



Best Practices for Consultation and Accommodation

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September 2009

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Executive Summary

As a result of historic court cases such as *Haida Nation v. British Columbia*, the Provincial and Federal Crown have a legal duty to consult with, and potentially accommodate, First Nations whose Aboriginal rights may be infringed upon by development projects in their traditional territory. The New Relationship Trust (NRT) heard from First Nations in British Columbia (BC) that there are inconsistencies in the degree of success in consultation and accommodation for First Nations in the province. NRT engaged Meyers Norris Penny (MNP) to identify best practices that, when repeated, will optimize consultation and accommodation outcomes for First Nations in British Columbia on a consistent basis.

Our conclusions and recommendations of best practices are drawn from positive consultation experiences that have been derived from primary and secondary information sources, including previous reports on consultation and accommodation as well as direct interviews with First Nations leadership, First Nations management and corporate BC.

MNP would like to extend our thanks to Chief Bill Cramner of the 'Namgis Nation and Chief Judith Sayers of the Hupacasath Nation, as well as the representatives from the other First Nations, organizations and companies that generously offered their time, wisdom and experiences to our team. It was an honour and a privilege to have had the opportunity to meet and work with you.

SUMMARY OF BEST PRACTICES FOR FIRST NATIONS IN CONSULTATION AND ACCOMMODATION

<p><i>Preplanning</i></p>	<ul style="list-style-type: none"> • First Nation membership should identify appropriate authority to represent them in the consultation • Designate a team responsible for Negotiations • Be proactive about consultation; seek out proponents you wish to do business with • Ensure community understands what consultation and accommodation is; ensure involvement of the community; define what consultation means to the community • Consult community to create collective vision and long term goals • Identify the community’s internal consultation protocol to identify internal processes to support consultation and accommodation • Consult internally to develop community’s external consultation and accommodation policies and guidelines • Self evaluate community capacity and identify knowledge gaps • Hire any needed expertise with the understanding that they will help develop internal capacity • Express to the proponent any need for funding to meaningfully engage in consultation
<p><i>Community Support</i></p>	<ul style="list-style-type: none"> • Inform and involve membership throughout the consultation and accommodation process • Ensure negotiations are transparent to Nation members • Use effective communication tools with community such as membership meetings, newsletters, information sessions with industry
<p><i>Exercising Inherent Jurisdiction</i></p>	<ul style="list-style-type: none"> • Approach consultation and accommodation with an inherent rights strategy • Collect evidence to support title and rights claims • Be prepared with a land use plan for making decisions at a strategic level • Operate as a Nation; negotiate at multiple tables • Follow through with the consultation process to maintain credibility as a Nation
<p><i>Developing a Consultation Policy</i></p>	<ul style="list-style-type: none"> • Ensure a comprehensive consultation model or policy to be adaptable to a wide range of issues • Differentiate the First Nation’s expectations of industry from those of government • Continue to encourage and support BC First Nations Leadership to initiate consultation policy development with Crown

<i>Introductions to Proponents</i>	<ul style="list-style-type: none"> • Have a system and procedure in place to respond to proposals right away and indicate if more time, resources or information is needed • Request a meeting and be proactive about following up • First Nations tell proponent when consultation begins • Clearly outline expectations of policies or models to follow • If applicable, introduce First Nation’s legal counsel and any allies
<i>Relationship Building</i>	<ul style="list-style-type: none"> • Work together to design consultation protocols with Crown or industry • Invite proponents to community meetings to interact with the membership • Develop relationships directly- not through lawyers • Get to know each other’s values and interests • Let the relationship guide the agreements- do not let the agreements guide the relationship
<i>Satisfying the Duty to Consult & Getting a Good Deal</i>	<ul style="list-style-type: none"> • Identify and keep in mind the benchmarks of the Crown’s duty to consult • Continue in consultation process until full effects of the proposal are understood, efforts have been made to minimize those effects, and the First Nation can make a fully informed decision. • Specify which events or circumstances will trigger an ongoing or additional duty to consult after accommodation has been provided • Do not be afraid to ask for what you want for accommodation; be aware of the range of options • Determine reasonable benchmarks of accommodation to expect, based on strength of claim and degree of infringement on rights • Clearly express concerns about a proposal and work to get the most accommodations of those concerns as possible • Be strategic about requests; assess community needs and values to determine most appropriate accommodation to benefit whole community • Keep a log of all communication with the proponent • Document process to substantiate perceived lack of accommodation if such occurs • Engage allies to leverage best deal
<i>Dealing with Provincial Referrals</i>	<ul style="list-style-type: none"> • Implement a filter process for referrals based on the level of impact on rights and title • First Nations leadership council to push for Provincial funding for referrals • First Nations leadership to assess whether referral process meets Crown’s obligation to consult; request or propose an alternative

Tools & Resources

- **Determine where to get additional expertise, should it be needed in the future**
- **Manage experts and advisors according to the relationship built with the proponent**
- **Provide clear written communication to hired professionals**
- **Use consultation policy to inform experts on community's goals and approach**
- **Conduct traditional use studies as demonstration of rights and title authentication**
- **Use impact studies to support claims of infringement on rights and title**
- **Create clear agreements with proponent at different stages of the process**

1. Introduction

1.1 PROJECT VISION AND PURPOSE

The New Relationship Trust heard from First Nations in British Columbia (BC) that there is uncertainty in the manner in which they collectively approach consultation, and inconsistency in the collective outcomes of consultation for the First Nations. In general, First Nations are questioning whether there are better protocols, internally developed consultation policies, approaches or practices that will lead more consistently to successful outcomes. NRT engaged Meyers Norris Penny (MNP) to identify those best practices that will optimize consultation outcomes for First Nations in BC on a consistent basis.

The goal of this project was to gain a collective understanding of the views of First Nations in BC to arrive at a sampling of best practices that captures what “consultation in good faith” means from a First Nations perspective, and how First Nations may best approach the process to achieve those expectations.

This report draws from positive consultation experiences and provides practices that have been derived from primary and secondary information sources, including previous reports on consultation and accommodation as well as direct interviews with First Nations leadership, First Nations management and corporate BC.

1.2 HOW TO USE THIS GUIDE

This guide draws on the experiences of a number of First Nations Chiefs and key administrative staff, First Nations professionals and industry representatives who have very kindly offered their direct experience, wisdom and input. This, combined with extensive literature reviews of pertinent studies, papers and legal case studies, provides the core recommendations for this guide titled “Best Practices for Consultation and Accommodation”. The guide is intended to benefit those First Nations who want to learn and understand how and what other First Nations are doing to achieve successful outcomes through consultation.

Summary of Best Practices: A table summarizing the best practices identified throughout the report is conveniently provided at the beginning of this document, in the executive summary.

The remainder of this guide is organized in three sections:

1. Introduction: This section includes the project vision and purpose, a definition and description of best practices, pertinent case history to provide context for the legal duty to consult and accommodate First Nations and an overview of the benefits of effective consultation.

2. Creating Effective Consultation: This section describes our findings, gained from interviews and literature reviews, as they relate to best practices First Nations can use to create and participate in effective consultation with Crown and industry. This section is presented in four parts:

Key ideas are highlighted throughout the margins of this document for clarity and ease of use.

2.1 Getting Started: This section covers topics First Nations should know before they participate in a consultation process, such as:

- Responsibility for consultation
- Preplanning and community support
- Separating business from politics
- Exercising governance and jurisdiction
- Developing a consultation policy

2.2 Stages of Effective Consultation: This section provides insight on the different stages of consultation and accommodation, such as:

- Introducing the community
- Building relationships
- Completing consultation
- Getting a good deal from Accommodation

2.3 Current Challenges: This section describes the frustrating Provincial referral process, and various ways First Nations can deal with its challenges.

2.4 Resources for Consultation: This section explains the role of experts and advisors to First Nations during the consultation process, as well as different tools to improve the effectiveness of consultation and accommodation.

Best Practices:

- At the end of each topic sub-section, a bulleted list provides the key best practices as they relate to the topic discussed.

3. Case Studies: This section provides the case studies of the 'N̓amgis and Hupacasath First Nations' experiences with consultation processes, and the lessons learned from these experiences.

The first case study on the 'N̓amgis First Nation illustrates how a First Nation and their partner created a successful business relationship; what the key success factors were; how cultural considerations such as values, beliefs and decision making systems were understood; and what methods of communication were successful within the partnership.

The second case study of the Hupacasath First Nation illustrates the challenges that First Nations have going forward when dealing with government as it relates to honoring the legal obligation of the crown to consult with First Nations in a meaningful way, rather than just paying lip service to the process.

Summaries of the key court cases described in the Introduction are provided in Appendix 1, as well as a bibliography in Appendix 2.

1.3 WHAT ARE BEST PRACTICES?

A best practice is a proven method, technique, or process for achieving a specific outcome under a specific circumstance, in an effective way. It is a concept based on lessons learned by one group, which can be passed on to another group, facing a similar set of circumstances or tasks.¹ A best practice has been demonstrated through experience to reliably lead to a desired result. Therefore, the trials and errors of lessons learned by one individual or organization can be shared with another, such that they do not have to start from scratch.² In this way, the group or individual can focus on accomplishing the task, without first having to figure out the best way to go about it. Utilizing best practices can save both time and money. In addition, the use of best practices can facilitate a more consistent set of results.³

One characteristic of a best practice is the ability to be duplicated or repeated by others. Additionally, best practices need to be dynamic (able to be changed or improved upon), not static (can't be changed), such that they can be modified and evolve to fit new and changing circumstances.⁴

The best practices presented in this guide are based on the experiences of various BC First Nations in the consultation process with government, municipalities and industry.

Definition: A Best Practice is a proven way of repeatedly achieving a desired outcome.

¹ Gunsch, 2008

² Ibid.

³ Ibid.

⁴ Ibid.

1.4 WHAT IS THE DUTY TO CONSULT

Aboriginal Rights & Title

Aboriginal Rights are inherent and protected by S.35 of the Constitution Act, 1982.

In 1982, existing Aboriginal and Treaty rights were recognized and affirmed in Section 35 of the *Canadian Constitution Act*.⁵ Aboriginal rights such as hunting, fishing, and trapping, as well as self-governance, are inherent rights that stem from the existence of Aboriginal Nations' use and occupancy of traditional territories prior to British sovereignty in Canada. The *Constitution Act* did not give these rights to Canadian Aboriginal peoples, it simply recognized rights they have had since time immemorial.

Aboriginal Title includes the right to choose to what use the land is put. Title has an economic component which requires compensation for infringement.

The constitutional protection of Aboriginal rights includes Aboriginal Title, which:

- Is a right to exclusive use and occupation of lands;
- Has an inescapable economic component that requires fair compensation when title is infringed; and
- Includes a right to choose to what use the land can be put.⁶

Government can infringe on Aboriginal rights if it can meet the test of justification, which includes consultation with First Nations.

The recognition and affirmation of Aboriginal and Treaty rights in the Constitution Act, 1982 protects these rights from unnecessary infringement. The Crown can still infringe on Aboriginal and Treaty rights, if the infringement is justifiable. According to the Supreme Court, in order for the Crown to justifiably infringe on Aboriginal and Treaty rights it must meet the following elements:

- The Crown has a valid legislative objective;
- As little infringement as possible;
- Appropriate consultation with the Aboriginal group; and
- Accommodation of Aboriginal Interests.⁷

It is this framework for justifying infringement, in which the concept of Aboriginal Consultation and Accommodation was first introduced.

Duty to Consult and Accommodate

The courts have recognized that the Crown, both federally and provincially, has a duty to consult and accommodate First Nations, based on the honour of the Crown.⁸ Each case is examined individually, as the content of the duty varies with the circumstances. Generally however, governments must provide affected First Nations with adequate notice and full information concerning the proposed action and its potential impact on their rights. Governments must listen in good faith and be willing to revise the original proposal before a final decision is made. The refusal of the Crown to alter its position in a consultation process, may evidence an unreasonable approach to the duty to consult and accommodate.⁹ Governments must provide feedback during the consultation process and provide reasons for a decision, if necessary.

Accommodation does not necessarily follow consultation. Where accommodation is necessary the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests. Accommodation will most clearly be required when a strong

⁵ McNeil, 2007

⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

⁷ McNeil, 2007

⁸ *Haida v. British Columbia (Minister of Forests)*, 2004 SCC 73

⁹ *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139

case exists for the First Nation claim, the consequences of the government's decision will adversely affect that claim in a significant manner and steps are required to prevent irreparable harm or minimize the effects of infringement.

The Crown is not obligated to come to an agreement with the Aboriginal group, and the consultation process does not provide the affected First Nation with the power to veto the proposed action pending final proof of their claim. Rather, the consultation process is meant to attain the reconciliation of conflicting interests. To this end, the courts have looked closely at the conduct of the parties to evaluate whether reasonable attempts have been made to foster reconciliation. As a result, First Nations must not frustrate the Crown's reasonable good faith attempts. In other words, a First Nation cannot, in good faith, avoid or refuse to actively participate in the consultation process and then argue later that it has not been consulted.¹⁰

Who?

The duty to consult and potentially accommodate is owed to all First Nations whose claimed Aboriginal rights or title will be affected by a contemplated activity, whether those rights have been proven or not.¹¹ The honour of the Crown also obligates the Crown to consult and accommodate First Nations when it contemplates activity that may potentially infringe upon Treaty rights, including modern day comprehensive land claim agreements and their implementation.¹²

The duty to consult and accommodate First Nations is an obligation owed by the Crown. Therefore, the Crown cannot delegate its fiduciary duty to consult to third parties, such as industry.¹³ However, the Crown can and does delegate procedural aspects of consultation to industry by legislation and regulation (ie. The Crown will not authorize a license until First Nations have been consulted).

Because permits, licenses and approvals granted by the Crown can be subject to legal challenge if the Crown does not fulfill its consultation duty, it is still in the best interest of business to make sure that First Nations are consulted in a timely and appropriate manner.¹⁴ This was emphasized in the *Platinex* case, in which an injunction was granted against a mining operation that began without resolving issues with the First Nation in the area. The Court ordered all parties to negotiate, under court-supervision, to reach an agreement that addressed the First Nation's concerns.¹⁵

When does the Duty Apply?

The honour of the Crown requires that the Crown consult with Aboriginal Nations as soon as it has knowledge, real or constructive, of the existence or potential existence of an Aboriginal right or title and considers any action that potentially has a negative impact on those rights.¹⁶ This means that the duty to consult and potentially accommodate is owed to Aboriginal groups, whether or not their rights or title have yet been proven in court.

The Crown's duty to consult also applies when it considers any project that may impact Treaty rights.

Industry does not have a legal duty to consult with First Nations; however, it is good business practice for them to do so.

The Court mandates negotiation over litigation to achieve reconciliation between First Nations and the Crown.

¹⁰ *R. v. Douglas*, 2008 BCSC 1097

¹¹ *Haida v. British Columbia (Minister of Forests)*, 2004 SCC 73

¹² Morellato, 2008 presentation: *Little Salmon/ Carmacks First Nation & Mikisew*; the decision in *Little Salmon* is currently under leave to appeal.

¹³ *Haida v. British Columbia (Minister of Forests)*, 2004 SCC 73

¹⁴ Proudfoot, 2008 presentation

¹⁵ Morellato, 2008 presentation

¹⁶ *Haida v. British Columbia (Minister of Forests)*, 2004 SCC 73

Consultation duty arises as soon as the Crown has knowledge of the existence or potential existence of an Aboriginal right.

The scope of the duty to consult will be determined on a case by case basis- depending on the circumstances.

The scope and content of the duty to consult lies on a spectrum - The stronger the claim, and the more serious the infringement, the greater the duty to consult.

Consultation, to be effective, should include First Nations at the strategic planning level.

The Crown cannot take a passive approach to consultation; it must be pro-active and inform itself of aboriginal and treaty rights at stake.¹⁷

Scope of the Duty

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the Aboriginal right or title, and to the seriousness of the potentially adverse effect on the right or title claimed. It is important for First Nations to clearly outline their claims with supportive evidence of the rights they assert, as well as evidence of the infringement on those claimed rights.

If the claim is weak or the potential for infringement is minor, the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in response to the notice. If the claim is strong, the potential infringement is significant and the risk of non-compensable loss is high, deep consultation and accommodation may be required.

The scope of the duty to consult is determined on a case-by-case basis, and there tends to be little consistency as to the outcome.

Requirements for Meaningful Consultation

In order for consultation to be meaningful, it must be initiated at an early stage. The courts have found that the duty was not met where the Crown did not initiate consultation at the early strategic planning stage of a project.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that First Nations are provided with all necessary information in a timely way so that they may sufficiently express their interests and concerns. This provision of information further ensures that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.¹⁸ A failure to consider the strength of the First Nation's claim or extent of infringement represents a complete failure of consultation based on the factors that are required for meaningful consultation.¹⁹ Depending on the scope and content of the duty, First Nations' participation in an existing review process, such as an Environmental Assessment, may qualify as sufficient consultation if concrete measures are made to address the First Nation's concerns.²⁰

In the landmark *Tsilhqot'in* case the Court acknowledged that, in general, the processes of consultation have often been dysfunctional, without leading to significant change. Unfortunately, there remains a discrepancy between what the Crown is required to do, and what is currently being done. In order for consultation to be meaningful and productive, joint decision making and consensus building between First Nations and the Crown is necessary. Reconciliation cannot be achieved through unilateral Crown action. Therefore consultation and accommodation should include First Nations at the strategic

¹⁷ Morellato, 2008 presentation

¹⁸ *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1997), 39 B.C.I.R. (3d) 227 (C.A.) at para. 160.

¹⁹ *Huu-Ay-Aht First Nation v. The Minister of Forests*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74 (WeC) at para. 126.

²⁰ Jepsen et al, 2005

planning level, such that First Nations governments can participate in the decision making regarding their lands, as is their inherent right.²¹

Consultation Funding

The BC Court of Appeal has questioned whether it is the responsibility of the Crown to provide financial assistance to the First Nation in order to achieve meaningful consultation.²² Regardless, it has become common for the Crown to provide funding in consultation matters.²³ The extent of this assistance may depend in part on the financial circumstances of the First Nation and whether it has resources from which to fund its participation. The extent of assistance also depends upon the complexity of the issues to be addressed during the consultation process.

²¹ Morellato, 2008

²² *Halfway River* at para. 146.

²³ *Dene Tha' First Nation v. Canada*, 2006 FC 1534 at para. 134, where the court ordered a remedies hearing to address, among other things, the provision of technical assistance and funding to the First Nation to carry out the consultation.

1.5 BENEFITS OF EFFECTIVE CONSULTATION

When consultation is effective it is an immense benefit to all parties involved.

-
- *Minimize adverse impacts of development*
 - *Socio-economic benefits to Aboriginal communities*
 - *First Nations participation in decision making*
 - *Improved Relationship between First Nations, Crown, and Industry*
 - *Investment certainty*
 - *Reconciliation*
-

For First Nations good faith consultation, done effectively, prevents unnecessary infringement on inherent Aboriginal and Treaty rights. Through the consultation process First Nations' can raise their concerns about proposed projects on their traditional land and have these concerns addressed such that adverse impact on their rights and title is minimized. By including First Nations values and perspectives in the planning of development projects, often the non-native community benefits from these considerations as well. An improvement to environmental standards in order to minimize impacts on hunting or fishing, for example, may benefit the overall wellness of a region as a whole.

Effective consultation allows First Nations' participation in decision-making with respect to their land. Effective consultation and accommodation can also provide opportunities for First Nations to participate in the economic development on their lands, and to benefit from the social and economic rewards of such opportunity. When First Nations are better enabled to participate in the economy and have improved social conditions, this creates certainty for the Province and benefits the Province as a whole.

When consultation is effective, the Crown also benefits from the improved trust and working relationship with First Nations. This creates a strong investment climate and greater economic certainty for the province which, in turn, benefits business and industry operating in the territories of BC First Nations.

When consultation is effective it is mutually beneficial for First Nations, industry, society as a whole, and the Crown, and the overall objective of reconciliation is reached.

2. Creating Effective Consultation

2.1 GETTING STARTED

Responsibility for Consultations

Legal Duty of the Crown

The recent Supreme Court decisions in *Haida* and *Taku River Tlingit* have clarified that the responsibility for consultation with First Nations is a legal duty of the Provincial or Federal Crown (see Appendix for summary). The final decision of the court was that this legal duty cannot be transferred to third parties such as industry. However, in the period between 2001-2004, while the cases were at the initial appeal stage, there was a third party duty to consult. In those years companies hired liaisons and consultants to begin developing relationships with First Nations, and the momentum of those years has resulted in many corporations still choosing to consult directly with First Nations themselves. Further, although the Crown cannot transfer the duty to third parties, the Crown may delegate procedural aspects of that duty to industry, through license requirements and legislation. In such instances, the proponent is expected to consult with First Nations, but the Crown has to take ultimate responsibility for the consultation process.²⁴

First Nations' Role

Although the legal responsibility to consult lies with the Crown, there is also an expectation that First Nations will cooperate with the Crown's efforts, in good faith. Consultation can be a burden on a First Nation, and therefore, coordinated action on its part is necessary.²⁵

Consultation should occur with decision-makers whom Aboriginal communities have identified as having the appropriate authority to represent them in the consultation process. Those decision-makers have the responsibility to, in turn, consult internally within their community to determine the Nation's position. The Métis Nation of Ontario, for example, has mandated that consultation should only occur with their democratically elected representatives.²⁶ It is helpful to industry, government and municipalities, if it is clear who they should consult with, whether that is the Chief and Council, a designated department within the First Nation's administration, or, for instance, Hereditary Leadership or a council of Elders.

The intention is not to exclude political leaders from the consultation process. The idea is to empower them to delegate the authority to consult to a negotiating team, which carries out the consultation and accommodation on the Nation's behalf. The staff on the negotiating team are like the players, and the leadership is like the coach – the team goes out on the field and executes the game plan of the coach! This approach is also useful in ensuring stability and continuity in the

The Court expects that First Nations will not frustrate the Crown's efforts to consult.

It should be clear to industry and government who they should approach for consultation within the First Nation.

Empower leadership to delegate consultation to a negotiating team.

Political leadership are the coaches, and the negotiating team are the players who execute the game plan.

²⁴ Nouvet, 2009

²⁵ Clog and Alexander, 2004

²⁶ Metis Nation of Ontario, 2008

face of leadership changes in the community. Stability is very attractive to potential investors and business partners as it provides certainty to industry.

Our findings indicate that it is a good strategy for First Nations to have a single negotiating team in order to create continuity, pool knowledge and share resources. However, when distinguished expertise is developed it is important to utilize that knowledge base to its fullest. Experts can inform multiple projects, but should be assigned priorities based on their knowledge specialization so that rights and title experts are not the primary negotiators on economic engagements, or vice versa.

One First Nation we talked to has set up a Land and Resource team to consult with industry or government whenever there is proposed activity that may impact their traditional territory. When relevant, members of the Economic or Traditional Knowledge teams participate as well, to represent their different mandates and interests.

When to Separate Business from Politics

If the consultation leads to the parties negotiating accommodation measures, such as an impact benefit agreement, joint venture or business partnership between the proponent and the First Nation, it is a best practice to separate business from politics at the operational level. In this situation the First Nation's economic development corporation may be mandated by the First Nation leadership to negotiate such a business arrangement. Even though the goal is to separate politics from business, good corporate governance is still required. Business entities such as Economic Development Corporations should be set up to be accountable and transparent.

It is the responsibility of the Crown, and good business practice for industry, to initiate the consultation with First Nations. Nevertheless those communities who are open to development opportunities in their territory should be proactive and seek out a relationship, letting industry know why they should do business with the First Nation; essentially, letting industry know that the Nation is "open for business" and ready to consult. In doing so, however, it is generally a best practice for First Nations to keep in mind existing consultation activities and pending developments to avoid pursuing other, possibly conflicting opportunities, which may hinder the existing consultation.

Best Practices:

- **First Nations membership should identify appropriate authority to represent them in the consultation**
- **Designate a team responsible for Negotiations**
- **Be proactive about consultation; seek out proponents you wish to do business with**

Preplanning for Consultation

There are several steps First Nations can take in pre-planning for consultation with Government or industry.

Gather Evidence in Support of Claim

An essential first step is for First Nations to gather and/ or indicate evidence in support of their rights and title claims so that they can demand a high degree of consultation. Traditional use studies, anthropological or archeological studies, and oral histories can all serve to strengthen a First Nations claim to their rights and traditional territory. This is not to say that First Nations should postpone entering into a consultation process before such evidence is accumulated, but when possible it is a best practice to continually gather and document evidence since the scope of the duty to consult with First Nations is proportionate to the strength of their claim.

First Nations may be reluctant to share some sensitive cultural information. First Nations may choose not to share all relevant information, but in doing so risk that these interests may not be taken into account during the decision process. The federal court stated that Aboriginal groups should work with the proponent on establishing a confidentiality arrangement that ensures that sensitive information is not made public.²⁷

Community Vision

Secondly, it is important that the staff responsible for consultation, as well as the community as a whole, understand the concept of consultation and accommodation. One way to achieve this is to create a guidebook that summarizes consultation, answers common questions, and helps prepare people to engage with government or third parties. It is important to consult within the community itself and find out their questions, concerns, and their level of understanding before creating such a guidebook.²⁸ Alternatively, or in addition, First Nations can conduct a workshop or seminar on consultation and accommodation, and invite experts and advisors to the session to answer questions from the community. Together the community can define what consultation means to them.

Our findings show that before engaging in consultation it is important to have a clear vision endorsed by the community. This vision, made up of the First Nation's goals and values, should guide the entire consultation, and ensure the community's core principles are represented. The Nation can hold a workshop or seminar with the council and community representatives to collectively create their vision. Some First Nations have created land use plans that identify their vision for their whole traditional territory. A code of ethics for development of lands and resources is another method, as are comprehensive community plans and economic development strategies.²⁹

Capacity

We have found that before engaging in consultation, First Nations should also examine and organize their capacity. Communities should self-evaluate their skills and knowledge and identify any gaps. If a First Nation wants to be involved

Knowledgeable expertise is needed to be effective in land and resource management to exert control over territory.

Community input is critical to a successful consultation process.

The community's vision and core principles should guide the First Nation's approach to consultation.

Self-evaluate skills and hire expertise to fill any knowledge gaps.

²⁷ Nouvet, 2009

²⁸ Metis Nation of Ontario, 2008

²⁹ Brian Payer & Associates, and O'Neil Marketing & Consulting, 2007

in land and resource management and exert control over their traditional lands, they will likely need to hire outside assistance to deal with legal, technical, and financial aspects of projects. While it is often necessary to hire outside expertise to fill capacity gaps within the First Nation, it is a best practice to retain outside assistance on the understanding that they will commit to work with the First Nation to develop its internal capacity.

It is important to know what kind of expertise is needed, and where to get that expertise, and how much they charge for their services, so as to know what sort of funding is required to properly consult. Consultation funding from the Crown is determined on a case by case basis. In the case of *Platinex Inc v. Kitchenuhmaykoosin Inninuwug First Nation* the court recognized that appropriate funding is essential to create a level playing field between the parties and the Court ordered the Crown to be responsible for funding the First Nations' reasonable costs of consultation.³⁰ It is a best practice to inform the proponent if, and how much, funding is needed for the First Nation to engage in the consultation process. Generally speaking, funding for consultation is commonly provided for by industry as a means of supporting good faith consultation between the two parties.

Staffing is another important aspect of capacity and pre-planning for consultation. Some First Nations have specific staff members who screen all government referrals to determine their level of impact and whether consultation is required. Internal agreement about who will consult with companies and/ or government is required. If a First Nation decides to have a separate negotiating team, they still need to keep the leadership informed and connected to the process, so a decision infrastructure is necessary. It is also important to have these responsibilities clearly laid out so that the consulting party knows who to contact, and does not try to bypass the staff and go directly to Chief and Council, for example.

Internal Protocol and Policies

An internal protocol for consultation and accommodation is a useful best practice that can be used to identify:

- Community objectives
- Community caucus to make recommendations to leadership
- Decision infrastructure
- Staff responsibilities
- Reporting structure
- Internal processes
- Consultation log
- Dispute resolution

An internal protocol is distinct from an external protocol or policy to guide consultation and accommodation processes with proponents.

Another pre-planning strategy is for First Nations to develop their own external consultation policies or guidelines to ensure a consistent and united approach. Some First Nations have formalized their policies in a written document that is

³⁰ *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CanLII 16637 (Ont.S.C.); see Appendix for a brief overview of this case.

then ratified (approved) by the community. Other First Nations have found it effective to simply vocalize and discuss their policies in advance, so that everyone is on the same page. A template agreement can also be used to provide a sense of what core benefits to ask for, and a baseline for minimum acceptable standards of accommodation.

First Nations and the proponent, whether it is government or industry, can also work together to pre-plan for their specific consultation engagement. If the parties engaging with one another design the consultation process together and formulate ground-rules, they will both be more invested in the process, and more trusting of each other.³¹

Best Practices:

- **Ensure community understands what consultation and accommodation is; ensure involvement of the community; define what it means to the community**
- **Develop community vision and goals**
- **Identify the community's internal consultation protocol to identify internal processes to support consultation and accommodation**
- **Consult internally to develop community's external consultation and accommodation policies and guidelines**
- **Self-evaluate community capacity and identify knowledge gaps**
- **Hire any needed expertise with the understanding that they will help develop internal capacity**
- **Express to the proponent any need for funding to meaningfully engage in consultation**

³¹ Cormick, et al., 1996

Community Readiness and Support

Seek accommodation that addresses as many community needs as possible. A visioning process with the community will help determine those needs and generate community support.

Look at the big picture – develop long term goals.

Report back to membership at all stages.

Community readiness and support for consultation comes from involving the community in the pre-planning for consultation as discussed in the previous section. Developing a collective vision statement or statement of principles provides a focus for the issues to address in consultation. First Nations should remain steadfast with their values, rights, goals and objectives.

Staying focused on this vision will also generate community endorsement and support. Talk to elders, key youth, and other community members in an informal way to find out what the needs of the community are. This helps to ensure that the Nation can find wins for as broad a spectrum of the community as possible. In addition to immediate needs, such as employment opportunities, it is commonly recommended that the First Nation should determine long term goals for the future, such as participating in land use planning and exerting jurisdictional control. Having long term goals will also help to guide the First Nation when seeking long term accommodation from development projects in their territory.

Obtaining input from the community is important throughout the consultation process, not just at the beginning. Report back to the membership at all stages of the process. Develop a transparent communication strategy to keep the community continuously informed. An expectation of transparency from all parties involved should be made clear from the start. Encourage the proponent to address the membership at band meetings or hold a workshop where the community can openly ask questions and address the corporation directly. If possible, invite independent experts to create an open and transparent dialogue.

Table 1 below provides a guideline for how to obtain community input.

Table 1: Community Input Process³²

Task	Description
Create a First Nations community participation and communications plan	Allow for different ways the community can give input. For example, at community meetings, through a questionnaire or home visits with community members to interview and gather their comments.
Get youth involved	This helps create ownership and commitment by youth and helps foster future leaders.
Schedule community sessions at various stages of the consultation process	Depending on the size of the community, there may be more than one session to gather input. If possible, provide a meal, and hold sessions at times that are convenient for the membership, such as evenings and weekends.
Promote the session	Send out information about the sessions in community newsletters or in a flyer. Deliver the notices house-to-house.

³² Adapted from Brian Payer & Associates, and O'Neil Marketing & Consulting, 2007

Task	Description
Invite experts, advisors, and/or representatives of the proponent to share information	<p>Before providing their input regarding specific consultations or proposed projects community members need to be fully informed about the stage of the project and the consultation, and have all the necessary information to make responsible and informed decisions. Asking the proponent to attend a community session will show them the need for transparency and accountability to the community.</p>
Ensure community members are informed	<p>The announcement should state where, when, why, who to contact, and how they can participate. Let people know the purpose of the session- to let community members share their ideas and express their concerns about the consultation and the proposed project. Also let them know how the information will be used.</p> <p>Provide as much background information as possible, so participants can think about their position before they attend.</p>
Be specific with your questions	<p>Ask participants what they think about specific issues such as their vision for the future of the community, their opinion on the terms that have been negotiated in a consultation, impacts of the proposed project, and benefits to the community.</p>
Encourage other formats for providing input	<p>Let community members know who to contact if they are unable to attend but still want to express their ideas and concerns. Provide alternative ways for the membership to contribute their input: a comment box, voicemail box, etc.</p>
Go back for community endorsement and support	<p>Conduct follow up sessions or send out follow up communication letting the membership know how their input was used and how it has affected the outcome.</p> <p>In particular update the membership on any outstanding questions or issues from previous sessions.</p>

Best Practices:

- **Consult community to create collective vision and long term goals**
- **Inform and involve membership throughout the consultation and accommodation process**
- **Ensure negotiations are transparent to Nation members**
- **Use effective communication tools with community such as membership meetings, newsletters, and information sessions with industry**

Exercising Governance and Jurisdiction

Section 35(1) of the *Constitution Act, 1982*, recognizes existing Aboriginal and treaty rights in Canada. Since then “the inherent right of the Aboriginal peoples to govern themselves has become a generally accepted aspect of Canadian constitutional law”.³³ This inherent right comes from the existence of self-governing Aboriginal nations in North America prior to the arrival of Europeans. In *Campbell v. British Columbia*, the court affirmed that First Nations have a right of self-government in relation to any rights they claim they already have. For example, if a First Nation has a title claim to their traditional territory, they can choose to assert self-governments rights over their lands and resources, and exercise jurisdiction over management of them. Aboriginal title includes the right of a First Nation to choose how land can be used. Engaging in consultation is an important aspect of exercising such territorial jurisdiction.³⁴

According to the case law, the jurisdiction of Aboriginal governments can be infringed upon by government, if that infringement is justified. Part of this justification is a requirement of consultation with the First Nation. Consequently, the governments approach to consultation is an infringement justification model. The Crowns’ approach to consultation may try to undermine Aboriginal rights, particularly self-government rights, which they are reluctant to acknowledge. But rights of First Nations do not have to be recognized by the government – they already exist, and have been recognized in law.

It is a best practice for First Nations to approach consultation with an inherent rights strategy.

Assertion of Title

The first step in exercising jurisdiction over traditional territory is making assertions of Aboriginal title.

“Because the strength of the evidence of Aboriginal title informs the degree of the Crown’s obligation to consult and seek accommodation, it is imperative that First Nation communities organize and collect as much evidence as possible of their Aboriginal title rights in order to strengthen their position, both at the negotiating table and in the courtroom.”³⁵

Strategic Planning

Because Aboriginal title includes a right to decide to what use the land is put, First Nations should be involved in all stages of the decision process. In *Haida*, the Supreme Court of Canada identified the need for consultation at the strategic level, in addition to the operational level. If Aboriginal interests are considered early on at the strategic level, it will reduce redundancies in consultations at the operational level regarding specific projects, and make consultation more effective and efficient.

In order for a First Nation to negotiate with the Province or industry proponent over their strategic plan, it is advisable that the First Nation be prepared with their own strategic plan from which they can draw upon.

Inherent Aboriginal rights include self-governance.

Aboriginal title includes the right of a First Nation to choose to what use their land is put.

Approach consultation from an inherent rights perspective.

Collect evidence to support and strengthen Aboriginal rights and title to traditional territory.

Develop a land use plan in order to be prepared for consultation at the strategic level.

³³ McNeil, 2007: p1.

³⁴ McNeil, 2007

³⁵ Ibid: p13.

A First Nations strategic plan can cover a wide range of objectives, or if specific to land or the management of particular resources it can take the form of a territorial land use or stewardship plan. The purpose of the plan is to inform their decisions at the strategic level for their territory.³⁶ For example, a land use plan represents the First Nation's vision of land protection and use for cultural, social, spiritual, and economic purposes. The objective of a land use or stewardship plan is to ensure any and all consultation and accommodation is inline with the community's vision. For several First Nations that we spoke to, this is an important aspect of asserting jurisdiction within their territory.

"Governments have definite political strategies in place to deal with First Nations so that these governments can achieve their goals."³⁷ Therefore, in order to exercise jurisdiction over their territory, First Nations should also develop an integrated political and legal strategy. "First Nations who have well-established political strategies are less likely to have to litigate."³⁸ While First Nations should engage in litigate when necessary to protect their Aboriginal rights and title, the Courts are increasingly encouraging parties to resolve disputes out of the court, through negotiation and development of consultation protocols. Litigation is costly, and can be a drawn out and lengthy process. Furthermore, litigation often damages relationships. Keep this in mind when considering the best strategy to approach consultation.

Our findings also indicate that, in order to take the most advantage of business opportunities, it is suggested to proceed at the Nation level, rather than the individual band level. Put politics aside, and form a single negotiating team or development corporation with representatives from all the communities in the region. As a collective, the Nation has stronger leverage and the consulting party cannot play the different communities against each other. If First Nations do not deal with overlapping territories up front, or do not agree to set the issue aside, one First Nation will set the bar for all the others, and can therefore frustrate the efforts of other First Nations seeking specific accommodation. This strategy requires a high level of trust and coordination amongst individual First Nations. At times the interests and priorities of some First Nations may not be identical, which could undermine the process. Consider these factors when deciding what strategy to take, and if possible, establish the common interests between First Nations to try to work together.

A good inherent rights strategy provides for negotiations to take place at multiple tables, as different opportunities arise. First Nations should not focus entirely on the Province and Canada, but work with industry, municipalities and other interests. These entities sometimes have their own differences with the Crown, and therefore opportunities for alliances may exist.³⁹

Establish a consultation policy that addresses the unique needs and goals of the community.

Another effective strategy for exercising jurisdiction is for First Nations to set their own agenda for the consultation process, which includes establishing their own consultation and accommodation policies designed to best suit the community's needs and vision.⁴⁰

It is also imperative that First Nations which become involved in a consultation process must be committed to finishing what they started. Failing to follow

³⁶ *The framework for an Aboriginal Title and Inherent Right Strategy*

³⁷ *The framework for an Aboriginal Title and Inherent Right Strategy: p. 16*

³⁸ *Ibid: p17.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

through can undermine a community's credibility, and could be used against them by the Crown in court.⁴¹

Best Practices:

- **Approach consultation and accommodation with an inherent rights strategy**
- **Collect evidence to support title and rights claims**
- **Be prepared with a land use plan for making decisions at a strategic level**
- **Operate as a Nation; negotiate at multiple tables**
- **Develop consultation policy**
- **Follow through with the consultation process to maintain credibility as a Nation**

⁴¹ Ibid.

Developing a Consultation Model or Policy

In BC, negotiations and consultations with First Nations are very inconsistent. As a consequence there is also no regularity in the outcomes of the consultation process. Our findings show that in order to achieve greater consistency and success it is a best practice to develop and implement an adaptable consultation model or policy to guide the process in the right direction.

The Province developed a consultation policy in 2002, without input from First Nations.

Consultation has different meanings for different people. A First Nation's consultation policy should define what consultation means to their community.

The business community has recommended that government and First Nations develop a consultation policy together.

Parties who design the negotiation process together are more trusting of each other.

Policies should be flexible and dynamic, to reflect the diversity of First Nations.

The government is the only party that has really developed a publicly accessible consultation and accommodation template. The provincial policy for consultation with First Nations was put out in 2002, without any input from First Nations, and has not been updated to reflect more recent case law, such as *Haida*. While the government is trying to figure out the procedural aspects of the legal duty to consult by creating consultation policies, the lack of input from First Nations defeats the very purpose of consultation itself.⁴²

Some First Nations throughout the province have developed their own baseline for consultation and created their own policy or template for consultation. This has involved internal consultation with their own membership, in the form of workshops or interviews, to produce a model that reflects their values, standards, and expectations. It is important to have a clear definition of what consultation is, as it means different things to different people. Our findings indicate that it is a best practice for First Nations to differentiate their expectations from government and from industry in their policy. The Crown's duty to consult and accommodate is a legal obligation stemming from the honour of the Crown, whereas consultation with industry is a business negotiation, and does not discharge the Crown's duty to consult.

When a First Nation develops its own external consultation policy it is a best practice to create an adaptable model. Although the objective of an external consultation policy is to create consistency in consultation outcomes, the policy should remain flexible enough to cover a wide range of matters. A narrow policy may be ineffective or inefficient.

The New Relationship Business Group, representing business in BC affected by First Nations consultation, has repeatedly recommended that government engage First Nations in the development of a First Nation consultation policy.⁴³ Some Aboriginal groups have taken steps to initialize a consultation policy developed in collaboration with the Crown, rather than waiting for the Crown to include them. The Métis Nation of Ontario, for example, has submitted a proposal to the Ontario Ministry of Aboriginal Affairs to develop a consultation framework together.⁴⁴

When parties design the process and ground rules together they are more trusting and invested in the process.⁴⁵ Therefore, it could be a future best practice for BC First Nations' leadership to work together with the province in designing a consultation policy that will lead to consistent successful outcomes. The Federal government's Action Plan on Aboriginal Consultation and Accommodation also aims to develop a federal consultation policy. Part of its strategy includes engaging with First Nations in the development of such policy.⁴⁶

⁴² Metis Nation of Ontario, 2008

⁴³ New Relationship Business Group, 2007

⁴⁴ Metis Nation of Ontario, 2008

⁴⁵ Cormick, et al., 1996

⁴⁶ INAC Consultation and Accommodation Unit, 2008 presentation

Therefore it would also be a future best practice for BC First Nations to become engaged in this process. These policies will need to be flexible and dynamic to reflect the regional priorities and interests of different First Nations, as a one-size-fits-all framework will not be suitable.⁴⁷

Best Practices:

- **Consult internally to develop community's consultation and accommodation policy**
- **Ensure a comprehensive consultation model or policy to be adaptable to a wide range of issues**
- **Differentiate the First Nation's expectations of industry from those of government**
- **Continue to encourage and support BC First Nations Leadership to initiate consultation policy development with Crown**

⁴⁷ Metis Nation of Ontario, 2008

2.2 STAGES OF EFFECTIVE CONSULTATION

How to Introduce Your Community

Typically the Crown, whose legal obligation it is to consult, or the industry proponent, in whose best interest it is to consult, will approach First Nations to initiate the consultation and accommodation process. The way in which a First Nation responds to proposals is its first introduction to the proponent. How a First Nation introduces its community can be important to the success of the consequent consultation.

The Crown introduces a proposed activity to the community through the referral process. In some instances industry proponents may approach a First Nation directly and present them with a project proposal. Our interviews revealed that First Nations should respond to referrals and proposals right away, even if they have not made a decision regarding the proposed project. It has been identified as best practice to:

- Send a letter from Chief and Council to confirm receipt of the referral, and indicate an intention to respond.
- Indicate if you need more time or information to make a proper response, as well as any resource and funding needs required to make a fully informed decision.
- Outline title claims to the land and any Aboriginal rights over the claimed area, such as hunting, fishing, or trapping rights.
- Indicate the existence of evidence such as traditional land use studies, to support Aboriginal rights and title claims, or the need to undertake such studies.
- Outline concerns about the impact of the proposed project on those rights.
- Declare your expectation of meaningful consultation, and invite the proponent to a meeting to discuss the referral or proposal further.
- Specify who the proponent should consult with – Chief and Council or a specified negotiating team.
- Indicate that, depending on the community's response upon reviewing all relevant information and conducting necessary studies, the First Nation may be open to business opportunities.
- When responding to industry directly, be sure to provide a copy of your response to the appropriate government ministry.
- Properly archive all documents, including the First Nation's response letter.

First Meeting

Upon sending out the initial response, be proactive about following up to obtain a face-to-face meeting. Our interview findings suggest that First Nations should try to get a meeting with the highest officials possible. If necessary, First Nations who do not have an ongoing relationship with the appropriate ministry can request assistance from other First Nations leadership to leverage a meeting. Whether a First Nation is in opposition or support of a project, it should not state its position until the meeting takes place. To be effective, First Nations should have a plan going in to the meeting. It may not be necessary to bring legal

First Nations should wait until the first in-person meeting to state their position on the proposal.

counsel along to the first meeting, but First Nations should seek legal counsel prior to the meeting to help them formulate their position and develop their strategy. By making it clear that they have legal support First Nations can more strongly assert that their concerns must be taken seriously by the proponent.

During this initial meeting First Nations can take the opportunity to explain their expectations and introduce and explain the consultation and accommodation process that is suitable to them. If applicable, present past successful consultation experiences as a model or standard for moving forward with other negotiations.

If the initial series of meetings are simply informational, and do not constitute meaningful consultation from the First Nations' perspective, the First Nation should clearly say so. First Nations should tell industry of government when consultation starts, and ends.

In situations where a proposed activity affects multiple First Nations, or in the context of overlapping territory, our findings indicate that it is a best practice for First Nations to introduce themselves as a united group. This can be important because the Crown and industry may try to leverage any disputes, and play First Nations against one another. Proceeding at a Nation or Tribal Council level, rather than at the individual community level, can be a way to strengthen the First Nations' position.

While it is the Crown's duty to consult, it is more and more common for industry to take on the procedural aspects of consultation and accommodation, and approach First Nations directly. However, our findings also show that once First Nations have decided they want development in their community, they should also be proactive about developing their resources by approaching industry and actively seeking investments into their territory. In order to attract partners or investors, First Nations should introduce their goals in a way that is appealing to the proponent by highlighting both the benefits to the other party, as well as what the First Nation can offer to the partnership. Having First Nations support is attractive to proponents because it offers a degree of certainty to the proposed activity.

Present successful past consultation experiences as a model to go forward.

Introduce goals of accommodation in a way that is appealing to the proponent.

Best Practices:

- **Have a system and procedure in place to respond to proposals right away and indicate if more time, resources or information is needed**
- **Request a meeting and be proactive about following up**
- **First Nations tell proponent when consultation begins**
- **Clearly outline expectations of policies or models to follow**
- **If applicable, introduce First Nation's legal counsel and any allies**

Building a Relationship

Effective Consultation processes require building a relationship between parties.

The principles of a good relationship include:

- Trust
- Communication
- Collaboration
- Integrity
- Respect
- Understanding

Developing a good working relationship can be challenging and takes time. However, agreements built on a foundation of these principles are much stronger as a result. With the commitment of all parties, the relationship, and subsequent agreements, becomes easier with time.

Design a Consultation Protocol

An effective strategy for building a relationship is to collaboratively design the consultation protocol – a blueprint that will guide the consultation process.

Topics addressed in a consultation protocol include:

- Scope and Purpose
- Principles
- Consultation Process
- How parties will communicate
- Review and amendments
- Funding
- Issue and Dispute Resolution Processes

Consultation protocols set the stage for how the parties will communicate with each other. Agreeing to a consultation protocol can create a foundation of trust from which to move ahead on the next stages.

Agreements such as consultation protocols are useful tools in relationship building. They guide the development of a relationship by setting out role, expectations and objectives, which is especially useful where there is no previous existing relationship between the parties. Moreover, an agreement must guide the relationship in situations where there is a lot of turnover of personnel of the parties. However, when utilizing agreements the focus should always remain on the relationship itself. The objective is to build a foundation of trust and mutual respect so that the relationship can hold its own.

Building Trust

Transparency is essential to building that trust. Therefore, a priority for relationship building is open and frank communication. One strategy is to invite the proponent to a community meeting to address the membership directly. If the project goes forward, it is a best practice to hold community meetings with the proponent at various stages of the project, to build on the relationship and keep the membership engaged.

Consultation protocols are a blueprint for how the parties will consult with each other.

Transparency implies openness, communication, and accountability, where information is easily accessible to the public.

In order to build the foundation on which to move ahead in consultation and accommodation, it is a best practice to develop a relationship between parties—not between the parties’ lawyers. While lawyers are needed to put agreements into words, it is the trust built through the negotiation process that holds agreements together. Our findings suggest that First Nations should manage their lawyers and hired professionals in accordance with the relationship built directly with the proponent.

Direct relationships are created by spending time together. Our findings indicate that it is important for the parties to get to know each other. To foster understanding and create awareness about the First Nations perspective, First Nations could provide a cross-cultural training session to the proponent.⁴⁸ Similarly, it is a best practice to get to know the proponent as well, and understand their organizational structure, and decision making processes.

By listening to the needs of the proponent, First Nations can better situate themselves for interest-based negotiation. Interest-based negotiation involves finding common interests, needs and values to create mutually beneficial solutions.⁴⁹ Understanding the other party allows First Nations to shape proposed solutions in a way that is appealing to the proponent consulting with them. In doing so, First Nations are more likely to achieve success in accommodation.

Get to know the other side and help them to better understand the First Nations’ perspective.

Interest based negotiation involves finding common interests and solutions that benefit all parties involved.

Best Practices:

- **Work together to design consultation protocols with Crown or industry**
- **Invite proponents to community meetings to interact with the membership**
- **Develop relationships directly, not through lawyers**
- **Get to know each other’s values and interests**
- **Let the relationship guide the agreements – do not let the agreements guide the relationship**

⁴⁸ Brian Payer & Associates, and O’Neil Marketing & Consulting, 2007

⁴⁹ INAC Consultation and Accommodation Unit, 2008 presentation

Even on the low end of the spectrum, when the duty to consult is low, the minimum standard of good faith consultation requires the Crown to be prepared to alter its decisions to reflect the concerns of First Nations.

When is the Duty to Consult Satisfied?

An important best practice for knowing when the consultation duty has been satisfied is to identify the benchmarks of the consultation duty owed to First Nations. Meaningful consultation cannot be considered complete if the minimum standards are not met. At a minimum, the Crown must consult in good faith. This may involve any of the following:

- Notice to affected aboriginal groups
- Disclosure of all relevant information and studies in regard to the proposal
- Seeking aboriginal opinion on the proposal, and listening with an open mind
- Being prepared to alter the original proposal before a decision is made
- Providing feedback during the consultation process and offering reasons for the decision, if necessary

At the higher end of the spectrum of the duty consult, “the Crown will need to work with the Aboriginal group to try to find a satisfactory way of accommodating the group’s reasonable concerns.”⁵⁰ When deciding whether the duty to consult has been satisfied, the Court considers whether the consultation process was reasonable, not just the outcome.

The Court has declared that the availability of resources will be considered when determining whether consultation was adequate. Capacity funding is essential to ensuring a level playing field.

In order for First Nations to provide their opinion and concerns about a project they first need to properly assess the impact of the project on their Aboriginal or Treaty rights. Therefore consultation may require capacity funding for First Nations to conduct their own studies and research in order to make that assessment. Consultation funding is determined on a case by case basis, and First Nations should voice funding needs on the onset of the consultation process.

The duty to meaningfully consult with First Nations is not considered to have been fulfilled until:

- The First Nation makes a fully informed decision about the proposed activity;
- The full effects of a proposed project on the First Nation’s rights, culture, and way of life are understood; and
- Efforts are made to mitigate those effects.

Consultation is Ongoing

Consultation is not final; it should be reflective of the ongoing relationship between the Crown and/or industry and Aboriginal peoples in Canada. The Crown cannot act unilaterally and must include Aboriginal peoples throughout the strategic and operational decision making phases.⁵¹

The full effects of a project usually cannot be entirely determined at first glance, and therefore consultation should be a dynamic process with many phases. Effective consultation agreements include a clause which stipulates that the

⁵⁰ Nouvet, 2009: p6.

⁵¹ Morellato, 2008

discovery of new potential adverse affects on Aboriginal rights and title will trigger additional consultation.

Furthermore, our research found that effective consultation with industry continues through each phase of the project: from the pre-application process, through to development and operation of the project, and through to the site reclamation phase (in the instance of a mine, for example). Further, the consultation process should include monitoring of the implementation of the accommodation measures by the parties.

However, it is unlikely that the government or industry would agree to an open-ended right to further consultation that may result in a license being invalid. Both the government and industry proponents want a degree of certainty and finality in order to grant licenses and make investments to move the project forward. Therefore, it is a best practice to specify in the consultation and accommodation agreements what events or circumstances will trigger an ongoing duty to consult.

Best Practices:

- **Identify and keep in mind the benchmarks of the Crown's duty to consult**
- **Continue in consultation process until full effects of the proposal are understood, efforts have been made to minimize those effects, and the First Nation can make a fully informed decision**
- **Specify which events or circumstances will trigger an ongoing or additional duty to consult after accommodation has been provided**

Accommodation: Is it a Good Deal?

It is important to understand that consultation does not automatically lead to accommodation. However, frequently the duty to consult reveals a duty to accommodate. That is, in many cases the legal duty owed to First Nations by the crown will be more than mere consultation and require accommodation of First Nations interests. According to the Courts, accommodation includes, but is not limited to:

- Minimization of infringement on Aboriginal or Treaty rights
- Altering decisions or amending activities to address First Nations concerns
- Balancing First Nations' and societal interests
- First Nations participation in decision-making
- Fair compensation for any remaining infringement

These features have been determined by the Court as part of the Crown's duty to accommodate, which is mandated by the honour of the Crown. Therefore, when the strength of the First Nations claim and the level of infringement warrant accommodation, the features listed above are reasonable benchmarks to expect during the consultation and accommodation process. Our findings show that it is a best practice for First Nations to be fully aware of the duty of accommodation owed to them, such that they are fully prepared to enter into accommodation discussions. Additionally, it is a best practice for First Nations to fully understand the scope and nature of the proposed project before entering into accommodation discussions.

Pursue accommodation measures before opposing a proposal entirely, while being protective about the ability to oppose projects later, if accommodation measures do not adequately address concerns.

Pending proof of claim, First Nations do not get a veto on projects, so it is very challenging to entirely oppose development projects, even if they are infringing on Aboriginal or Treaty rights. Even if the issue goes to litigation, the Court's tendency is to send parties back to negotiation, and will only grant an interim injunction, as was the case in *Platinex*. Our findings indicate that if a First Nation is opposed to a particular project in their territory, it is advisable to pinpoint the specific reasons for opposition, so as to clearly raise those concerns so they can be addressed through accommodation measures. Since it is very likely that projects will still go ahead without the First Nations support, the First Nations should try to get the most benefits and accommodations as possible. For example, First Nations could require proponents to meet specific environmental standards. Additionally, First Nations can require special management or consideration for traditional use areas or archeological sites. However, our findings indicate that First Nations who are inclined to oppose a project should be protective about their ability to oppose a project later on, should accommodation offers be unsatisfactory. It is important that First Nations establish their minimum accommodation acceptance requirements should they be forced to negotiate their last position on the project before it is approved without their consent.

Many First Nations have existing projects currently ongoing in their territory that were approved without their involvement. The court, in *Platinex*, has shown that it is prepared to grant injunctions on projects already underway if consultation and accommodation duties have not been fulfilled. Therefore, First Nations should be aware of the leverage they have, and not hesitate to ask for accommodation measures for development activity on their territory that is infringing on their rights and/or title.

Range of Accommodation Options

It is a best practice for First Nations to make a clear expression of their expectation to be accommodated. This requires a First Nation to inventory and prioritize its community's needs, and provide a full disclosure of those needs to the proponent. Good accommodation agreements provide a whole range of accommodation measures, such as:

- Jobs for community members
- Training
- Education and scholarships
- Community infrastructure (social needs)
- Disturbance payments
- Compensation
- Revenue sharing
- Equity opportunities: shareholder, joint venture, partnership, etc.
- Contracting opportunities for ancillary services and First Nations businesses
- Capacity funding
- Mitigation measures (rerouting proposed routes, authorizing construction only for time periods when there will be less impact to wildlife, etc)
- Establishment of no-development zones
- Ongoing environmental monitoring
- Land reclamation and other guaranteed environmental standards
- Sustainability measures
- Long-term benefits to the community
- Other needs...be creative

It is a best practice for First Nations to maintain an awareness of this range of accommodation options to achieve accommodation on your terms.

Our findings indicate that the best way to negotiate a good accommodation deal is to just ask! Of course, back up your requests with research and analysis, and when possible, identify the mutual benefit to the proponent providing the accommodation. Furthermore, First Nations achieve greater success when they are strategic about their requests as they will not necessarily get everything they have requested.

Good accommodation deals also involve balancing the needs of the community with its values. The goal of accommodation should be protecting First Nations interests, rights, and way of life.⁵² Good accommodation agreements should benefit the entire community, and those benefits should stay within the community. Additionally, accommodation should focus on sustainability and building capacity. When considering accommodation First Nations should consider the long term and ask for benefits that continue to bring value to the community in the future. Some examples of accommodation measures that

Clearly express accommodation expectations.

*Present accommodation requests in a way that appeals to the proponent.
For example, set up a non-profit organization addressing social issues in the community.
Corporations prefer to give funds to charitable organizations.*

⁵² Metis Nation of Ontario, 2008

generate long term benefits include scholarships for post-secondary education or establishment of funds which could facilitate First Nation owned businesses.

Furthermore, Good accommodation agreements provide measures such as the establishment of a management team or some body to supervise larger projects and ensure that the accommodation measures are implemented, including periodic reporting to the parties. Such teams or bodies should include representatives of the First Nation(s) and industry and/or government.

Dealing with Unsatisfactory Accommodation

In case the other party resists accommodation, or acts out of good faith, it is a best practice to fully document the process. First Nations involved in consultation should keep a consultation log in which they record all communications with government or industry, including written records of meeting, letters, phone calls and outcomes. This is important to show the Courts, should it reach that level, that the First Nation did not frustrate the efforts of the other party, and made good faith attempts towards reconciliation. Also, it is important to document the process as evidence of the other party's lack of sincere effort towards appropriate accommodation. Remember, the other party will be documenting everything including their phone calls as their own evidence.

Document all accommodation offers and discussions.

If the unsatisfactory consultation is occurring through a third party, such as an industry proponent, First Nations should contact government representatives to inform them that the duty of accommodation is not being fulfilled. Alternatively, if the consultation is with government, First Nations can be strategic and contact related parties, such as industry proponents, to engage them to put pressure on the government to fulfill its duty. Engaging allies or the media is another strategy to leverage a better accommodation deal. The goal of consultation and accommodation as reconciliation is beneficial to First Nations, industry, and government. If First Nations do not feel as if they are getting appropriate accommodation, it is a best practice to reiterate the benchmarks of accommodation specified by the court, and be firm in the expectations to be accommodated according to the standards set in law. Recent developments in the case law have determined that in evaluating whether the Crown's duty has been fulfilled, the Court will consider the actual substance of the accommodation offered, not just the process.⁵³

⁵³ Morellato, 2008 presentation

Best Practices:

- Fully understand the scope and nature of the proposed project before entering into accommodation discussions
- Do not be afraid to ask for what you want for accommodation; be aware of the range of options
- Determine reasonable benchmarks of accommodation to expect, based on strength of claim and degree of infringement on rights
- Clearly express concerns about a proposal and work to get the most accommodations of those concerns as possible
- Be strategic about requests; assess community needs and values to determine most appropriate accommodation to benefit whole community
- Keep a log of all communication with the proponent
- Document the process to substantiate perceived lack of accommodation if such occurs
- Engage allies to leverage best deal

2.3 CURRENT CHALLENGES IN CONSULTATION

Dealing with Provincial Referrals

Although it is a forward trend that industry consults directly with First Nations, the legal obligation rests solely with the Crown. For matters of federal jurisdiction, the duty is owed by the Federal Crown, and for provincial jurisdictional issues, the duty is owed by the Province. Unfortunately, there is an observed discrepancy between what the Crown is required to do, and what is currently being done.⁵⁴

The provincial consultation policy was created without input from First Nations.

In 2002, in response to the case law, the Province came out with its own Consultation Policy, which they developed without any input from First Nations in the province. The standard way that the Province approaches First Nations for consultation is through the referral process. Commonly, decisions are made at a senior level, before First Nations are contacted. Then a referral package is sent to First Nations describing the proposed project and intentions of land use in their traditional territory. The referral stipulates that the First Nations has a prescribed time to respond; otherwise they will proceed with the application. If the First Nation does respond, and there is an infringement on their rights or title, the Province tries to determine that the infringement is justifiable. If they are not able to, it is then that they proceed to engage in consultation, and potentially accommodation, in the form of negotiations with First Nations. "The degree of consultation and accommodation is invariably determined by Crown officials."⁵⁵

Assessing referrals to determine the degree of impact on rights and title requires time and technical resources. Currently, these costs are mostly being paid by First Nations.

It is common for First Nations in BC to be overwhelmed with the amount of referrals they receive every week from numerous unrelated government departments. Assessing the referral to determine the impact on Aboriginal or Treaty rights and responding to the referrals appropriately is time consuming, and requires many resources. If a First Nations responds to a referral their correspondence with that government department is then increased substantially- further squeezing the limited resources of the First Nation. Most First Nations do not have the capacity to properly address all the referrals they receive. Therefore, our findings indicate it is a best practice for First Nations to encourage the leadership council to push for referral funding from the Provincial government.

Additionally, it is a best practice for First Nations to implement an internal process to filter the referrals into low, medium and high impact projects. If the First Nation uses Geographic Information Systems (GIS) to map their traditional use and archeological sites, referrals can be overlaid and compared to the GIS database to identify conflicting land uses and possible infringements. By cataloguing and filtering the referrals through such a process, only those proposals of moderate and high impact need to be brought forward to the leadership or negotiating team to deal with the Province.

This process is highly technical and requires expertise, which is costly. Some First Nations have had to use borrowed monies, such as Treaty money, to pay for the resources needed to respond to referrals. In such instances the Province is fulfilling its consultation duty for free, at a cost to the First Nation. Some First Nations, to save money and pool resources, have established a referral clearing house that sorts through, and responds to all referrals received by the participating First Nations.

⁵⁴ Morellato, 2008

⁵⁵ Ibid.

Example of a Referrals Office

*The **Nanwakolas Council Referrals Office** was incorporated in 2007 to assist its member First Nations in responding to provincial referrals and other land and resource management and planning issues. Nanwakolas means “the place where agreement is made.”*

The referral office does not make decisions on the content of the response, but it

- *Ensures member First Nations have best available information to make decisions*
- *Develops the response to reflect the member Nation’s decision*
- *Assists member First Nations in its communication with the referral applicant*

Referral staff have specialized knowledge in

- *GIS technology*
- *Environmental issues*
- *Research*

Source: <http://www.cstc.bc.ca/downloads/Nanwakolas%20Overview.pdf>

The Court has ruled that meaningful consultation requires incorporation of Aboriginal and Treaty rights at the strategic planning level.

The referral process, as it currently exists, forces First Nations into reactionary mode, as they are responding to the higher level strategic decisions already made by the Province. The Court, in *Haida*, asserted that the duty to meaningfully consult requires incorporation of aboriginal and treaty rights into the strategic planning level by the Crown. Therefore, it is a best practice for First Nations leadership to collectively evaluate the Provincial referral process and assess whether it is in fulfillment of the Crown's duty to meaningfully consult and accommodate. If it is determined that the referral process is not satisfactory for First Nations, it would be a future best practice for the First Nations Leadership of BC to work together, in collaboration with the Crown, to develop a consultation policy with a viable alternative to the referral process.

Best Practices:

- **Implement a filter process for referrals based on the level of impact on rights and title**
- **First Nations leadership council to push for Provincial funding for referrals**
- **First Nations leadership to assess whether referral process meets Crown's obligation to consult; request or propose an alternative**

2.4 RESOURCES FOR CONSULTATION

Role of Experts and Advisors

In order to exert jurisdiction over their lands First Nations leadership need to be knowledgeable in many subject areas surrounding resource management. Our interviews revealed that it is a good idea for First Nations to self-evaluate their own capacity, and hire the necessary expertise to fill in the gaps in dealing with the financial, technical, legal and environmental issues of the economic projects on their lands. Outside assistance should be hired with the understanding that they will commit to work with the First Nation to develop its internal capacity, and transfer skills and knowledge to the community.

Resource management requires knowledge in many subject areas.

Even if outside assistance is not required on the outset of a project, it is suggested to at least know where to get such expertise, if the need should arise. Timelines on projects can be very short; therefore First Nations may need to hire experts in order to be more efficient in meeting important deadlines.

The key factor that affects the use of legal counsel and other experts is the financial resources to afford such advice. One of the important preconditions of engagement with Crown or industry should be a requirement that they financially assist the First Nation so they may make informed decisions. Without informed consultation, there is no legal certainty to any agreement. It is a best practice to establish this requirement at the onset of the consultation process.

Our findings show that legal expertise in particular is an eventual necessity in the consultation and accommodation process. However, their role in the process should be supportive rather than managing. Successful relationship building occurs when First Nations and proponents engage directly with each other, not through their lawyers. Some proponents might suggest that First Nations do not need lawyers at all. However, these proponents most certainly have their own legal experts in the background. In order to achieve a level playing field during consultation and accommodation First Nations should have legal advice from the onset. When First Nations introduce their lawyer during the initial communication, even if the lawyer is not involved in the preliminary relationship building, it sends a clear message to the proponent that the First Nations has legal support should it be required, and therefore should be taken seriously.

Having access to legal advisors helps create a level playing field.

Some of our interviews suggested that First Nations should utilize professional negotiators throughout the consultation and accommodation process, so as to save time at the end stage in converting the relationship into legal language. Other First Nations have chosen not to utilize legal assistance until the documentation stage, for drafting and reviewing the agreement made. Even if a First Nation does not utilize lawyers for every consultation, it is a good idea to have access to a technical negotiator, liaison or advisor so that their support is within reach.

Legal advisors can also be a useful tool to prepare the community before the consultations begin. One First Nation we interviewed had a team of legal and technical advisors attend a workshop in the community so that everyone could learn what legal duty of consultation and accommodation was owed to them, and determine as a community what consultation meant to them, from their own community's perspective. This was useful in facilitating a community vision, as well as helping the lawyers to better understand the expectations of its client.

Hosting a workshop with legal and technical advisors for community members can help the community to be better informed about the consultation process.

Do not allow experts to control the consultation process.

Whether First Nations utilize experts throughout every stage of consultation, or choose to bring them in at the deal stage of the process, the best practice is to ensure that they manage their experts carefully, and not allow them to dictate or control the process. To ensure that legal representatives, negotiators, and advisors accurately reflect the First Nation's position, it is a best practice for First Nations to provide clear written instructions to their legal counsel and any hired professionals. Establish a team that is familiar with the community, its values, and perspectives.

Best Practices:

- **Self evaluate capacity and knowledge expertise**
- **Hire any needed expertise with the understanding that they will help develop internal capacity**
- **Determine where to get additional expertise, should it be needed in the future**
- **Manage experts and advisors according to the relationship built with the proponent**
- **Provide clear written communication to hired professionals**
- **Use consultation policy to inform experts on the community's goals and approach**

Consultation Tools

Our findings show that an important tool for First Nations is to develop a consultation policy or guidebook that conveys to the proponent the First Nation's expectations of the consultation process, as well as helps to prepare the community and negotiating team to have a clear vision of those expectations.

It is also a best practice for First Nations to record all communications with government or industry. A consultation log is an important tool to substantiate the First Nations good faith participation in the process, and the level of consultation that has gone on. A consultation log should include written records of meeting, letters, phone calls and outcomes.

Additionally, there are several studies that serve as tools in the consultation process. For instance, traditional land use studies are effective tools for First Nations to inventory the use of their land, and create a vision and land use plan for the First Nation. Furthermore these studies can be effective as supportive evidence to strengthen their claim to the land, and therefore strengthen the duty of consultation and accommodation owed to them.

Other studies, such as socio-economic and environmental impact studies are effective tools for the First Nation to use in trying to communicate the potential adverse impacts of a project on their community. Furthermore, these studies help to strengthen claims of infringement on First Nations and Treaty rights, as they indicate the degree of impact such projects may have.

When a First Nation undertakes their own studies and involve their own members, such studies can be a tool to increase the capacity of a First Nation, as the members involved in the study obtain valuable research skills. Additionally, these studies are an effective tool to build confidence in their assertions, as well as confidence in the project. If a First Nation has completed its own study on the various impacts of the project, they can either corroborate or refute the opinions of the proponent, and make informed decisions about the appropriate accommodation.

In addition to relationship building, our findings indicate it is important to have very clear agreements. The parties cannot know what all the issues and concerns are from the beginning. As studies are done, and information is exchanged throughout the consultation process, different interests and concerns arise. Therefore it is important not to try and negotiate the end agreement at the beginning. It is a best practice to utilize different agreement tools at different stages of the negotiation. These agreements parallel the growth and development of the relationship between the First Nation and the proponent.

MOUs

The first agreement reached between the parties is generally a Memorandum of Understanding (MOU). An MOU is a "formal agreement between governments or organizations" which allocates responsibilities, and expresses the common intentions of the parties to negotiate an agreement.⁵⁶ MOUs can also be signed at different stages of the negotiation, summarizing what has been agreed to so far, and indicating the intentions for agreement moving forward.

Traditional Land Use studies can provide strong supportive evidence for rights claims, and create understanding of how First Nations use the land.

Impact studies are effective tools for determining the seriousness of infringement on First Nations rights.

Conducting their own studies helps First Nations build capacity and confidence.

Use different agreements at different stages to formalize the relationship.

Memorandums of Understanding express intention of the parties to come to an agreement through negotiation.

⁵⁶ Jepsen et al., 2005

Engagement or consultation Protocol

When the parties first sit down together, it is a best practice to develop a consultation protocol together, which sets up their relationship in a formal manner. In this agreement First Nations can outline the manner in which they expect to be consulted, the process they expect to be followed, and any other expectations that the First Nation has going into consultation with the proponent. Funding for capacity for the First Nation to engage in the process can also be specified here. The engagement protocol may be one comprehensive agreement, or a bundle of agreements that address different issues that need to be agreed upon before the parties can move forward in the negotiations. For example:

Consultation Protocols outline the way the parties expect to consult with each other and how they will address different issues.

- Sharing of Information agreements should be established by First Nations who will be sharing traditional use information with the Crown or industry to convey the impacts of a project and negotiate mitigation measures to ensure their traditional knowledge is protected.
- Sharing of Information agreements should also ensure that First Nations have access to all information legally available about the proponent, the project, and all deals in the relevant market.
- Dispute resolution processes should be put in place prior to disputes arising.
- Other relationship protocols, as needed.

Engagement or consultation protocols are flexible, and can include whatever areas the First Nation sees as valuable to building a positive relationship. Our findings suggest that First Nations should establish a template for such an agreement, so that they have nailed down the core issues they need to have addressed.

Consultation and Accommodation Agreements

As consultation moves forward, agreements will act as tools in the process. The parties can utilize various agreements at various stages to formalize decisions agreed to during the development of the relationship. If it is determined that there is an infringement on the Aboriginal or Treaty rights of the First Nations, agreements will be made to accommodate the First Nation. Accommodation may take the form of:

- Mitigation of infringement
- Compensation for infringement
- First Nations' participation in the economic development of their lands

Throughout the process of negotiating accommodation with industry or the Crown, different agreements will be reached. These can take multiple forms including:

- Impact Benefit Agreements
- Labour Agreements
- Ownership or Royalty Agreements

Accommodation Agreements can take many forms. They address how infringement will be minimized, and how First Nations will be compensated for and benefit from the development.

Impact Benefit Agreements (IBA), for example, are comprehensive agreements that set out in writing the range of accommodation measures agreed to by the parties. Topics covered in an IBA include, but are not limited to:

- Environment and Mitigation (including monitoring measures)
- Training and Employment (including employment support system)
- Aboriginal Enterprises (opportunities to tender and criteria for awarding contracts to Aboriginal businesses)
- Financial provisions
- Dispute resolution mechanisms (steps taken to resolve issues)
- Terms and Termination

First Nations can create their own template agreements but some First Nations have found it to be more successful if both parties go in with a blank slate, and create the agreement from scratch together. The best practice is not to allow the Agreements to form the relationship, but allow the relationship to form the Agreement. However, it is important to be prepared and anticipate different agreements that may be needed, so that First Nations can achieve their expectations. Good agreements anticipate all potential eventualities and address them before they occur.

Allow the relationship to determine the agreement. Good agreements anticipate all potential problems before they happen.

Best Practices:

- **Develop a consultation policy**
- **Conduct traditional use studies as demonstration of rights and title authentication**
- **Use impact studies to support claims of infringement on rights and title**
- **Create clear agreements with proponent at different stages of the process**
- **Let the relationship guide the agreements - do not let the agreements guide the relationship**

3. Case Studies

NAMGIS NATION – A BEST PRACTICES SUCCESS STORY

Introduction

The 'Namgis First Nation resides at their village of 'Yalis at Alert Bay, on Cormorant Island. Their traditional territory includes Cormorant Island and extends to lands adjacent on the Northeast Coast of Vancouver Island. The 'Namgis have outlined their territory on a map included in their Statement of Intent for the BC Treaty Process. They have also indicated the extended resource harvesting territory that they share with other Kwakwaka'wakw Nations on their Statement of Intent maps. The 'Namgis have also undergone Use & Occupancy mapping for their territory, documenting traditional and current uses of the lands, as well as recording place names, songs, and other traditional and archeological knowledge related to their territory. Their research about their territory and involvement in the BC Treaty Process is evidence of a strong *prima facie* case for Aboriginal Title to their lands.

The 'Namgis participate in consultation and accommodation with the Crown primarily at the Treaty table. However, they have been involved in direct consultation and accommodation with industry with positive results for their community.

Consultation with Polaris Minerals: The Orca Sand & Gravel Story

Polaris Minerals approached the 'Namgis First Nation because an area they wanted to explore was within 'Namgis territory. CEO and President Marco Romero met with the 'Namgis to introduce the opportunity for a sand and gravel quarry in their territory. The 'Namgis agreed to allow Polaris to do further exploration in the area, as long as they hired 'Namgis members for the exploration. They also requested to do their own studies, independent of Polaris, on environmental impacts. These studies, funded by Polaris and conducted by 'Namgis members, allowed the 'Namgis membership to develop confidence in the project. Whenever the community wanted to hire independent professionals or experts to provide their opinions, Polaris Minerals paid the costs. Polaris also promised the 'Namgis that if at any point they did not want to continue the project, Polaris would respect their concerns and walk away.

Throughout the consultation period, Polaris Minerals and the 'Namgis Nation got to know each other and began building a relationship. Trust between the parties took time to develop, but both the 'Namgis and Polaris emphasized listening to each other and having open discussions as the key to developing a solid foundation. The 'Namgis also did their due diligence to investigate Polaris and its directors. Marco Romero met directly with Chief Bill Cramner for the negotiations of the sand and gravel operation. However, Polaris also attended community meetings, at different stages throughout the negotiation, to address the membership directly and answer their questions and address their concerns.

Accommodation

Once it was decided that the 'Namgis wanted to go ahead with the development, Chief Cramner and his Council conducted internal community meetings to determine whether they wanted to pursue royalty or partnership opportunities. The 'Namgis Nation decided to become minority partners in Orca Sand and Gravel (OSG), with 12% ownership in the operation. Polaris financed a large part of their buy-in, which will be paid back from revenues during the first four years of the project. When entering the Partnership agreement with Polaris, 'Namgis had legal counsel present and hired taxation and partnership law experts to guide and assist them. The 'Namgis also negotiated that 50% of the OSG labour force will come from either the 'Namgis Nation or their Kwagiulth neighbours, with whom Polaris also consulted. Additionally, Polaris established a community trust with a percentage of the sales going into that trust. Polaris was also open to additional accommodation measures requested by the 'Namgis, such as a land reclamation plan to renew the site when the operation shuts down, and an abalone transportation project to protect abalone resources in their territory.

Territorial Overlap

The site of OSG, 3.8 km west of Port McNeil on north eastern Vancouver island, is located in the overlapping traditional territories of the 'Namgis and the Kwakiutl First Nation. Initially there was a lot of friction between the two First Nations, but the Kwakiutl and 'Namgis came to an agreement not to argue about who owns the land so that both First Nations could take advantage of the valuable business opportunity that OSG offered. 'Namgis and Kwakiutl Chiefs and Councils, as well as Hereditary Chiefs, met together and worked hard to work things out between themselves.

Other Opportunities

Since the successful implementation of the agreements between Polaris Minerals and the 'Namgis Nation, other developers have approached the 'Namgis to do business. These other companies have recognized the mutual benefit to Polaris in accommodating the 'Namgis, and are seeking to establish a similar relationship. Through its participation in the development of OSG the 'Namgis have shown that they are prepared and open for business in their territory.

The 'Namgis formed Kwagis Power, in partnership with Brookfield Power, for a run of the river project on the Kokish River. The 'Namgis negotiated 25% ownership in the power corporation, which will be paid for through sales once the project is in operation. In addition to revenue, the project will also provide the community with its significant power needs, especially in the winter. Like Polaris, Brookfield approached the 'Namgis directly, before the 'Namgis even received a Provincial referral for the project.

The 'Namgis use their relationship and agreements with Polaris as a model to guide the consultation and accommodation process with industry proponents. Brookfield agreed to conduct all its studies jointly with the 'Namgis, and employed 'Namgis members in conducting the studies. Brookfield also attended multiple community meetings to keep the membership informed and involved throughout the process.

These economic development projects also provide many employment opportunities for the membership through various subcontracting and ancillary business opportunities. Many of these companies have already approached the 'Namgis to work together on these opportunities.

Best Practices & Lessons Learned

- Look at the Big Picture first, then work out details
- Use successful negotiations as a model to guide future industry negotiations
- Present goals in a way that is appealing to proponent, emphasizing the benefits to them
- Proceed cautiously- due diligence
- Businesses are set up as separate entities from the First Nation itself, with their own Board of Directors
- Have community capacity in place making it easier to take advantage of opportunities as they come up
- Compile and document evidence to support rights and title claims
- Collaborate with neighbouring First Nations to work together
- Keep membership informed and involved in consultation and accommodation processes

HUPACASATH NATION – HIGHLIGHTING FIRST NATIONS’ NEED TO PUSH FOR SHARED DECISION MAKING

Introduction

The Hupacasath First Nation (HFN), a member of the Nuu-chah-nulth Tribal Council, occupies its 232,000 hectare traditional territory on central Vancouver Island, around the area that is today known as the Alberni Valley. According to Chief Judith Sayers, who has been Chief to the community for 14 years, the long term goals of the HFN are capacity building and sustainable development. These goals are included in the First Nation’s vision outlined in their land use plan. The land use plan, along with a comprehensive traditional use database, encompass strong evidence to support their rights and title claim to their territory.

Land Use Plan

The HFN developed their own land use plan to enable them to exert their rightful ownership and control over the lands and resources in their traditional territory. It is a higher level strategic plan which is intended to give guidance to lower level plans, such as forestry, mining and tourism development plans. The plan outlines their vision for their territory and designates Use Areas into “Protected”, “Special Management” or “Resource Development” zones. The HFN envision the implementation of the plan as a multilateral process with combined efforts of governments and resource users and the Hupacasath Nation through co-management agreements.

The land use plan clearly outlines the HFN’s expectations for implementation of the plan, and distinguishes its expectations of government from its expectations of industry. The land use plan includes key principles of a government to government protocol, such as explicit recognition of rights and title, and Hupacasath governance systems, as well as a commitment to funding the implementation process. The expectations from industry also include recognition of rights and title, as well as employment and economic benefits for the HFN.

The land use plan, which is available on the Nation’s website, includes an online referral system which allows HFN staff to look at referrals in electronic form and easily transpose traditional use and land use plan maps, in order to determine their response to the referral.

Challenges with the Province

Since 2003 Chief Judith Sayers and the HFN have met with three different ministers to discuss how to align their land use plan and Vancouver Island’s land use plan. All ministers were enthusiastic and agreed to the Hupacasath’s vision of aligning and implementing the plans. Unfortunately their momentum has not been carried forward, and these promises have, to date, not been fulfilled. As a consequence, HFN’s concerns and interests have not been included at the strategic planning level for their territory. This lack of shared-decision making has resulted in many challenges with the Province.

The province’s Forest Revitalization Act reallocated timber harvesting licenses, without consultation with First Nations about the impacts this would have on their rights and title. The Annual Allowable Cut, for example, was not reduced in HFN territory despite the HFN’s identification of many “red zone” or “protected” areas in their forests. The HFN raised their concerns at multiple meetings, but the province made their reallocation decisions without informing First Nations. HFN is still waiting on their request for a letter from the Ministry of Forests, outlining how their concerns were addressed. In the opinion of Chief Judith Sayers, the Province is not fulfilling its legal duties to the HFN.

HFN took the Ministry of Forests to Court when the Ministry allowed Weyerhaeuser to transfer part of its license into private lands. The province’s decision was made without any consultation with the HFN and resulted in one third of their traditional territory being taken out of their control. The Court ruled that the government should have consulted and gave the parties two years to do so. HFN negotiated with the Province for 28 months, but the province’s minimal compensation and accommodation offer was not

satisfactory. Of HFN's list of concerns, not one request was met. In Chief Judith Sayers' opinion, the Province did not show any understanding of the impact their decision would have on the HFN's sacred sites, hunting and gathering areas, and medicinal plants.

Great Central Lake is the future drinking water for all of Port Alberni. The HFN are concerned about approximately 50 illegal float-homes on the lake, 40 of which are located in important salmon spawning and archeological areas. The Hupcasath entered into an Issues Resolution Process with the Province to figure out how to deal with these illegal homes. Instead of removing the homes, the government wanted HFN to look into providing services and infrastructure to these float-homes and move them into a single area. HFN determined that this was not economically feasible and did not properly address their environmental concerns. The province has not shown it has heard HFN's concerns and has continued to postpone meetings on this issue. The HFN have determined that they will leverage the media to have their concerns heard, if the province does not step up and address them.

Also in HFN territory, a fish farm operates 1 km down inlet from one of the HFN's reserves. When the fish farm operating company wanted to renew its license there was an extensive consultation with the federal government during which the company admitted that the current site was not ideal, environmentally speaking, as it was not flushing properly, allowing contaminants to accumulate. Later on, the provincial government approached the HFN to participate in their consultation process after HFN had consulted with the Federal government. The provincial and federal consultation processes are separate. HFN was frustrated by the lack of communication between the federal and provincial governments, and it is a strain on their time and resources to have to consult on the same issue repeatedly.

Best Practices & Lessons Learned

- Utilize legal mechanisms to push concerns forward
- Leverage the media to have concerns heard
- Be persistent, and remain steadfast on values
- Make land use plan publicly accessible to exercise and assert jurisdiction over traditional territory
- Document traditional uses to support rights & title claims
- Push for shared decision making between First Nation and provincial and federal governments as it relates to consultation and accommodation

Appendix 1 – Summary of Key Court Cases

R. v. Sparrow 1990 1 S.C.R. 1075

In this case the Supreme Court of Canada held that Mr. Sparrow, who was prosecuted under the federal *Fisheries Act* for fishing contrary to the terms of his Band's food fishing license, had an Aboriginal right to fish for food that was protected by Section 35 of the *Constitution Act, 1982*. The court ruled that the Crown had not demonstrated a clear intention of extinguishing the specific Aboriginal right, prior to its protection in the Constitution.

Significant to consultation, the Court also established a test that required the Crown to justify any infringement on Aboriginal rights protected by Section 35. The Crown must prove that it has a valid legislative objective, there is as little infringement as possible, and there was appropriate consultation. The Sparrow justification test applies to proven Aboriginal rights and title, as well as to treaty rights.⁵⁷

Delgamuukw V. British Columbia 1997 3 S.C.R. 1010

Gitskan and Wet'suwet'en hereditary Chiefs claimed Aboriginal title and a right to self-government over their traditional territory. Due to problems concerning the hearing of evidence, mainly oral history, the Supreme Court of Canada ruled that a new trial would be required to make a specific determination of Aboriginal title and self-government rights in this case. However, in their decision the Court made some general pronouncements on the scope and content of Aboriginal title. In order to establish title, an Aboriginal group must prove that at the time of sovereignty it had occupied a territory to the exclusion of others; and has maintained a substantial connection to that land into the present. If an Aboriginal group legally establishes title, it has the communal right to exclusive use and occupation of the lands for purposes not limited to traditional activities, and can therefore include economic exploitation of the land. However, lands cannot be used in a way that destroys the special relationship with the land that made it Aboriginal title in the first place. Aboriginal title can only be surrendered to the Federal Crown.

Additionally, the Court declared that the federal and provincial Crown can justifiably infringe upon aboriginal title if it can meet the justification principles set out in the Sparrow decision. Part of the justification may include compensation to the Aboriginal group, and consultation is required anytime the Crown's actions will infringe on Aboriginal title. In most cases, depending on the circumstances, the scope of the duty will require more than mere consultation, and the Crown will have to address the concerns of the Aboriginal group who has title to the lands, and may even require their full consent.⁵⁸

Following the *Sparrow* and *Delgamuukw* decisions, the Crown had a legal duty to consult with Aboriginal groups whenever it contemplated any activities that may infringe upon established Aboriginal rights or title. However, until the *Haida* and *Taku River* cases, it was unclear what the legal obligation was to Aboriginal groups when their rights or title had not yet been proven in Court.

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73

In this case the court ruled that the Province had a legal obligation to consult with the Haida about decisions relating to the harvest of timber from an area on the Queen Charlotte Islands over which

⁵⁷ Hunter, 2006

⁵⁸ Bergner, 2006; Jepsen et al., 2005

the Haida have claimed Aboriginal title, but have not yet proven. According to the Court the Crown had failed to meet this obligation to the Haida. However, the Court determined that Weyerhaeuser, the timber harvesting company who was operating on the claimed territory, did not owe the Haida any duty to consult, because the Crown's duty cannot be delegated to third parties. However, it is still in the best interest of business to make sure the Crown properly fulfills this duty in a timely and appropriate manner.

The Court explained that the Crown's duty to consult stems from the honour of the Crown. This duty arises as soon as the Crown has knowledge, real or constructive, of the existence or potential existence of an Aboriginal right or title and considers any action that may potentially have a negative impact on those rights. Therefore, the Aboriginal group is expected to clearly outline the rights they assert and the alleged infringements. The scope of consultation is proportionate to the strength of the case for the existence of rights or title, as well as the seriousness of the impact on the claimed right. The Court also declared that good faith is required from both sides, and that no sharp-dealings are permitted. Depending on the circumstances, consultation may reveal a duty to accommodate the concerns of the Aboriginal group, such as altering decisions to balance the aboriginal concerns with societal interests. However, the Crown is not obligated to come to an agreement with the Aboriginal group, and the Aboriginal group does not have a power to veto, meaning forbid, a decision.⁵⁹

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) 2004 SCC 74

The Supreme Court of Canada released this decision alongside its decision in Haida. This decision gave some clarity about what consultation can look like in some circumstances.

The court ruled that the Environmental Assessment process engaged in by the Province for the reopening of a mine in the traditional territory of the Taku River Tlingit First Nation (TRTFN) did fulfill the Crown's legal requirement to consult with the TRTFN and accommodate their concerns, because it included concrete measures to address the concerns of the TRTFN. The Court found that the Crown did have a legal duty to consult with the TRTFN because it had knowledge of their claimed rights and title through their involvement with the BC Treaty Process, but the Crown had fulfilled its duty because the FN was involved in the Project Committee and fully participated in the environmental review. The court once again emphasized that the Crown did not have a duty to reach agreement with an Aboriginal group, as long as it consulted in good faith. The Crown is not necessarily required to establish a separate consultation process to address aboriginal concerns.⁶⁰

Platinex Inc. V. Kitchenuhmaykoosib Inninuwug First Nation, 2007 CanLII 16637 (Ont.S.C.)

In this case the Ontario Superior Court granted an interim injunction to the Kitchenuhmaykoosib First Nation (KI) who were not properly consulted in regards to the mining exploration of Platinex Inc in their traditional territory. Despite receiving notice from KI that they did not consent to the exploration, Platinex unilaterally decided to move ahead with exploration in the territory. Platinex was under pressure to commence drilling in order to satisfy the financial obligations owed to its investors. The Court however, saw that the pressures experienced by Platinex were self-created, and were no excuse for their action. The Court made itself clear that it would not give injunction relief to companies if consultation with First Nations regarding their rights did not occur. The Court instructed that good faith consultation by the Crown should involve negotiating an agreement, and highlighted that the Crown's failure to fulfill this duty promotes uncertainty for the resource industry.

The remedy mandated by the Court in this case was negotiated agreement through a court-supervised consultation process, involving the First Nation, Platinex, and the Provincial Crown. Each party was ordered to make good faith efforts to understand and accommodate the other parties' interests. In order to reach a tripartite agreement, the Court ordered the parties to complete

⁵⁹ Jepsen et al, 2005; Province of BC, 2002; Morellato, 2008

⁶⁰ Hunter, 2005; Jepsen et al., 2005

a Consultation Protocol, a Memorandum of Understanding (MOU), and a timetable, and when no agreement could be reached, these were imposed on the parties by the Court. The Court also recognized that appropriate funding is essential to create a level playing field in the consultation process, and the Court imposed Consultation Protocol and MOU ordered that the Provincial Crown would be responsible for funding the First Nations' reasonable costs of consultation.⁶¹

Mikisew Cree V. Canada, [2005] 3 S.C.R.

The Mikisew Cree First Nation went to Court to challenge Parks Canada's decision for a winter road route that would pass through Wood Buffalo National Park, on the bases that the Crown failed to consult the First Nation. The Mikisew are signatories to Treaty 8, and pursuant to the Treaty were promised the right to continue hunting, trapping and fishing throughout the surrendered lands, except those tracts taken up by the Crown for settlement, mining, lumbering, trading or other purposes. The Court ruled that even though the Treaty allowed for the "taking up" of lands, it still had a duty to act honourably, and therefore had a duty to consult and accommodate Treaty rights over surrendered lands.

In this specific case the Court determined that the duty to consult fell on the low end of the spectrum, and declared some minimum standards for consultation. As a minimum, the duty to consult requires the Crown to provide notice of the proposed infringement and engage directly with the First Nation; disclose all relevant information; inform itself of the impact of the proposed project on the aboriginal or treaty rights; communicate its findings to the affected nation; solicit and listen to the concerns of the nation, and attempt to address those in good faith. The Crown must also attempt to minimize the impact, and it cannot act unilaterally in its decisions.⁶²

Little Salmon/ Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources) 2008 YKCA 13

The concept of the duty to consult was initially thought only to apply in areas without treaties; however this was clarified by the Supreme Court of Canada in *Mikisew* that the duty to consult also applied in the interpretation of ancient treaties. On August 15, 2008 the Yukon Court of Appeal issued its decision in *Little Salmon* that the duty to consult and accommodate exists independent of treaties, and applies in the interpretation of treaties, both ancient and modern.

The issue in court was a decision by the Yukon's Director of the Agriculture Branch to transfer lands located within Traditional Territory, but outside of the Settlement Lands under the Final Agreement between Canada, the Yukon, and the Little Salmon/ Carmacks First Nation (signed July 21, 1997). The terms of the Final Agreement did not specify if the Yukon could transfer lands, nor did it specify the level of consultation required.

The Court determined that the duty to consult exists outside the treaty, and that duty applies to the interpretation and implementation of the treaty. The Court determined that Yukon must continue to be aware of potential harmful impacts on First Nations' treaty rights, and when those treaty rights may be affected, Yukon must seek consultation with First Nations.

The degree of consultation required will still be proportional to the degree of impact. The modern nature of recent treaties will be relevant in determining the extent of consultation required.

In this case the Court of Appeal concluded that although there was a duty to consult, the duty was in fact met by the Land Application Review Committee process, of which First Nation Governments participate as members when land applications may affect management of their traditional territories.

⁶¹ Morellato, 2008

⁶² Ibid.

As a result of this case there is no part of Canada that is not subject to the duty to consult with, and where necessary accommodate First Nations, Inuit or Metis.⁶³

Tsilhqot'in Nation v. British Columbia 2007 BCSC 1700

Chief Roger William, on behalf of the Tsilhqot'in Nation, claimed Aboriginal title to, and Aboriginal trapping and hunting rights in, two areas in their territory, including a registered Trapline, in which the Province permitted logging to occur. Chief William claimed that the Province's forestry planning and operations had infringed on their rights to hunt, trap, and trade, as well as their aboriginal title to the land.

One of the major issues at stake in this case was the extent of traditional territory that could be claimed for title. The Court ruled that title was not a right to all the land in a traditional territory; but neither was title simply land rights to small "postage stamp" parcels of land such as berry patches or fishing stations. The court ruled that Title was a right to tracts of land that were used regularly to sustain and define a people.

In the case of the Tsilhqot'in, Judge Vickers did not make a declaration of title, expecting parties to come to a negotiated solution, but he did provide his opinion that the First Nation had met the test for proof of title to almost half the claim area, as well as areas outside the claim. Aboriginal rights to trap, hunt and trade in skins and pelts to secure a moderate livelihood also existed in the claim area.

The Court determined that only the federal government has constitutional authority to make legislation in regards to Aboriginal title lands, and therefore, the BC *Forest Act* does not apply to lands that meet the test of proof for Aboriginal title. Furthermore, the application of the BC *Forest Act* infringes on that title and forest harvesting activities infringe on Aboriginal hunting and trapping rights. The Court also criticized the Crown for only acknowledging rights and title at the treaty table, and not during the consultation process.⁶⁴

⁶³ O'Callaghan, 2008

⁶⁴ Woodward, et al., 2008

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