is legally

obliged to consult with the First Nation with respect to almost all activities on Crown land.

Under the policy, the consultation process is divided into stages. First, the Crown conducts a pre-consultation assessment to determine whether a particular decision or activity will require consultation. After a pre-consultation assessment has determined that consultation is indeed required, the Crown must:

- Stage 1: initiate consultation;
- Stage 2: consider the impact of the decision on Aboriginal interests;
- Stage 3: consider whether any infringement of Aboriginal interests could be justified in the event that those interests were proven subsequently to be existing Aboriginal rights and/or title; and
- Stage 4: attempt to address and/or reach workable accommodations of Aboriginal interests, or negotiate a resolution.

The Provincial Policy thus sets out in detail the steps that provincial decision-makers must take to fulfill the Province's consultation requirement.

Under Stage 1, the Provincial Policy lists consultation activities, as well as indicators and counter-indicators of the possibility that Aboriginal interests may subsequently be proven to exist.

The consultation activities listed include phone calls, meetings, and exchanges of information, and require decision-makers to select the means most appropriate for gathering the information needed to consider Aboriginal interests in their decision-making process. In addition, decision-makers are required to rely on other sources of reasonably available information. This requirement may relieve the First Nation of repeatedly providing the same information to different ministries or branches of government.

The Provincial Policy states that the presence of one or more of the following indicators will require more in-depth consultation:

- title to the land has been continuously held by the Crown;
- the land is near or adjacent to a reserve or former settlement or village sites;
- the land is in areas of traditional use or archaeological sites;
- notice of an Aboriginal interest/Aboriginal rights and/or title has been received from a First Nation, even where made to another Ministry or agency of the Crown;
- the land is subject to a specific claim; or
- the land includes undeveloped land such as parcels outside an urban area and close to known fishing, hunting, trapping, gathering, or cultural sites.

It should be noted that this list of criteria may be misleading in some circumstances. The tests for the existence of Aboriginal rights and title have been set down by the Courts. It is those legal tests—and not the list of criteria—that govern the likelihood that Aboriginal rights and title will be established.

The Provincial Policy also indicates that a combination of the following counter-indicators may reduce the need for rigorous consultation:

- there is little indication of historical Aboriginal presence in the area;
- the land is presently alienated in fee simple to third parties;
- the land is presently alienated on a long-term lease to third parties;
- the land is developed in a manner that precludes the exercise of the Aboriginal right or the enjoyment of Aboriginal title as a right of present possession;
- the land is within urban areas;
- there is no indication that the First Nation has maintained or continued to assert a substantial connection to the land since 1846;
- the land was abandoned by the First Nation prior to 1846; and
- competing or conflicting Aboriginal title claims exist.

As noted above, some of these criteria appear relevant to the likelihood that Aboriginal rights or title will be established. Others have little or nothing to do with that question. The likelihood of Aboriginal rights and title being established should be assessed in accordance with the established legal tests.

The Integrated Land Management Bureau (formerly LWBC), which operates within the Ministry of Agriculture and Lands, has developed its own procedures for addressing Aboriginal interests. As part of this, it prepares an Aboriginal Interest Consultation Report. This report includes a checklist of considerations. In relation to Aboriginal title, the checklist includes the following as an indicator against a potential for Aboriginal title or Aboriginal rights:

- Land and water source developed in a manner that precludes the exercise of aboriginal rights or the land developed in a manner that precludes the enjoyment of aboriginal title as a right of present possession.

As with the criteria set out in the Provincial Policy, this criterion does not accord with the legal test for establishing Aboriginal title.

Under the Provincial Policy, the decision-maker is to assess the soundness of the First Nation's claim of Aboriginal rights or Aboriginal title, and then determine whether the proposed activity or decision will result in infringement. If it will result in infringement, the decision-maker is to determine whether that infringement can be justified.

If the infringement can be justified, the Crown is to enter into negotiations with the First Nation to reach a resolution that justifies infringement, through accommodation and/or compensation. If no agreement is reached, the policy requires the decision-maker to reassess the project or decision and/or seek legal advice from the Minister of the Attorney General (“AG”).

Although the Province has put effort into developing a policy to address its legal obligations, consultation is not always occurring in the way envisioned under the Provincial Policy.

First, the Province often does not comply with its own policy when consulting with First Nations. In *Huu-Ay-Aht*, the court concluded that the Ministry of Forests had failed to meet the requirements of both the Provincial Policy and its own Ministry consultation policy, and relied on this as a factor in determining that the Province had failed to consult meaningfully. Adherence to the Provincial Policy should be the least a First Nation can expect from the Crown in a process that should be governed by procedural fairness (*Cheslatta Carrier Nation v. B.C.*, 2000 BCCA 539).

Further, with a heightened awareness of their duty to consult and accommodate, some decision-makers and their staff are keeping detailed logs of any contact or communication they have with a First Nation, to be used as a record of the "consultation" they have undertaken. The decision-maker might log a simple phone call to try to arrange a meeting as a consultation attempt. The result is a discrepancy between activities that the decision-maker is identifying as "consultation" and activities that truly are steps toward meaningful consultation.

Although the Provincial Policy is a guide for decision-makers, the decision-makers are required to refer some aspects of consultation to the AG. Decision-makers cannot make a legal determination regarding the existence of Aboriginal rights or Aboriginal title. This issue must be referred to the AG.

Finally, decision-makers have been reluctant to provide First Nations with any feedback regarding which stage of the Provincial Policy the consultation has reached. This makes it increasingly frustrating for First Nations, who are working with limited resources and trying to focus on relevant issues. There is a clear tension between the Province's unwillingness to discuss the status of their internal review of First Nation rights and the oft-repeated legal requirement that consultation be a two-way street.

In summary, the Provincial Policy sets out a process for consultation and guidelines for decision-makers who are consulting. The criteria set out in the Provincial Policy, however, may be resulting in Crown decision-makers approaching the assessment of potential impacts to Aboriginal rights and Aboriginal title from a risk-assessment standpoint, rather than from the standpoint of a genuine approach to understanding the First Nation's asserted rights and shaping decisions in a way that infringe these rights as little as possible.

If the Crown's motivation for participating in consultation is to avoid litigation, rather than to avoid the unnecessary infringement of Aboriginal rights, including Aboriginal title, pending the final resolution of claims, can this consultation be meaningful? If it is, it will be more through good luck than good management.

Each consultation involves different players and issues, and each consultation should be approached as a unique process, bearing in mind the question: "What is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake[?]" (*Haida*, at para. 45).

B. The First Nation perspective

Many First Nation clients have expressed a number of frustrations with the consultation processes they are engaged in. The most frequently voiced frustrations are a lack of capacity and resources and a sense of futility.

The case law developments on the duty to consult have resulted in a dramatic increase in the number of referrals of pending Crown decisions that First Nations receive on a day-to-day

basis. Even First Nations that have an established process for dealing with referrals can become overwhelmed by the sheer volume. Each referral must be reviewed, assessed, and responded to. First Nations are generally asked to do this without the provision of any funding to address this onerous task. In addition, the referrals purport to impose response deadlines that are not always reasonable in the circumstances. Not surprisingly, most First Nations just cannot keep up with the process.

A further concern that a number of our clients have expressed is that no matter what level of response or what amount of information they provide, the Crown continues to approve all applications for land or resource use in their territory. They increasingly feel that they are participating in a process that is hollow and fails to result in meaningful consultation.

Finally, the focus of Crown decision-makers on site-specific information and impacts is frustrating to First Nations that assert Aboriginal title to their territory, and with it a right to the land itself and a right to choose the use to which the land is put. These First Nations view the Crown's decision to grant rights to another entity as a *prima facie* infringement of the Aboriginal title right, regardless of the site-specific impact of a particular activity.

C. The Crown perspective

First Nations are not the only party expressing frustration with the process. Crown decision-makers have expressed frustration at the lack of resources available to them, as a result of government policy decisions, to address First Nation concerns through further information-gathering or studies. Decision-makers are therefore faced with the difficult task of making decisions pursuant to a process that is hampered by a lack of capacity on both sides.

Further, there seems to be a misapprehension of the role that proponents should play in the consultation process. Some Crown decision-makers appear to have attempted to offload the entire consultation process onto the proponent, resulting in confusion, inadequate information, and unnecessary time constraints.

Crown decision-makers generally, however, take the position that they are attempting to provide a forum for consultation, and that First Nations must start taking greater responsibility for participating in the process. Unfortunately, too often they do not appear to have the mandate or authority necessary to ensure that process is meaningful, given all the circumstances.

VI. Conclusion

In order to be meaningful, consultation must be aimed at ensuring the honour of the Crown is engaged in decisions that have the potential to affect Aboriginal rights, including Aboriginal title. It should include the timely provision of information, a reasonable opportunity for First Nations to express their interests and concerns, serious consideration of their representations by the decision-maker, and the demonstrable integration of the First Nation concerns into the decision wherever possible. Where the decision is going to infringe Aboriginal rights, it will be natural for consultation to result in a discussion of and the implementation of accommodation.

While court decisions dealing with consultation tend to present us with the pathology of relationships between First Nations, proponents, and decision-makers with respect to decisions that have the potential to infringe First Nation rights, the case law does suggest that the meaningful process enunciated by the Supreme Court of Canada is often not being implemented.

Perhaps British Columbia's promise of a "New Relationship" will result in the allocation of the resources required to ensure that meaningful processes for consultation can be engaged, in order to ensure that First Nation rights are addressed through a process aimed at reconciliation.