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We also want to highlight the important contribution of MNP, who drafted the original Best Practices in Consultation and Accommodation report in 2009, much of which remains relevant and intact in this updated report.

It is our hope that this best practice report is a useful and valued tool for you and your organization, and that it helps promote reconciliation through respectful relationships between Indigenous Peoples, the provincial and federal governments, and industry.

Terminology Clarification

For clarification purposes, we provide the following explanation about the terms “Indigenous”, “First Nations” and “Aboriginal” as used throughout this report¹:

“First Nations” is used as the broadly accepted term in Canada that replaced "Indian Reserves" and "Indian Band" as defined under the Indian Act; the term is also used interchangeably when referring to First Nations governments.

“Aboriginal” refers to the original inhabitants of Canada and includes First Nations, Inuit and Métis. It is also used in this report when referencing Aboriginal title, rights and Treaty rights of Indigenous Peoples in Canada protected under section 35 of the Constitution Act, 1982 and as further defined by the Supreme Court of Canada.

“Indigenous” is used to encompass a variety of Aboriginal groups and incorporates “First Nations” and “Aboriginal”. Where possible in this report we use the term "Indigenous" to replace "Aboriginal", which reflects recent changes in the political and legal landscapes in Canada and other countries.

¹ Source: https://indigenousfoundations.arts.ubc.ca/terminology/, accessed August 30, 2018.
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EXECUTIVE SUMMARY

The best practices found in this report are based on effective consultation and accommodation experiences that were shared by First Nations leaders and managers, lawyers specializing in Indigenous law, and previous reports on consultation and accommodation. In Canada the federal and provincial governments are obligated to consult and accommodate Indigenous peoples prior to decisions which could affect their Aboriginal or Treaty rights as guaranteed by section 35(1) of the Constitution Act, 1982.
**Best Practice:** First Nations have advanced Aboriginal rights and title through court cases, and we are now beyond the stage of Duty to Consult. It is important that First Nations recognize we are now clearly in an era of defining “Consent.” First Nations should define what consent means from their perspective and continue to raise the bar of expectation when engaging with the Crown. Source: Interview with Bruce McIvor, February 2018

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**Inherent Rights & Indigenous Sovereignty**

The issue of Indigenous Peoples’ sovereignty and inherent rights in relation to their ancestral lands in Canada is rooted in the complex history of legal and political interactions between Indigenous Peoples and the Crown dating back to European arrival. In recent decades, Canadian courts have acknowledged that when the Crown asserted sovereignty in North America, the lands were already occupied and controlled by Indigenous Peoples based on their own systems of laws and governance. However, the courts have consistently failed to address the legal basis for how Crown sovereignty was acquired.

The duty to consult and other principles related to section 35 of the Constitution Act, 1982 that have been developed by Canadian courts are based on the assumption that Indigenous Peoples’ prior occupation of the land must be reconciled with the “reality of Crown sovereignty.” This assumption is contrary to Indigenous Peoples’ perspective that they retain sovereignty and ownership over their territories, and that they continue to hold inherent rights and decision-making authority over those lands.

The best practices for consultation and accommodation discussed in this guide are offered as a means of optimizing the available tools under Canadian law for protecting and advancing the rights of Indigenous Peoples, while also recognizing that outstanding issues related to Indigenous Peoples’ sovereignty must still be acknowledged and addressed by the Crown and the courts for meaningful reconciliation to take place.

**Consultation & Accommodation**

Consultation can provide an opportunity to protect and advance Aboriginal and Treaty rights through a respectful process of dialogue with the Crown. When undertaken effectively, consultation can ensure that Indigenous Peoples are able to raise concerns about a proposed decision or activity and have those issues meaningfully considered and addressed by the Crown. A robust, collaborative consultation process can also be a means to strengthen and support relationships between Indigenous communities, federal and provincial governments, and project proponents.

The Supreme Court of Canada (SCC) has established principles and requirements which govern the Crown’s duty to consult and the reciprocal obligations of Indigenous groups. The duty is part of a process of fair dealing which flows from the Crown’s obligation to act honourably in all its dealings with Indigenous Peoples. It exists to protect the collective rights of Indigenous Peoples and to further the underlying

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4 Haida at para 26.

5 Haida at para 17.

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Best Practice: Considering the Tshilhqot’in decision and other court cases and federal and provincial implementation of UNDRIP, we should no longer be talking about Consultation – First Nations should expect every government engagement to be about joint decision making and joint approval. Source: Interview with Industry Specialist, April 2018
Consultation and accommodation have been described as "interim mechanisms" that were introduced by the SCC\(^7\) to address the outstanding land ownership question in Canada until treaties or other agreements are reached with First Nations.\(^8\)

"Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in Van der Peet, supra, at para. 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay" (para. 186). – SCC, Delgamuukw v. BC, [1997] 3 S.C.R. 1010

"I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation" (para. 38). – SCC, Haida Nation v British Columbia (Minister of Forests), [2004] 3 S.C.R. 511.

The SCC has affirmed Aboriginal Title in Tsilhqot'in Nation v British Columbia (2014 SCC 44), and the federal government is anticipated to pass Bill C-262, “an Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples”\(^9\) (UNDRIP). With the SCC recognizing Aboriginal Title and the introduction of “Free, Prior and Informed Consent” outlined in UNDRIP, the provincial and federal governments will broaden their approach to the constitutional obligations to achieve reconciliation with Indigenous Peoples in Canada.

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\(^8\) British Columbia Treaty Commission 1997-1998 Annual Report: “Delgamuukw has escalated First Nations’ demands for a role in dealings by government over lands and resources within their territories. There are too many First Nations in the process for that to be achieved through treaties alone. Other means must be found. Delgamuukw suggests consultation processes become negotiation processes so that interim measures and economic development agreements become treaty building blocks.”

SUMMARY OF CONSULTATION AND ACCOMMODATION BEST PRACTICES

PREPLANNING

- First Nations should define what “informed consent” means from their perspective and continue to raise the bar of expectation when entering discussions with the Crown.

“First Nations have advanced Aboriginal rights and title through court cases, and we are now beyond the stage of Duty to Consult. It is important that First Nations recognize we are now clearly in an era of defining ‘Consent’. First Nations should define what consent means from their perspective and continue to raise the bar of expectation when engaging with the Crown.”

- Bruce McIvor.10

- Ideally for informed consent to work, a joint recommendation body should be set up. A process could then be established to guide the discussions to reach consent.

“Considering the Tsilhqot’in decision and other court cases and federal and provincial implementation of UNDRIP, we should no longer be talking about Consultation – First Nations should expect every government engagement to be about joint decision making and joint approval.” – Industry Expert11

- First Nation membership should identify who has the authority to represent them in the consultation process.

“Comprehensive Community Plans that are created by the people of a Nation establish that leadership has received community buy-in for a plan. When leadership continue to go back to the community after receiving a mandate through the CPP, this implies leadership is afraid of accepting responsibility and afraid of making mistakes. Leadership must take responsibility and control. Leadership needs to decide what is best for the community, not INAC,” state Al Little and Ron Arcos.12

- It is important for First Nations to differentiate when they need to have a designated negotiating team as part of consultation project and when they do not.

- Create a separate team for the consultation process that includes technical staff to review matters like environment and wildlife, and another team for accommodation negotiations that consists of business people who understand commercial agreements.

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10 Interview conducted by Brian Payer with Bruce McIvor, February 2018
11 Interview conducted by Brian Payer with Industry Expert, April 2018
12 Interview conducted by Brian Payer with Al Little and Ron Arcos, March 2018
• Be proactive about consultation where community wealth can be gained from Indigenous lands and waters; seek out business proponents you wish to work with.

• Ensure community understands what consultation and accommodation is; ensure involvement of the community; define what consultation means to the community.

“For example, in Heiltsuk territory, there were upwards of 90 community engagement sessions during the Marine Use Planning (MUP) process. They met with the MUP committee, which consisted of hereditary leaders, fishermen, technical folks, youth and members at large and then the community. They spoke about protected areas, historical, cultural and heritage areas, management, etc. This process included decisions about fisheries reconciliation. Community members simply want to know how a decision will benefit them – this is the fundamental key to how to communicate and engage with community. As part of this process, it is important to assemble teams with technical people who can explain recommendations to the community.” – Gary Wilson13

• Consult community to create collective vision, long-term goals, and to develop the community’s external consultation and accommodation policies and guidelines.

• Establish the community’s internal consultation protocols and processes to support consultation and accommodation.

• Self-evaluate community capacity and identify knowledge gaps.

• Provide the proponent and government with a budget that lays out the costs that will be incurred as a result of the requests to engage in consultation.

“It is important for First Nations to create a budget of estimated costs and submit to the proponent for approval and payment for the Nation to proceed with evaluating consultation requests. This demonstrates the Nation is organized and has a process for moving forward.” – Bill Adsit14

13 Interview conducted by Brian Payer with Gary Wilson, April 2018
14 Interview conducted by Brian Payer with Bill Adsit, June 2018
COMMUNITY SUPPORT

- 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

“Our economic development corporation does not go back to the community for community input - they use community communication verses community involvement. The corporation is mandated to do business and that is what they do. The development corporation provides yearly report to membership through newsletters and community meeting. For very large projects, family meetings are held with family heads. The development corporation is guided by the CCP and gets their broad-based mandate for economic development from the document.” – BC Indigenous Leader.15

EXERCISING INHERENT JURISDICTION

- Approach consultation and accommodation with an inherent rights strategy.

“The question is why we continue to ask for permission when we shouldn’t have to. As a people, a Nation with inherent rights and title to our traditional territory that has sustained us for a millennia, we need to follow our ancestors who developed systems and laws that guided our ancestors and continue to guide us, to sustain ourselves including surviving colonialism. So, we walk and talk like we have always had our rights and title - our language and actions need to demonstrate that we have jurisdiction, not them.” – Gary Wilson16

- Collect evidence to support title and rights claims.

For example, the Squamish Nation created their Land Use Plan - Xay Temixw (Sacred Land) Land Use Plan, which is a vital tool in their decision making on land and resource uses in their territory. The plan “sets out how to achieve the community’s vision by protecting and managing the Nation’s land for the benefit of present and future generations.”17

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15 Interview conducted by Brian Payer with BC Indigenous Leader, February 2018
16 Interview conducted by Brian Payer with Gary Wilson, April 2018
• Be prepared with a land and marine use plan for making decisions at a strategic level.

“Guardian Watchmen Program is based on the premise of stewardship, wherein trained community members are out on the water, on a daily basis, protecting the territory, and collecting relevant data that supports the negotiation process with government. A business case study was conducted to demonstrate the value of the program.” – Gary Wilson18:


• Operate as a Nation, and involve neighboring First Nations as well when shared territory is a factor; negotiate at multiple tables

• Follow through with the consultation process to maintain credibility as a Nation

DEVELOPING A CONSULTATION 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

18 Interview conducted by Brian Payer with Gary Wilson, April 2018
INTRODUCTIONS TO PROPOSTENTS

- Ensure that Industry engagement, through the consultation process is rooted in your community’s Vision of your lands and resources.
- Have a system and procedure in place to respond to proposals immediately and indicate if more time, resources or information is needed
  
  “George Watts was a proponent of an open and transparent process. Set up an achievable plan; revise as necessary; modify; set out guidelines as to how it will be operated; have proper documentation; and implement the plan.” – Al Little and Ron Arcos.19
- 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

RELATIONSHIP BUILDING

- Work together to design consultation protocols with Crown or industry after community has determined what it feels should be included in the protocols
  
  Industry understands that Aboriginal title is not held by an individual but communal. Though individual members may wish to capitalize on opportunities, it is important that the First Nations leadership determine the consultation and accommodation expectations. – interview with Sharon Singh
- Invite proponents to community meetings to interact with the membership
  
  “Successful community engagement occurs when industry is willing to sit down with a community reference team made up of technical people, Elders, hereditary and elected leadership, community members at large and youth. A proactive process that involves First Nations and industry working together before a provincial referral, come to terms, and then action the referral – that approach has shown excellent results.” – Gary Wilson 20
- Develop relationships directly with proponents - 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

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19 Interview conducted by Brian Payer with Al Little and Ron Arcos, March 2018
20 Interview conducted by Brian Payer with Gary Wilson, April 2018
### SATISFYING THE DUTY TO CONSULT & GETTING A GOOD DEAL

- Identify and keep in mind the benchmarks of the Crown’s duty to consult

- First Nations agreements with the BC government over natural resources activities like mining should include “me too” clauses, that essentially say that if another First Nation negotiates a better deal, then other First Nations with the me-too clause automatically benefit from the better terms.

- Develop a template for First Nations to use that sets out the upfront parameters that need to be considered as part of the consultation process with resource companies.

- When negotiating, it is important for First Nations to understand the economic value of the natural resource project at each stage. It is based on the valuation of stages and financial projections that negotiations should be developed.

  “Absolutely key - negotiators must know the full financial projections for a proposed project. The reason for this is the negotiators need to know how much income the proponent is projecting to make and what the return on investment is. The Negotiators need to know and fully understand what they believe is the minimum and what is maximum of the bottom line profit they believe the proponent will need to satisfy their shareholders. If they don’t know the numbers, then they have no idea of how much their resources are worth, and it is possible to ask for too much during the negotiations and the proponent may not move forward with the project. Negotiator must know what they are asking for and why.” – Bill Adsit

- 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.

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21 Interview conducted by Brian Payer with Bill Adsit, June 2018
- Document process to substantiate perceived lack of accommodation if such occurs
- Engage allies to leverage best deal

### DEALING WITH PROVINCIAL REFERRALS

- 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

*It is a best practice for First Nations leadership to collectively evaluate the BC Government referral process. 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.*

### TOOLS & RESOURCES

- Determine where to get additional expertise, should it be needed in the future. Hire experts with the understanding that they will help develop internal capacity.
- Provide clear written communication to hired professionals. Manage experts and advisors according to the relationship built with the proponent
- 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

*“There are lots of good IBAs published. Negotiators should look at these and pick out the best points of each and then massage them to fit their situation. Know what has been negotiated and achieved by others before negotiating. Best place to get industry information like this is through the SEDAR website.” – Bill Adsit*[^22]

[^22]: 22 Interview conducted by Brian Payer with Bill Adsit, June 2018

https://www.sedar.com/homepage_en.htm
1. INTRODUCTION

The intent of this report is to describe how recent consultation and accommodation court cases have impacted engagement strategies from a First Nations perspective, and to showcase the steps communities have taken to achieve their goals within the consultation and accommodation processes.
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. 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. 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.

One characteristic of a best practice is the ability to be duplicated or repeated by others. Best practices also need to be dynamic, so they can be modified and evolve to fit new and changing circumstances.

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.

How to Use this Guide

This guide draws on the experiences of several First Nations Chiefs and management staff, lawyers specializing in Aboriginal and Treaty rights law, and industry representatives who have offered their experience, wisdom and input. A literature review of consultation and accommodation reports, papers, and legal case studies also contributes to the recommendations in this report.

This report is organized into the following sections:

Executive Summary: This section provides a brief introduction to this report and a summary of the best practices identified in this report.

1. Introduction: This section includes the project vision and purpose, a definition and description of best practices, and how to use this guide.

2. What is the “Duty to Consult?”: This section provides pertinent case history to provide context for the Crown’s legal duty to consult and accommodate with Indigenous Peoples in Canada when activities are contemplated that may affect their Aboriginal and Treaty rights.

3. Consultation Best Practices: This section includes summaries of interviews and literature review as they relate to best practices that First Nations can use to create and participate in effective consultation with Crown and industry. This section also explains the role of experts and advisors to First Nations during the consultation process.
process, as well as different tools to improve the effectiveness of consultation in the different stages of engagements to improve benefits, such as:

- Exercising authority and jurisdiction
- Preplanning and establishing community support and strategy
- Developing a consultation policy
- Responsibilities within the consultation process
- Building relationships
- Completing consultation

4. Accommodation Best Practices: This section is a summary of topics to help First Nations engage in the different stages of accommodation negotiations.

5. New Developments – Future Impacts: This section introduces recent court decisions, public policy changes, and the federal government’s commitment to reconciliation with Indigenous communities in Canada (e.g. adoption of the United Nations Declaration of the Rights of Indigenous Peoples). This section is to help communities to implement new strategies in consultations engagements and accommodation negotiations.

6. Case Studies: This section outlines experiences with consultation processes, and the lessons learned from these experiences.

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

Please note this report does not intend to provide specific answers to what are complex legal matters. Instead, we hope the best practices in this document will provide pragmatic and useful suggestions on how to prepare for and participate in consultation and accommodation processes to ensure that Aboriginal, Indigenous and Treaty rights are protected and respected.
2. WHAT IS THE “DUTY TO CONSULT?”

“The duty applies in respect of both established rights and rights not yet recognized by the Crown or courts. As has been stated by BC First Nations leadership, the concepts of sovereignty and reconciliation are central to understanding the purpose of consultation and accommodation.”
Aboriginal & Treaty Rights

Indigenous Peoples’ Aboriginal and Treaty rights are recognized and protected pursuant to section 35(1) of the Constitution Act, 1982.

Aboriginal rights are collective, inherent rights that arise from practices carried out by Indigenous Peoples since prior to European contact. Courts have recognized the existence of Aboriginal rights including hunting, fishing and trapping, as well as the right to self-government and self-determination.

Aboriginal rights include Aboriginal title. Aboriginal title is a right to land which originates in Indigenous Peoples’ use and occupation of their territories at the assertion of Crown sovereignty. Title is held communally by the Indigenous group for the present generation and all succeeding generations.

Aboriginal title includes:

- the right to the exclusive use and occupation of lands, including for non-traditional purposes;
- the right to decide how the lands will be used and managed; and
- the right to economic benefits of the lands.27

Aboriginal title is also subject to the following limits:

- the lands cannot be alienated except to the Crown;
- the lands cannot be developed or used in a way that would substantially deprive future generations of the benefit of the lands; and
- if the title-holder does not consent to a proposed activity on its lands, the Crown may only proceed if it can establish that the infringement on Aboriginal title is justified.28

Treaty rights are rights flowing from treaties entered into between Indigenous Peoples and the Crown.

Consultation & Accommodation

The Crown’s duty to consult and accommodate Indigenous Peoples prior to making decisions which could affect their Aboriginal and Treaty rights is a procedural obligation which arises from the honour of the Crown.29 It is part of a process of fair dealing and reconciliation which flows from the recognition and protection of Aboriginal and Treaty rights pursuant to section 35 of the Constitution Act, 1982.

The duty applies in respect of both established rights and rights not yet recognized by the Crown or courts. As has been stated by BC First Nations leadership, the

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28 Tsilhqot’in at paras. 74-76.
29 Tsilhqot’in at para. 78.
concepts of sovereignty and reconciliation are central to understanding the purpose of consultation and accommodation.  

In addition to consultation, the Crown may also be required to take steps to accommodate the Indigenous group. Examples of accommodation measures includes:

- modifying a proposal to mitigate adverse effects on Aboriginal and Treaty rights;
- allowing for shared decision making; and
- providing economic accommodation, e.g. jobs, training, service contracts, one-time compensation, revenue sharing, project equity

**Who is Responsible for Consultation?**

Both the federal and provincial governments are responsible for carrying out the Crown’s consultation obligations.  

The duty to consult cannot be discharged by third parties, including project proponents. However, the Crown may delegate procedural aspects of the duty and may rely on accommodation measures carried out by third parties. Where procedural aspects of the duty are delegated to third parties, the Crown must maintain oversight and responsibility for the consultation process.

Indigenous groups also have reciprocal consultation obligations. When participating in consultation, an Indigenous group should:

- make its concerns known;
- be responsive and reasonable; and
- not frustrate the Crown’s attempts to consult.

While both the Crown and the Indigenous group are expected to engage in consultation in good faith, there is no obligation that the parties reach an agreement. Indigenous groups should be aware that engaging in hard bargaining is allowed, and that taking a firm position in negotiations is not equivalent to ‘frustrating’ consultation.

**Triggering the Duty to Consult**

The duty to consult is triggered at a low threshold. It arises wherever the Crown has real or constructive knowledge of the potential or actual existence of an Aboriginal or Treaty right and contemplates conduct that might adversely affect it.  

Adverse impacts include decisions which result in a physical effect on the exercise of the right, such as the construction of a pipeline or transmission line. The duty also

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30 Advancing an Indigenous Framework on Consultation and Accommodation in BC-2013
32 Tsilhqot’in at para. 78.
extends to organizational changes or strategic-level planning decisions, such as a decision authorizing the transfer of a mining license from one company to another.33

In order to trigger the Crown’s consultation obligations, there must be a direct relationship between the proposed decision or activity and the potential impact on the claim or right. Past wrongs, including prior breaches of the duty to consult, are not sufficient to trigger the duty to consult.34 However, this does not mean that previous decisions which have adversely impacted the right are irrelevant.35 Where a proposed action or decision will result in a new or additional impact, the historical context and existing state of affairs should be taken into account.36

Scope of the Duty to Consult

The scope of the duty to consult will vary depending on the strength of the First Nation’s claim and the seriousness of the potential impacts on the exercise of the right.37

At the lower end of the consultation spectrum, the Crown is required to:

- provide information in timely way so First Nation has time to express concerns and time to change plans;
- put forward proposals that are flexible and not yet finalized;
- listen carefully to the affected First Nation and attempt to minimize adverse effects; and
- whenever possible, demonstrably integrate responses to the First Nation’s concerns into its plan of action.

Where deep consultation is required, the Crown must also:

- be prepared to accommodate by adjusting plans accordingly;
- be prepared to negotiate interim satisfactory solutions;
- allow for First Nation participation in decision-making process; and
- provide written reasons explaining how First Nation concerns were considered and their impact on the decision.38

In all cases, the Crown representative must have the mandate to do what is necessary to fulfill its consultation obligations and carry out any required accommodated measures. The Crown’s duty to consult lies ‘upstream’ of the statutory mandate of decision-makers – it is not restricted to requirements or procedures that may be set out in legislation or policy documents.39

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33 Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43 (CanLII) [Rio Tinto] at para. 44.
34 Rio Tinto at para. 45.
36 West Moberly at paras. 117-19.
37 Haida at para. 39; Tsilhqot’in at para 79.
38 Haida at para 50.
**Consent vs. Veto**

In most cases, Indigenous group will not have a right to veto a pending decision. However, a lack of veto does not mean Crown can proceed with a decision regardless of First Nation opposition, and the Crown may still be required to accommodate the group even where consent is not required.

In situations where there is an established right and the impact of the Crown action or decision will be significant, the consent of the Indigenous group may be required.\(^4^0\) The Supreme Court has also confirmed that the Crown should seek the consent of Indigenous groups both before and after claims have been recognized if it wishes to avoid being charged with failing to uphold its constitutional obligations.\(^4^1\)

Although Canadian law does not require the Crown to obtain the consent of Indigenous Peoples in all circumstances, Indigenous Peoples have long been clear that consent-based decision-making in respect of decisions about lands and resources is a fundamental component of reconciliation.

Increasingly, Indigenous Peoples are demanding that the Crown seek their informed consent prior to decisions or authorizations which would affect the exercise of their rights or their lands, consistent with the direction of the Supreme Court and the honour of the Crown. The federal government has also acknowledged the importance of consent, including through its commitment to a renewed relationship with Indigenous Peoples based on partnership, recognition and respect, the implementation of the United Nations Declaration on the Rights of Indigenous Peoples, and its Principles respecting the Government of Canada’s relationship with Indigenous peoples.

"Where title is still “unproven” there is a practical, rather than strictly legal, requirement to obtain consent," states Scott Smith and Paul Seaman. "If development has proceeded without consent prior to Aboriginal title being established, [the Crown] may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing (Tsilhqot’in, 2014)."\(^4^2\)

Given these developments, it is likely that the issue of informed consent will play a prominent role in the development of the law and best practices regarding the use and development of Indigenous Peoples’ land and resources.

**Infringement & Justification**

In situations involving established Aboriginal and Treaty rights the Crown must go beyond consultation and attempt to justify any infringement of the right.\(^4^3\)

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\(^4^0\) Haida at para. 42; Tsilhqot’in at para. 76.

\(^4^1\) Tsilhqot’in at para. 97.


action or decision which results in more than an insignificant interference with an established Aboriginal or Treaty right constitutes a prima facie infringement.44

The Crown cannot make a decision or issue an authorization which would result in a prima facie infringement of an established right unless it can demonstrate that the infringement is justified.45 To justify an infringement, the Crown must establish that:

- it has discharged its procedural obligations to consult and accommodate the Indigenous group;
- the action or decision serves a compelling and substantial public purpose; and
- the action or decision is not inconsistent with the Crown’s fiduciary duty to the Indigenous group.46

Consultation & Environmental Assessments

The Crown often seeks to rely on environmental assessments and other regulatory processes to discharge all or part of its consultation obligations. However, environmental assessments on their own are rarely enough to address the full scope of the duty to consult.

Consultation requires an iterative process between Indigenous Peoples and the Crown. There should be an opportunity for Indigenous groups to identify concerns about a proposed activity and provide information about the potential impacts on their rights, and for the Crown to take steps to accommodate these concerns.

By contrast, environmental assessments often do not allow for meaningful dialogue between the Indigenous group and the Crown. The process is typically limited to the specific site or project as defined by the proponent and subject to legislative timelines which may be inadequate to address the Indigenous group’s concerns. In addition, the statutory decision-maker may be able to provide certain mitigation measures, but usually lacks a mandate to provide necessary accommodation.

Consequently, where the Crown intends to rely on an environmental assessment or regulatory process to fulfil aspects of its consultation obligations, it may also be required to establish a separate, additional engagement process directly with Indigenous groups in order to satisfy the duty to consult.47

When is the Duty to Consult Satisfied?

The question of when the duty to consult has been satisfied will depend on the specific circumstances of each case, including the depth of consultation owed to the affected Indigenous group.

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45 See for example Ahousaht Indian Band and Nation v Canada (Attorney General), 2018 BCSC 633 (CanLII).
In general, consultation must be carried out prior to the decision or action which will affect the Aboriginal or Treaty right.\textsuperscript{48} However, the duty to consult is ongoing and extends throughout the life of a project.\textsuperscript{49} The Crown is obligated to fulfill its obligations to consult and accommodate at all major steps related to a project, including permitting, licensing and the development of higher-level strategy documents.\textsuperscript{50}

At minimum, the Crown’s consultation obligations will not be fulfilled until:

- the Indigenous group has had an opportunity to review, understand, and raise concerns about the proposed activity and its potential impacts on its territory and Aboriginal title, rights and/ or Treaty rights; and
- the Crown has consulted in good faith with the intention of substantially addressing the Indigenous groups’ concerns.

Importantly, consultation is not just an opportunity for the affected Indigenous group to ‘blow off steam’ before the Crown proceeds to do what it intended in the first place.\textsuperscript{51} For consultation to be meaningful, the government representative must be prepared and have the proper mandate to make changes to the project and put in place the necessary accommodation measures in response to the Indigenous groups’ concerns.

Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.\textsuperscript{52}

**Capacity Funding**

Consultation costs can include fees for technical and legal support, as well as expenses associated with community engagement. In many cases, the Indigenous group will need access to funding over and above its day-to-day budget to meet these expenses.

Courts have confirmed that:

- funding is essential to achieving a fair and balanced consultation process between First Nations and the Crown,\textsuperscript{53}
- the Crown should not unreasonably expect a First Nation to absorb consultation costs in situations where the consultation arises as a result of a proponent’s desire to pursue a project and the Crown’s desire to see the project move ahead;\textsuperscript{54}

\textsuperscript{48} Tsilhqot’in at para 78; Haida.
\textsuperscript{50} Taku River at para. 46.
\textsuperscript{51} Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 SCR 388, 2005 SCC 69 (CanLII) at para. 54.
\textsuperscript{52} Tsilhqot’in at para. 79. See also Chippewas at para.32.
\textsuperscript{54} Saugeen at para. 159.
• in the context of environmental assessments and other regulatory proceedings, the denial of funding to enable Indigenous participation in the process can result in a breach of the duty to consult.\textsuperscript{55}

Consequently, it is appropriate for Indigenous groups to seek funding from the Crown and/or project proponents at the outset of consultation to ensure that the group has the necessary resources to meaningfully participate in the process.

\textsuperscript{55} Dene Tha’ First Nation v. Canada (Minister of Environment), 2006 FC 1354 (CanLII) at para. 114; Clyde River (Hamlet) v. Petroleum Geo-Services Inc., 2017 SCC 40 (CanLII) at para. 47
Successful consultation and accommodation practices require good governance, technical capacity, knowledge and expertise, financial resources, and clear policies and procedures.
Initiating Consultation

Typically, the Crown will approach Indigenous communities to initiate consultation if it is contemplating an action or decision which could affect the group’s Aboriginal or Treaty rights. Project proponents may also notify and seek to engage with Indigenous groups about a proposed activity.

Indigenous groups may also approach the Crown or proponents directly to initiate engagement about proposed projects or activities.

Preplanning for Consultation

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

Community Vision

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 territory. A code of ethics for development of lands and resources is another method, as are comprehensive community plans and economic development strategies.56

Some BC First Nations, including those engaged in the BC Treaty Process are developing constitutions as a key self-governing document. A First Nations constitution covers many important areas of community self-determination and self-governance, including how lands are managed, protected and developed.

It is important that the staff responsible for consultation and the whole community understand the concepts 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.57

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.

Strategic Planning

Indigenous groups should be consulted at all stages of a project, including higher-level strategic decisions. This is consistent with the Nation-to-Nation approach from which both BC and Canada are renewing their relationship with BC First Nations.

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57 Metis Nation of Ontario, 2008
If Aboriginal and Treaty rights 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.

Key strategic documents that First Nations may wish to develop that encompass their territory include:

- Declaration of Sovereignty
- Constitution
- Land and Marine Use Plans
- Traditional Use Plan
- Economic Development Strategy

In order for a First Nation to negotiate with the Crown or industry proponents on strategic-level issues, it is advisable that the First Nation be prepared with their own strategic plan that they can draw upon.

A First Nation’s 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 decisions at the strategic level for their territory. 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 in line with the community’s vision.

Where practical, it may be advantageous to engage in consultation at the Nation level, rather than as an individual First Nation. Putting politics aside and forming a single unit that represents all the Nation communities will establish a stronger unified voice. As a collective, the Nation has stronger leverage and legal standing; as well, the consulting party cannot play the different communities against each other (e.g. focusing on territory overlap issues).

However, this approach requires a high level of trust and coordination amongst the 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.

Indigenous groups may also wish to address issues related to shared or overlapping territories directly between themselves based on their own laws and protocols rather than with the involvement of the Crown.

**Developing a Consultation Policy and Procedures**

BC and Canada’s consultations and negotiations with First Nations are inconsistent. As a consequence, there is also no regularity in the outcomes of the consultation process. To achieve greater consistency and success it is a best practice to develop

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58 The framework for an Aboriginal Title and Inherent Right Strategy
and implement an adaptable consultation model or policy to guide the process in the right direction.

The BC Government has developed a publicly accessible guide for doing business with First Nations that it released in 2012 – Building Relationships with First Nations: Respecting Rights and Doing Good Business59 – which has not been updated to reflect more recent case law, such as Tsilhqot’in. While the government may have the basic 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.60

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. 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.

Some Indigenous groups in Canada have taken steps to initialize a consultation policy developed in collaboration with the Crown, rather than waiting for the Crown to include them.

Several BC First Nations have begun the process of establishing updated consultation and accommodation processes with BC through Reconciliation Agreements. These agreements are broad in scope and generally reflect a Nation to Nation approach to jointly developing Nation specific consultation and accommodation processes and structures.

Gather Evidence in Support of Claim

Information and evidence which support the existence of an Aboriginal group’s title and rights can be used to strengthen the group’s position when engaging with the Crown and industry.

Traditional use studies, anthropological or archeological studies, and oral histories can all serve to strengthen a First Nation’s claim to their rights and territory. This is

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60 Metis Nation of Ontario, 2008
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.

Indigenous groups should consider what measures may be needed to ensure that culturally-sensitive information is not disclosed without their consent.

**Capacity**

Capacity is the greatest challenge for First Nations and provides the greatest opportunity to advance its Indigenous governance and realize economic opportunities from activities in their territories.

Acquiring the necessary capacity to govern and manage the lands and resources throughout the territory requires a comprehensive strategy and approach. A First Nations approach should consider the organizational, personnel and financial resources required to effectively govern; as well as how it will engage with industry and government.

**Organizational**

Some First Nations have developed and employ a Lands and Resources department within their community governance and administration. Other communities, such as the Heiltsuk Nation and the Metlakatla First Nation have established separate legal entities. The Metlakatla Stewardship Society, an autonomous body within the Metlakatla Nation, oversees all consultation matters for the Metlakatla, as well as undertakes other stewardship activities for the Nation. By having a separate legal entity, overseen by a board of directors, they can directly enter into funding and contractual understandings with government and industry.

Either structure is workable and can be effective in managing consultation matters.

**Personnel**

Before engaging in consultation, First Nations should examine and organize their teams based on capacity. This requires communities to self-evaluate their team member skills and knowledge and identify any gaps. If a First Nation wants to be involved in land and resource management and exert control over their 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 with the understanding that they will commit to work with the First Nation to develop its internal capacity (e.g. mentorship).

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.\(^6\) It is a best practice to inform the government and proponent how much funding is needed for the First Nation to engage in the consultation process. Generally speaking, funding for consultation is commonly provided 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 protocols about who will consult with companies and/or government is required. If a First Nation decides to have a separate negotiating team, they should 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.

**Financial Sustainability Strategy**

Once the human resources requirements to oversee lands and resources governance are understood and identified, First Nations have three potential sources of funding to support operations.

Firstly, internal resources from a First Nations own-source revenues and resources can be established. Resources from business revenues or other sources, such as property taxation can be allocated to fund consultation and accommodation activities.

Secondly, external resources from BC and/or Canada governments can be obtained through a variety of negotiated understandings. Recently, First Nations have signed Reconciliation Agreements with BC that provide financial resources to First Nation signatories. As well, many BC First Nations have signed forestry agreements, which is in part intended to be a vehicle for revenue sharing with BC, as well as financial resources to enable capacity for forestry related consultation matters.

Thirdly, many BC First Nations have signed Consultation Agreements or MoU/Protocol agreements with industry proponents related to consultation matters that are associated with the proponent’s projects. First Nations that have enjoyed the most success in governing consultation and accommodation matters are employing all 3 aspects of financial capacity solutions.

**Role of Experts and Advisors**

To exert jurisdiction over their lands, First Nations leadership needs 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 legal, technical, environmental, and financial issues of the projects proposed in their

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61 Platinex Inc. v. Kitchenuhmayoosib Inninuwug First Nation, 2007 CanLII 16637 (Ont.S.C.); see Appendix for a brief overview of this case.
lands and waters. 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.

If outside assistance is not required on the outset of a project, it is still recommended to 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 to be more efficient in meeting important deadlines.

The key factor that limits First Nations ability to hire 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.

Legal expertise is a necessity in the consultation and accommodation process. Some proponents might suggest that First Nations do not need lawyers. However, these proponents most certainly have their own legal experts who understand the legal precedents regarding consultation and accommodation engagements.

Some of our interviews suggested that First Nations should utilize professional negotiators throughout the consultation and accommodation process, 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. 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 interviewed for this report 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 from their 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.

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.

**Community Readiness and Support**

Community readiness and support for consultation comes from involving the community in the pre-planning for consultation. 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 the Vision will also generate community endorsement and support. Talk to Elders, youth leaders, and other community members in an informal way to find out what the needs of the community are. This helps to ensure that the First Nation can find wins for as broad a spectrum as possible. In addition to immediate needs, such as employment opportunities, it is commonly recommended that the First Nation determine long term goals for the future, such as 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 and 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 them 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 Process

<table>
<thead>
<tr>
<th>TASK</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Create a First Nations community participation and communications plan</td>
<td>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.</td>
</tr>
<tr>
<td>Get youth involved</td>
<td>This helps create ownership and commitment by youth and helps foster future leaders.</td>
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<tr>
<td>Schedule community sessions at various stages of the consultation process</td>
<td>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.</td>
</tr>
<tr>
<td>Promote the session</td>
<td>Send information about the sessions in community newsletters or in a flyer. Deliver the notices house-to-house.</td>
</tr>
<tr>
<td>Invite experts, advisors, and/or representatives of the proponent to share information</td>
<td>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.</td>
</tr>
<tr>
<td>Ensure community members are informed</td>
<td>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. Provide as much background information as possible, so participants can think about their position before they attend.</td>
</tr>
<tr>
<td>Be specific with your questions</td>
<td>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.</td>
</tr>
<tr>
<td>Encourage other formats for providing input</td>
<td>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.</td>
</tr>
<tr>
<td>Go back for community endorsement and support</td>
<td>Conduct follow up sessions or send follow up communication to let the membership know how their input was used and how it has affected the outcome. In particular, update the membership on any outstanding questions or issues from previous sessions.</td>
</tr>
</tbody>
</table>

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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 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 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.63

Responding When Consultation is Requested

Although the duty to consult lies with the Crown, Indigenous groups who wish to participate in consultation must do so in good faith and not frustrate the Crown's consultation efforts. Referencing Halfway River First Nation v. B.C. (Ministry of Forests), [1999] “The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action." The duty to consult also involves “a reciprocal duty on Aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available

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63 Cormick, et al., 1996
to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.”

The federal or provincial government may initiate consultation about a proposed activity to the community through a referral or other notification system. 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 provide a preliminary response to referrals and proposals as soon as possible, even if they have not decided regarding the proposed project.

Consultation should occur with decision-makers for the First Nation who have the appropriate authority to represent the community in the engagement process. Those decision-makers have the responsibility to, in turn, consult internally within their community to determine the Nation’s position. The Heiltsuk Nation for example has established a separate legal entity, the Heiltsuk Integrated Resource Management Department (HIRMD), which is mandated by the Heiltsuk Tribal Council to undertake all consultation matters as they relate to stewardship of the lands and resources in the Heiltsuk Territory. It is helpful to industry, government and municipalities when it is clear who they should consult with, whether it is the Chief and Council, a designated department within the First Nation’s administration, or, for instance, Hereditary Leadership or a council of Elders.

First Nations may also consider developing a negotiating team with a mandate to carry out engagement activities. 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 on the Nation’s behalf. This approach is also useful in ensuring stability and continuity in the face of leadership changes in the community when elections occur.

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 representative interviewed for his project indicated they set up a Land and Resource team to consult with industry and government whenever there is proposed activity that may impact their territory. When relevant, members of the Economic or Traditional Knowledge teams participate as well, so that they can represent their different mandates and interests.

It has been identified as best practice to:

- Send a letter from Chief and Council to confirm receipt of the consultation request (provincial referral) and indicate an intention to respond.

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64 Halfway River First Nation v. British Columbia (Minister of Forests) [1999] 4 CNLR, (BCCA 470)
65 HIRMD.ca
It is important for First Nations to differentiate when they need to have a negotiating team or deal with a simple referral.

- 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 and Treaty rights over the claimed area, such as hunting, fishing, and 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 after 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 consultation discussions, meetings, and documents, including the First Nation’s response letter.

**Government to Government Relations**

Based on interview responses by Giovanni Puggioni, Executive Director of Major Projects with the BC Government\(^6\), the province often fields questions from proponents about First Nations that they cannot answer. One of the biggest challenges for industry that wants to do a business deal is who to speak with in each First Nation (e.g., elected or hereditary leadership, general manager or lands department). For example, international companies, such as Japanese firms, do not want to offend or be disrespectful to First Nations. They want to respect protocol and so want a clear path as to how to approach the community.

One of the key success factors when First Nations enter consultation processes with government is to determine the nature of the consultation being sought by proponents. In some cases, First Nations may benefit from guidance on the scope and scale of projects being proposed in their territories.

It is suggested that the consultation team and negotiations team be separate because the skill sets for each are different and not having the right people at the table can put the First Nation at a disadvantage. Business people understand

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\(^6\) Interview conducted by Brian Payer with Giovanni Puggioni, Executive Director of Major Projects with the BC Government, May 2018
commercial agreements while technical people understand aspects of the project such as environmental or wildlife.

**Recommendation:** It would help streamline the consultation process for a First Nation to state on their website how industry is to contact them and who is the point of contact for specific types of projects. When proponents contact the community, it would be helpful if First Nations clearly state who speaks on behalf of the community for consultation and negotiations. Streamlining the process will help ensure that civil servants within government are confident on how to proceed with consultation that meets First Nations expectations.

According to Mr. Puggioni, if a project goes into a stage when the province has an obligation to enter into discussions (e.g. environmental assessments), a government agent will negotiate with the community depending on whether the First Nation has a robust consultation and accommodation arrangement with the province and the proponent.

**Dealing with Provincial Referrals**

Although industry may engage directly with First Nations, the legal and constitutional obligation to consult and accommodate 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.67

In 2002, in response to the case law, the BC Government released its Consultation Policy, which they developed without input from First Nations in the province. The Province has an updated consultation policy document dated 2010 on its website.68

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 territory. The provincial referral stipulates that the First Nations has a prescribed time to respond; otherwise the Province will proceed with the application without the First Nation’s input.

It is common for First Nations in BC to be overwhelmed with the number of referrals they receive 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 Nation 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, it is a best practice for First Nations to encourage

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67 Morellato, 2008
the leadership council to push for referral funding from the federal and/or 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 impacts. 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.

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 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 government. Therefore, it is a best practice for First Nations leadership to collectively evaluate the referral process. 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.
Industry Engagement

While it is the Crown’s duty to consult, it is becoming more common for industry to take on the procedural aspects of consultation and accommodation, and approach First Nations directly. More importantly, once First Nations decide they want development in their territory, they should also be proactive about developing their resources by approaching industry and actively seeking investments.

To attract partners and 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.

Industry prefer to focus on risk tolerance versus how to mitigate risk after the fact – investors want to be reassured their money is safe from the start. For example, when a company is calculating whether they want to work in BC or Ireland, they will look at risk scenarios. There are some international companies that have turned away from Canada because the framework process used by government to consult with First Nations is not always the same. Industry does not mind risk, but uncertainty is not acceptable.

It is also important to note that Canadians care about the environment, and it is a misnomer that sustainability is a socially restricted phenomenon. What is lacking is trust in the government system and process. For example, the government puts in place regulatory processes. When the processes are breached because the rules of the game change, it erodes business and public confidence in the system. “The real challenge is not First Nations rights, it is the federal regulatory processes.”69

The Canadian legal system is trying to reconcile how First Nation rights sit in the forefront of government decision making. At the interface between the Canadian constitution, legislative and legal frameworks, there is also the element of good faith and responsibility. Building trust and new relationships are only as good as the agreements underpinning them, and like most relationships, they take a long time to develop.

Fundamentally, if communities don’t like the project they can take steps to slow or halt it from moving forward, and this uncertainty is tempering interest in new developments. Industry needs to step up its game and address First Nations in a respectful way. Our world view has changed, and we must respect the next seven generations versus this generation’s performance bonuses.

Building a Relationship

Effective engagement processes require building a relationship between parties. As best practices, the principles of a good relationship include:

- Respect & Recognition

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69 Interview with Sharon Singh conducted by Brian Payer, February 2018.
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.

Since 2014, First Nations in BC have entered into Reconciliation Agreements with the Province of BC. These agreements are high-level understandings between BC and the First Nation that first acknowledges the First Nation as a government with rights and title as it relates to their territory. These agreements lay the foundation for how further consultation and accommodation matters will be managed, and the obligations of the parties. For example, the Tsartlip First Nation negotiated an Interim Reconciliation Agreement with BC in 2017, which speaks in part to the parties wish to foster a long-term relationship based on the principles of open communication, mutual respect that will develop a phased and on-going path towards reconciliation.70

The Tsartlip agreement addresses a number of key issues, including:

- Tsartlip History and Culture
- Environmental Co-operation and Wildlife
- Referrals (consultations)
- Heritage protection
- Park Management
- Tsartlip Economic Interests
- Certainty Provisions

In the absence of updated Provincial Consultation Policy, the Tsartlip have taken the step to establish a formal approach to clarifying the relationship with BC as it relates to these matters.

**First Meeting**

Upon sending out the initial response, be proactive about following up to obtain a face-to-face meeting. First Nations should try to get a meeting with the highest officials possible. If necessary, First Nations that 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 and 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 send a strong message that they intend to ensure their concerns are taken seriously.

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

If the initial series of meetings are simply informational, and do not constitute meaningful consultation from the First Nation’s perspective, the First Nation should clearly say so. First Nations should tell industry or government when consultation starts and ends. This requires that First Nations understand how the courts have viewed engagements in the past, and what is recognized to be acceptable consultation practices.

In situations where a proposed activity affects multiple First Nations, or in the context of overlapping/shared territory, it is a best practice for First Nations to introduce themselves as a united group. This is 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.

Building Trust

Transparency is essential to building trust. Therefore, a priority for relationship building is open and frank communication. One strategy is to invite the Crown/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 Crown/proponent at various stages of the project to build on the relationship and keep the membership engaged.

In order to build the foundation for the engagement processes, 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.

Direct relationships are created by spending time together. It is important for the parties to get to know each other. To foster understanding and create awareness about the First Nation’s perspective, First Nations could recommend a cross-cultural training session to the proponent. 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 and solutions that benefit all parties involved.

common interests, needs and values to create mutually beneficial solutions. Understanding the other party allows First Nations to shape proposed solutions in a way that is appealing to the proponent. In doing so, First Nations are more likely to achieve success in accommodation negotiations.

**Consultation Tools**

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, 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.

Studies like socio-economic, cultural and environmental impact studies are effective tools for the First Nation to use to communicate the potential disturbances caused by a project. These studies help to strengthen claims of infringement on Aboriginal and Treaty rights, as they indicate the degree of impact projects may have.

When a First Nation undertakes their own socio-economic and environmental impact studies and involve their community members, the studies can be effective tools to increase the capacity of a First Nation, as the members involved in the study will gain valuable research skills. Additionally, these studies are effective tools 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 project.

**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 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

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72 INAC Consultation and Accommodation Unit, 2008 presentation
agreements that address different issues that need to be agreed upon before the parties can move forward in the negotiations. For example:

- 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. First Nations should establish a template for such an agreement, so that they have nailed down the core issues they need to have addressed. Topics addressed in a consultation protocol include:

- Scope and Purpose
- Principles
- Consultation Process
- How parties will communicate
- External communications
- 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 and relationship building from which to move ahead on the next stages.

Consultation protocols are especially useful where there is no previous existing relationship between the parties. Moreover, an agreement will guide the relationship in situations where there is a lot of turnover of personnel. 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.
4. ACCOMMODATION BEST PRACTICES

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.
Accommodation: Is it a Good Deal?

The duty to consult may also obligate the Crown to provide accommodation measures to avoid, minimize or compensate for impacts on Aboriginal and Treaty rights. According to the Courts, accommodation includes, but is not limited to:

- mitigating or avoiding impacts on Aboriginal or Treaty rights;
- altering decisions or amending activities to address First Nations concerns;
- providing opportunities for First Nations to participation in decision-making about the project; and
- providing compensation for impacts which cannot be mitigated or avoided.

These features have been determined to be components of the Crown’s duty to accommodate, which is mandated by the honour of the Crown. 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.

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 the project could result in significant impacts on Aboriginal or Treaty rights. Even if the issue goes to litigation, the Court’s tendency has generally been to send parties back to negotiation, and will only grant an interim injunction, as was the case in Platinex. More recently, however, the Supreme Court has confirmed that approvals and authorizations which are made in the absence of proper consultation and accommodation may be suspended or quashed.73

If a First Nation is opposed to a project in their territory, it is advisable to pinpoint the specific reasons for opposition. Clearly raising concerns will support accommodation measures if the project proceeds over their objections. For example, First Nations could request that proponents meet specific environmental standards. Additionally, First Nations may be able to obtain protections for traditional use areas or archeological sites and commitments from the proponent that the First Nation will be involved in monitoring or decommissioning activities.

First Nations that accept accommodation measures or enter into agreements with the proponent or the Crown should ensure that they preserve their right to challenge authorizations or approvals in relation to the project at a later date.

Many First Nations have existing projects currently ongoing in their territory that were approved without their involvement. Past wrongs, including prior breaches of the Crown’s obligations, do not trigger the duty to consult anew. However, where there are existing impacts and a proposed decision or action will result in a new or additional impact, courts have held that the Crown should take the existing state of affairs into account in relation to the consultation process and any related accommodation measures. The Crown is responsible for providing accommodation, if

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73 Tsilhqot’in at para. 79; Chippewas at para.32.
necessary, as part of the duty to consult. However, in some cases the First Nation may choose to also negotiate an impact benefits or other agreement with the project proponent. Agreements may include the following:

- Training and jobs for community members
- Post secondary scholarships and bursaries
- 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 agreements...be creative

The best way to negotiate an agreement with a proponent is to just ask. Of course, back up your requests with research and analysis, and when possible, identify the mutual benefit to the proponent. Furthermore, First Nations achieve greater success when they are strategic about their requests as they will not necessarily get everything they have requested.

The goal of a negotiated agreement is generally to protect a First Nation’s interests, rights, and way of life. Agreements should benefit the entire community, and those benefits should stay within the community. Additionally, agreements should focus on sustainability and building capacity. First Nations should consider the long term and ask for benefits that continue to bring value to the community in the future (e.g. scholarships for post-secondary education, create a fund that facilitates First Nation-owned businesses).

Agreements may provide measures such as the establishment of a management team or someone to supervise larger projects and ensure that the terms of the agreement are implemented, including periodic reporting to the parties. Such teams

74 Metis Nation of Ontario, 2008
or bodies should include representatives of the First Nation(s) and industry and/or government.

Types of Agreements

In addition to relationship building, it is important to have very clear legally-binding 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.

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

- Impact Benefit Agreements
- Labour Agreements
- Ownership or Royalty Agreements
- Resource Revenue Sharing Agreements

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)
- Indigenous Enterprises (opportunities to tender and criteria for awarding contracts to Indigenous 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.

MOU

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. 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. **It is important to note that MOUs, though important tools, may not serve as binding contracts.**

**Forestry Agreements**

The research findings for this report reveal that Forest Consultation and Revenue Sharing Agreements (FCRSA) are used by the BC Government to negotiate with First Nations for harvest activities in their territories. "It used to be 5% was negotiated with First Nations for the revenue sharing agreements; however, some First Nations are now targeting a 20% and above revenue share which has yet to be achieved," states an Industry Expert.

"Many First Nations continue to be tied to the wood lot scenario in BC; however, some communities are pushing the province to sign agreements for greater volume,” explains the Industry Expert. As an example, some First Nations involved in Pathway 1.0 are seeking 50% replaceable timber for what was taken from territory in place of the originally 20% offered by the province by leveraging the precedent of Aboriginal title confirmed in the Tsilhqot’in court case. “Not only is the province required to change its approach, it is also more common to find forest companies willing to enter comprehensive services agreements and royalty sharing,” adds the Industry Expert.

There are now cases on the horizon that will impact First Nations and potentially provide significant compensation for past infringements on First Nations rights; these cases will change the landscape even more, states the Industry Expert.

**Recommendation:** The First Nations Forestry Council is aware of some of the best forestry deals negotiated with the BC government. It is suggested that First Nations in BC become members of the Forestry Council, and in unity increase their leverage to negotiate new deals that take the Tsilhqot’in decision and other court cases into consideration. Accepting deals that are not as good as what other First Nations have negotiated could mean losing millions of dollars annually.

**Mining Agreements**

First Nations are negotiating directly with mining companies for early stage exploration agreements. Some of the factors influencing the negotiations include the actual length of the negotiations, legal consulting costs, and number of members needed to negotiate the agreement. Based on research conducted for this report, it is understood negotiating with junior mining companies can result in $5,000 to +$20,000 in upfront costs to a First Nation before negotiated funds are received from the companies.

After the early stage exploration agreements, one of the next levels of negotiations involve disturbance agreements, which are based on the depth of the drilling, number

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* 75 Jepsen et al., 2005
* 76 Industry expert, Brian Payer interview, April 2018
* 77 Industry expert, Brian Payer interview, April 2018
of drill sites, and number of holes. Research for this report found upfront costs for First Nations to negotiate with companies during this stage is approximately $30,000.

**Recommendation:** To assist First Nations, it would be helpful to develop a template that explains steps to take prior to and during consultation engagements with Junior mining companies. The template would detail the topics areas for First Nations to negotiation that have ranges of value (e.g. social, cultural, environmental, open book contracting, employment, training, etc.).

When interviewed for this report, the Industry Expert suggests that it is important when reviewing the negotiation agreements proposed by companies to look at historical agreements of both large and small companies. First Nations should ask for upfront monies for capacity to complete their review of the project (e.g. costs for Traditional Use Studies). First Nations may also want to negotiate for an onsite environmental monitor who is a member of the community, depending on the size and scope of the agreement and the quality assessment of the drill program.

When negotiating Economic and Community Development Agreements (ECDAs) with the government, First Nations are acquiring direct mineral tax revenue on new mines and major mine expansions. Based on research for this report, it is understood the highest rate negotiated by First Nations with the BC government for a mining royalty agreement is 37.5%. Some First Nations are seeking 50% and are pushing for retroactive compensation with mines; however, it is understood this percentage has not been negotiated to date. “What is interesting is that some First Nations are negotiating for Nation to Business Agreements for royalty share – this is a new bold step forward.”

**Dealing with Unsatisfactory Accommodation**

First Nations involved in consultation processes 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 consultation and/or accommodation. Remember, the other party will be documenting everything including their phone calls as their own evidence.

If the unsatisfactory consultation is occurring through a third party, such as an industry proponent, First Nations should contact government representatives to inform them of their concerns. 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. If First Nations do not feel they are getting appropriate accommodation, it is a best practice to reiterate the benchmarks of accommodation specified by the court

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78 Industry Expert, Brian Payer interview, April 2018
and be firm in the expectations according to the accommodation 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.79

When and How to Separate Business from Politics

If the First Nation decides to enter into negotiations with the proponent for an agreement, such as an impact benefit agreement, joint venture or business partnership, 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 to the First Nation. First Nations that are open to development opportunities in their territory should be proactive and initiate engagement with companies by letting industry know why they should do business with the First Nation – essentially, let industry know that the Nation is “open for business” and ready to discuss the terms they are prepared to support development activities in their territory. 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.

79 Morelliato, 2008 presentation
Provincial and Federal Governments in Canada are working to formally reset their relationship with Indigenous Governments. Both parties are working to establish Nation to Nation based solutions that will establish new institutions, processes and structures based on recognition of Indigenous rights.
Provincial Developments

In early 2018, the BC Government set out to implement the “Commitments Document” that was established under the previous government. This initiative is intended to be undertaken with First Nations in BC to “establish new institutions, processes and structures based on recognition of Indigenous rights.”

Set out in the Commitments Document are several Action Items that will have a direct and indirect impact on how Provincial Consultation and Accommodation will be addressed, conducted, and governed. Examples of target outcomes stated in the Action Items include: entrench First Nations rights; strengthen First Nations Governance; and address outdated legislation, including those relating to consultation matters.

Federal Developments

The Government of Canada has stated that they are “committed to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change.” To support these objectives, Canada has established 10 principles that guide their work; most notably:

Principle 1 – The government of Canada recognizes that all relations with Indigenous peoples need to be based on recognition and implementation of their right to self-determination, including the inherent right to self-government.

Principle 6 – The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

The initial work includes the development of a Recognition and Implementation of Indigenous Rights Framework, along with proposed legislation to formalize the standard of recognition of Indigenous rights as the basis for all federal government relations with Indigenous peoples. This consultation related to this work is underway in Spring 2018, with a proposed tabling of the proposed legislation before the end of 2018.

First Nations Leadership Council (FNLC) and other First Nation groups across Canada are preparing for this development. The FNLC and BC First Nation Chiefs put forward the following four principles as foundations for Canada’s Recognition Framework.

Principles:

1. Recognition and implementation of inherent indigenous title and rights

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80 2018 – Joint Agenda: Implementing the Commitment Document
81 Minister of Justice and Attorney General of Canada, 2018
2. Acknowledgement of indigenous governance and laws with respect to lands and resources

3. Acknowledgement of mutual responsibility that government systems shall shift to relationships, negotiations and agreements based on recognition

4. Movement towards consent based decision-making and title based fiscal relations, including revenue sharing.

It is important to recognize that representative bodies such as the FNLC and the Assembly of First Nations play an important advocacy role; it will be the opportunity and responsibility of First Nations to incorporate these and their own relationship principles with BC and Canada.

International Developments

“As Canada moves to implement the articles of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), proponents will be required to make adjustments to how they approach obtaining and maintaining consent throughout the project lifecycle. Early adopters will be rewarded with lasting, profitable partnerships and project and regulatory certainty.” - Scott A. Smith and Paul Seaman

Canada’s commitment to implement UNDRIP has the potential to change how the governments in Canada interpret Indigenous rights, including how they are defined and protected. The SCC has not addressed UNDRIP to date but has confirmed the applicability of international law in Canada. At the time of writing this report, Bill C-262 which would legislate the implementation on UNDRIP in Canada has passed second reading in the House of Commons and is currently before the Senate.

“Bill C-262 affirms UNDRIP as a universal international human rights instrument, with application in Canadian law,” state Sandy Carpenter and Sam Adkins. “While the federal government previously promised to implement UNDRIP from a policy perspective, the UNDRIP Act is the first instrument to legally attempt to do so.

“The Bill establishes legal mechanisms to achieve this purpose:

1. “The federal government must, in consultation and cooperation with Indigenous peoples in Canada, take all measures necessary to ensure that Canadian laws are consistent with UNDRIP

2. “The federal government must develop and implement a national action plan to achieve the objectives of UNDRIP, again in consultation and cooperation with Indigenous peoples

3. “The Minister of Indian Affairs and Northern Development has to submit a report by May 31 of each year, until 2037, on the implementation of each of

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If Bill C-262 is passed onto legislation, this may broaden Indigenous governance power and strengthen Indigenous laws in Canada. For example, UNDRIP article 18 states that:

“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”

UNDRIP article 27 states that “states shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure system, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.”

When reviewing articles 18 and 27 and the references to “free prior and informed consent” (FPIC) in UNDRIP, the passing of Bill C-262 into Canadian legislation would appear to commit government and industry to seek informed consent from Indigenous groups for projects. Whether a narrow interpretation of FPIC is applied in Canada, the federal government has stated that “recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between the federal, provincial, territorial, and Indigenous jurisdictions and laws.”

“An opportunity exists for the federal government to align efforts to seek consent through FPIC in ways that encourage respectful ongoing co-operation. In this way, consent is obtained not through singular, point-in-time agreement, but rather is reaffirmed continually through ongoing collaboration.”

“Practical implications for miners: Agreements with Indigenous communities should foresee potential changes and uncertainty flowing from UNDRIP implementation and clarify the parties’ obligations. For example, what happens if:

- Ibid
- Ibid
“Indigenous authority and jurisdiction to regulate projects is formally recognized in law (including potential requirements to obtain permits from IGs)

“Indigenous authority and jurisdiction to tax projects is formally recognized

“Indigenous law-making authority and jurisdiction is formally recognized such that Indigenous laws apply to projects”

Recent Canadian Court Decisions

The following is a sample of Indigenous court cases in Canada in 2017-2018. In addition to these cases, Appendix 1 includes summaries of landmark decisions involving consultation and accommodation.


The cases confirm the Crown may rely on regulatory agencies to fulfill the Crown’s duty to consult, even when the Crown is not involved in the process. The cases provide guidance on what practices will and will not sufficient to meet consultation requirements as part of the regulatory approval process. The Supreme Court of Canada ruled the duty to consult had been discharged in Chippewas, but not in Clyde River.


Ktunaxa Nation v. British Columbia, 2017 SCC 54

"On November 2, 2017, the Supreme Court of Canada dismissed the appeal of the Ktunaxa Nation’s claim that the province’s decision to approve the Jumbo Glacier Resort infringed their freedom of religion under the Charter of Rights and Freedoms and that the consultation and accommodation process that was followed was unreasonable." 92


First Nation of Nacho Nyak Dun v. Yukon, 2017 SCC 58

“The Supreme Court of Canada unanimously ruled that the Yukon Government acted improperly by proposing a unilaterally developed land use plan at the end of an independent, treaty-based land use planning process. The Yukon Government was ordered to return to the final stage of the treaty land planning process and consult on the plan proposed by the independent commission.


“The court also made pronouncements related to modern treaty interpretation, the Crown’s conduct in treaty mandated collaborative process and the court’s own role in adjudicating modern treaty disputes.”93

Resource: https://www.woodwardandcompany.com/?p=1865

Canada (Governor General in Council) v. Mikisew Cree First Nation, [2017] 3 FCR 298, 2016 FCA 311

The case concerns whether the Crown is obligated to consult Indigenous groups in the development of legislation that may affect the exercise of section 35 rights. The Federal Court of Appeal held that the duty to consult should not be included in the legislative process. The Supreme Court of Canada’s decision on the appeal is pending.


R. v Desautel, 2017 BCSC 2389

The case addresses whether individuals who do not reside in and are not citizens of Canada can hold and exercise section 35 rights in their ancestral territories in Canada. The BC Supreme Court upheld the decision of the lower court that the respondent, an American citizen, was exercising a constitutionally-protected right to hunt in BC. The BC Court of Appeal will hear the appeal in the fall of 2018.


Ahousaht Indian Band and Nation v Canada (Attorney General), 2018 BCSC 633

The BC Supreme Court held that Canada was not justified in infringing the Aboriginal commercial fishing rights of the five plaintiff First Nations and provided Canada with 12 months to change its fishery policies to give effect to the decision.

“Ahousaht forced the hand of government over fishing rights within their traditional territory. They were not looking for consent - they were exercising their traditional rights and title to resources in their territory,” stated Al Little and Ron Arcos.94


Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations), 2018 BCSC 440

The case concerns the resolution of conflict between the Crown’s constitutional obligations to one Indigenous group with whom it had entered into a modern treaty, and another who assert title and rights to a portion of the lands subject to the treaty. The BC Supreme Court held that legal principles for ascertaining the existence of the Crown’s duty to consult must be modified when the land or resources subject to an

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94 Interview conducted by Brian Payer with Al Little and Ron Arcos, March 2018
asserted claim overlaps land or resources governed by a modern treaty. An appeal has been filed with the BC Court of Appeal.


Tsleil-Waututh Nation v. Canada (Attorney General) 2018 FCA 153

The Federal Court of Appeal quashed the Canadian government’s approval of the Trans Mountain pipeline project, stating the National Energy Board (NEB)’s review of the project was flawed and that Canada did not properly consult with Indigenous peoples who would be affected by the project.

The Court stated that Canada acted in good faith and used an appropriate consultation framework; however, “at the last stage of the consultation process prior to the decision of the Governor in Council, a stage called Phase III, Canada's efforts fell well short of the mark set by the Supreme Court of Canada…. Canada failed in Phase III to engage, dialogue meaningfully and grapple with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns. The duty to consult was not adequately discharged… missing was a genuine and sustained effort to pursue meaningful, two-way dialogue.”

The “result was an unreasonable consultation process that fell well short of the required mark.”


**First Nations Institutions**

The BC First Nations Leadership Council (FNLC) formed the BC First Nations Consultation and Accommodation Working Group in 2011 to provide a pathway for “transforming the status quo of ineffective, and often dishonourable” negotiations by BC and Canada. In 2011 they recognized that First Nations must be proactive and take the lead in creating a meaningful government-to-government engagement process.95

The main themes identified in the FNLC report continue to resonate today and are foundational concepts in consultation and accommodation approaches. A key theme or position taken identified that the concepts of sovereignty and reconciliation are central to understanding the purpose of consultation and accommodation.

The FNLC articulated the three principles that are foundational to the duty to consult; recognition, relationship and reconciliation. A recognition of aboriginal and treaty rights; acknowledgement of the unique relationship between the Crown and aboriginal peoples; and finally, that any consultation process must be tied to the notion of reconciliation.

These 3 R’s are key elements of the new proposed Federal government approach and framework.

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95 FNLC: Advancing an Indigenous Framework for Consultation and Accommodation - 2013
In this era of evolving recognition of Indigenous rights and developing laws and policy related to consultation and accommodation, First Nations are taking a lead role in creating new ways and approaches to protecting and exercising their sovereignty.
Common Law Duty to Consult

The following memorandum by Mark Stevenson dated May 11, 2018 was provided in response to interview questions from Brian Payer for this report.

“In regard to sovereignty, many communities do not consider it part of their lexicon because the term sovereignty implies that the laws of both Canada and British Columbia would not apply, which is not the case. Due to this knowledge, we typically do not declare sovereignty. But, we do declare ownership and jurisdiction of the territory and require deep consultation before any disposition. In response to your question regarding land use and marine plans, we have developed and shared our land use and marine plans with both the federal and provincial Governments. We have tried to use both the Chilcotin decision [Tsilhqot’in Nation v. British Columbia, 2014 SCC 44], and the United Nations Declaration on the Rights of Indigenous People (UNDRIP) to help us at the negotiating table. But these examples have fallen onto deaf ears with the provincial and federal governments. [emphasis added]. As for how we view our government in relation to municipal, provincial and federal governments in Canada, we would view ourselves as equal. But, the reality is that we are most similar to a municipal level of government, as both the provincial and federal governments have greater power and jurisdiction.

“With regard to organizational capacity, we would say that our key strength relating to governance is our ability to lobby the provincial and federal governments. Our weakness relating our band administration and economic development corporation are the silos between administration and economic development. To prepare our Nation for consultation and accommodation with governments and industry, we have created a Comprehensive Community Plan, a Land Use Plan as well as a Marine Use Plan. The “change-making” decisions that we have taken to create better opportunities for successful consultation and accommodation have been in relation to access to long term fibre, as well as an Impact Benefit Agreement with B.C. Hydro regarding the John Hart Dam. Our strategy for multi-nation economic opportunities is to form economic partnerships with other First Nations. For example, creating economic partnerships with other First Nations in the forestry industry. Our communities’ vision and values are incorporated into our Comprehensive Community Plan, which was developed to guide all decisions, but often the community plan and vision need to be subject to other strategic decisions.

“We use a variety of methods to achieve community engagement in our decision-making process. They are engaged through the Land Use Plan, Marine Use Plan and the Comprehensive Community Plan, as well as the quarterly treaty meetings including the Annual Peoples Assembly. The most effective processes at engaging the community are both the Comprehensive Community Plan and the quarterly treaty meetings. Engaging the community with the decision process to become engaged with industry is not significant, because we like to keep business and politics separate.

“We have been successful in our involvement with industry, but we have found that industry is not as cooperative as provincial or local governments. Industry
engagement—industry perspective is not applicable to our community nor are government to government relations.

“The key agreements that we have negotiated are the John Hart Impact Benefit Agreement with B.C. Hydro, a forestry agreement on Rosewall Creek with the B.C. Government, and a land agreement for failure to consult with the Ministry of Transportation that resulted in them paying for a sidewalk and a traffic light on the reserve. Our negotiating team is structured with our legal team having heavy involvement, Chief and Council and technical support. The Rosewall Creek accommodation agreement would be a good case study to offer other First Nations.

“We have a number of important additional comments that we believe would be helpful advice for other First Nations. Governments just give lip service to UNDRIP, Chilcotin Decision, and reconciliation but nothing has changed on the ground. The most effective tool that we have today is our political lobbying power, especially with the B.C. Government.

“The way that we engage with the duty to consult with the B.C. Government is through the Nanwakolas Clearinghouse. We have signed an agreement between Nanwakolas and B.C. called the Nanwakolas Reconciliation Protocol.

“Although we do receive the provincial government’s consultation through the Clearinghouse, B.C.’s engagement process is directed at issuing tenure and not accommodation. So, they are only doing the minimum that they are required to do by law. They do not even address justification because they assume that the right has not been proven, and therefore they do not have to justify their infringement. If the court were to determine a right, the government is prepared to provide a justification and accommodation. The way that the B.C. government does a strength of claims analysis is based on their internal historical review of our evidence. They determine whether or not we have the right based on an internal, non-transparent process where they make conclusions about whether we have the right or not. This often leads to them concluding that we do not have title, which create economic consequences for us because they will not accommodate for title. This needs to be changed because this analysis is not reviewable. They need to ensure that the provincial consultation process conforms to the common law duty to consult. For the most part, the B.C. government is trying to contract out of their common law duty to consult by not recognizing Aboriginal Rights and Title, until a court has told them to.”
Approaching Consultation and Accommodation Negotiations

The following section of this report is based on responses from Bill Adsit during an interview conducted by Brian Payer.

Approach to Consultation

When industry requests consultation, they should be told upfront that they will have to pay for the Nation’s time as well as fund the Nations capacity to evaluate the project; consultation was not initiated by the Nation and is not a Nation cost. As part of the initial consultation conversations, it is important for First Nations to understand the proponent’s timeframe for the project – when they want to start and when they want to complete the project.

It is important to create a budget of estimated costs and submit it to the proponent for approval and payment in order for the Nation to proceed with the consultation request. Some First Nations forget about a budget; however, it is important as it demonstrates the Nation is organized and has a process for moving forward. For example, the Tahltan have rejected the process where people can go online and stake a claim with the province. Currently, the Tahltan charge to consult regarding exploration mine claims in their territory and have flatly indicated that no one speaks for them in their territory.

Where possible the First Nation should use First Nations consultants. The key with negotiations is having the First Nation’s interests at heart and not the consulting fee. When First Nations realize they require outside expertise, the consultant should help develop internal capacity through mentorship during the project. Another important factor for the Tahltan is they make a point of getting to know all the government Ministers and are in regular contact.

Industry Engagement - Community perspective

Most proponents want to sign IBA’s with First Nation because it takes away risk; agreements provide business certainty that the proponent’s investors are seeking. As a practice, the Tahltan do not say no when a proponent first approaches them. They listen, hear the company side and then decide. When the proponent wants to engage the First Nation, the company should be informed that they are required to provide funding to conduct due diligence assessment of the project – the consultation process is not merely conversations with Chief and Council.

If the company does not provide funds to conduct a proper review of the project, then the First Nation should make it clear they are not engaging in consultation until those funds are provided. This of course stalls the project.

When the community in brought into the consultation, it is most effective for communities to vote on the proposed agreements (e.g. IBA) either directly, by emails or other methods. It is important that everyone can vote so there is no disagreements or dissention later – the last thing anyone wants is to have a weak ratification vote and have a new Chief and Council nix the project after a community election.
Proponents should finance the voting process, including flying the negotiations team to meet with community members.

If a project is declined in the community vote, there should be a place for community members to say why they voted no (e.g. allow them to voice environmental concerns), and then the negotiating team can work on the issues to determine if a second vote is warranted.

**Negotiating Agreements**

The negotiation team drafts the Nation’s own procedures and what they will request during the negotiations – there is no reason to reinvent the wheel – this work has been done before. Once the procedures template is complete, then the negotiation team should sit with First Nations leaders and incorporate what they want in an IBA. Final stage is to bring the template agreement (e.g. IBA draft) to the lawyers and they can finalize the template. This would be the model that would be used with each negotiation and it would be constantly updated and improved as new ways and means are uncovered.

Absolute key - negotiators should request the business plan and full pro-forma financial projections for a proposed project. The reason for this is the negotiators need to know how much income the proponent is projecting to make and what the return on investment (ROI) is. The Negotiators need to know and fully understand what they believe is the minimum and what is maximum of the bottom line profit they believe the proponent will need to satisfy their shareholders.

In evaluating company financials, view the expenses and contingency budget lines to see they are reasonable. To do this, it is helpful to have an accountant on the team that is familiar with start-up mine costs, for example.

If the negotiators don’t know the projected financials, then they have no idea of how much the natural resources in their territory are worth. It is possible to ask for unreasonable royalties and other benefits during the negotiations and the proponent may not move forward with the project. Negotiator must know what they are asking for and why.

As an example, the Tahltan Central Government is responsible for negotiating IBAs. They look at direct awards, joint ventures, etc. The Tahltan Heritage Resources Environmental Assessment Team (THREAT) is the Tahltan organization that is central to IBA negotiations. Also involved is the Tahltan Nation Development Corporation (TNDC), which has first right of refusal of any projects in the Nation’s territory. To determine if the Central Government agrees with mining companies, TNDC uses net smelter returns as the basis for a royalty payment.

The TNDC include the following sections in each IBA: a clause for direct awards for certain contracts; and preferential contracts for Tahltan businesses over non Tahltan businesses, as long as their bid is a fair negotiated price. The Nova Gold was their first professional IBA. Alta Gas was $1.2 billion of which Tahltan Nation got $700 million thru the joint venture; they had 26-30 IBAs for that project.
It is important will all IBAs to have an implementation committee in place to ensure the companies are fulfilling their obligations.

**Agreement Terms**

One approach is to ask the company which contractor they prefer to work with and then form a joint venture with that contractor based on 51% First Nations ownership. Profit sharing for the joint venture is a different agreement. The First Nation needs to understand what different types of companies make as bottom line profit. For example, a trucking company generally makes 9%, and camp catering 15%. The FN needs to know these numbers before negotiating with the joint venture partner.

Under employment and training components of IBA, at a minimum First Nations should negotiate post-secondary bursaries for community members (e.g. $2,000 per student). As an example, the Tahltan have negotiated to receive $20,000 - $30,000 per year, ongoing every year from each company in their territory. For employment, the Tahltan negotiate a minimum of 40% employment target to a maximum of 60% with company agreeing to fulfill this with their best effort. Currently, the average wage for Tahltan workers in the territory is $86,000 per year.

It is critically important to gather proper financial evidence in support of negotiations. There are lots of good IBA’s published. Negotiators should look at these and pick out the best points of each and then massage them to fit their situation. Know what has been negotiated and achieved by others before negotiating. A great place to get industry information like this is through the System for Electronic Document Analysis and Retrieval (SEDAR) website: https://www.sedar.com/homepage_en.htm.
Assertion of Sovereignty - Environmental Processes- Squamish First Nation

In 2013 a project to build a $1.6 Billion LNG plant and shipping facility was presented to the Squamish Nation. The facility was being proposed to be located at the mouth of Squamish River on a former village site called Swiyat, in the heart of the Squamish Nation territory.96

The Squamish Nation took the position that they would not immediately fight the project; as they did have serious concerns and questions regarding environmental, cultural impacts that affected their Aboriginal rights and title. Instead they worked develop a process that would enable them to assess the issues independently, and within their rights. The project was scheduled to be reviewed by the BC Environmental Assessment (BCEA) Process. A process that Squamish Nation viewed as falling short of what is required to fulfill the Crown’s constitutional obligation to Squamish. The Squamish Nation vowed that the project would not be built without its consent.

This is in line with BC and Canada’s adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that speaks to the importance of receiving free, prior and informed consent from Indigenous peoples before their lands are taken, occupied, used or damaged. UNDRIP also speaks to indigenous rights to self-determination, to autonomy and self-government.97

It was within this context that the Squamish sought to develop its own Environmental Review Process, to work alongside the BC Process. They designed their own process with two key objectives in mind; firstly, that an informed decision by the Squamish Nation, and secondly that it was a shared decision-making process with BC.

There were key elements of Squamish’s process that contributed to a successful approach; including:

- It was an independent assessment, outside of the pre-existing BC process
- Confidentiality; proponent agreed not to share Squamish information
- Squamish process paralleled the BC process, to not duplicate efforts; Squamish used many of the BC process technical reports and information
- Enabled the Squamish to develop a independent Traditional Use and Occupancy Study
- Proponent agreed to pay for the process

To formalize the process, in the absence of current legislative authority, the Squamish Nation created a contractual arrangement with the proponent, to set out the terms and conditions of participating in its legal process.98

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96 J Hunter; Globe and Mail January 13, 2017
97 UNDRIP Articles 3,4
98 The Squamish Nation Assessment Process; A Bruce, E Hume November 2015
The proponent agreed to abide by the Squamish Process, including agreeing to abide by any conditions of approval that the Squamish Nation set.

Upon completion of the Squamish Review process, which included extensive community engagement and advice from independent consultants and scientists, the Squamish Nation issued its own Environmental Certificate, with 25 conditions that the proponents agreed to abide by.

The approach that Squamish Nation took demonstrates that it is possible, in the absence of a legislated framework, to develop a major project review in BC that can respect Aboriginal rights and title, respect the intent behind UNDRIP, and respect Squamish Nation governance.

With creativity and an open-minded approach, and co-operative proponent, create a project review process that is respectful to all parties, and provides economic certainty.
## Appendix 1: Summary of Key Court Cases

<table>
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<tr>
<th>R. v. Sparrow</th>
<th>1990</th>
<th>1 S.C.R. 1075</th>
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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.99

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99 Hunter, 2006
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.  

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.

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100 Bergner, 2006; Jepsen et al., 2005
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 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 the timber harvesting company that 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.101

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101 Jepsen et al, 2005; Province of BC, 2002; Morelliato, 2008
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 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.102

102 Hunter, 2005; Jepsen et al., 2005
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.103

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103 Morellato, 2008
The Mikisew Cree First Nation challenged two pieces of omnibus legislation introduced by the federal government in 2012 on the basis that the Crown failed to discharge its constitutional duty to consult prior to enacting legislation which would affect Mikisew’s Treaty rights to hunt, fish and trap.

The Federal Court agreed with Mikisew and granted a declaration that the duty to consult was triggered in respect of the omnibus bill. On appeal, the Federal Court of Appeal found that the lower court erred in conducting a judicial review of the legislative action because in developing policy ministers are acting in a legislative capacity and are therefore immune from judicial review.

The Supreme Court unanimously held that the ministerial development of legislation cannot be subject to judicial review by the courts. On the larger question of the application of the duty to consult, the majority of the Court found that the duty is not triggered by the development of legislation, even where it has the potential to affect Indigenous Peoples’ Aboriginal and Treaty rights. Two members of the Court held that the Crown’s duty extends to all government decisions, including the development of law.

Importantly, the majority emphasized that although that the duty to consult was not triggered in relation to the development of legislation this did not absolve the Crown of its obligation to conduct itself honourably. The fact that the legislative process is not subject to judicial review should not “diminish the value and wisdom” of consulting Indigenous Peoples prior to enacting legislation that has the potential to adversely affect their Aboriginal and Treaty rights, even where there is no recognized constitutional obligation to do so.
In this case the Ontario Superior Court granted an interim injunction to the Kitchenuhmaykoosib First Nation (KI) who were not properly consulted in regard to the mining exploration of Platinex Inc in their 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 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.104

104 Morellato, 2008
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 territories.

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.105

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1. O’Callaghan, 2008
The *Tsilhqot’in Nation v British Columbia* decision by the Supreme Court of Canada confirmed Aboriginal title for the Tsilhqot’in Nation. This ruling established the BC government cannot claim a right to lease lands for logging on lands protected by Aboriginal title and they must gain approval for such action from the title-holder before proceeding.

In 1983, the BC government issued a licence to Carrier Lumber to cut trees in lands that was claimed by the Xeni Gwet’in band of the Tsilhqot’in Nation. The Tsilhqot’in asserted that they were a semi-nomadic nation that lived in the area for centuries, managing these lands and protecting it from invasion. The Xeni Gwet’in blockaded the area and prevented Carrier from logging, filed suit seeking a court declaration that would prohibit the company from logging in their territory, and sought to establish their claim for Aboriginal title to the land.

The federal and BC governments opposed the title claim. The trial judge rejected the Aboriginal title claim for procedural reasons. The trial decision was appealed to the British Columbia Court of Appeal, which upheld the decision that the Tsilhqot’in did not hold title except for limited situations. The court applied a title test that examined site-specific occupation of tracts of land at the time of Crown sovereignty.

The BC Court of Appeal decision was appealed to the Supreme Court of Canada, which allowed the appeal and ruled that the Tsilhqot’in did have a claim of Aboriginal title to 1,750 square kilometres of claimed territory.

The Supreme Court held that Aboriginal title constitutes a beneficial interest in the land, the underlying control of which is retained by the Crown. Aboriginal rights conferred by the court decision include the right to decide how the land will be used; the right to possess title; the right to the economic benefits of the land; and to proactively use and manage the land, including its natural resources.

Anticipating similar future cases, the Supreme Court stated the Crown must establish that the proposed incursion on the land is justified under section 35 of the Constitution Act, 1982 if the Aboriginal title holder does not consent to the proposed use of the land. To justify an infringement of Aboriginal title, the Supreme Court set out mechanisms the Crown is to show.

The Crown discharged its procedural duty to consult and, if appropriate, to accommodate Aboriginal interests;

1. That its actions were backed by compelling and substantial legislative objective; and

2. The government’s action is consistent with the Crown’s fiduciary obligation to the Aboriginal body in question. ¹⁰⁶

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This case involves a logging license on land Grassy Narrows considers its traditional territory and whether provincial authority applies on those lands.

The Supreme Court of Canada ruled in favour of the Ontario government's right to permit industrial logging on a First Nation's traditional lands, which followed the judgment in the Tsilhqot'in case. The difference between the cases is that Grassy Narrows were signatories to Treaty 3, which extinguished their Aboriginal title rights and replaced them with Treaty rights. Treaty 3 was one of 11 treaties known as the Numbered Treaties that were negotiated soon after Confederation between the federal government and First Nations. The Tsilhqot'in did not sign a treaty which means their Aboriginal title remains, and any infringement by the government must meet a high bar of justification. A simple consultation and accommodation will not do.¹⁰⁷

Appendix 2: Bibliography of Literature Review


Dene Tha’ First Nation v. Canada, 2006 FC 1534.


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


