THE CROWN'S DUTY TO CONSULT WITH FIRST NATIONS

by

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ABSTRACT

The Crown has fiduciary obligations to First Nations and must act in consequence. One of this consequence is that the Crown has a duty to consult with aboriginal peoples when it infringes aboriginal or treaty right. The thesis deals with the principles related to the Crown’s duty to consult with First Nations. I elaborate on principles established by the courts and also on questions that remain unanswered to date. Those questions include when, how and with whom the consultation should be done. I also examine the situation in New Zealand, where the consultation process is a little more advanced than here in Canada and compare the principles elaborated by New Zealand courts with those existing in Canada. From the New Zealand experience, I suggest consultation guidelines to be used in Canada by the Crown and its representatives.
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INTRODUCTION

The Crown’s duty to consult with aboriginal peoples\(^1\) has recently been in the spotlight in Canada and has been the subject of much discussion and litigation. To many aboriginal peoples, such duty means the Crown should consult them every time it intends to do something affecting their rights. It also means for some of them that in most cases, the Crown should obtain their consent before going on with a project.

On the other hand, the Crown argues that the constitutional duty to consult is limited to cases in which an infringement of an aboriginal or treaty right has been proven. In general, the Crown interprets its duty to consult as much less than that which the aboriginal peoples assert, especially in areas such as the scope and the contents of the duty, the funding of the process, etc.

Even though the courts have elaborated many principles to be followed in the consultation process, many questions about the Crown’s obligation to consult with aboriginal peoples remain unanswered. The purpose of the thesis is to clarify what is the duty to consult, when and how it applies and what are the obligations of each party. Since it is still a fairly new area of law, there are very few articles or books that deal with this matter. Mostly, my thesis will be an analysis of the jurisprudence in Canada and New Zealand related to the Crown’s duty to consult with aboriginal peoples.

\(^1\) I use the terms “aboriginal peoples” and “First Nations” synonymously throughout this thesis.
In the first chapter, I examine what kind of relationship exists between the Crown and First Nations. The Crown has fiduciary obligations to First Nations and must act in consequence. I explain the origins of the obligation to consult, demonstrating that the constitutional obligation to consult comes from the Sparrow justificatory test. However, there are also a duty to consult that can arise from the legislative, as a principle of natural justice and from the B.C. Consultation Guidelines.

I define what consultation means exactly, explain the differences between consultation and negotiation, and suggest some forms of consultation by which the Crown could fulfil its duty in various situations. I examine why consultation is so important in the relationships between the Crown and First Nations. The courts have often encouraged the Crown and First Nations to discuss solutions with each other rather than resorting to judicial system. Consultation is definitely a means to avoid having to go to courts.

I examine when the consultation is required, what is the scope of the consultation requirement and how the consultation should occur. I define what constitutes a "meaningful" consultation and address one of the most important principles established by the courts which is that the obligation of consultation is a two-way process. I also address the question of who needs to conduct the consultation process. Could the consultation be done by third parties or is it only the Crown that can fulfil this obligation? On the other hand, who should be consulted? I look at what groups the Crown needs to consult in different situations, including who inside a particular group has the authority to represent it and make important decisions. I finally address the question of who should
pay for consultation. Are First Nations entitled to some kind of financial help and if so, from whom?

In Chapter 2, I look at the situation in New Zealand relating to the Crown’s duty to consult with the Maori. I explain what is the Treaty of Waitangi, its history, its principles and its consequences for the New Zealand Crown and the Maori. One of the most important principles of the Treaty of Waitangi is the New Zealand Crown’s duty to consult with the Maori.

The passing of the Treaty of Waitangi Act\(^2\) in 1975 has created the Waitangi Tribunal. I explain generally how the Tribunal works and its purposes. More particularly, I look at what the Tribunal has said in relation to the duty to consult with the Maori. I discuss what triggers the duty to consult, when should the consultation occur, how the consultation process should work, who should be consulted, who has to pay for consultation and finally the fact that consultation is a two-way process.

I also examine what the other New Zealand courts have said about the duty to consult. More particularly, I look at an important decision of the New Zealand Court of Appeal rendered at the end of the 1980’s.\(^3\) The decision made various rulings related to the Treaty of Waitangi principles, including the duty to consult.

\(^2\) 1975 No 114.
The adoption of the *Resource Management Act* in 1994 has also given new tools to the Maori to require consultation with the Crown on environmental issues. I discuss about the different aspects of consultation as elaborated by the New Zealand Environmental Court. More particularly, I look at what is consultation, the fact that consultation is a two-way process, when should the consultation occur, who should consult, who should be consulted, who should pay for consultation and, finally, how the Crown, corporations and the Maori can achieve certainty.

I then compare the situation in New Zealand with the situation in Canada and use that comparison to propose new solutions in various pending issues related to consultation. These questions include funding, the question of whom should be responsible for the consultation process and the existence of an aboriginal administrative tribunal.

Finally, I use what I have learned from the New Zealand’s experience to suggest consultation guidelines. Those guidelines could be used by the Canadian Crown and its representatives in order to improve their relationship with aboriginal peoples. The guidelines should be particularly useful for those who need to consult First Nations on different matters.
A. THE CONSTITUTION ACT, 1982

The Constitution Act, 1982 brought about many changes to the Canadian legal system. Besides the patriation of the amending powers to Canada and the adoption of the Canadian Charter of Rights and Freedoms, s. 35 of the Constitution Act, 1982 recognized and affirmed the rights of aboriginal peoples.

Serious discussion on constitutional reform began at the end of the 1970s. At the beginning, it was only question of the patriation of the amending powers to Canada, the insertion of a bill of rights and some provisions relating on English and French. Aboriginal issues were not originally at issue in those discussions.

But Indian, Metis and Inuit leaders used this constitutional debate to seek the insertion into the new constitution of a section to protect their unique rights. At first, Canada refused to recognise any treaty or aboriginal rights. But in 1981, Canada agreed to constitutional recognition and affirmation of aboriginal and treaty rights.
After many political discussions and debates, it was agreed to insert s. 35 in the constitutional package to protect aboriginal and treaty rights. It reads as follows:

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

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The meaning of s. 35 is not immediately clear. At the beginning, no one knew exactly what it meant. Indeed, the governments did not seem to take seriously the protection given by s. 35.

There were four Ministers’ conferences from 1983 to 1987 on aboriginal issues. During the four, the views of the federal and provincial governments about s. 35 were somewhat clarified. Many suggested that s. 35 was a “box of rights”, but in their view, it was an empty box that would be filled as a result of future negotiations. On the other hand, aboriginal peoples believed that the box was full of rights. In fact, they thought that

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all the aboriginal and treaty rights that had not been extinguished prior to 1982 with their full consent were “existing aboriginal and treaty rights”. Ultimately, it was the courts that had to interpret s. 35.

The courts have wrestled with the meaning of this section and the consequences of its adoption. The Supreme Court of Canada has ruled that:

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

The Supreme Court of Canada established that the objects of s. 35 are first, the recognition of aboriginal societies that occupied the Canadian territory prior to the establishment of Europeans and secondly, the provision of a method by which it is possible to reconcile this prior occupation with the sovereignty of the Crown. In other words, the purpose of s. 35 is to protect aboriginal rights while also permitting the Crown to act in the interest of the entire Canadian society.

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6 R.C.S. 1985, App. II, No. 44, as am. by the Constitutional Amendment Proclamation, 1983, (SI/84-102) at s. 35.
Many court decisions have clarified the nature of aboriginal rights and, as a consequence, defined the legal relationship between the Crown and First Nations. It is now well established that the Crown has fiduciary obligations to First Nations.

**B. FIDUCIARY OBLIGATIONS**

When Europeans first arrived in Canada, aboriginal peoples were already living here and had their own territories, laws and forms of government. At first, aboriginal peoples entered into relations with European nations on a nation to nation basis.

For this reason, the Courts have held that the Crown has a fiduciary relationship with aboriginal peoples.\(^8\) The special trust relations are created by history, treaty and legislation. The historic powers and responsibilities assumed by the Crown constituted one of the sources of the fiduciary obligation. The Supreme Court of Canada held that:

> The Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.\(^9\)

The special relationship of the Crown with First Nations implies that the Crown should act in the interests of First Nations when dealing with them. Every time the Crown deals with First Nations, its honour is at stake.\(^10\) For example, in *Guerin*, the

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10. See *e.g. Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].
Supreme Court of Canada held that the Crown had fiduciary obligations when surrendering aboriginal lands.

From Guerin, we can conclude that the Crown has fiduciary obligations towards aboriginal peoples when it deals with aboriginal lands or other Indian assets. Other decisions have also added other circumstances in which the Crown has fiduciary obligations towards aboriginal peoples.

As a fiduciary, the Crown must protect the best interests of aboriginal peoples before it acts. In Sparrow, the Supreme Court of Canada has stated that fiduciary obligations owed by the Crown to aboriginal peoples may be satisfied to some extent by the involvement of aboriginal people in decisions taken with respect to the land.

C. THE SPARROW DECISION

Sparrow is a very important decision relating to the Crown’s fiduciary obligations and the effect of s.35 of the Constitution Act, 1982 on the status of aboriginal and treaty rights. In this decision, the Supreme Court of Canada explored for the first time the scope of s. 35.

In Sparrow, the Supreme Court of Canada addressed the content and the consequences of the rights protected by s. 35 of the Constitution Act, 1982. It ruled that the Crown can infringe on aboriginal or treaty rights only if it complies with a number of requirements that are part of a justificatory analysis.
In fact, the Supreme Court of Canada developed in this decision a test, in the context of s. 35 of the *Constitution Act, 1982*, that protects aboriginal rights while also permitting the Crown to act and legislate as long as the activities or legislation are justifiable infringements on those protected rights. In other words, aboriginal or treaty rights are not absolute and the *Constitution Act, 1982* gives them only limited protection.

1. **THE CONTEXT OF THE DECISION**

The context of this decision was the violation of the terms of the Musqueam food fishing licence under the *Fisheries Act*\(^\text{11}\) and regulations. The appellant, a member of the Musqueam Indian Band, was charged under s. 61(1) of the *Fisheries Act* with the offence of fishing with a drift net longer than permitted. He admitted the facts, but defended the charge on the basis that he was exercising an existing aboriginal right to fish. He argued that the net length restriction was inconsistent with s. 35 of the *Constitution Act, 1982* and therefore, was invalid.

The issue was whether the power of the Parliament to regulate fishing was limited by s. 35 of the *Constitution Act, 1982*, and whether the net length restriction in the Indian Band food fishing licence was inconsistent with that provision. The Supreme Court of Canada found that the findings of fact were insufficient to lead to an acquittal. Also, the

\(^{11}\) **R.C.S. 1970, c. F-14.**
Court ordered a re-trial that would allow findings of fact in line with the test set out in the judgment.\(^\text{12}\)

2. THE COURT’S ANALYSIS

The Supreme Court of Canada addressed the meaning of “existing” aboriginal rights and the content and the scope of aboriginal rights. It also analysed the meaning of “recognized and affirmed”, and the impact of s. 35 of the Constitution Act, 1982 on the regulatory power of Parliament.

a. “Existing”

The Supreme Court of Canada defined the meaning of “existing” rights as follows:

The word “existing” makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982.\(^\text{13}\)

It is important to mention that “existing” aboriginal rights are not frozen in time. In the Court’s view, the phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time.\(^\text{14}\) In other words, aboriginal rights can be exercised in a contemporary manner.

\(^{12}\) Sparrow, supra note 9 at 1120.
\(^{13}\) Ibid. at 1091.
\(^{14}\) Ibid. at 1093.
b. The scope and content of aboriginal rights\textsuperscript{15}

In order to know if the Musqueam Band had an aboriginal right to fish, the Supreme Court of Canada examined whether the Musqueam have lived in the area as an organized society before the coming of European settlers and whether the taking of salmon was an integral part of their lives and remains so to this day. It concluded that the Musqueam had an aboriginal right to fish for food, social and ceremonial purposes in the territory in question.

The Crown argued that the Musqueam right to fish had been extinguished by the \textit{Fisheries Act} and regulations. The Court ruled that in order to prove the extinguishment, the Crown had to show a clear and plain intention to extinguish the Musqueam's right to fish.

The Supreme Court of Canada found that there was nothing in the \textit{Fisheries Act} that demonstrated a clear and plain intention to extinguish the aboriginal right to fish. Indeed, it held that regulation of a right is the opposite of the extinguishment of a right. Therefore, the Court found that the Crown had failed to discharge its burden of proving extinguishment. The Musqueam right to fish was therefore still existing at the time of the adoption of s. 35 of the \textit{Constitution Act, 1982}.

\textsuperscript{15} See also \textit{Van der Peet}, supra note 7 at 743-745, in which the Supreme Court of Canada examined more specifically the definition of aboriginal right. In that case, the Court held that an aboriginal right is an element of a practice, custom or tradition integral to the distinctive culture of an aboriginal group that existed prior to the contact with European society.
c. “Recognized and affirmed”

The Supreme Court of Canada examined the impact of s. 35 of the Constitution Act, 1982 on the regulatory power of Parliament. The Court found that:

...the words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91 (24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.16 [emphasis added]

To summarize, aboriginal and treaty rights protected by s. 35 of the Constitution Act, 1982 are not absolute. They can be infringed by the Crown only if it meets the justificatory test.

3. THE SPARROW JUSTIFICATORY TEST

In Sparrow, the Supreme Court of Canada developed a test in the context of s. 35 of the Constitution Act, 1982 which protects aboriginal rights while also permitting governments to legislate for legitimate purposes where the legislation is a justifiable infringement of those protected rights. The test must be used each time the Crown purports to infringe an aboriginal or treaty right.

16 Sparrow, supra note 9 at 1109.
a. The proof of a *prima facie* infringement of an existing aboriginal right

The party who challenges the Crown’s action must first demonstrate the *prima facie* infringement of an aboriginal right. In other words, a First Nation that challenges an action of Crown must first prove to the courts that it has an existing aboriginal or treaty right recognized by s. 35 of the *Constitution Act, 1982* and that its right has, *prima facie*, been infringed by the Crown.

To determine if an aboriginal right has been interfered with, so as to constitute a *prima facie* infringement of s. 35, certain questions must be asked. Dickson C.J. described the questions as follows:

First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.17

If a *prima facie* infringement is found, the analysis then moves to the issue of justification.

b. The Crown’s justification of an infringement

Once a *prima facie* infringement is proven, the burden is then on the Crown to establish that the infringement is justified. In order to do so, the Supreme Court of Canada has created a justificatory test to be used each time the Crown purports to infringe

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an aboriginal right. This test examines whether the regulation constitutes a legitimate regulation of a constitutional aboriginal right.

In the first part of the test, the Crown must demonstrate that it has a valid legislative objective. The conservation and the management of natural resources are examples of valid legislative objectives. In fact, any objectives found to be compelling and substantial will probably meet this part of the test.

If a valid objective is found, the analysis proceeds to the second part of the justification test. The Crown must demonstrate that it acted according to the honour of the Crown. For example, in the case of a right to fish or hunt for food, the Crown must establish that after conservation measures are taken, priority is given to aboriginal rights. In order to establish the honour of the Crown, there are also other relevant questions to be addressed, depending on the circumstances of each case:

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. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.\(^\text{18}\) [emphasis added]

\(^{18}\) Ibid. at 1119.
It is important to mention that those factors are not exhaustive. Other factors could be considered depending on the circumstances. On this matter, the Court stated:

*We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.* ¹⁹ [emphasis added]

Also, the Crown does not need to fulfil each of those factors in order to justify an infringement. For example, the fact that a First Nation has been compensated for an infringement of their right could mean that the Crown does not need to consult them in relation to that infringement.

c. **Summary of the justificatory test**

The *Sparrow* test could be summarized as follows:

A. Is there an existing aboriginal right?

B. If so, does the proposed government activity interfere with the right because it:

   (1) is unreasonable;

   (2) imposes undue hardship; or

   (3) prevents the holder of the right from using the preferred means of exercising it?

C. If the aboriginal right is interfered with, is the interference justified because:

   (1) there is a valid objective, such as conservation; and

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(2) the action is consistent with the integrity and honour of the Crown because:

(a) in the case of a right to fish or hunt for food, after conservation measures are taken, priority is given to First Nations;

(b) there is as little infringement as possible;

(c) in the case of expropriation there is fair compensation;

(d) there has been consultation?

This test must be applied depending on the circumstances and the facts of each case, as stated by the Court:

... We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.\textsuperscript{20}

The duty to consult comes from this justificatory test. As stated by the Supreme Court of Canada, this constitutional obligation arises only in the event of an infringement of an aboriginal or treaty right. As I explain later however, the nature of the duty to consult is one of the most controversial questions.

\textsuperscript{20} \textit{Ibid.} at 1111.
The duty to consult was mentioned several times by the Supreme Court of Canada in the years that followed Sparrow.\textsuperscript{21} But the most important case after Sparrow to deal with the question of consultation is Delgamuukw v. British Columbia\textsuperscript{22}.

D. THE DELGAMUUKW DECISION

On December 11, 1997, the Supreme Court of Canada gave judgement in Delgamuukw. The decision is of major significance. At the time the decision was rendered, it was seen by many as a victory for aboriginal peoples. Numerous meetings, round-tables, workshops and conferences have been held to discuss its potential impact on litigation and negotiation. However, Delgamuukw has left many legal uncertainties, one of the most difficult of which is the nature of the duty to consult.

The Court’s ruling established a number of principles about aboriginal title (which is a kind of aboriginal right) and identified a duty to consult with First Nations in respect of Crown activities that may infringe aboriginal title. The Supreme Court of Canada interpreted the duty to consult in the following terms:

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. \textit{Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified}, in the same way that the Crown’s failure to consult an Aboriginal group with respect to the terms by which reserve

\textsuperscript{22} Supra note 10.
The decision reaffirmed that aboriginal title and rights are not absolute. They may be infringed or interfered with, both by the federal and provincial governments.\textsuperscript{24} However, any infringement must be justified in accordance with the \textit{Sparrow} principles.

The Supreme Court of Canada elaborated on the two principles that the Crown must satisfy if it wants to interfere with aboriginal title. First, any infringement requires a compelling and substantial legislative objective.\textsuperscript{25} Legitimate objectives could include the development of agriculture, forestry, mining and hydro-electric power, the general economic development of the interior of B.C., the need to protect the environment and endangered species, the building of infrastructure and the settlement of foreign populations in support of these aims.

Other valid legislative objectives could also be conservation, public safety, historical reliance on a resource by non-aboriginal people and regional economic fairness. In fact, the list given by the Supreme Court of Canada is so large that it seems to give carte blanche to the Crown. I guess that eventually, the courts will have to clarify what exactly is accepted as legitimate objectives. As it is at the moment, the list could probably include everything that in the past has led to the loss of Indian rights.

\textsuperscript{23} \textit{Ibid.} at para. 168.
\textsuperscript{24} \textit{Ibid.} at para. 160.
\textsuperscript{25} \textit{Ibid.} at para. 161.
Secondly, any infringement must be consistent with the special fiduciary relationship between the Crown and aboriginal peoples. At the second stage, the government must consider three aspects of the aboriginal title:

1. The nature of aboriginal title requires the government, in allocating resources, where the fiduciary duty requires that aboriginal title be given priority, to reflect that priority by, for example, accommodating the participation of aboriginal people in the development of the resources of British Columbia.

2. Because aboriginal title encompasses the right to choose what can be done with the land, the fiduciary duty requires involving aboriginal peoples in decisions taken with respect to their lands. The duty to consult will vary with the circumstances. The exact duty ranges from discussion of uses at one extreme to a requirement of full consent, at the other extreme. But even when the minimum acceptable standard is consultation, that consultation must be in good faith and must intend to substantially address the concerns of the aboriginal peoples whose lands are at issue.

3. Aboriginal title has an economic aspect. This means that compensation is relevant to the question of justification. The amount of compensation will vary depending upon the nature and degree of infringement.
Accordingly, there is a duty to consult with aboriginal peoples when the Crown, by its actions, may infringe an aboriginal right. Justice Lamer explained the scope and the content of the duty to consult in the following terms:

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.\textsuperscript{26} [emphasis added]

In summary, the duty to consult comes from the \textit{Sparrow/Delgamuukw} justificatory analysis. Whether the Crown has consulted First Nations is an important element in order to determine whether an infringement of an aboriginal right is justified. The Crown must now provide an opportunity to First Nations to be heard when they might be affected by Crown’s activities.

\footnote{\textit{Ibid.} at para. 168.}
A. THE MEANING OF CONSULTATION

In order to understand what are the requirements of the duty to consult, it is important to define the meaning of consultation. Is it simply an obligation to notify First Nations of a specific project that may infringe their aboriginal or treaty rights or does it give a veto to First Nations over all the Crown’s activities?

Generally, consultation does not mean that the Crown has the obligation to reach an agreement with First Nations, although it sometimes might. Negotiation, which involves a process of bargaining in order to reach an agreement, may result from (in the rare case consultation requires agreement, but this is not normally the case), but is distinct from consultation.

To consult means: “to have deliberations with someone, to seek information or advice from a person or to take their feelings and interests into consideration.” Consultation is used to describe a type of engagement relating to a specific issue or piece of work and is

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designed to define problems, obtain information, share information, to gauge reaction on
different options, discuss issues or options and design processes.\textsuperscript{28}

Consultation is a communication process for presenting and receiving information
before final decisions are made, in order to influence those decisions. It provides external
contributions to decision-making from a range of sources. It is dynamic and flexible.

The \textit{Nisga’a Treaty}\textsuperscript{29} defines “consultation” in the following terms:

“consult” and “consultation” mean provision to a party of:

a. notice of a matter to be decided, in sufficient detail
to permit the party to prepare its views on the
matter,

b. in consultations between the Parties to this
Agreement, if requested by a Party, sufficient
information in respect of the matter to permit the
Party to prepare its views on the matter,

c. a reasonable period of time to permit the party to
prepare its views on the matter,

d. an opportunity for the party to present its views on
the matter, and

\textsuperscript{28} See \textit{e.g.} New Zealand, Ministry of Education, “Consultation and Engagement with Maori”, online:
2001) [hereinafter “Consultation and Engagement with Maori”].

\textsuperscript{29} \textit{Nisga’a Final Agreement}, Canada, British Columbia and Nishga’a Nation, August 4, 1998 at 5.
e. a full and fair consideration of any views on the matter so presented by the party.

In most cases, consultation is more than just sending information and gathering feedback. It involves a high degree of listening to and valuing of the perspectives and aspirations of First Nations. On the other hand, as I said, consultation is usually not about reaching an agreement or consensus.

Consultation, depending upon the circumstances, could mean\(^{30}\) setting out a proposal not fully decided upon, adequately informing a party about relevant information upon which the proposal is based, providing enough information for others to make intelligent and useful responses and/or allowing sufficient time to others to be sufficiently prepared.

It can also means listening to what the others have to say with an open mind and being prepared to change the proposal, start consideration of it afresh or even abandon it (in that there is room to be persuaded against the proposal), considering responses and comments before making a decision, deciding how the proposal should be changed, reaching a decision that may or may not alter the original proposal, reporting back on the final decision, responding to the people involved in the process and finally, doing all those tasks in a genuine and not cosmetic manner.

\(^{30}\) See generally Health Research Council of New Zealand, “Guidelines for Researchers on Health Research Involving Maori”, at 6, online: <http://www.hrc.govt.nz/maoguide.htm>; David E Hollands, “Consultation and public participation”, online: <http://homepages.ihug.co.nz/~deh/cons-art.htm> (last modified: 9 June 2000); Wellington City Council Consultation Policy, “The council commitment to consultation”, online:
According to these definitions, First Nations’ role in consultation will generally be one of expressing an opinion rather than making the final decision. Again, it is important to differentiate consultation from negotiation. Negotiation may result from but is distinct from consultation.

B. THE REASONS FOR CONSULTATION

Consultation is a vital step in the development of the relationship between First Nations and the Crown. In order to respect s. 35 of the Constitution Act, 1982, the Crown must consult with every First Nation susceptible of being affected by its actions.

The basic reason for consulting and interacting with First Nations should be to contribute to high quality and well informed decision-making. By gathering information, expertise and comments from First Nations, a decision-maker will have a better understanding of the issues.

One of the purposes of consultation should be to incorporate the consideration of aboriginal rights and perspectives within the structure of statutory decisions. Unfortunately, governments do not always adequately represent or understand the interests of aboriginal people. Consultation with aboriginal people can certainly improve the quality of information on which a decision affecting First Nations is based.

While there is an obligation to consult as a part of the Sparrow justificatory test, the importance of consultation is much wider. Even if there may not be a constitutional obligation on the part of the Crown to consult in every case, it nonetheless makes good sense to act in good faith and that could mean engaging in active consultation. Consultation may help to resolve possible contentious or difficult issues before an activity starts and avoid litigation as much as possible.

In the traditional adversarial model, the Crown and First Nations would compete for the outcome, so that each party has its own expert, each expert produces a model and disputed facts are used in each model. The inevitable result is that uncertainty still remains and the controversy continues.

In a consultation process, all parties work together as joint problem-solvers. Consultation may help the parties to communicate, understand mutual issues, engage in joint fact finding, reconcile their differences and in some cases, agree on a better quality and mutually acceptable outcome. Consulting and building relations with First Nations will enable the Crown to increase its understanding of First Nations’ demands.

Whether consultation is required by the Constitution, or by a specific law or for administrative law purposes, it can minimise objections and protests and it should improve the quality of the project. Consultation can sometimes lead to a negotiated
resolution of an issue with First Nations or at least can provide a way to accommodate the interests of a First Nations, allowing a project or an activity to proceed.

For example, after some consultations with a particular First Nation, a mining company could take into account a First Nation’s concerns and decide to operate in another part of a traditional territory, where the aboriginal activities are lower or non-existent. This way, the mining company can proceed with its exploitation activities while minimizing the effect on a First Nation’s traditional activities.

Consultation is in a way consistent with being a good neighbour. Initial and ongoing consultation can prevent problems from arising because of misunderstanding between the two societies. It can also eventually lead to the development of partnerships.

Courts repeatedly encourage consultation and negotiation over litigation. They have frequently asked the Crown and First Nations to discuss their issues rather than using the courts to resolve their conflicts. The consultation process is a way of achieving this goal. If done correctly with an open-mind, it can permit to avoid judicial conflict.

At least in theory, consultation could help to resolve or avoid contentious issues. But the practical utility of such process has still to be demonstrated.
C. EXAMPLES OF THE APPLICATION BY THE COURTS OF THE DUTY TO CONSULT

Before analysing the principles elaborated by Canadian courts, I will review three recent decisions in order to demonstrate how the duty to consult has been applied by the courts. One is from the British Columbia Court of Appeal, one is from the Ontario Court of Appeal and the last one is from the Federal Court of Canada, Trial Division.

*Halfway River v. British Columbia* is one of the most important decisions of the British Columbia Court of Appeal on the question of consultation. At the moment, *Halfway River* is clearly one of the two leading decisions related to the duty to consult in Canada. Generally, the other decisions have applied the principles set out in this decision. While the decision leaves a number of issues unanswered, it established many principles on the duty to consult.

*TransCanada Pipelines* is the other leading case on the subject of consultation. It represented the first assessment by the Ontario Court of Appeal on the scope of the Crown’s duty to consult. An application for leave to appeal the decision to the Supreme Court of Canada was dismissed on October 19th, 2000.

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31 There have been many decisions about the Crown’s duty to consult with First Nations in the last few years, many of which have arisen from British Columbia.


33 *TransCanada Pipelines Ltd. v. Beardmore (Township)*, [2000] O.J. No. 1066 (C.A.) [hereinafter *Transcanada Pipelines*]. This decision is also known as the Greenstone case.
Finally, *Liidlii Kue First Nation*\(^{34}\) is a decision of the Federal Court of Canada, Trial Division. The questions raised in this case were primarily about the scope and the nature of the constitutional obligation to consult with First Nations. The judge reviewed the principles established by *Halfway River* and *TransCanada Pipelines*.

1. **HALFWAY RIVER FIRST NATION V. BRITISH COLUMBIA**

   The problem that gave rise to this court action related to the issuance of a cutting permit by a district manager of the provincial Ministry of Forests to Canfor, a forestry company. On September 13, 1996, the district manager granted Canfor a timber harvesting license to log on Crown land adjacent to the Halfway River’s reserve land. In December 1996, Canfor commenced its harvesting operation. In order to show their disagreement, the members of Halfway River erected a roadblock. Canfor then applied to the British Columbia Supreme Court for an injunction. The parties decided that the injunction would be dealt with at the same time as Halfway River’s application for judicial review of the cutting permit.

   a. *The British Columbia Supreme Court’s decision*\(^{35}\)

      The Halfway River’s members are descendants of signatories to a treaty that preserved their traditional right to hunt on Crown land adjacent to their reserve. Halfway River also had an outstanding Treaty Land Entitlement Claim against the federal Crown and the land in question in this case was land that the band wanted as part of a claim.

\(^{34}\) *Liidlii Kue First Nation v. Canada (Attorney General)*, [2000] F.C.J. No. 1176 (FCTD) [hereinafter *Liidlii Kue*].

settlement. Halfway River complained that the issuance of the cutting license infringed its rights under Treaty 8. It brought an application for judicial review, seeking to quash the permit on the ground that the district manager’s administrative actions exceeded his statutory powers.

Halfway River argued that the approval of the logging permit violated principles of administrative law and infringed their aboriginal and treaty rights. The Minister argued that the Nation’s right to hunt under the treaty was subject to the Crown’s right to require or take up lands for purposes such as forestry. Alternatively, the Minister argued that any breach of the treaty right to hunt was justified and that rules of procedural fairness had been followed.

Halfway River’s application for judicial review was allowed, and the decision to grant the permit was quashed by the Chambers judge for the following reasons:

a) There was a reasonable apprehension of bias because on the record, it appeared that the district manager had made up his mind that there were no Treaty 8 infringements, even before he made any inquiries of Halfway River.

b) The district manager made errors of fact. The court held that given the limited evidence concerning possible infringements of Treaty 8 obligations, it was unreasonable for the district manager to conclude that there would in fact be no infringement of aboriginal or treaty rights of the Halfway River.
c) Notice to the First Nation was inadequate because it was delivered after the cutting permit was approved by the district manager.

d) There was a *prima facie* infringement of hunting, fishing and trapping rights.

e) The Crown’s infringement of Halfway River’s Treaty 8 right to hunt was not justified because it failed in its fiduciary duty to engage in adequate, reasonable consultation with Halfway River.

Focusing on the adequacy of the consultation, the Chambers judge said that there were no sufficient efforts by the district manager to determine the nature and extent of Halfway River’s claim to the area. The judge also mentioned that the district manager did not give enough information to the First Nation concerning the logging permit to be issued. The judge found that there was not enough consultation even though the Ministry of Forests was regularly in contact with Halfway River.

Prior to the issuing of the permit, the Chambers judge found that the following meaningful opportunities to consult were provided:

a) 14 letters from the Ministry of Forests to Halfway River during 1995 and 1996 requesting information and/or a meeting to offer consultation;

b) three meetings between the district manager and Halfway River;

c) five telephone calls between the Ministry of Forest and Halfway River in 1995 and 1996; and
d) an opportunity to provide feedback on the Cultural Heritage Overview Assessment.

On the other hand, the Chamber judge held that the following reasonable opportunities to be heard were denied to Halfway River:

a) Halfway River was not invited to attend a meeting between the Minister of Forests and Canfor employees at which the cutting permit was approved.

b) The report Potential Impacts to Fish and Wildlife Resources was not provided to Halfway River until August 26, 1996 even though a draft copy was available as early as January 4, 1996;

c) There was no real opportunity to participate in the Cultural Heritage Overview Assessment;

d) Canfor's actual application for the logging permit was not provided to Halfway River until after the decision to issue the cutting permit was made.

Halfway River argued that the fiduciary duty of the provincial Crown to consult with them included a duty to provide funding to their First Nation in order to help them to gather information and pursue the consultation process. The Chambers judge held that the authorities given to him by the First Nation on this fiduciary duty (e.g. to provide funding for consultation) were not clear enough in this case, but the question of this fiduciary duty was still arguable.
The Chambers judge also held that there is a duty on the First Nation to co-operate in the consultation process. Halfway River needed to make reasonable efforts to facilitate discussion with the Ministry of Forests. However, even if Halfway River may not have been entirely reasonable, in this case, the fact is that the Ministry of Forests did not meet its fiduciary obligation to consult meaningfully with the First Nation.

b. The Court of Appeal's decision

The Court of Appeal reviewed the decision of the lower court to set aside the cutting permit. The Court dismissed the appeal by a majority of two to one. Each of the three judges wrote separate reasons for judgment. While a majority ratio can be discerned, there are some differences between the judges on consultation issues. That makes the decision a difficult one from which to draw firm conclusions about the parameters or scope of the obligation.

The main judgement of the Court was delivered by Finch J.A. He reviewed the administrative law issues and found that the Chambers judge erred in finding that the district manager's decision give rise to a reasonable apprehension of bias. Even if the district manager played both an investigative and an adjudicative function, it could not be said that he prejudged the matter. However, Finch J.A. affirmed the Chambers judge's decision that the district manager had breached Halfway River's right to be heard. Huddart J.A. agreed with this analysis on administrative law issues.

36 Supra note 32.
Both Finch J.A. and Huddart J.A. dismissed the appeal essentially on the grounds that the consultation was inadequate. The third judge, Southin J.A., dissented on procedural grounds. For Southin J.A., the real issue was the interpretation of Treaty 8. For that reason, in her view, the application should have been converted into an action to allow for a full review of the aboriginal rights that were potentially at issue.

On the subject of consultation, Southin J.A. stated:

With respect, to create a system in which those appointed to administrative positions under the Forest Act or any other statute of British Columbia regulating Crown land in the Peace River are expected to consult “to ascertain the nature and scope of the treaty right at issue” and to determine “whether the proposed use is compatible with the treaty right” is to place on our civil servants a burden they should not have to bear - a patchwork quilt of decision making by persons appointed not for their skill in legal questions but for their skill in forestry, mining, oil and gas, and agriculture.

A District Manager under the Forest Act is not more qualified to decide a legal issue arising under this treaty than my colleagues and I are qualified to decide how much timber Canfor should be permitted or required to cut in any one year in order to conform to the terms of its tenure.

Not only is this burden on the civil servants unfair to them, but also it ladens the people of British Columbia with burdens heavy to be borne, burdens which no other province’s people have to bear, even though the other provinces, except Newfoundland, also have First Nations.37

The other judges discussed the duty to consult at some length. Both Finch J.A. and Huddart J.A. addressed the adequacy of consultation, but they approached the issue quite differently.
Finch J.A.'s reasons for judgment

Finch J.A. explained the Crown's duty to consult as follows:

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples were provided with all the 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, where possible, demonstrably integrated into the proposed plan of action.

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. [emphasis added]

In Finch J.A.'s view, consultation must be reasonable and meaningful. The Crown must make full disclosure to the First Nation to allow it to make an informed decision. Alternatively stated, there is a duty to inform and a duty to be informed. The government has a duty to inform itself on the aboriginal perspective, practices and rights as part of the consultation process. On the other hand, First Nations must also act reasonably. They cannot simply refuse to consult.

The purpose of the consultation must be to address the aboriginal interest at stake.

37 Ibid. at paras. 229 to 231.
38 Ibid. at paras. 160-161; reference to cases omitted.
The content and scope of consultation vary with the circumstances of each case. The duty to consult arises before the measures are taken and the government must consult with First Nations who may be affected as opposed to only those who are affected.

Finch J.A. agreed with the Chambers judge that there were potential opportunities to consult that were denied to Halfway River. The Crown did not provide in a timely way information that Halfway River would have needed to inform itself on the effects of the proposed action. It did not ensure that Halfway River had an opportunity to express its interests and concerns. More particularly, the failure to share the report on Potential Impacts to Fish & Wildlife Resources in a timely manner and the lack of opportunity to participate in the Cultural Heritage Overview Assessment constituted breaches of the Crown's fiduciary duty to consult with Halfway River. It was not an answer to say that Halfway River did not take affirmative steps to be informed.

Because of all that, Finch J.A. held that the Crown did not meet the *Sparrow* justificatory test:

As laid down in the cases on justification, the Crown must satisfy all aspects of the test if it is to succeed. Thus, even though there was a sufficiently important legislative objective, the petitioners' rights were infringed as little as possible, and the effects of the infringement are outweighed by the benefits to be derived from the government's conduct, *justification of the infringement has not been established because the Crown failed in its duty to consult.* It would be inconsistent with the honour and integrity of the Crown to find justification where the Crown has not met that duty.\(^{39}\) [emphasis added]

To make his decision, Finch J.A. adopted what might be characterized as an infringement/justification analysis. He drew a distinction between adequate notice of an action to be taken as a requirement of procedural fairness and adequate consultation as a substantive requirement under the *Sparrow* justificatory analysis.

Finch J.A. understood the duty of consultation only as part of the *Sparrow* test of justification. He did not consider the duty to be an independent fiduciary obligation of the Crown. In his view, the constitutional duty to consult protected by s. 35 occurs only after the First Nation has demonstrated an infringement of an existing aboriginal or treaty right.

**Huddart J.A.’s reasons for judgment**

Huddart J.A.’s approach to the issues on this appeal varies somewhat from those of her colleagues. While she agreed entirely with Finch J.A. with regard to the administrative law issues, like Southin J.A., her opinion relating to the application of the principles from *Sparrow* to the circumstances of this case differed partially from Finch J.A.’s opinion.

Like Finch J.A., Huddart J.A. mentioned that the First Nation needs to co-operate in the consultation process. The First Nation should offer the relevant information to aid

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40 Supra note 9.
the decision-maker determining the nature and the extent of the right in question. The First Nation cannot unreasonably refuse to participate in the consultation process.

The requirement that a decision-maker under the Forest Act and the Forest Practices Code consult with a first nation that may be affected by his decision does not mean the first nation is absolved of any responsibility. Once the District Manager has set up an adequate opportunity to consult, the first nation is required to co-operate fully with that process and 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 as the first nation was found to have done in Ryan et al v. Fort St. James Forest District (District Manager), [1994] B.C.J. No. 2642, (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91. In my view, 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. 41 [emphasis added]

On the question of consultation, Huddart J.A. appeared to assert a more general obligation. First, she mentioned that not every interference with a treaty right should be considered as an infringement necessitating a justification under Sparrow. Whether there is an infringement of an aboriginal or treaty right will depend on the degree and significance of the interference. To make this affirmation, she relied on various Supreme Court of Canada decisions:

My difference with the reasoning of Mr. Justice Finch flows from my view that the chambers judge was wrong when she found that "any interference" with the right to hunt constituted an "infringement" of the treaty right requiring justification. I cannot read either Sparrow or Badger to support that view. As my colleague notes at para.

41 Halfway River, supra note 9 at para. 182.
124, in Sparrow the court stated the question as "whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest." In Badger, at 818, in his discussion as to whether conservation regulations infringed the treaty right to hunt, Cory J. indicated the impugned provisions might not be permissible "if they erode an important aspect of the Indian hunting rights." In Gladstone, supra, Lamer C.J.C. indicated that a "meaningful diminution" of an aboriginal right would be required to constitute an infringement. Each of these expressions of the test for an "infringement" imports a judgment as to the degree and significance of the interference. To make that judgment requires information from which the scope of the existing treaty or aboriginal right can be determined, as well as information about the precise nature of the interference.\(^{42}\) [emphasis added]

She also gave her own interpretation of the duty to consult. Instead of treating the consultation process as part of the justificatory test, she moved the question of consultation to the very beginning of the process. To act constitutionally, the decision-maker would have to consult with First Nations before making a decision, in order to ascertain the nature and the scope of the rights and therefore, be able to determine whether the proposed action is compatible with the First Nations' uses of land.

If after consultation, the decision-maker determines that the Crown's activities are compatible with the First Nations' uses of land, then he must try to accommodate both parties. Huddart J.A. said that an accommodation test should eventually be created by the courts. At that point, in her view, there would be no infringement and therefore, no need

to apply *Sparrow* justificatory principles, even though consultation would be needed to
determine whether the aboriginal and non-aboriginal uses of land are compatible.

The following passage from her reasons for decision demonstrates her point of
view:

Mr. Justice Finch points out that the District Manager's
failure to consult adequately precluded justification under
the second stage of the *Sparrow* analysis of the
infringement of the Halfway treaty right to hunt he
considered was constituted by CP212. *In my view this
deficiency in the decision-making process is a breach of the
Crown's fiduciary responsibilities that makes this Court's
application of the Sparrow analysis premature.*

Because only the First Nation will have information about
the scope of their use of the land, and of the importance of
the use of the land to their culture and identity, if the
Sparrow guidelines are to organize the review of an
administrative decision it makes good sense to require the
First Nation to establish the scope of the right at the first
opportunity, to the decision maker himself during the
consultation he is required to undertake, so that he might
satisfy his obligation to act constitutionally. It is only upon
ascertaining the full scope of the right that an
administrative decision maker can weigh that right against
the interests of the various proposed users and determine
whether the proposed uses are compatible. This
characterization is crucial to an assessment of whether a
particular treaty or aboriginal right has been, or will be
infringed. Thus, particularly in the context of a judicial
review where the Court relies heavily upon the findings of a
decision maker, a consideration of whether consultation
has been adequate must precede any
infringement/justification analysis using the *Sparrow
guidelines.*[^1] [emphasis added]

In Huddart J.A.’s view, in a judicial review, if there is no infringement of aboriginal rights, but only interference with those rights, the courts would only have to determine if the accommodation of the aboriginal or treaty rights was sufficient. It would not be necessary to apply the *Sparrow* justificatory analysis. In this case, she said that there was no need to apply *Sparrow* justificatory principles.

On the other hand, if after consultation, the decision-maker determines that the aboriginal and non-aboriginal’s uses of land are non-compatible, then and only then, *Sparrow* justificatory test should be applied.

The position of Huddart J.A. is a little confusing. In Huddart J.A.’s view, the duty to consult exists as a general Crown duty and should be fulfilled before either aboriginal rights or infringements are established. She moved the duty to consult, which is supposed to be an element of the *Sparrow* justificatory analysis, to a standalone Crown’s obligation.

In fact, she proposed to use consultation to determine the existence, the nature and the scope of aboriginal or treaty rights and the possible infringement of those rights. Even before the court, in Huddart J.A.’s view, the question of consultation should precede the establishment of an aboriginal or treaty right infringement.

In Huddart J.A.’s view, the consultation duty exists not only as part of the justification test. It applies by itself as a fiduciary obligation. That means that there is no
need to prove the aboriginal right or the infringement prior to the consultation. In general, she raises the obligation to consult to a much higher standard.

Decision

The appeal was dismissed. The Court held that the Chambers judge did not err in quashing the district manager’s approval of the permit application in that the issuance of the cutting permit infringed Halfway River’s right to hunt, and the Crown failed to show that the infringement was justified. There was no appeal of the decision to the Supreme Court of Canada.

The Court of Appeal’s decision has been mentioned and/or followed in many subsequent decisions related to the duty to consult. In fact, the judgment has become one of the most important decisions dealing with the Crown’s duty to consult with First Nations.

2. TRANSCANADA PIPELINES LTD. V. BEARDMORE (TOWNSHIP)

This case, from the Ontario Court of Appeal, concerns the amalgamation of the Townships of Beardmore and Nakina and the Towns of Geraldton and Longlac into a single municipality to be known as the Municipality of Greenstone. It was also proposed to annex to the newly created municipality 930 square miles of unorganized territory

represented by the Caramat Local Roads Board. The amalgamation was the result of a Final Proposal Order of the Greenstone Restructuring Commission. The commission was established by the Minister under s. 25.3 (1) of the Municipal Act.\(^{45}\)

a. The Trial Court’s decision\(^{46}\)

Following the issuance of the Final Proposal and Order of the Greenstone Restructuring Commission, three applications for judicial review were brought to the Divisional Court. The applicants, TransCanada Pipelines, Long Lake 58 First Nation (LL58), Nishnawbe-Aski Nation (NAN) and Ginoogaming First Nation (GFN), sought judicial review including an order quashing the proposal and declaring it unconstitutional, as well as an injunction preventing implementation of the amalgamation.

The duty to consult was raised by the First Nations. NAN represents 47 First Nations in Ontario in respect of common interests in relation to Treaty 5 and 9. GFN is a member of NAN and a beneficiary of Treaty 9. Its land is adjacent to the proposed new municipality. The members of GFN use those lands for traditional activities such as hunting, fishing, trapping and gathering.

NAN and GFN challenged the Final Proposal and Order on the grounds that the commissioner did not adequately consult with them or other aboriginal governing bodies.

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about the restructuring proposal. NAN and GFN submitted that the Final Proposal and Order might affect:

a) potential or existing aboriginal land claims or aboriginal governance negotiations that are in progress or contemplated;

b) the exercise of treaty and aboriginal rights, such as hunting, fishing, trapping and gathering;

c) the current use of lands and resources for traditional purposes by aboriginal peoples.

LL58 is a First Nation whose reserve would be surrounded by the proposed Municipality of Greenstone if its boundaries are not altered. It is not actually a signatory to a treaty with the Crown, but it has an unresolved claim based on aboriginal rights and title or, alternatively, based on treaty land entitlement or, alternatively, based on the Crown's failure to give the First Nation an opportunity to enter into Treaty No. 9 in 1906. The resolution of the Land Claim would likely involve the transfer of significant Crown lands which would be impeded by the expansion of the municipal boundaries.

LL58 adopted the grounds advanced by TransCanada Pipelines which focused its objections on the grounds that the Final Proposal and Order was contrary to the provisions of the Municipal Act, *ultra vires* the object and policy of the Act, patently unreasonable and contrary to the principles of municipal restructuring contained in the Commission's Terms of Reference.
In addition, LL58 submitted that it was not accorded procedural fairness by the Commission, that the order of the Commission did not give reasons for the annexation of previously unorganized territory and that the Commission breached its obligations under s.35 of the Constitution Act, 1982. More specifically, LL58 advanced that the Commission failed to consult the band about the restructuring.

The trial judge, O'Driscoll J., allowed the application. The Final Proposal and Order was quashed and the Commission was not to make any further orders respecting it. The proposed annexation of unorganized territory violated the Municipal Act and was of no force and effect.

The trial judge held that the Commission lost its jurisdiction when it failed to consult at all with LL58 and failed to properly, adequately and meaningfully consult with NAN and GFN. In his view, those aboriginal applicants were the people who would have been affected the most by the annexation. The Commission failed to carry out its duty to consult with and protect the aboriginal peoples from threats to their rights and interests. It is important to mention that the judge did not decide if there has been an infringement of aboriginal or treaty rights.

O'Driscoll J. also held that the Commission acted without any evidence upon which to base its annexation order. It had no financial analysis or report to show that there would be significant cost savings due to restructuring. The proposal would substantially increase municipal assessment and tax revenue. It by-passed the Ontario
Municipal Board’s restructuring and annexation test of the greatest good, common sense and fairness and constituted a “tax grab”. The Commissioner lost jurisdiction and credibility when he failed to consider the “tax grab” and found a basis for annexation. The Commission lost jurisdiction through the appearance of bias and thereby denied fairness to the applicants. At the end, an election was ordered to be held in each of the four municipalities.

b. The Court of Appeal’s decision

The Court of Appeal reversed O’Driscoll J. on all his findings. The Court allowed the appeal of the Crown and rejected the cross-appeal of the NAN and GFN. They were asking for a declaration that the Final Proposal and Order of the Commission infringed their aboriginal rights confirmed and protected by s. 35 of the Constitution Act, 1982.

The unanimous decision of the Court of Appeal was delivered by Borins J.A. He concluded that there was no positive legislative obligation on the Commission to consult with the First Nations. On that basis, the Commission could not lose its jurisdiction to pronounce on the restructuring project.

Concerning the obligation to consult, Borins J.A. mentioned that the scope, content and requirements of the duty vary depending on the type of right and the nature of a government activity. The purpose of the consultation must be to address the aboriginal

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47 Supra note 33.
interests at stake and First Nations must act reasonably. They cannot simply refuse to participate in the consultation process.

Regarding the nature of the duty, Borins J.A. described O'Driscoll’s finding as an elevation of the duty to consult to an independent ground on which government action may be challenged. Borins J.A. disagreed with the trial judge on this point and shifted the duty back into the justificatory analysis from Sparrow. He referred to Badger and Delgamuukw and concluded:

(...) what these cases decide is that the duty of the Crown to consult with First Nations is a legal requirement that assists the court in determining whether the Crown is constitutionally justified in engaging in a particular action that has been found to prima facie infringe an existing Aboriginal or treaty right of a First Nation. It is only after the First Nation has established such infringement through an appropriate hearing that the duty of the Crown to consult with First nations becomes engaged as a factor for the court to consider in the justificatory phase of the proceeding. ...

... As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the Constitution Act, 1982. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action. [emphasis added]

In Borins J.A.'s view, to trigger a duty to consult, First Nations must first demonstrate the existence of aboriginal or treaty rights and an infringement of those

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48 Ibid. at para. 112.
49 Ibid. at paras. 119-120.
rights. Consultation is only an element among others to justify an infringement by the Crown. This position is exactly the same that Finch J.A. articulated in *Halfway River*.

In the present case, because the objections of the First Nations were, at best, hypothetical, Borins J.A. concluded that a *prima facie* infringement had not been established to trigger the duty to consult. He noted that the evidence before him and before the trial judge did not conclusively establish the requisite aboriginal or treaty right. As well, the inadequacy of the evidentiary record made the question of infringement speculative, particularly in relation to whether an aboriginal or treaty right existed and if so whether it would be infringed.

Borins J.A. also noted that there was a serious deficiency in the particulars of the First Nation's land claim. More specifically, he highlighted the lack of information on the status of the land claim negotiations and on how the municipal restructuring would impede or jeopardize the resolution of the claim.

Borins J.A. further found that there was no evidence that the land claims would be prevented from continuing by the creation of the new municipality. Given that the land claims may or may not succeed in whole or in part and that there was nothing on the court record for the Court to be able to predict their outcome, there was no basis to set aside the Final Proposal and Order on the ground that the Commission lost its jurisdiction when it failed to consult the First Nations.\(^\text{50}\)

\(^{50}\) *Ibid.*, at paras. 120-121.
In summary, Borins J.A. found that the Commission had no duty to consult. The First Nations had not established an aboriginal or treaty right and even if they had, they had not proven that the Final Proposal and Order would infringe their right.

Borins J.A. also dismissed the cross-appeal brought by the First Nations. They were asking the Court to declare that the Final Proposal and Order of the Commission infringed their aboriginal rights. Borins J.A. found it impossible to consider the cross-appeal, because the trial judge had not made any finding and rendered no decision on this subject. It was not in the public interest that the Court of Appeal deal with the constitutional issue raised by the cross-appeal since there was no proper constitutional record.\(^{51}\)

The First Nations applied for leave to appeal the decision of the Ontario Court of Appeal to the Supreme Court of Canada. The application for leave to appeal was dismissed by the Supreme Court of Canada without reasons on October 19\(^{th}\), 2000.\(^{52}\)

The dismissal gave a strong indication about the Court’s view concerning the Crown’s duty to consult. First, the onus of establishing a *prima facie* infringement rests with First Nations. First Nations cannot simply raise hypothetical infringements or speculation about future infringements. Next, a review by a court of the adequacy of consultation by the Crown will arise only during the justificatory analysis from *Sparrow*.

3. LIIDLII KUE FIRST NATION V. CANADA (ATTORNEY GENERAL)\textsuperscript{53}

This is an application by the Liidlii Kue First Nation for judicial review of a land administrator's decision. The decision of the land administrator, Hornby, was to issue a land use permit to Bernier in order to allow her to test drill on unoccupied Crown land in Northwest Territories over which she had mining claims. Bernier sought approval to drill twelve test holes using a helicopter supported diamond drill.

The land to which the drilling permit would have been applied was subject to the Treaty No. 11. That Treaty was signed by different bands, including Liidlii Kue, starting in 1921. The Federal Court interpreted the Treaty 11 right "as being a qualified or conditional right, the right to hunt, trap and fish on unoccupied Crown land, until the Crown seeks to use it."\textsuperscript{54}

Liidlii Kue had been sent a copy of the proposal and asked for comments. It responded to the application by requesting that the granting of the order be delayed until it could consult those members that would be directly affected. What followed was an extensive exchange of information. The land use administrator requested of Liidlii Kue information and views from the actual hunters and trappers about how they thought the drilling operation would affect their hunting and trapping activities. Hornby felt that such information would help design ways of minimizing any negative impact of the drilling.

\textsuperscript{53} Supra note 34.  
\textsuperscript{54} Ibid. at para. 46.
Liidlii Kue objected to the quality of material received from the Crown. It raised issues about the co-ordinates of drilling sites that ultimately resulted in the government funding Liidlii Kue to commission a study on the matter. The First Nation alleged that a study costing $66,575 was required to assess the impact of the test drilling on aboriginal activities. It asked that the study be conducted by an expert knowledgeable about aboriginal practices or a mammalian biologist specializing in animal behaviour and population movements.

The land administrator stated that such a study would relate to a full-scale mining operation, not test drilling. He offered to give to Liidlii Kue $5000 for a study that would assess the concerns of local hunters. The First Nation accepted the $5000, but sought to obtain more. Finally, no funding at all was provided.

Discussions continued over the course of almost a year before the permit was actually issued. The land use administrator and Liidlii Kue did not reach any agreement on the matter and ultimately Liidlii Kue challenged the permit in court.

Liidlii Kue sought a declaration that there is a constitutional and fiduciary duty to consult it adequately before a permit is issued, an order of mandamus compelling consultation, and an order prohibiting the issuance of a permit until such consultation was completed.
Liidlii Kue claimed that its traditional harvesting rights would be infringed by the issuing of a permit that would allow test drilling. The right to pursue the usual vocations of hunting, trapping and fishing on the land was preserved by Treaty 11, except on land that may be required for mining and other purposes. The First Nation argued that aboriginal title was not extinguished by Treaty 11.

The Attorney General conceded that the permit should be quashed, as the funding had not been provided. It refers to principles of natural justice, particularly the reasonable expectation doctrine. Therefore, the rest of the application became moot and should not be considered. In the alternative, the questions should be decided in an action rather than in this application.\(^\text{55}\)

Liidlii Kue and Ms. Bernier objected to the setting aside of Mr. Hornby’s decision without also dealing with the other remedies, e.g. the duty to consult. Ms. Bernier was particularly concerned. She wanted a practical solution. She was willing to help the First Nation in the consultation process and most of all, she did not want to be in the middle of a dispute between Liidlii Kue and the government.\(^\text{56}\)

Finally, the Court decided that the judicial review proceeding should deal with all the constitutional and fiduciary obligations. That was the most economical way to proceed.\(^\text{57}\)

\(^{55}\) Ibid. at paras. 16-17.
\(^{56}\) Ibid. at paras. 18-19.
\(^{57}\) Ibid. at para. 20.
First, Liidlii Kue challenged the validity of the Canada Mining Regulations, because they do not require consultation. Reed J. held that the First Nation cannot challenge the legislation in this proceeding, because only a decision may be subject of an application for judicial review.\(^{58}\)

Next, relying on *Adams\(^{59}\)*, the First Nation argued that the Territorial Land Use Regulations were *ultra vires* because they do not contain explicit guidance as to how the treaty rights in question are to be accommodated. The Court rejected that proposition and affirmed that *Adams* does not mean that “all provincial and federal legislation of general application that might impinge on aboriginal rights has to have included in it provisions respecting the accommodation of aboriginal rights.”\(^{60}\)

The subject of the duty to consult was the focal point in the issuing of a land permit to test drill in areas where Liidlii Kue held mining claims. The question was whether the Crown was obligated to consult with Liidlii Kue when the proposed action would interfere with its treaty right to hunt, trap and fish on unoccupied Crown land.

Reed J. found that there was a constitutional obligation to consult with the First Nations when a decision was made to occupy land covered by a treaty. In this sense, it was an application of the *Sparrow* justification analysis. She rejected the duty to consult as a “stand alone” constitutional obligation and adopted Finch J.A.’s analysis in *Halfway*

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\(^{58}\) *Ibid.* at para. 23.


\(^{60}\) *Liidlii Kue*, supra note 34 at para. 25.
River. Reed J. also mentioned the *TransCanada Pipelines*’ decision, but said that it was not helpful in the present case. This decision would be more useful in a case where the aboriginal rights are uncertain.

She also agreed with Huddart J.A.’s ruling in *Halfway River* in that she was not persuaded that the *Sparrow* analysis was necessary in this case, due to the minimal or even non-existent infringement of treaty rights:

> I am not persuaded that an analysis in accordance with the *Sparrow* criteria is required to justify the land use that is contemplated. As noted by Madame Justice Huddart, the first criterion is satisfied by the terms of the treaty itself. The second and third fit awkwardly. Also, even if they are applicable, the assurances that have been given by Mr. Hornby and the offers of Ms. Bernier to ensure minimal impact of the drilling activity on those holding the treaty rights satisfies those requirements.61

Reed J. perceived the jurisprudence to require different content and standards of consultation depending on the circumstances of each case. She confirmed that the scope of consultation varies with the nature of the aboriginal right62 in question and the nature of the infringement63. She mentioned that the scope and nature of the consultation also varies with the scope and nature of the obligations of the Crown that arise as a result of the nature of the right.64

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64 *Ibid.* at para. 54.
At the end, Reed J. analysed what would be the scope and nature of the consultation required in the present case. In this case the right being asserted is a treaty right to hunt, trap and fish on unoccupied Crown land. It was a conditional right, expressed to exist until the land is required for one of the uses listed in the treaty, including mining.

Reed J. noted that if the whole tract covered by the treaty or a significant part thereof was being taken up, or was in danger of being taken up, this would render the treaty right meaningless. But, in this case, given the limited use proposed by the permit under consideration, this was not a serious consideration. As a result, Reed J. held that the consent of the Liidlii Kue to the taking of lands in this case was not required.

She affirmed or reaffirmed some of the principles related to the Crown’s duty to consult. First, the purpose of consultation must be to address the aboriginal interest at stake. The Crown must consult with the intention of substantially addressing First Nations’ concerns. It has a duty to inform itself of the aboriginal perspective, practices and rights.

As held by Finch J.A. in *Halfway River*, the government must provide information to First Nations in a timely way. It must give them opportunities to express their interests and concerns and First Nations’ representations must be seriously considered in the decision.
First Nations also have some obligations. They must act reasonably and they cannot impose unreasonable conditions to participate in the consultation process.

In this case, Reed J. held that there was a constitutional obligation to consult with those exercising the right to hunt, trap and fish on the land. This obligation was recognized by the land administrator. Hornby’s proposed consultative process was appropriate, given that the potential infringement was minimal and temporary. Further, she held that the detailed study that Liidlii Kue sought was not reasonable at this stage.

Accordingly, Reed J. did not think it was necessary to issue a declaration that there was a constitutional and fiduciary duty to adequately consult because the offer to consult that was made in this case was adequate in the circumstances. She did not find it necessary to issue an order of mandamus to compel consultation, nor an order prohibiting issuance of the order until consultation is complete.

The application was allowed in part, due to the lack of the promised funding. The decision under review was set aside and returned for reconsideration by a different land use administrator under the Territorial Land Use Regulations within three months. The Court asked the land administrator to impose reasonable time limits on those with whom he or she would consult, in order to ensure compliance with the time frame that was established.
In the next pages, I will review the principles elaborated in these three decisions as well as other decisions related to the duty to consult.

D. IS THERE A GENERAL DUTY TO CONSULT?

1. THE DUTY UNDER S. 35 OF THE CONSTITUTION ACT, 1982

One of the questions that has been debated since Delgamuukw is whether the duty to consult is an independent obligation that applies in all situations in which aboriginal rights may be infringed or affected by a proposed action, or whether it arises only in limited circumstances as part of a justificatory analysis relating to the infringement of previously established rights.

In Sparrow, the Supreme Court of Canada set out the justificatory analysis in relation to aboriginal rights. Aboriginal rights are not absolute and the Crown may infringe them as long as it meets the justificatory test. One of the elements of the justificatory test is the duty to consult adequately with the First Nations whose rights are infringed.

This conclusion is well explained in Sparrow. The infringement of the aboriginal right was well established before the Court passed to the justificatory analysis. Sparrow suggests that the duty to consult is not an independent obligation. Before the courts, the question of consultation arises only where an infringement of an aboriginal or treaty right
has been proven. So far, most of the judicial decisions have rejected the notion of an obligation to consult in circumstances where the s. 35 right has not been established. 

In *Halfway River*, Finch J.A. also describes the duty to consult as part of the *Sparrow* test of justification. He did not consider the duty as an independent fiduciary obligation of the Crown. In his view, the constitutional duty to consult protected by s. 35 arises only once the First Nations have demonstrated an infringement of an existing aboriginal or treaty right. That is also the position adopted by Borins J.A. on behalf of the Ontario Court of Appeal in *TransCanada Pipelines*.

To date, only Huddart J.A. of the B.C. Court of Appeal in *Halfway River* appears to have asserted a more general obligation to consult. She seems to believe that some consultation is needed even if there is no infringement of an aboriginal or treaty right that has been proven. 

Some First Nations have also embraced the position of Huddart J.A.. They argue that the Crown should consult them even if they have not yet established a specific aboriginal or treaty right. They say that the opposing position obliges them to go to court first to establish their rights before they can ask for consultation. That was obviously not

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65 See e.g. *Halfway River*, supra note 32; *Liidlii Kue*, supra note 34 and *TransCanada Pipelines*, supra note 33.

66 For more details on her position, see "Huddart J.A.'s reasons for judgment", supra p. 37 of this paper.
the purpose of the duty to consult. Instead, the point of the consultation should be to avoid litigation.

On the other hand, the Crown continues to argue that the duty to consult exists only for the purpose of justifying an infringement of aboriginal or treaty rights. It appears at the moment that the weight of authority is with the Crown.\(^\text{67}\) To date, the majority of the courts have declared that the constitutional duty to consult exists only as part of the justificatory analysis.

As a practical matter, I think that when an action or legislation may infringe aboriginal or treaty rights, the Crown should consult before the action is taken or the legislation is enacted. The opposite view would go against the purpose of consultation. Since consultation is supposed to prevent and avoid litigation, it is sensible that it occurs before any measure is taken. If not, the infringement would have already occurred and the consultation would not be capable to prevent it.

However, before the court, the question of whether the duty of consultation, as required by s. 35 of the Constitution Act, 1982, has been breached, should only be raised after an infringement of an existing aboriginal or treaty right has been established, as part of the justificatory analysis from Sparrow. Since consultation is only a factor, among others (for instance compensation, priority) permitting the Crown to justify an

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\(^{67}\) Supra note 65.
infringement of an aboriginal or treaty right, it should not be considered by courts unless an infringement is proven by First Nations.

In sum, as set out in *Halfway River* and *TransCanada Pipelines*, the constitutional duty to consult is not an independent obligation. It arises only where an infringement of an aboriginal or treaty right is proven, as an element of the *Sparrow* justificatory test. Nevertheless, consultation requirements could arise from other sources.

2. THE DUTY TO CONSULT OUTSIDE S. 35

a. Statutory requirements

A duty to consult may arise outside of the constitutional framework. For example, some obligations to consult could arise from a specific statute, at an earlier stage than would be required under the *Sparrow/Delgamuukw* test. For instance, the *Environmental Assessment Act*\(^{68}\) contains provisions that require consultation with First Nations in specific circumstances. Those provisions were applied by the Supreme Court of British Columbia in *Cheslatta Carrier Nation v. British Columbia*:

Under the Environmental Assessment Act such a duty may be derived from subsection 2(e), which lists as one of the explicit purposes of the Act,

\[\text{to provide for participation, in an assessment under this Act, ... by first nations...}\]

Similarly, subsection 7(2) indicates this goal of the legislation:

\[\text{An application for project approval certificate must...include or be accompanied by a preliminary}\]

\(^{68}\) R.S.B.C. 1196, c. 119.
overview of the reviewable project including but not limited to a description of...

Information distribution activities and consultation activities undertaken by the proponent with a first nation and a summary of the first nation’s responses and of the issues identified...

Further, subsection 9(2) reads as follows:

The executive director must invite each of the following to nominate a number of individuals...

Any first nation whose traditional territory includes the site of the project or is in the vicinity of project;

Finally, subsection 14(1), "Public Information and Consultation", reads:

...the executive director, in consultation with the project committee, must make a written assessment of the adequacy of any measures that the proponent has taken or proposed relating to the distribution of information about the reviewable project that is the subject of the application of project report...

The written assessment may

Specify further measures necessary to ensure adequate distribution of information about the reviewable project, including but not limited to each or any combination of the following reasons:

Consultation with one more first nations.69

These provisions have been characterized as creating a “statutory obligation to consult”:

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69 Cheslatta Carrier Nation v. British Columbia (Project Assessment Director), (1998) 53 B.C.L.R. (3d) 1 at paras. 44 to 47.
The common law duty of consultation as articulated above is always present and always important from the Petitioners' point of view. In this case, there is in addition a statutory obligation to consult. That obligation in no way lessens the common law duty but it focuses on the issues of project approval as in this case.\(^{70}\)

It is important to remember that these statutory obligations to consult arise without the necessity of establishing an existing aboriginal or treaty right.\(^{71}\)

b. Administrative law requirements

There are also certain principles of administrative law that may oblige the Crown to consult with a First Nation prior to the establishment of an aboriginal right. These administrative law requirements arise from the requirements for natural justice and procedural fairness that also require some degree of consultation.

There have already been cases in which the need for natural justice and procedural fairness was addressed by the courts in the context of the duty to consult. For example, in \textit{Halfway River}, Finch J.A. said that: "... the legislation and the Regulations do require consideration of First Nations' economic and cultural needs, and imply a positive duty on the District Manager to consult and ascertain the petitioners' position, as part of an administrative process that is procedurally fair."\(^{72}\)

\(^{70}\) \textit{Ibid.} at para. 43.
\(^{71}\) J.J.L. Hunter, Q.C., "Consultation with First Nations When does the Obligation arise?" (Canadian Aboriginal Law 2000, Pacific Business & Law Institute, October 19, 2000) [unpublished].
\(^{72}\) \textit{Supra} note 32 at paras. 32 to 34.
Similarly, in Westbank v. B.C. (Minister of Forests), Sigurdson J., while rejecting an obligation to consult under s. 35, as part of the justificatory analysis, accepted that administrative law requirements could apply to First Nations before they established any infringement of their rights:

Based on the authorities I have referred to, and the circumstances of this case, I am unable to find that there is a duty to consult as an aspect of a fiduciary duty that arises prior to the petitioners’ establishment of aboriginal title.

I turn to the petitioner’s alternate position that there is nevertheless a duty to consult as a matter of procedural fairness.

I think that even in the absence of ongoing negotiations or a possible infringement of a proven right or of aboriginal title, there is, nevertheless, an obligation of procedural fairness on the part of the District Manager when making decisions that he knows might affect asserted aboriginal rights.74 [emphasis added]

c. The B.C. Consultation Guidelines

The B.C. Consultation Guidelines could also be considered as another type of obligation and could be used as a remedial mechanism. Originally, the operational guidelines were developed by the province of British Columbia following the British Columbia Supreme Court’s Delgamuukw decision. They were modified in December 1997 in response to the Supreme Court of Canada’s decision in the same case.

73 Supra note 44.
74 Ibid. at para. 85 to 87.
The document describes the need to consult with First Nations on aboriginal rights and title and outlines in detail the method to consider the potential of aboriginal rights in decision making processes. The guidelines ask provincial organizations to consult with First Nations on the potential existence of aboriginal rights in order to ensure that the rights are considered and protected.

Provincial ministries and agencies are asked to implement a strategy to consult with aboriginal groups to gather information on aboriginal considerations related to land and resources activities. Many agencies have drafted their own internal procedures to consult with aboriginal peoples within the context of their operations. While the methods of consultation may vary from agency to agency, they should all be guided by the B.C. Consultation Guidelines.

Cheslatta Carrier is an example of the application by the courts of the Guidelines:

These Guidelines were referred to at para. 94 in the Reasons of Sigurdson J. in Westbank, supra, and require government officials to deal in good faith in addressing aboriginal "concerns relating to infringement." The Guidelines state that the Province must assess the likelihood of aboriginal rights and title "prior to land resource decisions concerning Crown land activities", and they instruct statutory decision-makers to "take steps to ensure consultation activities contain proper representation from all potentially affected aboriginal groups." If these Guidelines are being complied with, they constitute a substantial answer to the concerns voiced by Mr. Janes. If they are not being complied with, the answer is not to distort the law of civil procedure but to raise the issue in a specific case. At the very least, rules of procedural fairness may be invoked, as occurred recently in Halfway River
E. WHAT IS THE SCOPE OF CONSULTATION?

Consideration of whether consultation is required depends on whether a possible aboriginal right will be potentially infringed by a Crown’s activity. The extent of consultation should always be appropriate to the scale of the potential infringement.

The famous sentence of Justice Lamer in Delgamuukw, “There is always a duty to consult”, has been interpreted by some people as giving First Nations a veto over Canadian exploitation of resources. That is not correct. The Supreme Court of Canada clearly stated that the duty to consult varies within the circumstances of each case.

Consultation can be considered across a spectrum ranging from minimal to significant involvement. It ranges from discussions carried out in good faith to circumstances that may require the full consent of a First Nation. At one end of the scale, there are cases in which there is little infringement of an aboriginal or treaty right. At the other end, there are cases in which the infringement is very severe. Between these two extremes, there is the majority of cases in which the Crown will need to consult “meaningfully” with First Nations.

\[^{76}\text{Supra note 44 at para. 20.}\]
For the cases in which there is little infringement, a simple notice or a letter of information may well be sufficient. In cases in which the infringement is more severe, First Nations will need to be consulted more significantly and in rare cases, consent of First Nations might even be necessary before any action can occur.

Some decisions have addressed the question of the degree of consultation needed. For example, the British Columbia Supreme Court affirmed that the consultation requirement will ordinarily be satisfied by the inclusion of aboriginal peoples on environmental review committees pursuant to B.C.'s environmental review process. Consultation does not generally require the Crown to obtain the Band's informed consent to conservation measures neither is the Crown required to obtain a vote by the band approving conservation measures.

In sum, consultation requirements vary depending on the type of right - aboriginal cultural practices, land based rights, aboriginal title, reserve land, treaty right - and the nature and effects of government activities on aboriginal rights.

F. WHEN SHOULD THE CONSULTATION OCCUR?

Before a court, the question of whether the Crown has fulfilled its duty to consult arises once First Nations have proven an infringement to an aboriginal or treaty right.

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77 Cheslatta Carrier Nation v. British Columbia (Project Assessment Director), supra note 69.

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Whether the Crown has consulted or not is important in order to know if an infringement of an aboriginal or treaty right is justified or not.

But, in practice, at what stage or stages in the project is the consultation required? For example, in the case of a legislative amendment, when is consultation needed? At the point of strategic planning, policy development, legislative amendments, implementation, evaluation or review? When should consultation begin and end?

As I mentioned, one of the purposes of consultation is to verify the existence of an aboriginal right and the possibility that a Crown’s activity infringe that right. Consultation is supposed to avoid litigation and minimize infringements of First Nations’ rights. Therefore, it is logical that consultation occurs before any measure is implemented. In practice then, in order to fulfil the obligation, consultation should occur before any decision that may affect aboriginal or treaty rights is taken.

That may cause however some political problems for the Crown. The governments do not necessarily want to disclose their negotiations to private parties. For instance, the governments have sometimes chosen to keep development projects secret for a period of time. Does the duty to consult obligate them to tell First Nations about those “secret” projects?

There are also some difficulties with the time needed by First Nations to complete their own consultation process. First Nations might need more time that what is allowed
in the legislation for consultation. First Nations might have traditional ways to consult their community and might need time to organize themselves and take an informed decision.

It makes sense for the Crown to give enough time to First Nations to prepare themselves sufficiently. That could mean, giving more time than was provided for in the legislation. However, time allowed for consultation should be reasonable. First Nations cannot use the consultation process to stop projects' development for too long.

Consultation should begin as early as possible in the process. It is strongly recommended that the Crown and its representatives consult with First Nations at an early stage, to allow full participation in the entire process. As a general rule, the later the consultation begins the more difficult and less successful it is likely to be. Moreover, once before the court, the Crown’s consultation may not be accepted if it was done too late in the decision-making process.

Consultation should be ongoing throughout the project by way of whatever means are mutually agreed upon at the beginning. When necessary, regular contact should be kept with the First Nation in order to update it on progress, and provide their representatives with opportunities to contribute to the development of ongoing projects. While this process might be time consuming for all parties, it is essential to develop a co-operative working relationship between the Crown and First Nations.
G. WHAT IS A “MEANINGFUL” CONSULTATION?

Canadian courts have ruled that consultation with First Nations, when required under s. 35 of the Constitution Act, 1982, must be “meaningful”. What does a “meaningful” consultation mean?

The authors of the article “From consultation to reconciliation: Aboriginal rights and the Crown’s duty to consult” affirmed that the duty to consult requires that the Crown:

(a) provides a First Nation that may be affected by government legislation or a decision with full information on the proposed legislation or decision;

(b) provides a First Nation an understanding of impacts on their aboriginal rights of projects or activities;

(c) fully informs itself of the practices and views of the First Nation; and

(d) be prepared to make changes to its proposed action based on information obtained through consultations.\(^{80}\)

Various decisions have interpreted what might constitute “meaningful” consultation. Generally, the courts have found that a “meaningful” consultation can mean that the Crown should take the initiative in the consultation process\(^ {81}\); consult with First

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Nations in a non-adversarial process\textsuperscript{82} and try to build a relationship of trust with aboriginal peoples instead of only filling a bureaucratic requirement\textsuperscript{83}.

The Crown should also listen to aboriginal peoples with the intention of substantially addressing their concerns\textsuperscript{84}; ensure that aboriginal peoples have an opportunity to express their interest and concerns\textsuperscript{85}; do more than simply meet with aboriginal peoples to inform them of future measures; give consideration to alternatives presented by aboriginal peoples\textsuperscript{86}; be prepared to make changes to its proposed action based on information obtained through consultations\textsuperscript{87} and demonstrably integrate aboriginal proposals into the proposed plan of action wherever possible\textsuperscript{88}.

Finally, the courts held, in different cases, that the Crown should more specifically discuss the determination of an appropriate scheme for the regulation of fisheries with the Band\textsuperscript{89}; inform the Band of all conservation measures being implemented before they are implemented\textsuperscript{90}; explain to the band the reason for the application of priorities\textsuperscript{91}; ensure that a band is provided with full information on the conservation measures and their effect on aboriginal peoples and other user groups in a timely way\textsuperscript{92} and inform itself

\textsuperscript{83} Ibid. at para. 36.
\textsuperscript{84} Makivik Corp. v. Canada, [1999] 1 F.C. 38 (T.D.).
\textsuperscript{85} Halfway River, supra note 32.
\textsuperscript{86} R. v. Noel, [1995] 4 C.N.L.R. 78 (Y.T.T.C.); Halfway River, supra note 32.
\textsuperscript{87} Halfway River, supra note 32 at para. 160.
\textsuperscript{88} Ibid.
\textsuperscript{89} Sampson, supra note 78.
\textsuperscript{90} Jack, supra note 79; Sampson, supra note 78.
\textsuperscript{91} Sampson, supra note 78.
\textsuperscript{92} Jack, supra note 79; Halfway River, supra note 32.
fully of the fishing practices of the aboriginal group and their views of the conservation measures. 93.

Consultation must always be done with an utmost good faith. In general, the courts have demonstrated willingness to support and validate consultation efforts that have been carried out in good faith. The concept of reasonableness must also come into play during the consultation process. In R. v. Nikal, Cory J. states:

So too in the aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and consult, such efforts would suffice to meet the justification requirement. This is no more than recognizing that regulations pertaining to conservation may have to be enacted expeditiously if a crisis is to be avoided. On occasion, strict and expeditious conservation measures will have to be taken if potentially catastrophic situations are to be avoided. The nature of the situation will have to be taken into account in assessing the conservation measures taken. The greater the urgency and the graver the situation the more reasonable strict measures may appear. 94 [emphasis added]

In sum, the Crown has an obligation to inform and a duty to be informed. It must make full disclosure to First Nations to allow them to make an informed decision. The Crown must inform itself of the aboriginal perspective, practices and rights and must provide a mechanism by which input can be received and considered.

93 Ibid.
94 Supra note 21 at para. 110.
H. HOW SHOULD CONSULTATION TAKE PLACE?

What form of consultation will best meet the consultation objectives? In fact, the methods of consultation will vary from situation to situation, depending upon the nature of a proposed activity, the preferences of First Nations, the type of information needed, the type of feedback wanted, etc. For example, the method of consultation could be face to face meetings, discussions with organisations and individuals, requesting written submissions or a mix of these. The important thing is to select the most appropriate method to gather the information needed.

The B.C. Consultation Guidelines\(^9\) suggest different methods of consultation. These methods can include meetings and correspondence with aboriginal groups; exchanges of information related to proposed activities; the development and negotiation of consultation protocols; site visits to explain the nature of proposed activities in relation to potential aboriginal rights; carrying out traditional use studies and participation in local advisory bodies.

A few questions must be looked at in order to determine which form of consultation works the best in a particular case. Which forms of consultation will deliver valid and representative information, issues and ideas? Are there financial, personnel, time constraints and how will these affect the form of the consultation? What expectations are there about consultation, from interest groups, the economic sector in general, or the wider public and how will you manage these? Are there some participants...
that are likely to dominate and how can you configure consultation to ensure a balance of views is maintained? What forms of consultation are particular groups likely to respond best to? What has worked well in the past? What are the risks of adopting one approach over another?  

It is also important to define at the beginning of the process to what extent external comment can influence the final outcome. Consultation processes should be clearly defined to First Nations, along with explanations of how information will be used in decision making. For instance, the approaches could be:

(a) **No influence:**

The public authority makes the decision without external comments. The authority says it is making the decision and announces the final result.

(b) **Limited influence:**

The public authority makes the final decision. But in the process, other information or expertise is sought or received. While external views are taken into account, the final decision is still made by the public authority. It is communicated to all parties, showing their comments were considered and how the outcome was reached.

(c) **Shared decision-making:**

The public authority may not have all the answers to make the decision itself. The decision-making role is shared with other parties. The final decision is one the parties

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95 *Supra* note 75 at 4.
96 See generally New Zealand, Ministry of Education, “Consultation and Engagement with Maori”, *supra* note 28; *B.C. Consultation Guidelines*, supra 75 at 11.
reach together. This may include a consensus, in which people accept a final position even if they do not agree with it or it is not their ideal.

(d) Delegation:
The public authority decides it does not need to take the decision at all. The power to decide is given to another group.97

I. WHO SHOULD CONDUCT THE CONSULTATION?

1. THE CROWN AND ITS REPRESENTATIVES

The constitutional duty to consult, as part of the Sparrow justificatory analysis, rests with the Crown. This is the Crown that is responsible to ensure that the duty is fulfilled. But, who are the best Crown’s representatives to conduct the consultation process?

To answer this question, there are different factors to be taken into account. For example, who will be perceived by First Nations as having authority? What levels of authority are needed? What level of expertise is needed and is specialist knowledge required? Would it help if they had a current relationship with those being consulted? Would an internal or external person be better?

When many Crown agencies are involved in consultation processes, they should try whenever possible to integrate all the consultation processes in one process. That will ensure maximum clarity and efficiency. First Nations must know who they are dealing with and what is everyone’s role.
The governments are large, hierarchically organized institutions, in which decision making processes are very complicated. One of the problems that First Nations often encounter in consultation process is that they meet with Crown’s representatives that do not have real power to engage the Crown. These Crown representatives are often there only to gather information, but they cannot make any decisions of importance. They have to consult their superiors before making decisions. This process can be time consuming and it can also be very frustrating for First Nations.

At the beginning of the process, the Crown’s representatives should make it clear to First Nations whether they have decision-making powers. The experience of decision-making and consultation by public agencies indicates that it is very important to define, at the beginning, who is making the decisions.

2. THE ROLE OF THIRD PARTIES

As I said above, the constitutional duty to consult rests with the Crown. However, the Crown has a lot of constraints of various natures. For instance, the Crown has political constraints, it has to be careful not to create precedents, it has to respond to public opinion, etc. As a consequence, it can sometimes be difficult for the Crown to fully fulfil its obligation.

One solution is to give the opportunity to third parties to conduct the consultation process themselves. This raises another question, can the consultation be conducted by

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97 ERMA New Zealand, Policy on consultation & interaction, April 1999 [unpublished].
third parties? A third party could be a forestry company, a mining company, etc. Those peoples are usually closer to First Nations and are more likely to want a practical solution in less time. They do not have all the political constraints and they want practical solutions. Consultation by third parties could reduce delays and could lead to more workable solutions for all parties.

However, is it fair to let First Nations, sometimes very small bands with not that much experience in consultation or negotiation, consult with big companies who have lots of resources and experience in this sort of situation? Can the results of consultation be fair?

Although the question remains uncertain, it seems that the courts tend to accept that part of the consultation be done by third parties. However, the Crown must always keep an eye on what is happening in the consultation process. At the end, the fiduciary obligation to consult rests with the Crown. In the event a tribunal would find a lack of consultation, it is likely the Crown that would be responsible for damages encountered by First Nations due to this breach of fiduciary obligation.

J. CONSULTATION IS A TWO-WAY PROCESS

Consultation is a two-way process. First Nations have not only rights, but also some obligations in the consultation process. First Nations must respond to the Crown’s

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98 See e.g. Liidlii Kue, supra note 34.
offers to consult them and must co-operate with the Crown’s efforts to consult. They need to make efforts to bring their cultural perspectives before the decision-makers.

Aboriginal groups cannot attempt to stall a project by foregoing participation until the final stages of consultation nor can they unduly delay the economic development of an area by refusing to participate in a consultation process. If aboriginal peoples do not fully participate and provide sufficient information related to their rights that may be affected, they cannot complain later of a lack of consultation in the decision-making process. Moreover, the way in which a First Nation conducts itself in a consultation process may influence its ability to retain its right to be consulted.

However, in their article relating to consultation, Sonia Lawrence and Patrick Macklem express an opposing view. They state:

\[
\text{Whether a First Nation acts reasonably or unreasonably when consulted by the Crown should be irrelevant to a determination of the ultimate constitutionality of the Crown action in question. To hold otherwise would render the constitutional recognition and affirmation of existing Aboriginal and treaty rights contingent on the behaviour of the First Nation in contexts unrelated to the exercise of its rights.}^{99}
\]

This question has not been considered by the Supreme Court of Canada yet, but the lower courts have so far rejected this interpretation. For instance, in Halfway River, the British Columbia Court of Appeal stated that First Nations need to co-operate in the consultation process and should offer the relevant information to aid the decision-maker.
determining the nature and the extent of the right in question. They cannot unreasonably refuse to participate in the consultation process.

In Ryan v. British Columbia (Minister of Forests), Legg J. accepted the findings of the learned judge and found that: "... there was consultation but that it did not work because the Gitksan did not want it to work and that the process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met.”

Therefore, he ruled that the Crown had fulfilled its constitutional duty to consult.

Consequently, the weight of authority does not currently support Sonia Lawrence and Patrick Macklem on this question. The case law is well established that First Nations must co-operate with the Crown in the consultation process. If they do not, it is not possible for them to complain later of a lack of consultation in the decision-making process.

K. WHO SHOULD BE CONSULTED?

1. GENERAL PRINCIPLES

One of the most difficult questions in the consultation process is determining who should be consulted. First, the Crown should consult every First Nation known to it who may have aboriginal rights affected by a Crown’s decision. It is better to go larger at first.

99 "From consultation to reconciliation", supra note 80 at 278.
The Crown should take steps to ensure consultation activities contain proper representation from all potentially affected aboriginal groups. That may include doing preliminary consultation to discover which groups are or will be affected by a decision. Consulting exclusively with national organisations is almost certainly not sufficient.

2. WHO HAS THE AUTHORITY TO REPRESENT ABORIGINAL PEOPLES?

There is also the question of who has the authority to represent the interest of aboriginal peoples. For example, should the Crown consult with native individuals, clans, bands or nations? If the affected groups are signatories of a Treaty, should the Crown consult with all bands of a Treaty group or just a representative group of this Treaty?

a. What is the nature of aboriginal rights?

To answer those questions, it is important to determine who are the holders of the protected rights and who has the authority to agree to an action. To determine the holders of aboriginal rights, it is necessary to examine the nature of those rights.

The common law has recognized the existence of aboriginal rights. In Van der Peet, the Supreme Court of Canada held that an aboriginal right is an element of a practice, custom or tradition integral to the distinctive culture of an aboriginal group that existed prior to the contact with European society.

\[^{101} \text{Van der Peet, supra note 7 at 743-745.}\]
Aboriginal rights are held communally. In *Delgamuukw*, Justice Lamer said, in relation with aboriginal title:

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. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests.  

b. What group is the holder of aboriginal rights?

In order to know who can represent a particular group, it is important to know what group is the holder of aboriginal rights. In other words, who, amongst the native individuals, clans, bands or nations, has the power to make decisions relating to aboriginal or treaty rights?

For treaty rights, it is sometime possible to know the beneficiaries of the Treaty by looking to the common intention of the parties. If the intention is not clear, then an expert could examine the historical context.

For aboriginal rights, because they are elements of a practice, custom or tradition integral to the distinctive culture of an aboriginal group that existed prior to the contact with European society, the exercise of those rights should also depend on the practice, custom or tradition of a particular group. Traditionally, it seems that one of the important entities in the relations between the Crown and aboriginal peoples has been the nations.

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102 *Delgamuukw*, supra note 10 at 1082-1083.
Since the beginning of their relationship, the Crown has recognized the powers of the nations to conclude treaties, contracts, to sign agreements of all sorts, to cede lands, etc.\textsuperscript{103}

But, the treaties were also often with less than the whole language group. For instance, the pre-confederation Ontario treaties were often with what is now recognized as individual bands. Therefore, one can ask the question "what is the land-holding unit" under the system of the particular aboriginal grouping. The answer will vary from group to group.

What about Indian Bands? First, it is important to mention that Indian bands are not traditional. As we known them now, they are post-contact, post-treaty, post-Indian Act entities. Nevertheless, bands have become the representative bodies for status Indians.\textsuperscript{104} It is now a well-established practice for the Crown to deal directly with Indian Bands.

c. Who are the representatives of a band?

At the beginning of the relations between the Crown and aboriginal societies, the Crown was usually negotiating (treaties for instance) with Indian Chiefs. The Crown accepted the authority of those Indian Chiefs. However, it happened a few times that the aboriginal peoples refused to respect various agreements signed by their chiefs for the

\textsuperscript{104} It is unclear at the moment who are the representatives of non-status Indian and Metis, since they are not represented by bands.
reason that those chiefs did not have the authority to sign such agreements. The Crown has then decided to always ask aboriginal communities to elect and choose their representatives in public prior to signing agreements.

The Royal Proclamation also gives a procedure. The Indian leaders must be chosen at public meetings for they may be no chiefs or leaders in the community with general authority, or with the authority to negotiate a treaty. With the James Bay and Northern Quebec Agreement, signed in 1975, the practice for agreements became established with a referendum and that has been standard since even for specific claims.

When dealing with the Crown, the representatives of a band are acting on behalf of the whole band. That means that they can proceed even if some peoples were absent when a decision was made. That also means that if a Treaty was signed for example, it applies to every member, even if there were some dissidents.

That brings the question of who in the community has the power to represent the community as a whole. When deciding who will be consulted, the Crown should identify who has the support and authority to represent the views of a group and who has the expertise in the subject at hand. This process may require prior consultation.
There is an existing dispute at the moment as whether the Band Council elected under the \textit{Indian Act}\textsuperscript{105} is the proper representative of the Band or whether the traditionalist leaders have the real power to represent their community.

The \textit{Indian Act} is an administrative statute dealing with the reserve system. For matters related to the \textit{Indian Act}, the Band Council is probably the best representative of the Band. The Band council has the powers given to it under the \textit{Indian Act}. However, the powers of the Band council are limited to what is included in the \textit{Indian Act}. Therefore, it is not surprising that all the claims negotiations take place outside its statutory framework.

In summary, there is still uncertainty concerning who the Crown should consult with. Inside bands, some discussions must be done in order to decide who are the proper representatives and I think that question has to be debated first inside the aboriginal community itself. The legislator may also want to clarify the status of Indian Bands and Band Councils. That should be done in consultation with aboriginal peoples and organisations.

L. \textbf{WHO SHOULD PAY FOR THE CONSULTATION PROCESS?}

As I mentioned above, First Nations must participate in the consultation process. They need to make efforts to bring their cultural perspectives before decision-makers. If First Nations do not fully participate and provide sufficient information to the Crown, it

\textsuperscript{105} R.C.S. 1985, c. 1-5.
may influence their ability to retain their right to be consulted. A tribunal may then find that an infringement of an aboriginal right is justified even if there was not sufficient consultation.

This situation brings another contentious issue, who should pay for consultation? Does the Crown have an obligation to provide funding to First Nations in order to enable them to participate in consultation processes? What happens when on the invitation to consult an aboriginal group advises that it lacks the resources?

First Nations often complain that they do not have significant resources for consultation. They affirm that the lack of financial resources make them unable to fully participate in consultation processes. The reality is that the consultation process can become very demanding economically for First Nations. The Crown agencies are sometime sending a panoply of letters announcing all kind of developments, projects, activities, new regulations, etc. to Band Councils that may or may not require consultation.

Unfortunately, First Nations often state that they are not able to keep up with the volume of referrals sent by the Crown. They do not have enough resources, human and financial, to respond to all those demands. And if they do respond, they often just object to any kind of development within their traditional territories because they do not have enough time and/or money to study every proposition. This situation is even more obvious in small bands that have even less resources to respond to every demand.
First Nations are asking for money for various purposes. For instance, funding could be needed to contribute to historical, cultural, environmental and anthropological studies, to afford competent lawyers and experts, to hire peoples to process and read the information received from the Crown and to assist to consultation meetings, etc.

The question of funding remains uncertain. To date, there is no obvious case where the lack of participation of a First Nation was related to a lack of resources. It is perhaps possible that in a case like that, where a First Nation could not participate because of financial problems, a court could recognize that providing funding is an element of the Crown’s duty to consult.

Until then, it seems that the weight of authorities do not balance in favour of a mandatory funding by the Crown of the consultation process. However, the Crown should consider providing some form of assistance to groups who would otherwise be unable to contribute in the process.

Finally, if a First Nation is entitled to some funding, who should provide funds? The Crown, third parties, both? Let’s take the example of an application by a forestry company for a licence of exploitation over an aboriginal traditional territory. Would it not be logical that the company contributes in part to consultation expenses? This question has not been studied by courts yet, so there is no legal answer at the moment. But, I guess that in the event of a court’s ruling saying that First Nations are entitled to some kind of funding, the Crown could probably share the bill with private companies.
THE CROWN’S DUTY TO CONSULT
WITH INDIGENOUS PEOPLES,
WHAT IS THE SITUATION IN NEW ZEALAND?

A. INTRODUCTION

It is well known that New Zealand has a significant Indigenous population. About 12.5 per cent of the New Zealanders are Maori. There are more than 400,000 New Zealanders who can claim some Maori descent. As in Canada, the relations between the races in New Zealand have attracted increasing attention in recent years.

Part of that debate has concerned the place of the Treaty of Waitangi, its meaning and its effects. The courts have interpreted the Treaty of Waitangi not by using the literal words, but rather by establishing Treaty principles to be followed by the Crown and the Maori. One of that principle is the Crown’s duty to consult with the Maori on major issues.

In this chapter, I will explain what is the Treaty of Waitangi, its principles and its effects on the Crown’s duty to consult. More particularly, I will discuss about the different aspects of the consultation as elaborated by the courts. I will also look at the

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106 Indigenous peoples from New Zealand.
reports of the Waitangi Tribunal related to the consultation with the Maori. Finally, I will study the consultation principles as seen by the New Zealand Environmental Court.

B. THE TREATY OF WAITANGI

The Treaty of Waitangi was signed on February 6th, 1840 by Captain Hobson on behalf of the British Crown and by about 500 Maori Chiefs in all. It was a solemn contract. The Treaty comprises a preamble, three short articles and a declaration by the chiefs of their acceptance and entry into it “in the full spirit and meaning thereof.”

The Treaty has two texts, one Maori and one English. The English text is not an exact translation of the Maori text. Despite the problems caused by the different versions, both represent an agreement in which the Maori gave the Crown rights to govern and to develop British settlement, while the Crown guaranteed the Maori full protection of their interests and status, and full citizenship rights.

In the epilogue of the Treaty, the signatories acknowledged that they have entered into the full spirit of the Treaty. These words are important, for it is the principles of the Treaty, rather than the meaning of its strict terms, that must be determined today. When using almost exclusively the spirit of the Treaty rather than its words, the variations between the two texts become less problematic.

There are many difficult and complex questions surrounding the Treaty and its contemporary application. Generally, the place of the Treaty of Waitangi in New Zealand
depends upon the eyes of the beholder. From the Maori standpoint, its role and status have never changed. It was and it is still today a transaction of sublime importance. From the Crown’s perspective however, the Treaty has not always been of great importance. In fact, the Crown denied its legal effects for many years.

Consequently, even today, the legal status of the Treaty of Waitangi remains uncertain. There are still different opinions on whether the Treaty has or not a fundamental significance in constitutional law. At the moment, the Labour party (which forms the Government) seems to accept the Treaty of Waitangi as New Zealand founding document and as the basis of constitutional government.

Nevertheless, the passing of the Treaty of Waitangi Act\(^\text{107}\) in 1975 as well as some other legislation related to the Maori has definitely changed the legal status of the Treaty, perhaps irrevocably.\(^\text{108}\)

C. THE WAITANGI TRIBUNAL\(^\text{109}\)

The Waitangi Tribunal was established in 1975 by the Treaty of Waitangi Act. The object of the Treaty of Waitangi Act 1975 is explained in its long title and preamble:

An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to

\(^\text{107}\) 1975 No 114.


the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

The Waitangi Tribunal is a permanent commission of inquiry charged with inquiring into the Maori claims relating to the Treaty of Waitangi. The Tribunal comprises 16 members, who are appointed for their expertise in the matters that are likely to come before them. Approximately half of the members are Maori.

The Tribunal was established in response to the Maori’s protests\textsuperscript{110} over instances where the Treaty of Waitangi was not observed. When the Tribunal was established in 1975, the Maori’s protests about unresolved Treaty grievances were growing. By establishing the Tribunal, the Parliament provided a legal process by which the Maori Treaty claims could be investigated.

For the first ten years of its existence, the Tribunal was empowered to look at claims that arose only after 1975. But in 1985, the \textit{Treaty of Waitangi Act} was amended and the jurisdiction of the Tribunal was extended back to February 6\textsuperscript{th} 1840, the date the Treaty was signed. Now, the Tribunal deals with past and present acts of state, dealing with claims against the Crown and the practical application of the Treaty.

When presented with a claim, the Waitangi Tribunal has to decide whether, on the balance of probabilities, that claim is well founded. Where the Tribunal finds that such is

\textsuperscript{110} There was a large march in 1975 down to Wellington, and the legislation was very much a response to that event.
the case, it may recommend to the Crown means by which the Crown can compensate the claimants, remove the prejudice or prevent similar prejudice happening to others in the future. The Tribunal reports its findings and makes its recommendations in writing. Those findings and recommendations can be found in the Waitangi Tribunal Reports.

The Waitangi Tribunal is unusual in that it was established as a permanent commission of inquiry. For this reason, it differs from a court in several important respects. The Tribunal has exclusive authority to determine the meaning and effects of the Treaty but generally, it has authority only to make recommendations. In certain limited situations, the Tribunal does have binding powers, but in most instances, its recommendations do not bind the Crown, the claimants or any other participants. The Tribunal does not have final authority to decide points of law. That power rests with the courts.

The tribunal is not involved in the settlement process and claimants agree not to pursue matters through the Tribunal while they are engaged in the negotiation process. Its process is more inquisitorial and less adversarial. The aim is to determine whether a claim is well founded. The tribunal can conduct its own research so as to try to find the truth of a matter. Its process is flexible and it is not necessarily required to follow the rules of evidence that generally apply in the courts.

The Tribunal can register the claim of any Maori with a grievance against a policy, practice, act or omission of the Crown. It is not required to check that a claimant has a
mandate from any group, but it may refuse to inquire into a claim that is considered to be frivolous or vexatious.

The Tribunal’s Reports are admissible in general courts, and may be seen as helpful, but again the findings are not binding on those courts. It has a limited power to summons witnesses, require the production of documents and maintain its order at its hearings. However, it does not have a general power to make orders preventing something from happening or compelling something to happen. Nor can it make a party to Tribunal proceedings pay costs.

D. THE PRINCIPLES OF THE TREATY OF WAITANGI

The principles are applied because of the difficulties with the literal words of the texts of the Treaty. Somers J., in NZ Maori Council¹¹¹, saw them as the same today as they were in 1840. Somers J. said: “The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply.”¹¹²

The function of the Waitangi Tribunal is to investigate whether matters complained of are inconsistent with the principles of the Treaty of Waitangi. The Tribunal has stated that some basic principles should guide the actions of the Crown and the Maori. These include the principle of reciprocity (i.e. the cession by the Maori of

¹¹¹ Supra note 3.
¹¹² Ibid. at 692.
sovereignty to the Crown was in exchange for the protection of Maori interests), the principle of partnership, the principle of active protection of Maori interests, the principle of the right of redress for past breaches, the principle of options and finally the principle of consultation.

Other principles are also sometimes considered as Treaty principles. Those include the principle of mutual benefits, the principle of equality, the principle of honest effort to ascertain the facts, the principle of consent, the principle of negotiation for interference with rights, the principle of the Crown guarantee to individual Maori of full exclusive and undisturbed possession of their lands, the principle of the right to govern without undue shackles, the principle of the Maori right of tribal self-regulation and the principle of reciprocal obligations.\footnote{113}

It is worth to mention that the phrase “the principles of the Treaty of Waitangi” is beginning to be seen in the fields of state enterprises, resource development and resource protection. In the past few years, the New Zealand Parliament passed the Conservation Act\footnote{114}, the Environment Act\footnote{115} and the Resource Management Act\footnote{116}, in each of which there appear specific provisions that each Statute is to be interpreted in such a way as to comply with the principles of the Treaty.

\footnote{113}{"The Treaty of Waitangi", supra note 108 at 28 and 50.}
\footnote{114}{1987 No 065.}
\footnote{115}{1986 No 127.}
\footnote{116}{1991 No 069.}
E. THE CROWN’S DUTY TO CONSULT WITH THE MAORI

Consultation is perhaps the most important way to ensure that the Maori have input into decision-making processes. Consultation in a Maori context is far more important to the Maori than representation in the Crown’s organisations.

In New Zealand, the Crown’s duty to consult with the Maori has its origins in the principles of the Treaty of Waitangi as elaborated by the New Zealand’s courts and the Waitangi Tribunal. The duty to consult is seen as part of the principles of partnership and active protection of the Maori.

1. THE INTERPRETATION OF THE NEW ZEALAND COURT OF APPEAL

The courts have been involved in Treaty matters in various ways. For instance, the courts have been involved where reference to the Treaty or to Maori values has been in a relevant statute; where the Treaty has been held relevant to the interpretation or application of a statutory provision or the exercise of an administrative discretion; and where the Treaty is declaratory of rights enforceable at common law. The courts have had a major role in guiding claim settlements through injunctive relief to restrain the transfer of state assets. This has generally been on the basis of some empowering statutory provision and upon principles of legitimate expectation.

More particularly, in 1987, the New Zealand Court of Appeal rendered a major judgement. The *NZ Maori Council* decision was given on June 29th, 1987. The decision
has been hailed as a historic case and a landmark judgement. The case was a turning point in New Zealand's legal history.

The Treaty of Waitangi was in issue only because of the statutory references to it made in the *State Owned Enterprises Act*¹¹⁷, itself. The decision should be viewed as part of a process of constitutional change embodied in the creation and subsequent widening of the jurisdiction of the Waitangi Tribunal, the growing practice of referring to "Treaty principles" in statutes, decisions of the Courts and other investigatory bodies.

It is perhaps the most important case in New Zealand's history. The decision was unanimous, but each of the five members of the Court delivered a separate judgment setting out his reasons for joining in the decision.

**a. Background of the NZ Maori Council decision**

The New Zealand government, as part of a programme of reorganising the public sector, embarked on the creation of a number of state owned commercial concerns known as State-Owned Enterprises to carry on commercial and land management activities formerly undertaken by government departments. Legislative effect to these changes was given by the *State-Owned Enterprises Act*. As part of the arrangement, it was proposed to transfer to the State-Owned Enterprises some four to five million hectares of Crown land.

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¹¹⁷ 1986 No 124.
These developments were watched by many Maori and the Waitangi Tribunal with mounting concerns. The litigation may be said to have its origins in an interim report of the Waitangi Tribunal dated September 8th, 1986. In fact, the intervention of the Tribunal played a significant role in the events that followed. On the recommendation of the Tribunal, two major changes were made to the Bill:

- The addition of what is now section 9 stipulation that nothing in the Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi; and
- The addition of section 27 which set out an elaborate procedure to deal with pending as well as future Waitangi Tribunal claims.

b. The Court’s analysis of the duty to consult

Since section 9 of the *State-Owned Enterprises Act* expressly forbids the Crown to act in a manner “inconsistent with the principles of the Treaty of Waitangi”, the Court had to determine what those principles are.

The Court discussed particularly the principle of partnership. The Court stated that the concept of partnership will help the relations between the Crown and the Maori during new developments. The duty of the Crown is not merely passive and the Crown must actively protect the Maori in the use of their lands and waters. The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The responsibilities of the parties to the relationship are to act towards one another in a spirit of reasonableness and good faith.
The Court also recognised that there is to be a kind of obligation of consultation with the Maori on major issues that affect them. However, the Court rejected the Maori’s submission that the Crown has an obligation to consult on every asset sought to be transferred to one of the State-Owned Enterprises. Such an absolute open-ended and formless duty would be incapable of practicable fulfilment and is definitely not implicit in the Treaty. Richardson J. said: “In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and it cannot be regarded as implicit in the Treaty.”118

Richardson J. explained the obligation of consultation as follows:

I think the better view is that the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.119 [emphasis added]

It follows from Richardson J.’s discussion that in some areas more than others, consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of the Maori are to be protected. For example, negotiation by the Crown for the

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118 NZ Maori Council, supra note 3 at 683.
purchase of Maori land clearly requires full consultation. Environmental matters, especially as they may affect the Maori access to traditional food resources require consultation with the Maori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on the Maori interests, will often give rise to the need for consultation.

The purpose of the consultation is to have sufficient information to act consistently with the Treaty principles and make an informed decision.\textsuperscript{120} The degree of consultation required in any given instance might, as Richardson J. said, vary depending on the extent of the consultation necessary for the Crown to make an informed decision.\textsuperscript{121}

The Court held that when there is a major change to a policy, as a reasonable Treaty partner, the Crown should consult the Maori regarding the manner of implementation of the policy.\textsuperscript{122} Once a policy is in force, the Crown should give the Maori an opportunity for comment.\textsuperscript{123}

There should be a timetable to avoid delay.\textsuperscript{124} The duty to consult does not necessarily mean an obligation to reach an agreement and the principles of the Treaty do

\begin{flushleft}
\textsuperscript{119} \textit{Ibid.} at 683.
\textsuperscript{120} \textit{Ibid.}.
\textsuperscript{121} New Zealand, Wellington, Waitangi Tribunal, Department of Justice, "Ngai Tahu Land Report" (1997) section 4.7 at 9 [hereinafter "Ngai Tahu Land Report"].
\textsuperscript{122} NZ Maori Council, supra note 3 at 665.
\textsuperscript{123} \textit{Ibid.}.
\textsuperscript{124} \textit{Ibid.}.
\end{flushleft}
not authorise unreasonable restrictions on the right to govern.\textsuperscript{125} Finally, the Court held that the duty to act reasonably and in the utmost good faith is a two-sided duty.\textsuperscript{126}

2. THE INTERPRETATION OF THE WAITANGI TRIBUNAL\textsuperscript{127}

As I said before, the Waitangi Tribunal’s role is to make recommendations on claims brought by the Maori against the Crown relating to the practical application of the Treaty. The Tribunal reports its findings and makes its recommendations in writing, in the Tribunal’s Reports. It is in those reports that the Tribunal’s recommendations about the obligation of consultation can be found.

It is worth mentioning that even the Waitangi Tribunal relies a lot on the \textit{NZ Maori Council} case when it elaborates on the duty to consult.

\textsuperscript{125} \textit{Ibid.}
\textsuperscript{126} \textit{Supra} note 4 at 664.
a. What triggers the duty to consult?

As a result of the Court of Appeal statements in the *NZ Maori Council* case, the duty to consult does not arise in all situations. There is a duty to consult with the Maori only on issues of major significance. The Maori expect to discuss proposals that affect them in their traditional way of life.

While the Tribunal is chiefly concerned with consultation on environmental matters, it also emphasises that the need for adequate consultation extends to a wider range of social, economic and cultural matters of particular significance to the Maori. In the contemporary context, resource and other forms of planning, insofar as they may impinge on the Maori interests, will often give rise to the need for consultation.

b. When should the consultation occur?

The Tribunal believes that discussion between the Maori and the Crown should take place on matters affecting the Maori while policy is still in the formative stage, to ensure adequate Maori input. In the Tribunal’s view, in order to be effective and meaningful, the consultation with the Maori should occur before action or decision is taken by legislation or by any tribunal or authority.

c. How the consultation process should work?

The appointments and the method of appointment are critical to the integrity of a process. The appointment process should be fully transparent and fair. The Crown alone should not determine the consultation procedure. Consultation should be on mutually
acceptable terms. The Crown should give to the Maori information on legislation and planning processes. Maori decision-making structures and values need to be combined with the majority’s system.

If consultation offers are to be effective and meaningful, there should be clear efforts made to involve the Maori in every aspect of the procedures. However, consultation does not require open-ended negotiation. The Tribunal relies on the Court of Appeal’s decision when expressing this view.

The Tribunal believes that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies of its responsibilities. If the Crown chooses to delegate, it must ensure that the authorities fulfil its Treaty duty of protection.

There are cultural constraints that need to be taken into account in the preparation of the consultation process. The Crown should be aware of the need to consult with the Maori in the traditional manner. The Maori have their own consultation and discussion processes, which do not usually fit with the requirement to file an objection, within a given number of days. The Crown should try to respect those constraints and plan to let more time to the Maori for the preparation of the consultation. On the other hand, the Maori need to be as efficient as possible in order to respect the time allowed and not delay unreasonably the process.
d. **Who should be consulted?**

One of the major difficulties in the consultation process is to find who are the “representatives of Maori” in a particular situation. The Tribunal recommends that the Crown consult with the Maori that are directly affected by a decision or legislation. Consulting exclusively with national Maori organisations is not sufficient.

It is worth mentioning that there is no New Zealand equivalent of the *Indian Act*, defining bands and band councils. There has not been that level of settler state legal structuring of local indigenous political organization. The Maori Land Court decides on ownership by individuals and family groups or clan, not on political representatives.

The Maori consider that the Crown should consult first with the group as a whole. Tribal leaders’ opinions do not always represent the common opinion of the group. The Tribunal believes that it is inappropriate for the Crown to determine the Maori representatives. The tribes have the power and must choose their own. That is why there needs to be a debate inside the tribe to permit an attempt to reach first a tribal consensus. Unfortunately, the modern circumstances do not usually permit of the time that Maori processes require and it is not always practicable to follow the traditional route.

e. **Consultation is a two-way process**

The obligation of consultation is a two-way process. The Maori must respond to the Crown’s offers to consult them and must collaborate with the Crown. The Maori
must make efforts to bring their cultural perspectives before the decision-makers. If they do not, they cannot pretend a lack of consultation in the decision making process.

f. Who has to pay for consultation?

The Tribunal believes it is the Crown's responsibility to remedy its past failures and ensure that resources are provided to involve the Maori in consultation processes. There has to be a positive and substantial Crown commitment of resources.

Since hearings before tribunals and committees often involve complex matters of scientific and legal content, the Maori should have access to legal aid in order to be represented by counsel and thus be effectively heard. Therefore, the Tribunal recommends that the Crown provide more resources for tribes to contribute more fully to local affairs and protect tribal interests.

g. Tribunal's recommendation

It is apparent to the tribunal that statutory intervention is needed to ensure the Maori participation in different areas, such as environmental policies. If the process of consultation is to be an effective one, it must be written into the various statutes and certain basic commitments must appear in those Acts on the status of different important matters for the Maori.
3. THE ENVIRONMENTAL COURT'S INTERPRETATION

In the application of the Resource Management Act of 1991 (RMA), the biggest issue and one of the most contentious is the issue of consultation, particularly with the Maori. Several decisions have now been made by the Environment Court concerning consultation with the Maori under the RMA.

The RMA provides a lead, by including a number of provisions to encourage consultation. For example, people and communities are to be able to provide for their social, economic and cultural well-being. The process of preparing, reviewing or changing policies and plans must involve some kind of dialogue with communities, including the Maori who have participation and consultation rights in recognition of their status as a Treaty of Waitangi partner.

Where an activity may cause a significant adverse effect on the environment, an explanation of the consultations undertaken by the applicant may need to be provided. A consent authority (decision-making authority) may invite anyone who has made an application or a submission to meet with each other or with other persons. The purpose of such pre-hearing meetings is to clarify, mediate or facilitate resolution of any matter or issue involved. The outcome of any meeting or process may be reported to the consent authority, circulated to all parties prior to the hearing, and be part of the information which is taken into account in deciding the application.
The consent authority is required to have regard to any actual or potential effects of allowing the activity. However, where a party has given written approval, the consent authority shall not take account of any actual or potential effect of the activity on that person.

If an appeal is lodged, the Tribunal may ask one of its members or another person to conduct mediation, conciliation or other procedures designed to facilitate the resolution of any matter. This may be done before or during the course of a hearing. The purpose of these additional dispute resolution provisions is to encourage the settlement of appeals.

Even though the RMA has a large number of sections on consultation, it appears that it is not as clear on the subject of consultation as it might be.

Section 8 of the RMA states:

8. Treaty of Waitangi – In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi. [emphasis added]

There has been much debate about whether this section gives rise to a duty to consult. However, since the courts have held that the duty to consult is a fundamental principle of the Treaty of Waitangi, the courts now tend to recognise the s. 8 of the RMA as a Crown’s statutory obligation to consult with the Maori on environmental matters. In *Gill v Rotorua District Council*, Kenderdine J. noted:
One of the nationally important requirements of the Act under the Part II considerations is that account be taken of principles of the Treaty of Waitangi 1840: Section 8 of the Act. One of these principles is that of consultation with the tangata whenua (…).  

Similarly, in *Haddon v Auckland Regional Council*, Kenderdine J. held that a local authority is required to actively consult with the Maori to discharge the s. 8 duty. This approach was based on the reasoning that consultation is a principle of the Treaty and as such, is necessary to discharge the obligations created by s. 8.

Nevertheless, there have been divergent decisions about the extent and nature of the duty to consult and the following is a summary of the law as it relates to consultation with the Maori under the RMA.

**a. What is consultation?**

The Environmental Court held that s. 8 of the RMA imposes a duty to consult where issues of importance to the Maori are at stake. The general aim is to ensure that the principles of the Treaty, including (but not limited to) consultation, are taken into account in the decision making process. Consultation should be proportionate to the extent and likely effects of the particular proposal as a matter of good sense. For instance, on large scale projects, consultation is definitely more than just sending out information to various Maori groups about an application.

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In Ngati Kahu & Ors v Tauranga District Council\footnote{Aqua King Limited v Malborough District Council (W 19/95) [hereinafter Aqua King].}, the Environmental Court identified the various elements of consultation and held that there is no need to reach an agreement, but generally more than mere notification is required. There must be opportunities for the adequate expression of views before decisions are made and sufficient information must be made available to the party with whom consultation is occurring to enable them to make intelligent and useful responses. Finally, the Court stated that the party carrying out the consultation must have an open mind.

There is also a timing issue that is worth mentioning. Adequate consultation requires reasonable time to consider options. Sufficient time must be allowed and a genuine effort must be made by everyone involved in the process.

b. Consultation is a two-way process

There is agreement that consultation is a two-way process. There is an obligation on the party being consulted to co-operate in the consultation process.\footnote{Tawa v Bay of Plenty Regional Council (A 18/1995) [hereinafter Tawa], Rural Management Limited v Banks Peninsula District Council (W 35/94) [hereinafter Rural Management Ltd].} In the Rural Management Ltd decision, Treadwell J. said:

The applicant had carried out its obligation under the Treaty of Waitangi by initiating a consultancy process with both the Ngai Tahu Trust Board and with the rununga. Representatives of the rununga had not been very co-operative in the process and in particular had failed without explanation to attend a meeting arranged by the applicant. Consultancy was a two-way process, particularly within the partnership concept. In withdrawing from the consultancy process without giving any reasons for that
withdrawal the rununga could not be heard later to complain that the principles of the Treaty of Waitangi had been infringed. [emphasis added]

Ultimately, the consultation process necessitates relationship building. More particularly in the context of resource management, consultation is not only about legal requirement, but at the very least, consultation makes good commercial sense.

c. When to consult?

In Gill, Kenderdine J. held that the reference to Treaty principles requires consultation at an early stage. Similarly, in Haddon, the Court held that consultation needs to be conducted early in the process and it would have been appropriate in the circumstances for consultation to occur before the formal notification had taken place.

d. Who should consult, council or applicant?

Local and regional councils have an obligation to consult with the Maori when considering resource consent applications and/or creating or amending policy. The High Court has confirmed that the duty of consultation with the Maori, under s. 8, is the responsibility of the consent authority, rather than the applicant for resource consent.\(^{133}\)

In Quarantine Waste, the Court noted that the statutory and Treaty obligation of consultation is that of the consent authority – as the local Government agency – not that of the applicant. In that case, Blanchard J. considered that the consent authority must be

the one who consults. He did not favour a second hand consultation conducted in the first instance by the applicant, because he thought the potential for distortion by an applicant is obvious. However, as with other aspects of consultation under the Act, there is a range of views as to who should conduct the consultation process.

While Blanchard J. rejected the possibility that the applicant consults directly with the Maori in order to fulfil the Crown’s obligation, other decisions have accepted the idea. It is now recognised good practice that an applicant for resource consent engages in consultation with Maori groups that may be affected by the application. For example, in *Aqua King*, the Court recommended that some consultation be undertaken by an applicant prior to lodging a resource consent application. The Court noted:

> We accept there are two stages of consultation under the Act that are required when there are issues of moment to Maori. They are the applicant’s consultation…and council officer’s consultation under Part II of the Act which arises from the principles of the Treaty of Waitangi 1840. That consultation is an obligation, which pertains only to councils.\(^{134}\)

Nevertheless, the obligation of the Crown is independent of anything the applicant may do. At the end, the statutory (under s. 8 RMA) and Treaty obligation to consult still rests with the agents of the Crown.\(^{135}\) The responsibilities occurring from the duty to consult are Crown’s responsibilities. In the event consultation would be insufficient, this is the Crown that would held responsible, and have to pay for damages for instance.

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\(^{134}\) *Aqua King*, supra note 130 at 12.

\(^{135}\) See *e.g.* *Quarantine Waste*, supra note 133.
e. Who should be consulted?

The “who” question remains one of the most difficult questions to answer. Maori groups have changed a lot recently and are not always readily identifiable. Nevertheless, identifying the right people to talk with is a critical aspect of consultation.

It is usually advised that unless the status of a group remains unchallenged, it is not for the developer or even the Crown to determine which Maori tribes have the power or authority over a specific territory. Instead, it is advised that developers and the Crown extend an invitation to all Maori representatives in the area to consult, whether they are a small emerging group or well known tribal organisation.

Regional and local authorities can assist with their own registers, and have at times made the call based on their knowledge of a particular locality. But because any interested party can object to an application, it often does not pay to consult exclusively with one particular group to the exclusion of others.

The Environmental Court and consent authorities have been reluctant to choose between different and sometimes competing Maori’s groups. The Court held that it should be avoided, when possible, making any findings about the status of a particular tribal authority, or about which sub-tribe might have traditional customary interests in a particular area.\textsuperscript{136}

\textsuperscript{136} Luxton v Bay of Plenty Regional Council (A49/94).
Similarly, the Court in *Tawa*\(^{137}\) held that it is not for the Regional Council to decide which of the competing tribes should be consulted. The appropriate forum for resolving claims of this kind is the Maori Land Court.

Section 30 of *Ture Whenua Maori Act*\(^{138}\) states:

The Maori Land Court may on the request of any Court, commission or tribunal, supply advice, in relation to any proceedings before that court, commission, or tribunal as to the persons who for the purposes of those proceedings, are the most appropriate representatives of any class or group of Maori affected by those proceedings.

It is also essential to establish who are the authorised people to discuss with depending on the various issues. In a tribe, there can be different people involved with different issues and it is essential to know whom to contact for specific matters.

In summary, if there is any doubt about who should be consulted, it is recommended to send an invitation to participate in the consultation process to all Maori's representatives who could possibly be affected by a development in a particular area. That means that where councils have been informed of the existence of a group in the affected area, consultation should be arranged. However, where groups are not known to the Council, it is a sufficient reason not to consult.

\(^{137}\) *Supra* note 132.

\(^{138}\) 1993 No 92.
f. Who should pay for consultation?

The cost of consultation is another contentious issue. The reality is that most of the time, the Maori do not have significant resources for consultation. Basically, there is no guidance in the RMA with regard to fees, which may be charged by The Maori for consultation. The practice of charging for consultation arose after the RMA was legislated and has become a standard and acceptable practice. The Crown and developers have now recognised the importance of supporting financially the Maori to enable them to participate in the consultation process.

The Maori charge both the Crown and applicants or developers for consultation services. They usually charge for their services including mileage, meeting time (for example a charge per hour) with the consent authority and/or developer, the cost of processing and reading all the information in relation to a resource consent application including assessments and expert opinions, the cost of historical or cultural reports and protocols.

In sum, the Crown and corporations might now consider these costs to be an ordinary business expense for RMA consultation. Conversely, the Maori need to recognise that developments of any significant size do not bring an open cheque book. It is important not to be afraid to bargain and discuss appropriate fees. By appropriate fees, I mean fees that are appropriate bearing in mind the particular size of the project, the effects on the Maori, the number of meetings, whether historical and cultural reports are necessary, etc.
F. HOW TO IMPROVE THE CANADIAN CONSULTATION PROCESS?

The situation in New Zealand relating to the duty to consult could be very useful for aboriginal peoples in Canada. The various principles relating to consultation that have been elaborated by New Zealand courts could definitely be applied in Canada in order to help different parties, involved in consultation processes, to resolve all kinds of problems.

Among those principles, Canada should probably be inspired by what is actually happening in New Zealand concerning funding, the question of whom should be responsible for the consultation process and the existence of an aboriginal administrative tribunal.

1. FUNDING

As I already said, it is now a standard and accepted practice for the New Zealand Crown and third parties involved in consultation processes to provide some funding to the Maori. The situation is quite different in Canada. To date, there have not been official publicly known policies about the funding that does occur in Canada.

It might be interesting for Canadian peoples involved in consultation processes to look at what is done in New Zealand regarding funding. It is true that in Canada as well, First Nations, especially small bands, do not often have sufficient financial resources to fully participate in consultation processes. It might be eventually necessary to help
financially First Nations who desire to participate in consultation processes. But as in New Zealand, consultation costs should probably be split between the Crown and third parties.

However, providing funds does not mean paying for all the costs related to consultation. First Nations will have to act reasonably and use carefully funds that will be provided to them. In fact, consultation bills should probably be split between the Crown, third parties and First Nations.

2. WHO SHOULD CONSULT?

Third parties seem to be more involved in consultation processes in New Zealand than here in Canada, although third party involvement in consultation in Canada does occur, in some sectors at least. For instance, BC Hydro does a lot of direct consultation with bands. In New Zealand, third parties consult frequently the Maori on different matters and the consultation is then seen as a fulfilment of Crown’s obligations.

In those cases, the responsibilities related to consultation rest with the Crown. If there happens to be a lack of consultation in a particular situation, the Crown could be pursued and could be found responsible for damages.

The same thing could happen in Canada. It will be a good thing if third parties can become more involved in consultation. The Crown should always keep an eye
though on what is done during consultation processes and ensure that Crown’s obligations related to consultation are fulfilled.

3. ABORIGINAL ADVISORY TRIBUNAL

In New Zealand, the Waitangi Tribunal, as an independent body, is able to do some inquiries related to questions arising from the Treaty of Waitangi. It is an impartial tribunal and does not have all the inconveniences related to an adversarial tribunal. The Waitangi Tribunal has the power to conduct historical, environmental, anthropological, etc. researches. It can make recommendations to the Maori and the Crown on matters related to the application of the Treaty of Waitangi.

It might be a good idea to eventually implement such a tribunal here in Canada. It is definitely a way to help the Crown and First Nations to avoid litigation. An advisory tribunal for aboriginal legal issues could allow both parties to submit problems to the tribunal. The tribunal could then make its own studies and researches, hear all parties affected and then make recommendations. The process would definitely be less adversarial.

The creation of an advisory tribunal could also resolve problems of funding. If the tribunal makes its own impartial researches, then First Nations would not have to do other expensive studies in parallel. It could also prevent costs associated to long and expensive judicial procedures.
Such a tribunal would know more about aboriginal legal issues than judicial tribunals. Some of the tribunal members should be aboriginal. Therefore, it could probably understand better aboriginal cultures, traditional practices, perspectives, etc. This way, it would be more adapted to the situation of both parties.

G. CONSULTATION GUIDELINES\textsuperscript{139}

New Zealand is in a way more advanced than Canada on the matter of consultation with indigenous peoples. Many government agencies have already elaborated guidelines to be used when consulting with the Maori.\textsuperscript{140} The private sector has also elaborated principles relating to consultation with the Maori.

I use what has been done in New Zealand to propose guidelines that could eventually be applied here in Canada by the peoples involved in consultation with First Nations. For more convenience, I adapted the guidelines from New Zealand to the situation in Canada.

These guidelines are intended to assist government agencies, companies involved in the development of natural resources and lawyers working in aboriginal law to consult and engage effectively when necessary with First Nations. The guidelines might be


\textsuperscript{140} In Canada, the province of British Columbia has also issued consultation guidelines.
useful for First Nations as well in order to know what are their rights and responsibilities in the consultation process.

It is important to mention that these guidelines set out below are not an exhaustive list of what can be necessary to ensure that the consultation process is conducted in good faith. Other behaviours might be helpful in order to avoid the risk of litigation.

1. PRELIMINARIES

A) Evaluate if there is a duty to consult. In deciding whether to consult, consider if there is a potential infringement of a possible aboriginal or treaty right. In other words, consultation is required with those who are likely to be affected by a policy/project.

B) Clarify the reasons for consulting.

C) Specify the desired outcomes.

D) Select the most appropriate methods and types of consultation to achieve the outcomes.

E) Calculate the costs and ensure funds are available.

F) Ensure adequate lead-time for all parties to the consultation process.

G) Understand and communicate with community organisations.

2. PREPARATIONS

A) Make contact with and invite participation of community groups to help prepare for the consultations.
B) Make the purpose of the consultation clear.
C) Advice as to who will represent the parties in the consultation process.
D) Identify who has authority to make decisions. It is important to define at the beginning of the process who is making the decision and to what extent external comment will influence the final outcome.
E) Discuss costs and negotiate funding if necessary.
F) Agree on an agenda and the facilities needed to achieve the objectives, including frequency of meetings, documentation, presentation speakers, venue, time and date, equipment, workshop leaders, plenary session and recording of input.
G) List tasks and timelines. Allocate responsibilities and ensure communication channels are open.
H) Forward invitations and publicize the process, allowing time for participants to prepare themselves and be briefed.
I) Make available information relating to the consultation so that participants can make informed and timely contributions.
J) Agree on feedback mechanisms and post-consultation strategies.

3. THE FACE-TO-FACE CONSULTATION

When necessary, the parties should meet from time to time to discuss the project. The meetings will provide an opportunity for the parties to discuss proposals relating to the consultation, provide explanations of proposals, or where such proposals are opposed, provide explanations which the relevant party considers support the proposals or
opposition to it. The parties should not be required to continue to meet each other about proposals that have been considered and responded to.

During the meetings, the parties should:

A) Ensure all necessary material is readily available and distributed.

B) Ensure all evaluation methods are understood and, if evaluation sheets are used, that they are collected.

C) Ensure all reports, workshop proceedings, tapes and records are collected for subsequent processing.

D) Work towards mutual trust and respect.

E) Enter into consultation with an open mind and a willingness to listen to a variety of points of view.

F) Share as much information as possible.

G) Focus on problem solving, rather than just problem identification.

H) Be open about the process, its objectives and any constraints.

I) Be open in their dealings with each other and clearly discloses proposals during the consultation process.

J) Be flexible and prepared to alter positions.

K) Be clear about what is possible and what is not. If your position cannot be altered, explain why.

L) Not make “take it or leave it” demands at the commencement of the process.

M) Decide what follow-up is required.

N) Announce agreed feedback mechanisms.
O) Ensure adequate time is given to First Nations to allow them to consult with their own communities in order to have the opinions of not only the First Nations' representatives, but the whole community, including women, elders, etc. The representatives will do so accurately and will not mislead or do or say anything likely to mislead the community members.

4. POST-CONSULTATION

A) Finalise consultation minutes and reports.
B) Evaluate the consultation in the organising committee.
C) Make a decision by taking into account the information gathered during the consultation process.
D) Effectively communicate the decision, including the reasons for the decision.
E) Provide feedback to all concerned according to the agreed mechanisms.
F) Be accessible for further contact.
G) Plan future improvements in light of experience and evaluations.
H) Ensure that appropriate action is take to follow up the feedback from consultations.
I) Ensure feedback continues as subsequent actions are taken, including explanations about why some First Nations' aspirations cannot be met.

5. EVALUATION AND FEEDBACK

At the end of the consultation process, it is always useful to evaluate how well the process went. This evaluation can permit you to improve your consultation process with
First Nations in the future. To help you evaluate your process, here is a list of relevant questions:

A) What worked well, and how did it contribute to meeting your objectives?

B) What did not work well and how did it undermine your objectives?

C) How did those you consulted provide feedback during consultation process?

D) Was the feedback sufficient or of the required quality?

E) What feedback did you get from participants about the process?

F) Did anything unexpected occur during the consultation?

G) How did you manage this?

H) With hindsight was there anything that you would have changed about the process and why?
CONCLUSION

A. SUMMARY OF THE THESIS

A decade after the Supreme Court of Canada’s decision in Sparrow changed the face of the relations between the Crown and First Nations, one of the biggest and most contentious issue is the issue of consultation. Consultation, if done correctly, can improve relationships between the Crown and First Nations. It is a good way to avoid misunderstandings and to avoid litigation. It is a good way as well to achieve one of the purposes of s. 35 of the Constitution Act, 1982, that is, reconciliation between the two societies.

1. THE PRINCIPLES ESTABLISHED BY THE COURTS

In the past few years, Canadian courts established a great number of principles related to the Crown’s duty to consult with aboriginal peoples. Even if it is still a controversial question, it seems more and more obvious that the duty is not a standalone duty. It is only one of the factors to be used in the Sparrow justificatory analysis. That means that First Nations have to first establish an infringement of an aboriginal or treaty right in order to trigger the duty to consult. However, other sources can be used to oblige the Crown to consult with First Nations. Those sources could be administrative law requirements, statutory obligations and the B.C. Consultation Guidelines.

The scope of consultation will vary with the circumstances. Usually, consultation is more than just giving information. In some cases, consultation may even require the
Crown to obtain the consent of aboriginal peoples before proceeding to any activities on aboriginal lands. Whatever the scope of the duty, the Crown has to consult in good faith in every circumstance. Consultation must be “meaningful”. The purpose of the consultation under s. 35 of the *Constitution Act, 1982* must be to truly address the aboriginal interest at stake.

Aboriginal peoples have also responsibilities in the consultation process. The obligation to consult is a two-way process. The way in which a First Nation conducts itself in a consultation process may influence its ability to retain its right to be consulted. There is a kind of protection for the Crown, if it makes reasonable efforts to consult, when a First Nation refuses to consult or insists on an agreement. First Nations can definitely not use consultation processes to delay unreasonably any kind of development.

2. THE QUESTIONS THAT REMAIN UNANSWERED

Even though the courts established a great number of principles about the duty to consult, there is still a lot of work to do. Therefore, many practical questions remain unanswered.

a. **When to consult?**

Courts have ruled that there needs to be an infringement of an aboriginal or treaty right to trigger the duty to consult. But in practice, when should the consultation occur? My opinion is, in order to be effective and useful, consultation should occur before any
measures are taken or legislation is enacted. However, that means that there would be no proof yet of an aboriginal right.

That means that in practice, consultation should occur as early as possible in the process. On the other hand, once before a court, the question of consultation will arise only after a proof of an infringement of an aboriginal right. I believe that makes sense, but it is not certain that it will be the courts’ opinion.

b. **How should the consultation occur?**

How the consultation should occur? In other words, what form of consultation should be used. For example, face to face meetings, discussion with organisations and individuals, requesting written submissions or a mix of these. It probably all depends upon circumstances. There is no general rule so far.

c. **Who should be consulted?**

This is in fact one the most difficult questions in the consultation process. This question can be answered in part by which First Nations may be affected by a particular decision? Should we consult with Bands, Nations, individuals? Also, who inside a particular group have the authority to represent it and make important decisions? The Band Councils? The traditionalist leaders?

That is still certainly a contentious issue, between the Crown and First Nations and among aboriginal peoples themselves as well.
d. **What is the role of third parties?**

What is the role of third parties as part of the consultation process? It is the Crown that has the fiduciary obligation to consult and who has to make sure the consultation obligation is fulfilled. But, can the consultation be done by third parties as well? It is probably a good practical solution to ensure that consultation is more practical and efficient. More details on how consultation can be delegated must be defined though. And, it is always important to remember that at the end, consultation obligations remain with the Crown.

e. **Who should pay for consultation?**

What happens when on the invitation to consult an aboriginal group advises that it lacks the resources? Who should pay for consultation? This is an important question that has not been resolved yet. First Nations keep asking for some money to help them participate to consultation processes. But, does the duty to consult include the obligation to provide funding? And if First Nations are entitled to some kind of financial help, who should contribute?

f. **Political problems**

How can meaningful time frames from the aboriginal perspective be squared with legislative time frames and political time frames? What to do if an aboriginal group raises legitimate prospects of infringement but the time line for a government initiative cannot accommodate aboriginal consultation as a separate element of the process? I guess government will have to adjust their time frames in order to be able to, when
required, consult and address concerns of aboriginal peoples before proceeding with a project.

Moreover, the lack of sufficient mandate on the government representatives, the cautiousness of politicians because of a fear of backlash, the institutional resistance within bureaucracies and the inadequate development of government policies do not help the Crown to fulfil its obligation to consult meaningfully in good faith with First Nations.

I suppose that those questions will be treated in a near future either by Canadian courts or by those involved in the various consultation processes. Hopefully, the Crown and First Nations will be able to co-operate in order to arrive at a consultation process scheme satisfactory for both sides.

The B.C. Consultation Guidelines were a good start for the British Columbia government and demonstrated, at least partially, its good faith. They still have to prove their effectiveness in practical situations though. Hopefully, the other federal and provincial governments might eventually copy the province of British Columbia and adopt as well some guidelines to be used when consulting with aboriginal peoples.

It is certainly a good idea to look at what other countries with similar problems have done so far. New Zealand is especially a good model since the consultation process is a little more advanced. The New Zealand example can be used to answer a few questions
that have not been resolved by Canadian courts yet. I am thinking for instance of the funding question or the creation of an aboriginal administrative tribunal.

**B. FINAL THOUGHTS**

The obligation to consult was created by the courts in the hope that it would help First Nations and governments to resolve contentious issues outside of courtrooms. It was created in the hope that it would permit both parties to better understand the cultural differences, their particular needs and traditions.

However, the obligation to consult is sometimes very hard to fulfil in real life. The process can be very demanding as much for First Nations as for the Crown. A lot of resources, financial and human, are needed to make the process work and both parties might not necessarily have those resources to put in the process.

The courts and the Crown have a lot of difficulties in trying to work out principles and procedure in this area. They have no precedents to draw on. While the issues may be similar to some of those that arise in labour relations, the court decisions do not draw upon labour literature, or literature about alternative dispute resolution. The decisions are based only on interpretations of s. 35 of the *Constitution Act, 1982* and, a little bit on administrative law principles. So far, the results gave limited guidance.

This is not at all surprising, given the newness of the duty to consult, the newness of a rights framework in the aboriginal area, and the fact that no existing literature
(dispute resolution literature, labour relations literature, experience from other jurisdictions) is being used in the decisions. To date, the courts have only set up principles, but much less has been done to explain how those principles should be applied in practice. The whole consultation process needs to be worked on. The intentions are good, but the practical details have yet to become established practice.

Therefore, the consultation question is far from settled and more negotiations and/or courts' decisions are needed before a consensus can be reached. There is still a lot of work to be done before attaining a perfect consultation scheme which would be effective in every situation where the Crown is required to consult with First Nations. To date, parties are armed only with nebulous case law principles which do not provide either party with clear strategies.
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