

2009 NStQ Consultation Guidelines

A Guide for Government and Third Parties

2009

On June 3rd, 2009 in Williams Lake, BC, these *2009 NStQ Consultation Guidelines* were endorsed by the Northern Secwepemc te Qelmucw Leadership, by way of a NStQ Leadership Motion, as the guiding policy for which governments, including Indigenous governments and 3rd Parties will engage the NStQ on proposals, issues and activities within the Secwepemcul'ecw. This endorsement was ratified by the NSTC Board of Directors on June 17, 2009.

NStQ Consultation Guidelines

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1.0 PURPOSE

The Northern Secwepemc te Qelmuw Consultation Guidelines (**NStQ Guidelines**) are intended to provide guidance to governments and third parties who are considering activities that may affect the NStQ people, culture, relationship to their ancestral territory and their rights and interests and therefore come to the NStQ asking to consult about the proposals.

The NStQ Consultation Guidelines express the NStQ expectation that governments and third parties will consult the NStQ in a way that recognizes and respects the NStQ people, political institutions, laws and rights. Within the NStQ worldview such recognition and respect are the basis for meaningful consultation.

The Northern Secwepemc te Qelmuw understand that the Crown's decision-making and economic development in British Columbia will affect them in both positive and negative ways, as a result the NStQ insist that they must be actively engaged and full participants in the decisions and processes that drive those decisions that will affect them. The NStQ seek to ensure that their Title, Rights and Interests are respected. In this regard:

The Northern Secwepemc te Qelmuw are deeply concerned about the social, environmental, ecological, cultural and cumulative impact that Crown decision-making and Crown-authorized activity may have on their lands. The Northern Secwepemc te Qelmuw are not necessarily opposed to economic development or other forms of change, but seek to share in its benefits. The NStQ need to ensure that the development of resources and other assets, takes place in a manner that is sensitive to NStQ rights, traditions, values and culture. The Northern Secwepemc te Qelmuw must be involved in the control and

The Constitutional duties of the Crown are clear:

- Aboriginal Title and Rights create the obligation to consult.
- Consultation requires accommodation, and,
- If adequate consultation does not take place, then compensation by the Crown, and, in some cases, resource companies is required.

management of development that affects them, and they demand a share of the social and economic benefits that follow.

This *NStQ Consultation Guideline* is a means to give effect to these goals. It will guide and structure the relationship of the Northern Secwepemc te Qelmucw with governments and third parties in all future dealings. It sets out the minimal approach to such consultations with the Northern Secwepemc te Qelmucw.

The closing sections of this paper describe the legal background of consultation in British Columbia.

Through these guidelines the NStQ will strive to:

1. Protect their cultural heritage and ensure stewardship over the traditional territory and resources within and associated with.
2. Increase a mutual understanding and respect with other levels of government and with third parties operating in the traditional territory.
3. Provide certainty and clarity to other levels of government and to third parties regarding their proposed or ongoing activities in the NStQ traditional territory.
4. Plan to provide economic opportunities for the NStQ in the Secwepemcul'ecw.
5. Develop NStQ capacity in governance, stewardship and resource management in the traditional territory.

Without Prejudice

Crown notices and information provided to the Northern Secwepemc te Qelmucw reviewed pursuant to this Consultation Guideline are reviewed on a without prejudice

When they first came among us there were only Indians here...the people of each tribe supreme in their own territory, and having tribal boundaries known and recognized by all. The country of each tribe was the same as a very large farm or ranch...from which they gathered their food and clothing, etc., fish they got in plenty...grass and vegetation on which...the game lived, and much of which furnished materials for manufactures, etc., stone which furnished pipes, utensils, and tools...trees which furnished firewood, materials for houses and utensils, plants, roots, seeds, nuts and berries which grew abundantly and were gathered in their season...and used for food; minerals, shells...which were used for ornament and for plants...water which was free to all. Thus, fire, water, food, clothing and all the necessaries of life were obtained in abundance from the lands of each tribe, and all the people had equal rights of access to everything they required. You will see the ranch of each tribe was the same as its life, and without it the people could not have lived.

An excerpt from the Memorial to Sir Wilfred Laurier presented by the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia on August 25, 1910 in Kamloops, BC.

basis. Neither the process nor any agreements concluded with the Crown or third parties as a result of the participation of the Northern Secwepemc te Qelmucw in the consultation process can be used to define or in any way limit our Aboriginal rights. Further, the participation of the Northern Secwepemc te Qelmucw in the consultation process is without prejudice to any future position that may be taken in negotiations or litigation or in any other process.

2.0 HISTORY & BACKGROUND

The Northern Secwepemc te Qelmucw (Shuswap People of the North) are comprised of the 4 communities of Tsq'escen', Stswecem'c/Xgat'tem, Xats'ull/Cmetem', T'exelc (Canim Lake Indian Band, Canoe/Dog Creek Indian Band, Soda Creek Indian Band and the Williams Lake Indian Band), and are part of the larger Shuswap Nation (17 bands in total), sharing a traditional territory that extends from the Columbia River Valley in the east to the Fraser River and beyond on the west; the north and south boundaries extend from the Upper Fraser River in the north to the Arrow Lakes in the south; in addition to language and traditions that precede contact with the Europeans (see Figure 2 for a map of the Secwepemcul'ecw). Archeological evidence points to the Secwepemc culture being as old as 10,000 years. Also known as the people from where the water flowed and we have held jurisdiction over and managed large tracts of the Fraser River and the surrounding area, including tributary watersheds, or parts of, such as the Quesnel, Chilcotin, Bowron Lakes and others. Our combined traditional territory spans between 5,300,000 hectares and 5,600,000 hectares and is the territory we call Secwepemcul'ecw¹. The jurisdiction and Secwepemcul'ecw has never been surrendered by the NStQ.

Traditionally we were a semi-nomadic people; then, as today, our lives were based on fishing, hunting and gathering of plants and materials. In addition to

¹ Secwepemcul'ecw: Northern Shuswap Traditional Territory.



FIGURE 1: SECWPEMPC PETROGLYPH

travelling large distances to gather food, we also travelled to satisfy our technological needs. The natural resources provided all that the Secwepemc required to survive and flourish within our traditional territory. We harvested deer, moose, elk, caribou, small mammals and salmon, as well as freshwater fish species. Additionally, we gathered over 135 species of plants for a variety of uses such as food, medicinal and ceremonial purposes. Our ancestors with intimate knowledge of our surroundings based the subsistence economy on balance of the use of the resources available. We made use of food and materials which were in abundance, but also relied on other sources when primary sources failed. We utilized the natural resources that we relied on with the value that family and relationship extends not only to our human family but also to our relationship to the natural world. All living beings are interconnected and valued as equals to humans. It is our value to respect each other as well as our environment. Today, with those unchanged beliefs and values, we maintain the same powerful connection to our Secwepemcul'ecw that our forefathers had.

The Northern Secwepemc te Qelmucw² continue to rely on the Secwepemcul'ecw for survival; harvesting animals and fish via traditional methods as well as using botanical resources such as berries, bark and other, for food, medicinal and ceremonial purposes. Social and economic reasons additionally lend to the purpose of our reliance on the resources from our Secwepemcul'ecw.

We maintain our stewardship over the land through these practices and our integral relationship to the land and traditional territory is to be accounted for and incorporated into any activity being proposed and consulted on with the NStQ. Through the process of consultation we are guiding the management of all resources on the traditional territory of the NStQ.

The Northern Secwepemc te Qelmucw have existing Aboriginal Title and Rights over the lands and resources throughout our Secwepemcul'ecw. These Title and Rights arise from prior occupation and use of lands and resources as distinct societies. Aboriginal Title is a legal interest in the land itself and the resources on that land. The

² Northern Secwepemc te Qelmucw (NStQ): Shuswap People of the North.

Northern Secwepemc te Qelmucw have a right to the exclusive use of NSTQ lands, to determine how the land and resources in our territories are used, and to benefit from our lands and resources in a sustainable manner.



FIGURE 2. SECWPEMCALECW

3.0 CONSULTATION PRINCIPLES

Stewardship and joint management over the land and natural resources are important to the Northern Secwepemc te Qelmuw. Government, Third Parties accountable to Aboriginal people will recognize the territorial base, jurisdiction, and requirement for fiscal support mechanisms such as control over; membership, land, water, forestry, minerals, conservation, environment, economic development, education, health, cultural development and law enforcement. The conduct of governments, including non-NStQ Government³ and/or third parties who consult with the NStQ, realizing that consultation is not limited to the aforementioned areas of jurisdiction, must be informed by the following principles:

A. Recognition of the NStQ People and their Rights

The NStQ people are entitled to recognition of the facts that:

- We were already, like our forefathers, governing ourselves and our territory with our own distinctive political institutions and laws when Europeans began arriving;
- We enjoy special status within Canada's constitutional structure as Aboriginal People; and
- We enjoy special status in international law as Indigenous People.

Those consulting with the NStQ must understand that the special status of Aboriginal Peoples and Indigenous Peoples

Charter and aboriginal rights must be jealously guarded from unjustified interference. This is in keeping with their significance and the primacy given to them by the Constitution.

Alphonse BCCA

³ Other First Nation Governments than the 4 NStQ Communities of Canoe Creek/Dog Creek, Canim Lake, Xats'ull and Williams Lake.

in Canadian Constitutional and International Law respectively is directed not only at recognizing Aboriginal/Indigenous Peoples' prior presence on the land but also at repudiating and remedying the continuing effects of the mistakes of the past. Recognition of the NStQ special status in constitutional and international law involves recognition of the reasons for the status. Thus, those consulting with the NStQ must approach the process as an opportunity to collaborate, undo and overcome the effects of roughly 150 years of discrimination, dispossession and other wrongs.

The NStQ people are also entitled to recognition of their rights, including:

- Pre-existing rights and responsibilities handed down through countless prior generations to the present and which will in turn be passed on to future generations – these rights and responsibilities predate and have been held onto from the time of the first European encounter through European exploration, sovereignty assertions as well as settler and other intrusions to the present day.
- Rights under Canadian law, including their Aboriginal rights as protected by Section 35 of the *Constitution Act, 1982*; and
- Rights under international human rights law.

Many of the aforesaid rights are overlapping. For example, the NStQ pre-existing right and responsibility to act as stewards of the land, water and other natural resources overlaps with the NStQ exclusive right as Aboriginal Title holders to decide how the land shall be used in accordance with our laws, traditions and values; as well as the NStQ fundamental human right to maintain, hold

The Crown, acting honorably, 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. ... 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.

Haida Nation SCC

secure and enjoy our property rights within our ancestral territory and resources without discrimination.

Because the NStQ territory (including the land, water and other natural resources) and the relationship thereto are central to NStQ identity, culture, spiritual and socio-economic well being, recognition of the NStQ property rights, including Aboriginal title to NStQ territory is a prerequisite to proper consultation with the NStQ.

B. Respect

Recognition without respect is hollow. Respect is shown in actions as well as words. So is disrespect. The NStQ require that those with whom they consult, respect NStQ governance and authority in regard to NStQ people and territory. NStQ political institutions and laws are no less legitimate or lower in status than Canadian political institutions and laws and must be treated accordingly. The NStQ also require that those with whom they consult respect NStQ rights and their *legal* significance as ancestral/inherent, constitutional and international human rights.

C. Authority and Freedom of Choice

Those who wish to consult the NStQ about their proposals must recognize and respect the NStQ authority and freedom. In the absence of prior agreement they must recognize and respect the NStQ authority and freedom to set conditions for consultation, refuse to consult or to reject proposals. Because it is NStQ Title, Rights and Interests that are at stake, it is for the NStQ to decide in accordance with their own political institutions and laws, whether and if so, how to deal with government and third party proposals

Recognition and respect for the NStQ authority and freedom to make such decisions imply that neither a NStQ refusal to consult, nor a NStQ rejection of a proposal provides its advocate, whether that advocate be government or third party, with a justification for proceeding with the proposed plan or project.

Recognition and respect for the NStQ authority and freedom to make such decisions also imply that those who consult with the NStQ must consult with the aim of obtaining the NStQ free, prior and informed consent before proceeding with any proposed plan or project.

D. Reconciliation

In the face of ever increasing Crown directed/sanctioned interference over the past 200 or so years, the NStQ people have sought not only recognition and respect for their rightful claims to governance, territory and other basic interests but also the reconciliation of these with the Crown's assertions in regard to the same. Until only recently the Crown ignored or rebuffed, often with ridicule, the NStQ efforts. In 1982, Canada finally committed itself **as a whole** to reciprocating the call of aboriginal peoples for a fair and just reconciliation by means of the constitutional recognition and affirmation of aboriginal and treaty rights. It took almost a decade more before British Columbia began to take its share in the nation's commitment seriously.

The NStQ people have long understood that reconciliation requires sharing and compromise. We have proven ourselves time and again willing to share and compromise for the sake of reconciliation. However, we do not accept a vision of reconciliation that asks the NStQ to share and compromise what remains for us, but ignores what has already been unilaterally taken by others, in disregard and disrespect of our people, our prior presence and our rights. Nor do the NStQ accept a vision of reconciliation not built upon the recognition and respect for our ancestral/inherent, aboriginal and human rights.

The NStQ agree with the Supreme Court of Canada that consultation and accommodation can form a path to reconciliation.

...Some of our Chiefs said, "These people wish to be partners with us in our country. We must, therefore, be the same as brothers to them, and live as one family. We will share equally in everything—half and half—in land, water and timber, etc. What is ours will be theirs, and what is theirs will be ours. We will help each other to be great and good."

An excerpt from the Memorial to Sir Wilfred Laurier presented by the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia on August 25, 1910 in Kamloops, BC.



As a general rule the NStQ are willing to travel this path. But those who wish to consult the NStQ about their proposals must appreciate that they are asking the NStQ people to share and compromise their Title, Rights and Interests, over and above what has already been taken. Those who wish to consult must also appreciate that the NStQ cannot share and compromise everything, endlessly, to the point of breaking faith with our ancestors; thus failing to address the needs of the living and forsaking future generations.

E. Timeliness

The NStQ must be given sufficient notice and time to consult properly. The NStQ have their own political and administrative structures, priorities and capacities. Those who come to the the NStQ to consult about their proposals must recognize and respect this fact. Neither governments nor third parties may assume that their preferred, unilaterally set timelines are sufficient to accommodate the NStQ internal requirements.

F. Information Provision/Exchange

The NStQ are entitled to make fully informed decisions about the proposals presented for consultation. The NStQ must be provided with all the information necessary to make a fully informed decision about the proposal, including the potential positives and advantages as well as the potential negatives and disadvantages. The proposal must also, where applicable include uncertainties, risks and cumulative effects.

The information provided must effectively serve the NStQ in arriving at an accurate and comprehensive assessment of what the proposal means for the people, the land, title, rights and interests and thus achieving an informed basis for deliberation, discussion and negotiation. The information must be provided in a clear, accurate, honest and understandable form. Where clarification is needed, the proposal's advocate(s) will provide it as requested. Where assistance is needed in understanding, assessing and responding to the technical, scientific, legal and other aspects of the proposal, the advocate(s) will, in consultation with the NStQ, provide the resources necessary. Where gaps are identified, the advocate(s) will, in consultation with the NStQ, either commission further studies or provide the

NStQ with the resources necessary to commission or undertake our own study or research.

Information exchange is an essential part of consultation. But it is neither the whole of consultation nor its purpose. It is when the parties have the requisite information in hand that proper consultation takes place: meaningful discussion, the search for mutual understanding and good faith negotiation aimed at reaching agreement and reconciliation. Absent prior agreement to the contrary, the NStQ do not consider the mere exchange of information respectful, meaningful or reasonable consultation.

G. Response/Capacity Funding

Responding to requests for and participating in consultation requires NStQ time, effort and expense. Due to limited resources available to the NStQ; the time, effort and expense is often diverted from other pressing or important matters. Unless otherwise agreed, those who come to the NStQ to consult about their proposals must cover the costs the NStQ incur in our efforts to be responsive.

The NStQ have not just a right, but a responsibility to make fully informed decisions in regard to their communities, territories and resources. The responsibility, like the right, is solely that of the NStQ. The responsibility is neither less serious than nor inferior to the parallel responsibilities of governments or third parties. When engaging in consultation and negotiation with governments and third parties, the NStQ have an associated right and responsibility to make their own fully informed judgments about the proposals and their socio-economic, legal, environmental and other implications.

Making fully informed judgments on our own may require the assistance of outside persons and organizations with the requisite expertise, with the ability to communicate their analyses intelligibly, and in whom the NStQ can place their trust. Unless otherwise agreed, those who come to the NStQ to consult about their proposals must ensure the NStQ



FIGURE 4. MITCHELL RIVER

have the financial and other resources necessary to engage such outside assistance.

H. Proposal Appraisal

Generally speaking, NStQ agreement to a proposal is contingent upon its potential benefits to the NStQ people. By virtue of our rights and responsibilities, the NStQ are most likely to agree to a proposal if its benefits are significant and its negatives non-existent or small. Benefits considered by the NStQ include:

- the enhancement of the NStQ ancestral/inherent, constitutional and international human rights; including rights of self-determination/governance and territory/title and the NStQ ability to exercise and enjoy them fully;
- the improvement of NStQ socio-economic conditions, including health;
- the renewal and strengthening of NStQ language and culture; and
- the restoration of the land, earth, air, water and natural resources and their ability to nourish life and the environment within NStQ territory.

To the extent that a proposal fails to promise such benefits or offsets the benefits with negatives, the NStQ will consider the proposal less acceptable. Negatives include:

- the infringement or violation of the NStQ ancestral/inherent, constitutional, and international human rights, including the diminishment of the NStQ ability to exercise and enjoy them;
- the lack of improvement or further diminishment of NStQ socio-economic conditions including health;
- the direct or indirect attack on or undermining of NStQ language and culture; and
- the further degradation and spoliation of the land, earth, air, water and natural resources within NStQ territory.

Where negatives accompany a proposal, the NStQ expects the advocate(s) to work in good faith, in consultation with the NStQ, to minimize, mitigate and otherwise lessen them. In some cases, the NStQ will consider compensation as a means of lessening them. The NStQ does not consider such compensation the equivalent of economic

benefits or revenue sharing. Economic benefits flow to the NStQ by right of their title and rights. Compensation flows as a remedy for interference, infringement or violation of such rights. For the sake of reconciliation, as a compromise, the NStQ may consider sharing economic benefits or revenue as part of an agreement in regard to a proposal. But compensation for interference, infringement, or violation of rights is a distinct issue for negotiation.

I. Transparency

Those who wish to consult with the NStQ about their proposals must ensure transparency in their own decision making processes, including their stages or steps in decision making, timelines, rules and policies, lines of authority, inter-departmental responsibilities, delegation, etc.

“Compensation flows as a remedy for interference, infringement or violation of rights”

4.0 ELEMENTS AND STEPS OF NSTQ CONSULTATION

Consultation is a dynamic and flexible process. Because the elements and steps of consultation belong to a dynamic and flexible process adaptable to the circumstances, they often overlap and flow into one another. Thus, the following elements and steps of NStQ consultation must not be understood as necessarily perfectly discrete or mutually exclusive in practice.

A. Structuring the Process

The first step of the consultation process is to discuss the process itself. Some proposals require only a simple consultation process. Others require a complex one. In either case, the NStQ are entitled to negotiate the structure of the process to best reflect NStQ political and administrative structures, priorities and capacities. Attempts to unilaterally impose a consultation structure on the NStQ or force an ad hoc and thus non-transparent approach on the NStQ is unreasonable, unfair and unacceptable.

Those attempts are also contrary to the principles of recognition and respect for the NStQ people, our rights and reconciliations.

“Consultation is a dynamic and flexible process”

B. Notice and Response to Notice

Consultation is a two-way or reciprocal process. Thus, consultation with the NStQ does not begin with the mere giving or receiving of notice. It begins when the NStQ respond, indicating whether and if so, how they wish to consult. The NStQ are entitled to a reasonable period of time to respond, taking into account the complexity of the response required, the NStQ political and administrative structures, capacities and other factors.

Unless otherwise agreed, notice shall be provided in writing and communicated directly to each potentially affected NStQ member community.

C. Information Provision/Exchange

Those consulting with the NStQ must provide information in a timely manner. It must be sufficient to enable the NStQ to make fully informed decisions in regard to the proposals. The information should include, among other things,

- the nature and scope of the proposed activity,
- the location, if any, of the proposed activity,
- the proponent(s),
- the governmental/third party decision maker(s), his/her authority, those who will assist in the decision making, and contact information,
- those who will undertake the activity,
- the collateral or related processes or approvals,
- the governmental/third party timelines, including deadlines and filing dates,
- the relevant documents, including applications, studies, and assessments,
- an explanation for why the proposed activity is deemed necessary or important, and
- a statement of how the proposed activity is anticipated to be of benefit and/or detriment to the NStQ people, rights and interests as well as the basis for the statement, including any assessments of NStQ rights.

A **proposed activity** may include, for example, a proposed law, rule, policy, strategic level plan, operational plan or project as well as an activity in the usual sense.

In response to mere notice, the NStQ are entitled to respond indicating our interest or lack thereof in consulting. In response to the provision of information regarding the proposal, the NStQ are entitled to identify and have addressed any gaps or deficiencies that detract from our ability to make fully informed decisions about the proposal. With the requisite information in hand, the NStQ are entitled to properly analyze, assess and deliberate the proposal and formulate and express views, including our views on the proposal's anticipated benefits and/or harms to the NStQ people, rights and interests and its acceptability or unacceptability as proposed.

D. Discussion and Negotiation

Where the NStQ finds an initial proposal unacceptable or objectionable we are, willing, in most cases for the sake of reconciliation, to work cooperatively to find common ground, resolve differences, discuss changes and negotiate an agreement that embodies recognition, respect, reconciliation and other core NStQ principles.

In some, usually more complex or difficult cases, the NStQ are, for the sake of reconciliation, willing to employ and may even request employing dispute resolution procedures like mediation. Those consulting with the NStQ are expected to recognize that the use of such procedures is sometimes appropriate and when appropriate, to reciprocate the NStQ willingness to avail themselves of them.

E. Agreement

The successful negotiation of a fair, respectful and mutually acceptable agreement is the capstone of consultation. It confirms the NStQ ancestral/inherent, constitutional and international human rights. It gives legitimacy to the proposed activity in light of these rights. By so doing, it genuinely advances the cause of reconciliation of aboriginal and non-aboriginal peoples within NStQ territory, British Columbia and Canada.

Note for 3rd Parties:

The foregoing sections; including NStQ Core Consultation Principles and the Elements and Steps of Consultation apply to 3rd parties as well as non-NStQ governments. For instance, third parties who wish to consult the NStQ must give effect to the core principles of recognition and respect for the NStQ people and rights, including our rights of governance over ourselves, the resources and property in our territory.

The principle of reconciliation calls for the repair of old and building of new relationships. The proposals which 3rd parties are to consult the NStQ on may or may not require Crown or other non-NStQ government authorization. In either case, the 3rd party not the Crown must take responsibility for its relationship with the NStQ, whether repairing an old or building a new relationship.

As a matter of both Canadian Constitutional and International Human Rights Law, the NStQ authority to govern ourselves and our territory exists prior to and distinct from the Crown's authority. Thus 3rd parties must consult with the NStQ in a way that recognizes and respects the NStQ prior and distinct authority and embodies a serious commitment to negotiating and obtaining NStQ agreement and authorization before going ahead with their plans.

5.0 INTERNATIONAL AND CANADIAN LAW

The Rights of Indigenous Peoples in International Law

Canada's international human rights obligations are articulated mainly in reference to the United Nations and Inter-American Human Rights systems. Both systems have given rise or are in the process of giving rise to declarations on the rights of indigenous peoples. On September 13, 2007, the United Nations General Assembly voted to adopt the *United Nations Declaration on the Rights of Indigenous Peoples*. Canada was one of four countries to vote against its adoption. A parallel *American Declaration on the Rights of Indigenous Peoples* is still in the drafting stages.

Aside from the issues of whether the *UN Declaration* is and whether the finalized *American Declaration* will be binding on Canada, both Declarations express norms of customary international law that are binding on all countries. Both Declarations also express emerging customary international law that will become similarly binding.

The most developed articulation of the rights of indigenous peoples and corresponding state obligations in contexts applicable to Canada have taken place within the Inter-American Human Rights system. Canada is a member of the Organization of American States (**OAS**) and is thereby bound by the *American Declaration of the Rights and Duties of Man*. The *American Declaration* constitutes a source of international legal obligation for all member states of the Organization of American States, including Canada. The Inter-American Commission on Human Rights is empowered to receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the *American Declaration* in relation to OAS member states. The Commission has considered a number of petitions claiming human rights violations by Canada since it joined the OAS in 1990.

In cases involving indigenous peoples, the Commission interprets and applies the *American Declaration* in light of customary international law, including customary international law on the rights of indigenous peoples. As the Commission fully explained in the Western Shoshone (*Dann v. United States*) case:

124. ... in addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands. ...
125. In particular, a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples. Central to these norms and principles is recognition that ensuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. In most instances, this has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.
126. For its part, the Commission has since its establishment in 1959 recognized and promoted respect for the rights of indigenous peoples of this Hemisphere. In the Commission's 1972 resolution on the problem of "Special Protection for Indigenous Populations: Action to combat racism and racial discrimination," the Commission proclaimed that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states." This notion of special protection has since been considered in numerous country and individual reports adopted by the Commission and, as will be discussed further below, has been recognized and applied in the context of numerous rights and freedoms under both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, including the right to life, the right to humane treatment, the right to judicial protection and to a fair trial, and the right to property.
127. In acknowledging and giving effect to particular protections in the context of human rights of indigenous populations, the Commission has proceeded in tandem with developments in international human rights law more broadly. Special measures for securing indigenous human rights have been recognized and applied in other international and domestic spheres, including most predominantly the Inter-American Court of Human Rights, the International Labor Organization, the United Nations through its Human Rights Committee and Committee to Eradicate All Forms of Discrimination, and the domestic legal systems of many states.

128. Perhaps most fundamentally, the Commission and other international authorities have recognized the collective aspect of indigenous rights, in the sense of rights that are realized in part or in whole through their guarantee to groups or organizations of people. And this recognition has extended to acknowledgement of a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used, the preservation of which is fundamental to the effective realization of the human rights of indigenous peoples more generally and therefore warrants special measures of protection. The Commission has observed, for example, that continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples and that control over the land refers both its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group. The Inter-American Court of Human Rights has similarly recognized that for indigenous communities the relation with the land is not merely a question of possession and production but has a material and spiritual element that must be fully enjoyed to preserve their cultural legacy and pass it on to future generations.

129. The development of these principles in the Inter-American system has culminated in the drafting of Article XVIII of the Draft American Declaration on the Rights of Indigenous Peoples, which provides for the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources. While this provision, like the remainder of the Draft Declaration, has not yet been approved by the OAS General Assembly and therefore does not in itself have the effect of a final Declaration, the Commission considers that the basic principles reflected in many of the provisions of the Declaration, including aspects of Article XVIII, reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.

The following are just some of the norms and principles governing the human rights of indigenous peoples and the corresponding obligations of OAS member states, including Canada, as determined by the Inter-American Commission in its interpretation and application of the *American Declaration*:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property (*Dann v. United States*; *Maya Indigenous Communities v. Belize*);

- the right of indigenous peoples to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied (*Dann v. United States; Maya Indigenous Communities v. Belize*);
- where their property and user rights arise from rights existing prior to the creation of a state, the right of indigenous peoples to the recognition of their permanent and inalienable title and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost (*Dann v. United States*);
- the right of indigenous peoples to have protected and exercise their right to property fully and equally with other members of society (*Maya Indigenous Communities v. Belize*);
- the right of indigenous peoples to use and enjoy property implies that neither the state itself nor third parties acting with the acquiescence or tolerance of the state, may act so as to affect the existence, value, use or enjoyment of that property without due consideration of and informed consultations with those having rights in the property (*Maya Indigenous Communities v. Belize*);
- the right of indigenous peoples to use and enjoy property implies that prior to making decisions that impact upon indigenous lands and their communities, such as granting permits to exploit the natural resources of indigenous territories, the state must obtain the fully informed consent of the indigenous community (*Maya Indigenous Communities v. Belize*); and
- the failure to respect the communal right of indigenous peoples to property in the their lands that they have traditionally used and occupied may be exacerbated by environmental damage occasioned by the state or state authorized resource exploitation in respect of those lands, which in turn affects the members of indigenous communities (*Maya Indigenous Communities v. Belize*).

The Rights of Aboriginal Peoples in Canadian Law

Canada's domestic human rights obligations are articulated by the Canadian Constitution Act, 1982. Those rights have been reaffirmed in case law by numerous actions against the Canadian Governments.

The Aboriginal rights of Aboriginal peoples are constitutionally protected rights. Section 35(1) of the *Constitution Act, 1982* says:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The NStQ Consultation Guidelines are informed by Canadian aboriginal rights jurisprudence. The following selected excerpts from Canadian judgments concerning the aboriginal rights are particularly relevant:

- Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came the Indians were there organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means.... What they are asserting in this action is that they had right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.
Calder SCC
- Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation.... At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown.... With this assertion arose an obligation to treat aboriginal peoples fairly and honorably, and to protect them from exploitation, a duty characterized as "fiduciary"....

Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights,

unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them.... Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada....

Mitchell SCC

- And there can be no doubt that over the years the rights of the Indians were often honored in the breach (for one instance in a recent case in this Court.... As MacDonald J. stated in *Pasco v. Canadian National Railway*...: "We cannot recount with much pride the treatment accorded to the native people of this country."

For many years, the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's, *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. ... It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government.

...As recently as *Guerin v. The Queen*..., the federal government argued in this Court that any federal obligation was of a political character.

It is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible.... Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. ...

Sparrow SCC

- It is Canadian society at large which bears the historical burden of the current situation of native peoples....

Peguis Indian Band SCC

- Charter and aboriginal rights must be jealously guarded from unjustified interference. This is in keeping with their significance and the primacy given to them by the Constitution.

Alphonse BCCA

- 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.

Haida Nation SCC

- Section 35 of the Constitution Act, 1982 seeks to provide a constitutional framework for the protection of the distinctive cultures of aboriginal peoples, so that their prior occupation of North America can be recognized and reconciled with the sovereignty of the Crown.... In an oft-quoted passage, Lamer C.J. acknowledged in *Van der Peet*, at para. 30, that, "the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries"....

Sappier/Gray SCC

- Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims.... Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfill its promises".... This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.

Haida Nation SCC

- ... aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867.

Campbell BCSC

- He [Mr. Alphonse] had an aboriginal interest in the carcass based on the communal right which he exercised when he killed the deer, and based on the aboriginal rights of self-government and self-regulation of the Shuswap people to deal with the carcass in accordance with the customs, traditions and practices of the Shuswap people which formed and continue to form an integral part of their distinctive culture.

Alphonse BCCA

- ... aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal

title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

... The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future.

Delgamuukw SCC

- First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.

Delgamuukw SCC

- Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties.

Delgamuukw SCC

- It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. ... It [i.e. the inalienability of aboriginal title] is also, again only in part, a function of a general policy "to ensure that Indians are not dispossessed of their entitlements"....

Delgamuukw SCC

- A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.

Delgamuukw SCC

- The right to aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is ... constitutionally guaranteed by Section 35.

Campbell BCSC

- Before this Court, the Crown submitted that "[l]arge permanent dwellings, constructed from multi-dimensional wood, obtained by modern methods of forest extraction and milling of lumber, cannot resonate as a Maliseet aboriginal right, or as a proper application of the logical evolution principle", because they are not grounded in traditional Maliseet culture.... I find this submission to be contrary to the established jurisprudence of this Court, which has consistently held that ancestral rights may find modern form.... In *Sparrow*, Dickson C.J. explained that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" (p. 1093). Citing Professor Slattery, he stated that "the word 'existing' suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'.... In *Mitchell*, McLachlin C.J. drew a distinction between the particular aboriginal right, which is established at the moment of contact, and its expression, which evolves over time (para. 13). L'Heureux-Dubé J. in dissent in *Van der Peet* emphasized that "aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live" (para. 172). If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless. Surely the Crown cannot be suggesting that the respondents, all of whom live on a reserve, would be limited to building wigwams. If such were the case, the doctrine of aboriginal rights would truly be limited to recognizing and affirming a narrow subset of "anthropological curiosities", and our notion of aboriginality would be reduced to a small number of outdated stereotypes. The cultures of the aboriginal peoples who occupied the lands now forming Canada prior to the arrival of the Europeans, and who did so while living in organized societies with their own distinctive ways of life, cannot be reduced to wigwams, baskets and canoes.

Sappier/Gray SCC

- Drivers of economic value are different today than they were in the past. A "frozen rights" theory has been rejected by the courts as incompatible with the purpose of s. 35(1).... Aboriginal rights are capable of growth and evolution: "s. 35(1) is a solemn commitment that must be given meaningful content"....

Mitchell SCC

- The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.

Mikisew SCC

- Since the purpose of s. 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s. 35(1) must recognize and affirm both aspects of that prior presence - first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land.

Delgamuukw SCC

- The Crown, acting honorably, 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. ... 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.

Haida Nation SCC

- The claims of the aboriginal peoples [to natural resources] must be taken seriously. Consultation is necessary.

Alphonse BCCA

- ... it is important to keep sight of the reason for the existence of the duty to consult. The Crown is honour-bound to consult and attempt reconciliation with aboriginal peoples when it makes decisions potentially affecting their unproven rights with respect to the occupation and use of land, because otherwise those rights may be devoid of content by the time they are recognized by courts or through treaty.

Ke-Kin-Is-Uqs BCSC

- Thus, the court's [i.e. the Supreme Court of Canada's] approach to the Crown's s. 35 obligations is informed by the unique nature of the constitutional rights that this provision is designed to protect. As Lamer C.J.C. explained in *Vanderpeet*, s. 35 rights are different from Charter rights as they are held solely by aboriginal members of Canadian society. They arise from the existence of distinctive aboriginal communities that occupied the land for centuries before the arrival of Europeans (paras. 19 and 33). Aboriginal rights arise not only from the prior occupation of land, but also from the prior social organization and distinctive cultures of aboriginal peoples who occupied that land (para. 74). The process of consultation and accommodation is directed toward the ultimate goal of reconciliation of those aboriginal rights with Crown sovereignty. In that process, the honour of the Crown requires it to recognize and acknowledge the distinctive features of aboriginal societies, since it is those features that must be reconciled with Crown sovereignty (para. 57).

Wii'litswx BCSC

- Since it is the Province that (by necessity) divides its mandate among Ministries and agencies, it is incumbent on the Province to do its best to ensure that the mandate of the specific Ministry or agency with which a First Nation is interacting is made clear, and to ensure that responsibility for consultation and accommodation is not lost in the complexity of (sometimes shifting) governmental structures. The Crown's duty is to carry on a process that is as transparent as possible.

Ke-Kin-Is-Uqs BCSC

6.0 APPENDICES

Appendix A

The following are addresses for facsimile and mail delivery of notice and correspondence to the Northern Secwepemc te Qelmucw Communities. The NSTC has been added for information purposes only.

T'exelc
Chief and Council
Attn: Referrals
2672 Indian Drive
Williams Lake, BC V2G 5K9

Stswecem'c/Xgat'tem
Chief and Council
Attn: Referrals
General Delivery
Dog Creek, BC V0K 1J0

Tsq'escen'
Chief and Council
Attn: Referrals
Box 1030
100 Mile House, BC V0K 2E0

Xats'ull/Cmetem'
Chief and Council
Attn: Referrals
3405 Mountain House Road
Williams Lake, BC V2G 5L5

Northern Shuswap Tribal Council
Attn: Referrals
17 S. 1st Avenue
Williams Lake, BC
V2G 1H4

Appendix B

References

Land of the Shuswap

George Manual Institute. <http://www.landoftheshuswap.com> (2004)

Northern Shuswap Tribal Council/Treaty Society

<http://www.nstq.org/> (2006)

United Nations Declaration on the Rights of Indigenous Peoples

UNPFII. <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (Sept. 13, 2007)

Draft American Declaration on the Rights of Indigenous Peoples

Organization of American States. <http://www.oas.org>. (2008)

Constitution Act, 1982

Department of Justice Canada. <http://laws.justice.gc.ca/en>. (2009)

Indian and Northern Affairs Canada

INAC. <http://nwt-tno.inac-ainc.gc.ca/CONS/cons-00-eng.asp> (2009-04-26)