

**Practical Meaningful Consultation
In
Canada**

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CAID

Practical Meaningful Consultation in Canada

Preamble:

Practical Meaningful Consultation in Canada was written to provide a practical bullet-form understanding on how rights are reconciled through meaningful consultation. KEEP IN MIND, this paper is an adapting teaching resource. The background and general model for the Meaningful Consultation process can be found in *Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation* (2009)¹. Other papers written in this series include *Working Papers on Meaningful Aboriginal Consultation: Overview* (2009)² and *Working Papers on Meaningful Aboriginal Consultation in Canada: Step 1 - Nation Consultation*.³

This practical brief was not prepared through legal council. Should you wish to use this brief, or any part of it, in support of the right to consultation guaranteed by Section 35 of the *Constitution Act*, seek legal advice. We do not accept civil or criminal responsibility for individual, group, or corporate use of information contained within this document.

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Practical Meaningful Consultation in Canada
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¹ (2009) Herbert, R. G., *Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation*.
<http://caid.ca/MeaCon092409.pdf>.

² (2009) Herbert, R. G., *Working Papers on Meaningful Aboriginal Consultation: Overview*.
<http://caid.ca/MeaConOve101609.pdf>

³ (2010) Herbert, R. G., *Working Papers on Meaningful Consultation in Canada Step One - Nation Consultation*.
<http://caid.ca/MeaConOne102309.pdf>

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About Consultation:

- Section 35 of the *Constitution Act* (1982) recognizes the Aboriginal right to consultation for Indian [First Nation], Inuit and Métis peoples in Canada.
- Court cases [common law] have given definition to the right to consultation.
- Consultation is defined as meaningful if it has both a consultation and an accommodation component.
- The Crown [provincial, territorial or federal government] has a duty to consult that arises from its fiduciary [big brother] responsibility and the honour of the Crown.
- The goal of meaningful consultation is the reconciliation of pre-existing Aboriginal societies [rights] to the [rights of the] Crown.
- These pre-existing [existed before colonization] Aboriginal rights are already recognized and affirmed in Section 35 of the *Constitution Act* before meaningful consultation occurs.
- Meaningful consultation is NOT a negotiation on rights.
- Aboriginal rights in Canada do not need to be negotiated.
- Aboriginal rights need to be declared with enough detail so they can be reconciled to rights of the Crown.

What do Rights Look Like?

- We can't see rights but we can see what allows for their expression and protection.
- Rights are defined in laws and protected by regulations.
- Rights are given expression through services and roles that create programs.
- Laws, regulations, services and roles that express and protect a right are the infrastructure for that right.
- All rights need their own framework of infrastructure to create programs for their expression (See Diagram 1).
- For practical purposes, rights are their law-regulations-services-roles infrastructure framework.

How do we Reconcile Rights?

- Reconcile in this situation means, “to make consistent or congruous,” [harmonized or equal].⁴
- Rights are expressed through their framework of infrastructure (laws, regulations, services and roles).

⁴ Mirriam-Webster dictionary.

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- Reconciling pre-existing Aboriginal rights to the rights of the Crown means equally recognizing and accommodating Aboriginal and non-Aboriginal rights into the same framework of infrastructure.
- In practical terms, we need to reconcile laws to laws, regulations to regulations, services to services and roles to roles from the Aboriginal and non-Aboriginal infrastructure framework for the right under consultation (See Diagram 2).
- A framework of infrastructure that includes and respects both the Aboriginal and non-Aboriginal right is reconciled.

Where do we Start?

- A right can be recognized but without infrastructure it can not be consulted or accommodated.
- Most traditional Aboriginal infrastructures were destroyed or prevented from developing by assimilation and residential schooling.
- So, we must start by defining traditional infrastructures for Aboriginal rights.
- Defined traditional infrastructure for a right must be written down so the right can be meaningfully consulted.
- These written traditional infrastructures are temporal interpretations and subject to adaptation, as needed, by oral tradition [law].
- Remember, if you don't write it down, it can not be accommodated. And if you write it down, the Crown must consider it in the meaningful consultation process.
- However, giving too much detail from the temporal interpretation into the meaningful consultation process may actually limit the final expression of the right under consultation.
- Don't try to do it all at once. There is more than one level to rights and there is meaningful consultation for each of these levels.

What Process do we Use?

- At the moment, the Crown holds all the strings for needed resources during consultation.
- So, without abandoning any traditional law for consultation, we have to fit cultural processes to work through the Crown's understanding of meaningful consultation.
- Common law in Canada divided meaningful consultation into two components:
 1. Consultation; and,
 2. Accommodation.
- These two steps are not enough for the meaningful consultation of pre-existing Aboriginal rights in Canada.

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- The problem is two-fold:
 1. The policy of forced assimilation all but destroyed Aboriginal infrastructure frameworks confounding consultation; and,
 2. Embedded Forced Assimilation Barriers⁵ (EFABs) are present throughout the non-Aboriginal [Crown] framework of infrastructure preventing the incorporation [accommodation] of Aboriginal rights into that framework.

- To overcome the problem we make room for traditional law by splitting consultation and accommodation each into two parts. The four components of meaningful consultation are:
 1. Nation Consultation;
 2. Nation-to-Nation Consultation;
 3. Harmonization; and,
 4. Restoration.

- The overall result from the four-step meaningful consultation process is the ability to create reconciled Canadian infrastructure that equally recognizes and accommodates both non-Aboriginal and Aboriginal rights.

What is Nation Consultation?

- This first step is the foundation in all meaningful consultation on Aboriginal rights.
- The need for a Nation Consultation step is a direct consequence of the destruction of culture-based Aboriginal infrastructures by forced assimilation and residential schooling.
- It is an internal consultation whose goals are:
 1. To define the cultural process for Nation Consultation; and,
 2. To define the traditional framework of infrastructure (law, regulations, services and roles) for an Aboriginal right under consultation.

What is Nation-to-Nation Consultation?

- This second meaningful consultation step is an external consultation between the Aboriginal nation and the Crown.
- The overall goal of Nation-to-Nation Consultation is to produce lists that can be used to accommodate the Aboriginal Nation, and right, under consultation.

⁵ Canada's policy of assimilation is still continued through the functioning of EFABs. EFABs are active policies, laws, regulations and services that were created within the policy framework of forced Aboriginal assimilation to do the work of assimilation. EFABs have not been identified and removed from the non-Aboriginal infrastructure framework of Canada.

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- These lists are created by reconciling the various components of Aboriginal and non-Aboriginal infrastructure for the right under consultation (i.e. laws to laws, *etc.*).

What is Harmonization?

- The third step in meaningful consultation.
- The need for a harmonization step is a direct consequence of the Crown building its framework of infrastructure for rights WITHOUT including Aboriginal rights.
- Any, and all, legislation, regulation, services or roles in non-Aboriginal infrastructure that prevent the expression of Aboriginal laws, regulations, services and roles found on the lists in the Nation-to-Nation step are identified and removed.

What is Restoration?

- This final step in meaningful consultation provides for the practical “on-the-ground” accommodation of the Aboriginal right under consultation.
- Places the Aboriginal right into non-Aboriginal legislation and regulations while creating Aboriginal components in services and roles.

Why is a Meaningful Consultation Process so Important?

- The meaningful consultation is the only process available to create a Canada in which Aboriginal and non-Aboriginal rights are equal and harmonized.
- If the process is done well, it will also provide cultural blueprints for rebuilding cultural infrastructures that were destroyed, or prevented from developing, by Canada’s policy of forced assimilation.
- If the process is done well, it will also provide a means to self-determination.
- The process is important because Aboriginal infrastructures built on accommodated rights need to be created for education, health, commerce, and etc., not just for natural resource management.
- The process is important because rights still being functionally denied to Aboriginal people in Canada will finally be restored.

What about Specific Consultations with Companies?

- Consultations with companies in Canada are not meaningful consultation.
- Consultations with companies in Canada do not take the place of meaningful consultation with the Crown.
- These consultations are simply contract negotiations for Impact and Benefit Agreements.

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- These contract negotiations are completely controlled by the Crown's laws, regulations, organizations and programs UNLESS there has already been meaningful consultation on the affected right by the Crown.
- The Aboriginal right affected by the company's activity only triggers the need for negotiation to compensate for infringement on the identified right.
- Negotiated agreements [example: impact and benefit agreements, IBAs] need a clause(s) to protect the affected Aboriginal group if there has been no meaningful consultation done by the Crown.
- If meaningful consultation has occurred on the right affected by the project, then all results from the meaningful consultation come into play to form a baseline for negotiations.
- Affected Aboriginal nations forced to negotiate contracts with companies without prior meaningful consultation by the Crown, literally become downgraded from a Sovereign Nation to the level of a corporation.

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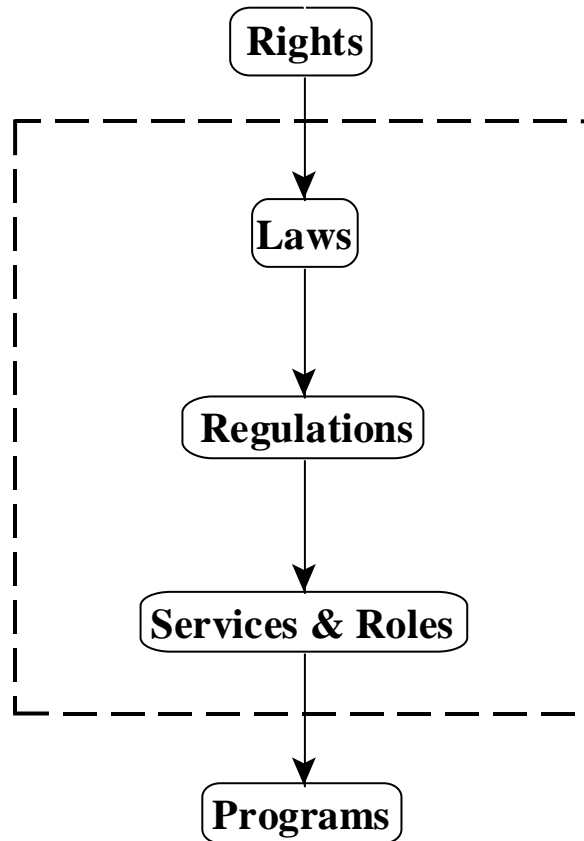


Diagram 1: The framework of infrastructure. The boxed area represents the infrastructure a nation needs to express rights as functioning programs. © Reserved March 2006 CAID

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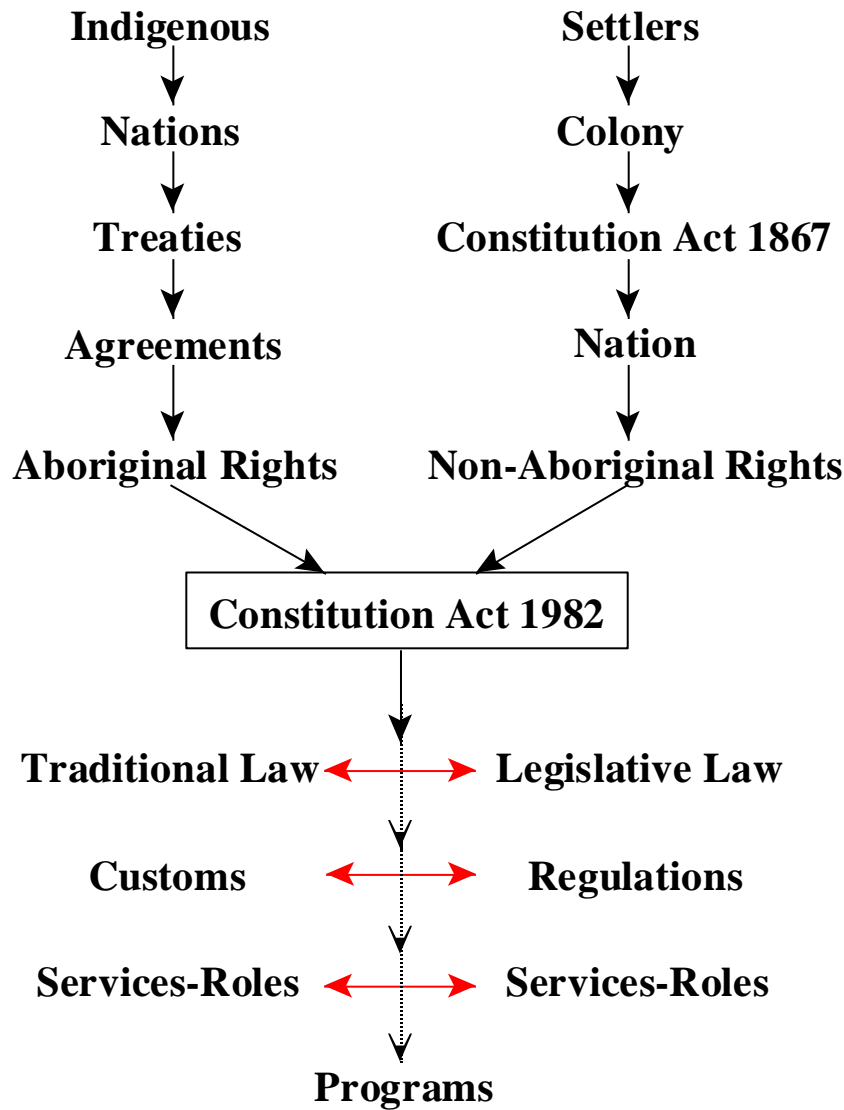


Diagram 2: Current Infrastructure with EFABs removed. The status of Canada's national infrastructure reconciliation with aboriginal rights becomes clear when EFABs are removed. Canada needs to reconcile laws, regulations and services-roles. © Reserved CAID May 2009.