HUL'QUMI'NUM MEMBER FIRST NATIONS

— and —

HUL'QUMI'NUM TREATY GROUP

Consultation — Policy —

'uwu ni'us 'uw tumuhw'ul nilh s'ul'e'tst

It is not just land — it is our life

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About the cover photo: *Lhunutun* is a mat creaser, a tool used along with a mat needle to weave bulrush mats. This mat creaser is carved from alder wood, with an *'ulhqi'* (snake) design. Photo by Gary Fiegehen, object Nbz844 courtesy of the Museum of Anthropology, UBC, Vancouver, Canada.

This Consultation Policy
has been adopted by the
Hul'qumi'num Treaty Group
and the chiefs of
Cowichan Tribes,
Chemainus First Nation,
Penelakut Tribe,
Lyackson First Nation,
Lake Cowichan First Nation
and the Halalt First Nation.

ADOPTION OF HUL'QUMI'NUM CONSULTATION POLICY >

PURPOSE AND FRAMEWORK

As the owners of *s'aalh tumuhw* (our land), the *Hul'qumi'num Mustimuhw* (people) have an obligation to future generations to ensure the lands, waters and resources in their territory are used responsibly. The Crowns' past actions in our territory have resulted in significant adverse impacts on our communities, lands, waters and resources. Consequently, the *Hul'qumi'num Mustimuhw* insist that we must be full participants in decisions that affect us. Crown consultation requirements are the result of court actions undertaken by First Nations to try and protect and preserve their territory, which is inextricably linked to their First Nations' title, rights, way of life and interests. The consultation process mandated by the Courts to protect First Nations' rights and interests is intended solely as an interim solution to land, water and resource issues, pending resolution by treaty or court adjudication.

The *Hul'qumi'num Mustimuhw* have been overwhelmed with government decisions that adversely impact the Hul'qumi'num title, rights, culture, heritage, interests and way of life. This Consultation Policy was developed to protect these Hul'qumi'num rights and values from further impact, acknowledge Hul'qumi'num authority and provide guidance on appropriate means of consultation to employ in *s'aalh tumuhw* (our land).

This Policy provides guidance on the minimal requirements for meaningful consultation with and accommodation of the Hul'qumi'num member First Nations (HMFN) and the Hul'qumi'num Treaty Group (HTG) in matters affecting *s'aalh tumuhw*.

This Policy provides a framework for consultation; each of the Hul'qumi'num member First Nations may set additional and individual standards. As well, consultation requirements may have to be expanded or adjusted according to the complexity, technical diversity and the degree of impact of a specific proposal, as well as the number of government agencies involved.

Finally, by clearly identifying the appropriate consultation process and means to achieve accommodation, this Policy will help prevent unnecessary conflict, confrontation and court action. It will guide and structure the relationship of HMFN and the HTG with governments and Third Parties in all future dealings.

FRAMEWORK

When designing this Consultation Policy, one of our aims was to make it as easy as possible to navigate, balancing the demand for thoroughness and precision, particularly with respect to legal principles, with the need for brevity and readability. In addition to sections on legal principles and consultation processes, we have included in the body of this Policy a brief section on *Hul'qumi'num Mustimuhw* rights, history and culture as a means of demonstrating our ongoing connection to the lands and resources because these are inextricably linked to the need for consultation.

For those looking for a more in-depth discussion of the legal context, including constitutional status and principles and the Honour of the Crown concept for example, we have included such discussions in Appendix C. Appendix A is a Glossary of critical words and terms. The words or phrases defined in it appear in bold type in the body of this Policy. Dispute resolution options appear in Appendix B; pertinent contact information in Appendix D.

LEGAL PRINCIPLES

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Meeting the Minimal Requirement for Consultation

This Consultation Policy sets out the minimum requirement for consultation and accommodation on the part of the Crown and Third Parties when proposing Activities in Hul'qumi'num member First Nations' (HMFN) territories. The validity of any Action that has an impact on HMFN is dependent on the Crown's ongoing fulfilment of its duty to consult with HMFN in accordance with this Policy.

Primary Conditions and Terms

Nothing in this document shall limit the Crown or Third Party's obligation to consult and accommodate under the Canadian *Constitution Act, 1982*, legislation and/or common law.

This Policy does not acknowledge the scope or content of any jurisdiction of the Crown.

Nothing in this document shall constitute the HMFN's or the HTG's endorsement of current legislation, regulations, policies, procedures or practices of the Crown. Nor shall anything in this document constitute the HMFN or HTG's endorsement of the plans, policies, procedures or practices of Third Parties in our territories, which we have had no meaningful role in creating

or administering and which do not reflect an honourable reconciliation of pre-existing HMFN jurisdiction with the Crown's asserted jurisdiction.

Nothing in this document shall prejudice any legal or other positions taken or that may be taken by HMFN or the HTG in any court, tribunal or administrative proceeding, process, treaty negotiation or otherwise.

Nothing in this Policy shall be interpreted in a way that extinguishes, abrogates or denies HMFN title or rights, within the meaning of sections 25 and 35 of the *Constitution Act, 1982*, regardless of whether such title, rights or privileges are established or defined at the time of implementation of this Policy.

Nothing in this Policy shall be interpreted in a way that justifies infringement of HMFN title and rights or prevents or limits the Aboriginal exercise of such title or rights.

Nothing in this Policy shall confer consent or provide approval of any past, existing, new or ongoing Activities within HMFN territory.

This Policy is without prejudice to HMFN title and rights, and to any future settlement of the land question that reconciles pre-existing HMFN sovereignty with the asserted sovereignty of the Crown.

This Policy is meant to inform the process of discussions between the HMFN, HTG and the Crown on land, water and resource issues. Other issues, such as child and family services and health care, will be addressed by other means as developed by the HMFN, the HTG if appropriate, and the Crown.

INTRODUCTION

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Six First Nations are working together as the Hul'qumi'num Treaty Group (HTG) for purposes of negotiating a treaty with Canada and British Columbia. Members include Chemainus First Nation, Cowichan Tribe, Halalt First Nation, Lake Cowichan First Nation, Lyackson First Nation and Penelakut Tribe. These Bands work together as the Hul'qumi'num member First Nations (HMFM), representing collectively the *Hul'qumi'num Mustimuhw* (people). We have Aboriginal title to our land, and Aboriginal rights throughout our individual and collective territories. These rights, based on Hul'qumi'num law and common law, are recognized in the Constitution of Canada and have been confirmed by the Supreme Court of Canada. Aboriginal title gives the HMFN the legal rights to exclusively use and occupy the land, including the right to choose how the land and resources in our traditional territories are used.

The *Hul'qumi'num Mustimuhw* (people) have never signed a treaty, surrendered or ceded our land, waters or resources; nor has the federal government lawfully extinguished our title. The *Hul'qumi'num Mustimuhw* have never been compensated for alienation of any of our territory, and we strongly maintain that we have never been conquered.

Section 35 (1) of the *Constitution Act,* 1982 provides these rights with constitutional protection, as follows:

> "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Based on s. 35(1), the federal and provincial Crowns have a constitutional obligation to respect the Aboriginal title and rights of the HMFN, and the Crown can be held legally accountable if they renege on their obligation.

Where treaties are not yet concluded, such as in HTG *s'aalh tumuhw*, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims. Treaties reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and define Aboriginal rights guaranteed by s.35 of the *Constitution Act, 1982*. It is a corollary of s.35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This in turn, implies a duty to consult and if appropriate, accommodate.

The *Hul'qumi'num Mustimuhw* are holders of the Aboriginal rights and title and are therefore owed the duty by the Crown to consult. Acknowledging this, the *Hul'qumi'num Mustimuhw* political representation is the HMFN. Thus, the HMFN must be consulted and, if appropriate, accommodated, on all Activities proposed or contemplated in the *Hul'qumi'num Mustimuhw*'s territory. Furthermore, the HTG is actively negotiating a treaty with the Crown on behalf of the *Hul'qumi'num Mustimuhw* based on our rights and title. Therefore, the HTG must also be part of the consultations and, if appropriate, accommodations.

This Consultation Policy is an expression of the HMFN understanding and exercise of self-determination, inherent jurisdiction and self-government.

Against this backdrop, HMFN and HTG insist that we must be consulted regarding all proposed Activities in our individual and collective traditional territories that may impact on these titles and rights. This Policy represents the minimal requirements for meaningful consultation, from the conceptual and early proposal stages on, with the HMFN and HTG on such Activities.

GENERAL STATEMENT OF HUL'QUMI'NUM MUSTIMUHW RIGHTS, HISTORY AND CULTURE

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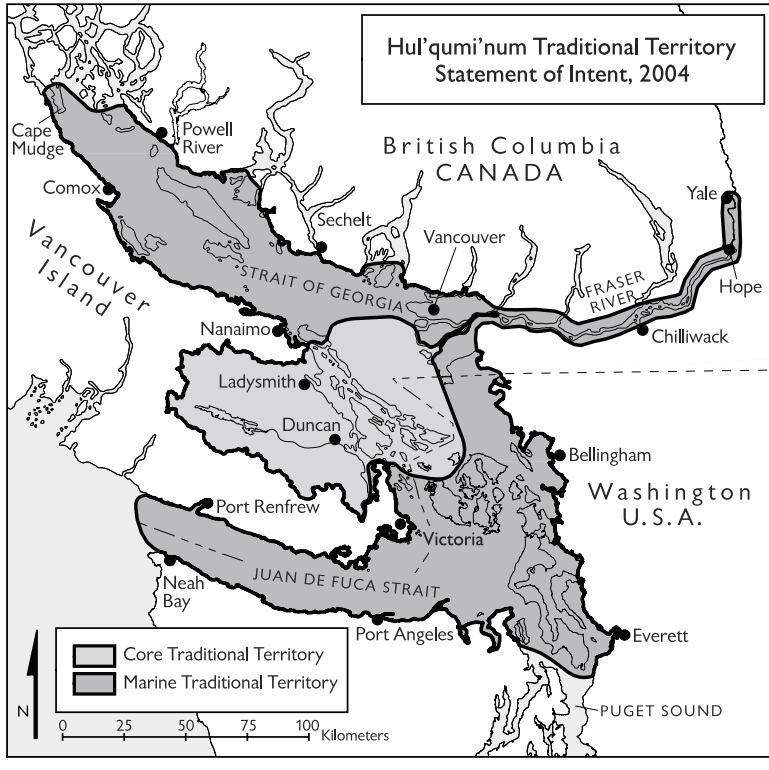
> *"That from time immemorial the Cowichan Tribe of Indians have been possessors and occupants of the territory..."*
>
> Petition of the Cowichan Chiefs 1909

The *Hul'qumi'num Mustimuhw* have Aboriginal title to *s'aalh tumuhw* (our land) and Aboriginal rights throughout 100 percent of the territory outlined in our Statement of Intent (2004). This Aboriginal title and our Aboriginal rights are based in Hul'qumi'num law and are recognized and affirmed in the Constitution of Canada and have been acknowledged frequently by the Canadian courts.[1]

The Hul'qumi'num core territory is southeast Vancouver Island, the Gulf Islands and the lower Fraser River. It encompasses the land in and around the watersheds of the Nanaimo, Chemainus, Cowichan and Shawnigan systems, the Gulf Islands and the mouth and south arm of the Fraser River to Douglas Island. The marine territory includes the waters of the Strait of Georgia, the Fraser River south of Yale, Juan de Fuca Strait and upper Puget Sound. A detailed GIS outline and a more detailed text description of the core and marine territories are available from HTG's website (www.hulquminum.bc.ca) or the BC Treaty Commission.

[1] See *Penelakut First Nations Elders v. British Columbia (Regional Waste Management),* [2005] B.C.W.L.D. 547 and BC and Cowichan Tribes v. Timberwest, Environmental Appeal Board 2002-PES-008 (a) September 4, 2003.



Hul'qumi'num Mustimuhw Territory; Statement of Intent 2004

The Hul'qumi'num member First Nations' (HMFN) Statement of Intent was established for purposes of treaty negotiations and as a formal declaration of our territory. The HMFN Statement of Intent map is based on extensive consultation with the *Hul'qumi'num Mustimuhw* communities. It illustrates the territory for which the Hul'qumi'num member First Nations have ongoing ownership and jurisdiction.

Collectively, the *Hul'qumi'num Mustimuhw* traditional territory includes the occupied areas as well as territory used for exercising our Aboriginal rights and title as indicated in our Statement of Intent.

The map (see page 11), first accepted by the British Columbia Treaty Commission in 1993 and revised and accepted in 2004, has been shared with the federal and provincial Crowns and is regularly referred to during treaty negotiations. Not only does it provide a parameter for treaty negotiations and reconciliation with the Crown but also helps the HMFN outline their territory for consultation purposes. It informs the Crown and Third Parties of their obligations to the HMFN.

Rights, History and Culture

These six First Nations share in common the *Hul'q'umi'num'* language (or Island Halkomelem, as it is sometimes referred to in English). *Hul'qumi'num Mustimuhw* refers to those people who speak the *Hul'q'umi'num'* language.

The Coast Salish people share a culture that is common to communities on south eastern Vancouver Island and in the Lower Mainland of British Columbia and south into Washington State. These communities are socially and economically connected by marriage, travel, trade and culture. The Coast Salish communities are further related by the winter dance and sacred ceremonies, religious practices, traditional names and canoe races and other sporting events. The relationships among Coast Salish communities remain strong throughout the Coast Salish world despite the Canada/US border. In fact, Coast Salish Elders teach that the border can not be permitted to interfere with Coast Salish understandings and ways of life.

Our society has developed a sophisticated understanding of *hwulmuhw* (Indigenous) relationships, *s'aalh tumuhw* and resource and extraction rights, as well as a worldview that reflects a spiritual relationship with the environment and an obligation to manage responsibly the use of resources. This worldview recognizes the need to manage human behaviour relative to the needs, including the spiritual needs, of the environment.

From the beginning of time, the oral histories of the *Hul'qumi'num Mustimuhw* have connected and continue to connect our people to *s'aalh tumuhw*. These oral histories, which have been carefully passed on by generations of Hul'qumi'num Elders, clearly express

laws that root the *Hul'qumi'num Mustimuhw* in our traditional lands. The First Ancestors of the *Hul'qumi'num Mustimuhw* are the original occupants of *s'aalh tumuhw* on southeast Vancouver Island, the Gulf Islands and the Lower Fraser River. Archaeological evidence dating back more than 9,000 years shows the continuous occupancy by the *Hul'qumi'num Mustimuhw* of *s'aalh tumuhw*. Maps of *s'aalh tumuhw* record more than 500 *Hul'q'umi'num'* place names blanketing the landscape, demonstrating our ongoing connection to these lands, waters and resources. Oral traditions of our First Ancestors affirm this deep rootedness in the territory.

In these traditions the Transformer *X'eels* arrived at the end of the age of the First Ancestors. He went through the land making things as they are now. He transformed the ancestors to the deer, to the cedar tree, to the rocks, which continue to be found in the land today. He taught the *Hul'qumi'num Mustimuhw* about the respect and obligations required to live in the world.

His transformations live on in the animals and landscape, which carry the history of *X'eels'* work in their Hul'qumi'num names. As descendants of the First Ancestors, the Hul'qumi'num people recognize our special connections to the *tumuhw* and the resources in it. The *Hul'qumi'num Mustimuhw* are related to the living things and places that were transformed by *X'eels* all those hundreds of years ago.

The Hul'qumi'num oral histories emphasize the importance of our extended family ties. The hereditary names, ceremonial masks and privileges that connect the people to territories and resources throughout the Coast Salish world are known. These names and oral histories tell about travels for fishing on the Fraser River as far up as Yale, north to Cape Mudge in the Strait of Georgia and in Knights Inlet. They tell about trips to the mountains of the mainland for hunting and gathering of mountain goat wool. They recall the travels of the *Hul'qumi'num Mustimuhw* as far as the interior of BC and central Oregon for trade and participation in the complex economic system of potlatching. They teach about the Hul'qumi'num defending their lands, waters and resources from intruders. The richness of our ancestral lands made for many generations of wealthy *Hul'qumi'num Mustimuhw* prior to contact.

The *Hul'qumi'num Mustimuhw* wish to once again contribute to the wealth of the Hul'qumi'num society in ways that follow the *snuw'uy'ulh* (laws) taught in our oral histories.

Hul'qumi'num *snuw'uy'ulh* teaches us that *Hul'qumi'num Mustimuhw* have an inalienable connection to the traditional territory. This connection to our land and resources is both a right and a responsibility. These laws are the foundation on which our relationship with the natural world is built, a relationship connecting the *Hul'qumi'num Mustimuhw* to our First Ancestors. It is a connection fundamental to our cultural identity and way of being. This oral history and the customary laws handed down over time teach the Hul'qumi'num that we are not of the land, but are the land and its resources. It is an ancient connection based on a long history of use, occupancy, and customary laws of land ownership. Indeed, the *Hul'qumi'num Mustimuhw* have been defending from incursion the lands, resources and waters within our territory throughout time, before 1846 and since.

The *Hul'qumi'num Mustimuhw* have title and rights to *s'aalh tumuhw* as described below:

> We assert the existence of Hul'qumi'num Aboriginal title in *s'aalh tumuhw,* our land, and Aboriginal rights throughout one-hundred percent of the territory outlined in our Statement of Intent. This Aboriginal title and our Aboriginal rights are based on Hul'qumi'num law. Our Aboriginal title and rights are recognized and affirmed in the Constitution of Canada, and have been recognized frequently by the Canadian courts.

The HTG was formed in 1993 by the HMFN. HTG's Mission Statement is as follows:

> The Parties to the Political Accord assert Aboriginal rights, titles, and interest with respect to their traditional territories. The Hul'qumi'num Treaty Group, representing Vancouver Island Salish Nations who share the same dialect and have never had their interest in their land extinguished, recognize that the treaty making process is an opportunity to complete unfinished business with the federal and provincial governments.

> The Hul'qumi'num Treaty group will negotiate to recognize and protect a way of life based on an economic and spiritual relationship between Hul'qumi'num First Nations and the environment. The Hul'qumi'num Treaty Group will ensure that the Chemainus, Cowichan, Halalt, Lake Cowichan, Lyackson and Penelakut First Nations fully participate in all aspects of the treaty negotiation process.

The requirement for consultation regarding Activities that may impact our Title and Rights on or within the Hul'qumi'num *s'aalh tumuhw* is based on this background of ancient laws and ways of being. The following Policy was developed to guide Third Parties through the process of meaningful consultation.

HUL'QUMI'NUM MUSTIMUHW PRINCIPLES

The laws, principles and practices of the *Hul'qumi'num Mustimuhw*, including those governing the treatment of land, water, birds, animals and resources, are embodied in the *Hul'q'umi'num'* language, which is not easily translated. Some of the laws and teachings are defined below as they demonstrate the *Hul'qumi'num Mustimuhw* way of thinking and the principles that have been handed down through generations.

snuw'uy'ulh: Hul'qumi'num laws and teachings
ts'ets'uw-wutul: helping each other
'uy shaqwalawun: good thoughts, manners, or behaviour
ts'ets'uw-wutul su 'uy shaqwalawun: helping each other with good manners, thoughts, or behaviour

- *Example*: The Hul'qumi'num Treaty Group (HTG) is comprised of six First Nations coming together to work as one in the negotiation of a treaty.
- *Example*: The treaty process involves three separate parties reconciling their respective interests and establishing a foundation for working together in the future.
- The philosophy embodied in this phrase conveys the concept that only human behaviour can be managed in relation to the environment; the environment itself cannot be managed. Central to this concept of management is the law and understanding that humans should take only what they need.

> Legislation and court decisions reflect this philosophy, as they are about managing or regulating human behaviour.

tlim 'o' s'aalh tumuhw: it is really our land.

This land is with certainty our land; *Hul'qumi'num Mustimuhw* have a clear concept of land ownership. Pre-contact, if someone wanted to access or use Hul'qumi'num land, exploit our resources or live on our land, they would be required to present themselves to the Hul'qumi'num land owners and receive consent.

> ***'uwu ni'us 'uw tumuhw'ul nilh s'ul'e'tst:*** it is not just land; it is our life
> ***mukw stem 'o' s'aa'lh:*** everything is ours.
> ***mukw ihwet 'uw ts' qwul:*** everybody has a voice.
> ***hwe'unamut ch tu mustimuhw tst:*** you listen to our people.

Based in the laws described above, the *Hul'qumi'num Mustimuhw* expect therefore, to be partners at all levels in the:

> identification of appropriate land designations;
> decisions on appropriateness of projects;
> development of initiatives; and
> benefits arising from the use of *s'aalh tumuhw*, and revenue sharing in resources taken from *s'aalh tumuhw*.

Our world view expresses the understanding that all things are connected; all things interact. Therefore the following must also be considered:

> project-specific issues;
> adjacency issues and impacts; and
> cumulative impacts.

The overarching intent of the *Hul'qumi'num Mustimuhw* is to preserve and protect:

> the lands critical to our culture, including the sacred sites;
> the ecosystems necessary for maintaining habitat;
> archaeological heritage resources; and
> our ancestral title and rights.

CONSULTATION PROCESS

1. When shall consultation be undertaken?

APPLICATION

This Consultation Policy applies to any consultation undertaken by either the provincial or federal Crown arising out of:

1. the Crown's duty to consult with each Hul'qumi'num member First Nation (HMFN) attendant upon the Crown's fiduciary duty with respect to each HMFN;
2. any statutory duty of the Crown to consult with each HMFN;
3. the Crown's duty to consult with and accommodate the interests of the HMFN arising out of the principle of the honour of the Crown, deriving from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation and enshrined in s. 35(1) of the *Constitution Act, 1982*; or
4. any other duty to consult with and accommodate the interests of HMFN that may exist or may arise.

This Policy applies to the federal and provincial Crowns, their Ministers, employees or agents, and other creations of the Crown (including local government and tribunals) and Third Parties undertaking or planning to undertake Activities authorized by the Crown in HMFN traditional territory.

The duty to consult arises when the Crown or an agent of the Crown has real or constructive knowledge of the potential existence of the Aboriginal right or title and contemplates Activity that might adversely affect the HMFN or treaty process. Consultation and accommodation before the final claims resolution must preserve the Aboriginal right or interest and are an essential corollary to the honourable reconciliation process required by s. 35 of the *Constitution Act, 1982*.

GENERAL

Each HMFN and the HTG expect the provincial and federal Crowns, and if appropriate, Third Parties to undertake consultation whenever a proposed Activity might affect individual HMFN traditional territory, or collective HMFN territory, or any geographic areas that might affect how each individual HMFN exercises its Aboriginal rights. This includes decisions involving private lands within *s'aalh tumuhw* (see map on page 11).

Without limiting the foregoing, each HMFN expects the provincial or federal Crowns, and, where appropriate, Third Parties to undertake consultation when the following are being considered in HMFN traditional territory:

i) resource extraction;
ii) exploration activities;
iii) any alteration (such as currently defined in the *Heritage Conservation Act* or applicable heritage legislation) to Heritage objects or Heritage Sites;
iv) strategic or operational plans relating to the use of lands, or exploitation of resources;
v) Crown Patent grants or other significant alienations of land, including the creation of parks within HMFN traditional territory; and
vi) plans, licences, permits or other authorization relating to lands and resources.

TIMING

Each HMFN and the HTG expect to be consulted at the earliest stage[2] of any such consideration, before the issue or approval of any plans, licences, permits or other authorization.

The HMFN and the HTG maintain that meaningful consultation is not limited to the later stages of any approval process, when significant time pressures are applied and can undermine effective, meaningful and adequate consultation.

2. How to initiate consultation?

RECOGNITION OF THE *PRIMA FACIE* CASE[3] FOR ABORIGINAL TITLE AND RIGHTS

The starting point for consultation with the Hul'qumi'num member First Nations (HMFN) and the Hul'qumi'num Treaty Group (HTG) is:

> recognition of co-existing HMFN and Crown titles over the general boundaries of HMFN traditional territory; and
> Recognition of the strength of a *prima facie* case will be strong, where one or more of the HMFNs or the HTG leads a bare minimum of evidence to justify a claim. A *prima facie* case is also established by a First Nation's participation in stage four or five of the treaty process and through interim-measures agreements. This is a well articulated principle of law deriving from the Supreme Court of Canada.

LEVEL OF THE CROWN'S DUTY TO CONSULT

The Supreme Court of Canada has stated that the duty to consult lies across a spectrum.

As stated in *Haida Nation v. British Columbia (Minister of Forests)* [2005] 1 C.N.L.R. [hereinafter *Haida Nation*]:

[2] In *Myrus James on behalf of the Penelakut Elders v. Regional Waste Manager and Sablefin Hatcheries* 2003-WAS-021(a) January 19, 2004, the Penelakut Elders and a group of Saltspring Island residents initiated legal action when First Nation remains were found in a shell midden which was a designated archaeological site and the Penelakut Elders argued there was inadequate consultation with respect to the approval of the project and that their Aboriginal rights were infringed. The case emphasizes the need for information to be provided to affected First Nations as soon as possible so that there can be adequate consultation and accommodation.

[3] This term means that a case can be made on the basis of evidence sufficient to raise sufficient to raise a presumption of fact or to establish the fact in question unless disproved by evidence to the contrary.

> "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice." [para. 43]

> "At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required." [para. 44]

The level of duty to consult will in most cases be significant or deep and in a few cases may be minor or mere according to criteria set by the Supreme Court of Canada in *Delgamuukw*[4] and *Haida Nation*. In those cases, the Court acknowledged that First Nations' prior existence in their territories and ongoing connection to their lands enhances their rights to consultation on Activities in their territory. In most cases this establishes a greater duty of consultation on the part of the Crown.

In the rare case where "mere" consultation is due[5], the process triggers a duty to:

- disclose information;
- discuss issues; and
- accommodate and substantially address the concerns of First Nations.

In most instances, the "deep" consultation process triggers a greater duty on the Crown to:

- seek early participation from First Nations, including at the strategic planning stage;
- provide full disclosure;

[4] *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].
[5] In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* S.C.J. No 71, 2005 SCC 69 [hereinafter *Mikisew*] it was established that even though there was a lower level of consultation required in the *Mikisew* case, there is always a duty of consultation and that there was a distinct duty of consultation owed to the *Mikisew* outside of the broader public consultation process.

- seek meaningful input and participation by First Nations;
- provide resources, including financial and legal or technical support for First Nations to participate in consultation;
- act with flexibility;
- sufficiently mandate and define the Crown decision makers;
- inform the First Nation community on the process and expectations, including reporting on outcomes of the consultation process;
- find satisfactory interim solutions as part of achieving accommodation; and
- be comprehensive and thorough.

IN WRITING, TO THE CHIEFS AND CHIEF NEGOTIATOR

Each individual HMFN expects the Crown to notify the Chiefs and Chief Negotiator individually in writing when a situation requires consultation.

This notice shall be sent to each HMFN Chief and Council, Attn: Referrals, and to the HTG Chief Negotiator, Attn: Referrals, by facsimile and regular mail. Contact information is attached as Appendix D.

PARTICULARS

This notice shall contain sufficient information for each HMFN to understand the following relative to any proposed Activity:

i) the nature and scope of the proposal;
ii) its timing;
iii) location;
iv) how the proposal might affect the traditional territory of each HMFN;
v) who is involved;
vi) who will be making the final decision for the Crown and who will be assisting in that decision;
vii) all documents referenced, including applications, studies, assessments and policies available for review;
viii) what collateral or related processes or approvals are being undertaken by the Crown;
ix) relevant deadlines or filing dates;
x) the Crown's proposed form of consultation;
xi) contact information of relevant parties, including

addresses and phone numbers of relevant decision makers and those providing assistance; and

xii) any other relevant information from the Crown that will facilitate the consultation process.

GENERALITY

Disclosure of the above particulars will not take away from the Crown's obligation to give adequate notice to each HMFN to ensure clear understanding of:

i) how their rights and interests might be affected; and
ii) how they can meaningfully respond to the proposed Action.

3. Form and conduct of consultation

CONSULTATION PROCESS

Consultation may take place in the form approved by each individual Hul'qumi'num member First Nation (HMFN), and if appropriate the HTG, including but not limited to:

i) oral consultation with the Chiefs and Council and Elders of each individual HMFN and the Chief Negotiator of HTG either with or without their legal counsel; or
ii) written consultation with each of the Chiefs and Councils and the Chief Negotiator.

FOR CLARITY: discussions or written communications with the Elders and the Chief Negotiator on their own will not discharge the Crown's duty to consult with each of the Chief's and Councils. The appropriate form of consultation must be established collaboratively at the outset by the HMFN, HTG and the Crown, on a case-by-case basis in accordance with the specific demands of each Action.

No other form of contact between the Crown and each HMFN will be considered consultation. Telephone calls to Band and HTG officials and employees, faxes and material sent to the Band office will not be considered consultation and in no way discharge the Crown's honourable duty to consult.

FIRST NATION OR TREATY GROUP AGENTS

The HMFN and HTG may wish to hire agents, such as staff, legal counsel or other technical experts to facilitate consultation. These agents or resource people may assist the process, but are not the appropriate bodies for consultation unless they are clearly mandated in writing. Consultation agents are not political representatives of the *Hul'qumi'num Mustimuhw*, the right holders, so cannot authorize, consent, or acquiesce to any Activity that might affect Hul'qumi'num rights. Their role is to provide the HMFN and/or HTG support through the technical review stages of the consultation process and to co-ordinate or facilitate political and operational interaction.

CROWN REPRESENTATIVES

Each individual HMFN and HTG will engage in consultation only with;

i) the relevant decision maker; and/or the
ii) representatives of the relevant decision maker as agreed to in advance in writing by each HMFN, HTG and the decision maker.

The Crown decision maker conducting the consultation must have adequate authority, resourcing and mandate to meaningfully consult, and to substantially address and achieve accommodation of the HMFN and HTG rights, title and interests.

FUNDING AND CAPACITY

For consultation to be meaningful, the HMFN must be provided the time and resources to participate effectively, including adequate funding for additional expertise. For example, many proposed Activities require technical analysis from engineers, foresters, archaeologists, ethno-botanists, hydro-geologists or biologists to determine the potential impacts on Aboriginal rights and title. The HMFN and HTG require sufficient resources to process and respond to applications, to conduct their own analyses, and to engage in meaningful discussions with the Crown and/or Third Parties.

A major concern for First Nations is the lack of financial and human resources for analyses and response to consultation requests. The duty to consult and accommodate necessarily

includes an obligation to ensure adequate and sustained funding for First Nations to carry out the ongoing work of identifying and articulating their interests, and to meaningfully participate in the decision-making process. The Crown is bound to act honourably in these matters, including ensuring that First Nations are on a level playing field with respect to information, expertise and resources. However, any investment of resources will not in itself constitute consultation by the Crown.

Subject to adequate resources being made available by the Crown or Third Parties, HMFN and the HTG will make reasonable efforts to participate in activities such as studies, assessments, conferences and workshops and the like.

FIRST NATIONS-SPECIFIC PROCESSES

First Nations are entitled to a distinct consultation process apart from public forums, general public meetings or stakeholder consultations. First Nations-specific consultation includes direct, two-way consultation between each HMFN, HTG and the Crown and three-way consultation among each HMFN, HTG, the Crown and Third Parties. In addition, the requirements of First Nations-specific consultation by the Crown are ongoing and must continue for the duration of the Activity. The Crown must ensure that the Supreme Court of Canada requirements articulated in case law, such as *Sparrow*[6]*, Delgamuukw, Mikisew, Taku*[7], and *Haida Nation* continue to be met.

Consultation with HMFN and/or the HTG may take many forms; the reviews may involve meetings, focus groups, expert presentations and/or community gatherings. Furthermore, there may be collaborative meetings with internal and external stakeholders (Elders, youth, fisher people, loggers, businesses), which may involve Third Parties.

AVAILABILITY FOR ORAL CONSULTATION

Each of the HMFN Chiefs and Councils and Elders, and the HTG will commit to oral consultation, subject to the scheduling of other priorities. The allocation of time is also based on an assessment of resources available to the Chiefs, Councils and Elders, and the HTG.

[6] *R. v. Sparrow* [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].
[7] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550 [hereinafter *Taku*].

Oral consultation should be scheduled well in advance and no less then two weeks before the date of the proposed oral consultation.

Communications regarding oral consultation and agendas must be directed to each of the HMFN Chiefs and Councils and the HTG's Chief Negotiator, Attn: Referrals.

AVAILABILITY OF HUL'QUMI'NUM MEMBER FIRST NATIONS

Each HMFN will make reasonable efforts, subject to adequate resources being made available by the Crown or interested parties, to participate in studies, assessments, conferences, workshops and the like. These will become part of the overall consultation process.

4. Accommodation

Accommodation of the rights held by the Hul'qumi'num member First Nation (HMFN) is an integral part of the honourable process of reconciliation. The duty to consult may lead to a duty to accommodate or a change in plans or policy in response to HMFN and, if appropriate, HTG concerns.[8] Although the duty to consult will vary, there is always a requirement to consult meaningfully, in good faith, with willingness on the part of the Crown to be flexible and change its course or plans based on information that emerges during the consultation process. This willingness to be responsive[9] is a critical component of the duty to act honourably when consulting HMFN and HTG.

> "The accommodation that may result from pre-proof consultation is just this —seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation." (*Haida Nation*, para. 49)

The *Haida Nation* decision directs that there is an increased obligation imposed on the Crown to accommodate an asserted right where there is compelling evidence to suggest that a right will be adversely affected by a Crown Action. The duty to accommodate arises when the outcome of a consultation process instructs that there should be an amendment to Crown policy, decisions, or planning. Accommodation is necessary when an

[8] *Haida Nation v. British Columbia (Minister of Forests)* [2005] 1 C.N.L.R. at para. 46; *Taku* at para. 42.
[9] *Taku*, para 25.

Activity or interest might adversely impact the economy, culture and heritage, health, environment or society of *Hul'qumi'num Mustimuhw* members.

Accommodation may take many forms, but will be specific to the requirements of the individual HMFN and the Hul'qumi'num treaty negotiations. "Accommodate" is defined as "to adapt, harmonize, reconcile." "Accommodation" is defined as "an adjustment or adaptation to suit a special or different purpose; a settlement or compromise." The Supreme Court of Canada has instructed that the Crown must approach consultation intending to substantially address First Nations' concerns and to find satisfactory interim solutions pending treaty or court resolution. In other words, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests, but must seek compromise so as to harmonize conflicting interests and move further down the path of reconciliation.

Identifying appropriate accommodations involves the investigation of a variety of factors that might cause adverse impact on the *Hul'qumi'num Mustimuhw* rights, title and interests, including each or all of the following:

> economy;
> culture and heritage;
> health;
> environment; and
> society.

The above factors must be considered when identifying potential adverse impacts and possible solutions or ways to avoid impacts.

TYPES OF ACCOMMODATION

Accommodation of *Hul'qumi'num Mustimuhw*'s rights, title and interests may include the following:

i) modifying or adopting legislations, policies, planning processes, resource-allocation regimes or treaty-related measures;
ii) engaging in memorandums of understanding or agreements;
iii) revising or adapting existing Crown policy and plans

to suit the special or different purposes of HMFN or the HTG if appropriate;

iv) joint decision making;
v) creating interim accommodation measures;
vi) abandoning the proposed Activity;
vii) developing land or resource protection measures and transfers;
viii) changing the location of a proposed Activity;
ix) creating alternatives to the proposed or contemplated Activity that adequately address HMFN or HTG interests;
x) conducting cumulative impact studies and making project adjustments accordingly or, where necessary, creating strategic level plans based on the impact study results;
xi) taking all necessary steps to avoid irreparable harm to *Hul'qumi'num Mustimuhw*'s rights or title, or minimize the effects of infringement;
xii) providing compensation, where the HMFN and, if appropriate, the HTG determines that compensation is appropriate;
xiii) conducting impact benefits studies;
xiv) revenue/benefit sharing:
> providing HMFN with a share of the revenue (direct and indirect) the Crown or Third Party acquires when it authorizes Activities in the *Hul'qumi'num Mustimuhw* traditional territory (such as royalties, profit sharing, joint ventures, equity interest, contracting, employment);

xv) capacity building;
xvi) setting requirements for Third Parties;
xvii) providing for ongoing consultation and accommodation of HMFN and, if appropriate, the HTG with respect to an Action or Activity; especially following up with mitigation and compliance-monitoring activities that include consequences for failure to meet the requirements for ongoing consultation and accommodation;
xviii) making other forms of arrangements, settlements or compromises with HMFN and, if appropriate, the HTG; and
xix) other creative options.

The means of accommodation outlined above are not mutually exclusive; accommodation may take on many forms.

5. *Dispute resolution*

Dispute resolution must be made available when conflicts occur between Crown decision makers and Hul'qumi'num member First Nations (HMFN) and the Hul'qumi'num Treaty Group (HTG) during the consultation process. As per the Supreme Court of Canada, the government may wish to adopt dispute resolution processes to help address possible conflicts.

Decisions about the type of dispute resolution processes must be made collaboratively.

6. *How decisions are to be made*

To reduce recourse to the courts and facilitate true reconciliation, the Hul'qumi'num member First Nations (HMFN) and the Hul'qumi'num Treaty Group (HTG) propose the following process for making decisions under the duty to consult and accommodate.

STAGE ONE
All parties work collaboratively to ensure:

> the process is based on joint decision-making;
> the process incorporates the principles agreed to by the parties at the table; and
> the process must be workable and effective.

If the parties cannot arrive at a compromise decision, then move to an institutional structure set out in Stage Two.

STAGE TWO (IF NEEDED)
The mutually agreed to use of an institutional structure to resolve disputes will include:

> identification of an independent body (see Appendix B);
> determination of the composition;
> determination of which Alternative Dispute Resolution (ADR) processes and principles will apply; and
> clarity on how binding decisions will be arrived at.

KEY ISSUES THAT IMPEDE THE CONSTRUCTIVE DISCHARGE OF THE CROWN'S DUTY OF CONSULTATION: WHAT IS NOT HONOURABLE 'BEHAVIOUR'

The following is a non-exhaustive list of issues and concerns around consultation with which First Nations have been confronted in the past. These issues are highly problematic and may prevent or impede the meaningful, effective and efficient discharge of the Crown's duty to consult.

1. Inadequate consultation

Generally, consultations conducted by the Crown have been woefully inadequate. The Crown must fully discharge its duty through a mutually agreed to and meaningful consultation process.

2. Lack of resources

The Hul'qumi'num member First Nations (HMFN) and the Hul'qumi'num Treaty Group (HTG) must be provided the financial and human-resource capacity for appropriate analysis and response.

i) The HMFN and/or HTG are forced to respond to proposed Activities with limited or no revenues, or with loan monies or other targeted funding. There is little or no consideration given to the fact that the HMFN and HTG are not proposing the Activity or benefiting from it yet they bear the whole of the risk to title and rights.

ii) The HMFN and HTG often do not have the capacity or resources to respond to proposals and the Crown has interpreted this inability to respond as consent to the Activity.

These scenarios are not honourable.

3. Rigid timelines

The HMFN and HTG must participate in the setting of timelines as they are the most appropriate bodies to confirm when they are able to analyse and make decisions about potentially adverse Activities on their lands, waters and resources.

4. Unclear process and information

The HMFN and HTG must be involved in determining the consultation process, which must be agreed to before consultation begins. First Nations often do not have a clear understanding of how the process might unfold.

To be meaningful, information provided to the HMFN and HTG must be accurate, clear and understandable. For example, *only* mailing out raw data is not helpful; the information must be clear, understandable and accessible to the lay person.

5. Unreasonable behaviour

The Crown may not engage in "sharp dealings" or otherwise act dishonourably. Furthermore, the Crown may not take unreasonable, fixed positions that impede the honourable process of reconciliation.

THIRD PARTY CONSULTATION

>>>

Where agreed upon, each individual Hul'qumi'num member First Nation (HMFN) or the Hul'qumi'num Treaty Group (HTG) will engage in consultation with Third Parties who are:

i) directly or indirectly interested in the proposed Activity, including the proposed beneficiary of the authorization; or

ii) acting on behalf of the parties described in (i).

Such discussions are not considered consultation by the Crown and must not be construed by the Crown as fulfillment of its duty to consult with HMFN. The Crown cannot delegate to Third Parties their ultimate legal responsibility to consult and accommodate. That said, the Crown may delegate procedural aspects of consultations in certain circumstances.

HMFN and HTG insist on the following terms in their relations with Third Parties:

> A clear written acknowledgment by the Third Party of the *Hul'qumi'num Mustimuhw*'s title, rights and interests; all Third Party documentation must identify the *Hul'qumi'num Mustimuhw*'s title, rights and interests. Such documentation

must include all information and be disseminated to shareholders, purchasers, lenders, governments and the public, thus putting all interested persons on notice that the Third Party's interests are encumbered by the rights, title and interests of the *Hul'qumi'num Mustimuhw*.

> Detailed information not only on the specific Activity proposed, but also on the short, medium and long-range plans in the area. All proposals must be analyzed in relation to existing development, both by the Third Party concerned and others.

> A written commitment not to proceed with an Activity until the consultation process and necessary accommodations are complete.

> An acknowledgement that consultation is ongoing for the duration of the plan, and an agreement to cease all Activity if disputes arise over compliance.

APPENDIX A

GLOSSARY

> >

Activity or Action – includes any legislation, regulation, policy, procedure, plan, tenure, project, grant, license, permit, restriction, amendment, approval, authorization, transfer, transaction, operation, activity, decision or conduct that may adversely affect First Nations' Aboriginal rights or title. It also includes all other government actions, whether legislative, regulatory or administrative.

Constructive Knowledge – is notice of a fact that a person or body is presumed by law to have, regardless of whether they actually do, since such knowledge is obtainable by the exercise of reasonable care. It means that the Crown or Third Parties can be held responsible for knowing everything that the various people and branches under them know.

Crown – includes representatives of the Crown of Canada, the Crown of British Columbia, their Cabinets, Deputy Ministers, committees, Ministries, Crown corporations, agencies, employees, contractors, agents, representatives and delegates authorized to discharge the Crown's duty to consult with First Nations, including local government (municipalities, regional districts).

Government to Government and Government to Government Relationship – the relationship in which the First Nations' government and the federal or provincial government work with each other as equals to make decisions on lands and resources, recognizing that First Nations' governments are not as well financially resourced. Consequently, capacity considerations must be taken into account.

Hul'qumi'num Member First Nations – include six First Nations (currently Indian Bands under the *Indian Act*): Chemainus First Nation, Cowichan Tribes, Halalt First Nation, Lake Cowichan First Nation, Lyackson First Nation and Penelakut Tribe.

Hul'qumi'num Mustimuhw – for purposes of this Consultation Policy; the people belonging to the six First Nations: Chemainus

First Nation, Cowichan Tribe, Halalt First Nation, Lake Cowichan First Nation, Lyackson First Nation and Penelakut Tribe.

Land – defined broadly to include surrounding waters, riverbeds, lakebeds, the seabed, foreshore and resources below and above ground. In the most general sense, "land" refers to ground, soil, or earth; including fields, meadows, pastures, woods, moors, waters, marshes and rocks, and including free or occupied space for an indefinite distance upwards as well as downwards.

Prima Facie – Literally means "at first sight" or "on the face of it." "Prima facie evidence" is evidence that is good and sufficient on its face; it appears to be true and accepted. It is evidence sufficient in law to establish a fact unless rebutted (disproved by some evidence to the contrary).

Third Party – includes any individual, corporation, firm, industry, society or other non-governmental organization carrying on, or proposing Activities in First Nations' territory.

APPENDIX B

OPTIONS FOR DISPUTE RESOLUTION & INSTITUTIONAL STRUCTURES

PREVENTIVE ADR ADR clauses Partnering Consensus building Negotiated rule making Joint problem solving	**NEGOTIATED ADR** Principled Problem solving	**FACILITATED ADR** Mediation Conciliation Ombudsman 3rd party neutral
FACT FINDING ADR Neutral experts May be binding or non binding	**ADVISORY ADR** Early neutral evaluation Rights based mediation Private judging Summary jury trial Mini trial Non binding arbitration	**IMPOSED ADR** Binding arbitration Court

APPENDIX C

LEGAL CONTEXT

A. PRESENT CONSTITUTIONAL STATUS

Under the existing constitutional reality, both Canada and British Columbia must recognize and implement their obligations under s.35 (1). As stated by the SCC in Reference Re: Succession of Quebec [1998] 2 S.C.R. 217;

> "The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada..." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch"

> "At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

B. THE HONOUR OF THE CROWN

The historical context of the honour of the Crown goes back to the time of earliest contact between the British and the first Aboriginal peoples they encountered in Canada. As noted by Rotman[10] there was more equity in the initial relationship between First Nations and the Crown, since the British interest

[8] L.I. Rotman, "The Honour of the Crown: Past, Present, and Future," Canadian Aboriginal Law 2005: The Shifting Paradigm, Pacific Business and Law Institute, Ottawa, ON September 20-21, 2005.

was primarily an economic one. Trading in goods and negotiating with each other was an essential part of early British-Aboriginal relations, and the earliest alliances and treaties reached between the British and the Aboriginal peoples of Canada were based on what is referred to as the "Honour of the Crown." Such relations comprised an acknowledgement of the First Nations as autonomous, independent nations in their own right, on equal footing with the British. The *Treaty of Albany* and the *Treaty of Niagara, 1764*, reflect this equality, which was also symbolized clearly through the Covenant Chain.[11]

The *Royal Proclamation of 1763* was based upon these early agreements, which formed the basis of the "Honour of the Crown." All relations between the Crown and Aboriginals were founded on peace, friendship and respect. As further noted (Rotman, 2005):

> "Insofar as the Aboriginal rights provisions of the *Royal Proclamation of 1763* have never been repealed and have been expressly incorporated in section 25 of the *Constitution Act, 1982* they remain relevant to contemporary Crown-Native relations and the notion of the Honour of the Crown that lies at its foundation in the *Constitution Act, 1982*."

S. 25 reads as follows:

> "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty, or other rights or freedoms that pertains to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the *Royal Proclamation* of October 7, 1763..."

The "Honour of the Crown" concept remains the foundation of contemporary relations between the Crown and Aboriginals and has been consistently affirmed by the Courts, most notably by the Supreme Court of Canada in its recent decisions *Haida Nation*, *Taku*, and *Mikisew Cree First Nation*.

[11] "The symbolism of the Covenant Chain demonstrates that the Parties were allied but retained their independent character as nations." L.I. Rotman, "The Honour of the Crown: Past, Present, and Future," Canadian Aboriginal Law 2005: The Shifting Paradigm, Pacific Business and Law Institute, Ottawa, ON September 20-21, 2005, p. 1.14.

The Crown's duty to act honourably in its dealings with First Nations has also been acknowledged politically. Recently, in the document "The New Relationship," the BC Government affirmed its commitment[12] to a new relationship with BC First Nations. The "Action Plans" section of the document states:

> "We agree together to manage change and take action on the following:
>
> 1. Develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing."

Embedded in this recognition of "Government-to-Government" duty is the notion of the Honour of the Crown. Therefore, it is reasonable for First Nations to expect the Crown to honour this commitment in the establishment of a new relationship. The Supreme Court of Canada in *Haida Nation* stated that "the honour of the Crown is always at stake in its dealing with Aboriginal peoples," and as such, is central to Crown-Aboriginal relations.

C. THE HONOUR OF THE CROWN AND PRIVATE LAND

The Crown cannot bypass its duty to consult by re-designating lands that form part of a Tree Forest License (TFL) as private timberlands. In *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.*, 2005 B.C.S.C. 1712 (*Hupacasath*), Madame Justice Smith found that the Crown had a duty to consult with the *Hupacasath* on their Aboriginal claims regarding private timberlands prior to their being removed from TFL 44. The *Hupacasath* First Nation has not surrendered their rights and title to these lands by treaty. The Province and Brascan sought to have declared that the *Hupacasath* were not owed a duty of consultation because Aboriginal rights and title claims are limited to Crown lands. The lands in question were removed from TFL 44 (originally held by Weyerhauser) and transferred to Brascan, establishing fee simple ownership. Thus,

[12] The Provincial government's commitment to establishing a New Relationship on a government to government basis with First Nations people was acknowledged publicly and politically at the First Minister's Meeting held on November 24-25, 2005. The Honour of the Crown was stated as a guiding principle towards establishing the new relationship between the Federal and Provincial government's and Canada's First Nations peoples.

the province and Brascan claimed no duty of consultation existed. This is an example of what is not consultation, as was stated by Madame Justice Smith:

> "...The Crown's honour does not only exist when the Crown is a land-owner. The Crown's honour can be implicated in this kind of decision-making affecting private land. Here, the Crown's decision to permit removal of the lands from TFL 44 is one that could give rise to the duty to consult and accommodate. I refer back to the words of the Supreme Court in *Haida Nation* at para. 76: the province may have a duty to consult and perhaps accommodate on TFL decisions, which reflect the strategic planning for the utilization of the resource and which may potentially have serious impacts on aboriginal rights [para. 199]."

In *Timber West v. Cowichan* the panel made the following statements:

> "Furthermore, the Panel finds that limiting aboriginal people to challenging only the original grant of fee simple, rather than any subsequent Crown-authorized use of the private land, would be contrary to the purpose of section 35 of the *Constitution Act, 1982*, which is to effect a reconciliation of pre-existing aboriginal interests with those of broader Canadian society by requiring the Crown to seek an accommodation of aboriginal interests whenever an infringement occurs. The questions of whether an infringement will occur and, if so, what is an appropriate accommodation, are fact-specific inquiries. If Timber West's analysis were correct, the infringement and justification analysis would take place only with respect to the granting of fee simple, an activity which may not cause actual interference with the exercise of aboriginal rights on the ground, but which would create the potential for a variety of infringements at the discretion of the private landowner.
>
> Conversely, for aboriginal rights and title that are not subject to a treaty, there has been no agreement between the parties that the aboriginal rights will not be exercised on certain lands, including fee simple lands. The geographical scope of aboriginal rights, including aboriginal title, is determined by patterns of historic occupation and use. Any further limitations on the scope

> of those rights must meet the justification test of section 35 of the *Constitution Act, 1982*. Consequently, the question of appropriate accommodation between the aboriginal interests and other interests will be determined according to the purpose of section 35 and the constitutional principle that the Crown must oversee interactions between holders of aboriginal rights and title and the settler population. The discretion of a fee simple land owner cannot unilaterally define appropriate accommodation."

In effect, recent cases on the 'duty to consult,' such as *Haida Nation*, *Hupacasath* and *Timber West v. Cowichan*, underscore the legal principle that Third Parties and the provincial government cannot disregard or avoid the Crown's duty to consult with First Nations with respect to decisions concerning "private lands" in the Province of BC.

D. THE LEGAL HISTORY

Beginning with the decision of the Supreme Court of Canada in *Sparrow* in 1990, the courts have set out the legal duties of the Crown to consult with First Nations. The resulting decisions have made it clear that the duty to consult applies to both the federal Crown and the Provincial Crown. In the *Sparrow* case, the Supreme Court of Canada said the following about the duty to consult, as part of the Crown's requirement to justify the infringement of an Aboriginal right:

> "Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the question of whether there has been as little infringement as possible in order to affect the desired result: whether, in a situation of expropriation, fair compensation is available, and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented (emphasis added)."

The relevant obligations of the Crown have both a procedural and a substantive aspect. As a consequence, consultation with First Nations needs to be linked to accommodation. This flows from the decision of the Supreme Court of Canada in *R. v. Gladstone* [1996] 4 C.N.L.R. 65 (S.C.C.) (*Gladstone*), where the Court said that "at the

stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interests of the Aboriginal rights holders in the fishery."

In *Delgamuukw*, the Supreme Court of Canada further articulated the law with regard to consultation and accommodation. It expanded on the above passage from *Gladstone*, indicating that there is a need for a substantive as well as procedural approach to the justification of an infringement on Aboriginal title:

> "...By analogy with *Gladstone*, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licenses for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive.
>
> The "duty to consult" has been applied in a number of cases other than where conservation is an issue. It has been articulated in relation to the construction of mines and hydroelectric projects as well as fishing and forestry endeavours. It has also been the subject of decisions concerning licenses, permits and approvals for oil and gas development. ...aboriginal title encompasses within it a right to choose to what ends a piece of land can be put... This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands." (*Delgamuukw*)
>
> "The right to aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35." (*Campbell*)[11]

[11] *Campbell v. British Columbia (Attorney General)* [2000] B.C.J. 1524.

The Court also indicated the following about consultation:

> "...The fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. ...The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

The Court made it clear that there is a cost for the Crown if consultation and accommodation are not adequate:

> "...Aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification.... indeed, compensation for breaches of fiduciary duty is a well-established part of the landscape of aboriginal rights. ...The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated."

The constitutional duties of the Crown are clear. Aboriginal title and rights create the obligation to consult. Consultation requires accommodation, and if adequate consultation does not take place, then compensation by the Crown, and, in some cases, resource companies is required.

E. KEY CONSTITUTIONAL PRINCIPLES

(*Haida Nation* and *Taku*, Supreme Court of Canada)

This Consultation Policy is based on key constitutional principles, which must form the starting point of any discussions with Crown or Third Parties:

Rights and Obligations

1. First Nations in British Columbia have and assert Aboriginal title and rights and Treaty rights. These rights are protected by s. 35(1) of the *Constitution Act, 1982*. The governments of Canada and British Columbia are constitutionally bound to respect these rights and are subject to legal recourse when they fail to do so.

2. Both the federal and provincial Crown stands in a fiduciary relationship to First Nations when they have discretion or are asserting decision making authority over First Nations' rights, title or interests that are sufficiently specific.

3. The Crown has a legally enforceable duty to First Nations to consult with them in good faith and it must seek workable accommodations between Aboriginal interests and the short-term and long-term objectives of the Crown and other parties. That obligation extends to both the cultural and economic interests of First Nations.

4. The Crown's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the "Honour of the Crown," which must be understood generously. The Honour of the Crown is always at stake in its dealings with Aboriginal peoples, therefore there is always a duty to consult when dealing with Aboriginal title and rights

5. The Crown, acting honourably, cannot cavalierly run rough-shod over Aboriginal interests where claims affecting these interests are being seriously pursued via treaty negotiations.

6. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty lies in the honour of the Crown and the goal of reconciliation suggests that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. The ultimate aim of consultation and accommodation before final claims resolution must preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that is demanded by s. 35 of the *Constitution Act, 1982*.

7. Actions of the Crown, as well as actions of Third Parties authorized by the Crown, that are inconsistent with the First Nations' rights are invalid unless they can be justified according to fiduciary principles.

8. There is a reciprocal duty on First Nations 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 available to them.

NATURE OF THE CONSULTATION PROCESS

9. These requirements can only be met through a First Nations-specific consultation process. First Nations are legally entitled to, and insist upon, a distinct process directed to their own issues, interests, and concerns, and separate from any existing public processes.

10. These requirements are triggered without the First Nations first having to go to court to prove their rights. The Crown has a positive duty to be alert to possible infringements of treaty and Aboriginal rights that might result from the exercise of Crown authority, and to be pro-active in avoiding or limiting any impacts. Consultation and accommodation must be carried out in an honourable fashion, since the Honour of the Crown is always at stake. The Crown must not engage in sharp dealings or surface bargaining (*R. v. Badger* [1996] 1 S.C.R. 771).

11. The Crown must be responsive to First Nations interests, beyond merely listening to First Nations, through a joint decision-making process.

12. For consultation to be meaningful, the Crown must include First Nations in the first stages of decision-making. The Crown has a legal duty to consult, which arises when it has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might affect it.

14. Although the *Sparrow* requirements are prerequisites for the validity of Crown Action, they do not end at the decision-making stage. They are ongoing and continue for as long as Crown authority is being exercised.

15. A Third Party may be liable to a First Nation for its Actions. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable.

16. The Crown alone remains legally responsible for the consequences of its Actions and interactions with Third Parties that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development. However, this does not reduce or replace the Crown's own constitutional and fiduciary duties to First Nations. Third Parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The Crown's duties cannot be delegated.

In *Delgamuukw* and in judgments such as *Jack, Sampson, Halfway River, Mikisew, Nikal*, and *Gitxsan*, the courts have articulated the following additional principles regarding consultation and accommodation.

a) There is a duty on the Crown to ensure that a First Nation is provided with full information on the conservation [or any other] measure and its effect on the First Nation and other user groups (*R. v. Jack* (1995) 16 B.C.L.R. (3d) 201 B.C.C.A. (*Jack*).
b) The Crown is required to explain the need for a particular conservation [or other] measure (*R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 (B.C.C.A.: (*Sampson*).
c) The Crown has a duty to fully inform itself on the fishing [or other] practices of the Aboriginal group and ascertain the First Nation's views of the conservation [or other] measures (*Jack*).
d) The Crown's duty to consult is not fulfilled by merely waiting for a First Nation to raise the question of Aboriginal rights (*Sampson*); there is a positive duty on the Crown to inform and consult (*Halfway River v. British Columbia (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.) (*Halfway River*).
e) The fact that a First Nation receives adequate notice of an intended decision does not mean that there has been adequate consultation (*Halfway River*).
f) 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 can adequately 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 (*Halfway River*).
g) Consultation must be undertaken with the genuine intention of substantially addressing the concerns of First Nations (*Mikisew Cree First Nation*).

h) There is a reciprocal duty on First Nations 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 available to them (*Halfway River*).
i) Providing "standard information," which is of the same form and substance as the information being given to all interested stakeholders taken alone, does not constitute consultation within the meaning of section 35(1) (*Mikisew Cree First Nation*).
j) First Nations are entitled to a distinct consultation process apart from public forums or general public or stakeholder consultations. Whether or not there is a lesser duty to consult or a higher duty, meaningful consultation must occur (*Mikisew Cree First Nation*).
k) The concept of reasonableness applies to the duty to consult (*R. v. Nikal* [1996] 1 S.C.R 1013).
l) The shortness of time or the economic interests of non-First Nations are not sufficient to obviate the duty of consultation (*Gitxsan and other First Nations v. British Columbia (Ministry of Forests)*, 2002 BCSC 1701 (*Gitxsan and other First Nations*).
m) The first step in any consultation process is a discussion of the consultation process itself (*Gitxsan and other First Nations*).
n) Whenever the federal or provincial government makes a decision that infringes a First Nation's right, it must be justified (*Sparrow*).

APPENDIX D

CONTACT INFORMATION

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