



Crown Consultations with Modern Treaty Partners

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Sources of Crown Consultation Obligations

- Common law legal duty to consult.
- Modern Treaties and other agreements and protocols between government and Indigenous groups.
- Statutory obligations, e.g. Section 8 of the *Mackenzie Valley Resource Management Act* provides that “The federal Minister shall consult the first nations, the Tlicho Government and the Déline Got’ine Government with respect to the amendment of this Act.”
- Policy/good governance.



Nature of Consultation Duties

Duties in relation to consultations are specific to the source of the obligation:

- Common Law Duty to Consult obligations are determined by case law.
- Consultation obligations arising from Modern Treaties are determined by the Treaty itself interpreted in a manner consistent with the honour of the Crown.
- Consultations based on policy/good governance do not carry specific duties, but are governed by the principle ‘the honour of the Crown’.



Evolution of the Concept of the Duty to Consult

1982	s. 35 of the Constitution Act	<ul style="list-style-type: none">• The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
1990	Sparrow	<ul style="list-style-type: none">• Duty to consult as part of the inquiry into whether the Crown could justify an infringement of a section 35 right.
1997	Delgamuukw	<ul style="list-style-type: none">• Applied Sparrow in the Aboriginal title context.
2004	Haida/Taku	<ul style="list-style-type: none">• Described the duty as applying to assertions of section 35 rights.
2005	Mikisew	<ul style="list-style-type: none">• Extended the duty to Crown conduct implementing treaty provisions.
2010	Rio Tinto	<ul style="list-style-type: none">• Confirmed that the duty is prospective.• i.e. it applies in relation to potential impacts on current conduct not past conduct.
2010	Little Salmon	<ul style="list-style-type: none">• Where a modern agreement includes consultation provisions, the duty to consult continues to apply in relation to aspects not covered by the agreement.
2014	Tsilhqot'in	<ul style="list-style-type: none">• Confirmed that the duty applies before title is established;• After title is established consultation is a pre-requisite to justifying an infringement of Aboriginal title.
2017	Chippewas / Clyde River	<ul style="list-style-type: none">• Regulatory agencies may both trigger and fully satisfy the duty to consult• Impacts of the proposed conduct must focus on impacts on the s. 35 rights at issue• Consultations are not formulaic
2018	Mikisew	<ul style="list-style-type: none">• The duty to consult cannot apply to legislative action.



Hallmarks of the Duty to Consult

As a Crown duty, it applies to both federal and provincial governments, but not private entities such as project proponents.

The fundamental purpose is to advance reconciliation.

It applies where the rights that may be impacted are established (by way of an agreement or by a court decision) or are asserted, but not yet established.

The scope and content of the duty varies with the strength of the claim to the asserted right, or the importance to the Indigenous community of the established right, and the seriousness of the potential adverse impacts.

In all cases what is required is reasonable, good faith efforts to provide meaningful consultation that seeks to reconcile the interests at stake.

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Triggering the Duty to Consult

Three concurrent elements trigger the duty to consult:

- contemplated Crown conduct;
- section 35 rights; and
- potential adverse impacts on the rights.

There must be a nexus between the Crown conduct and the potential adverse impacts on rights.



Crown Conduct as a Triggering Event

Crown conduct is cast broadly and can include planning, decision-making, a course of conduct. Some examples are:

- federal government transactions or projects (e.g. land disposals, leases, re-use plans or physical federal undertakings or operations)
- approval processes for third-party projects (e.g. interprovincial pipeline, environmental assessments and related activities or decisions)
- proposed settlements with Indigenous groups where there are overlapping claims (e.g. land claims agreements, additions to reserve).

The duty to consult arises when the Crown is contemplating a decision or a course of action that may have a negative effect on a section 35 right, established or asserted.

Crown conduct does not include legislative initiatives, though some uncertainty remains with respect to regulations.





Fulfilling the Duty to Consult

The content of the duty to consult varies with the circumstances, but generally includes the following:

- early notification;
- opportunities for Indigenous groups to become involved;
- provision of relevant, sufficient and timely information about proposed project;
- sufficient time for Indigenous groups to participate in consultations, consider information provided and respond;
- consideration of the Indigenous group's ability to participate in consultation, including capacity funding;



Fulfilling the Duty to Consult (*Continued*)

- giving meaningful and timely responses to questions and concerns raised during consultation;
- making genuine efforts to understand concerns and attempt to address them;
- ensuring the record or reasons provided demonstrate that concerns of Indigenous peoples were considered and understood, and how they had in impact on the decision.



Accommodation

The duty to consult is to consult and, where (if) appropriate, accommodate Indigenous interests.

Accommodation has been described in various ways:

- seeking compromise in an attempt to harmonize conflicting interests and to move parties further down the path towards reconciliation and the need to uphold the honour of the Crown;
- making good faith efforts to understand concerns of Indigenous peoples, and attempting to address them;
- taking steps to prevent irreparable harm or to minimize adverse impacts, e.g., adjusting an activity, policy or process; placing terms or conditions on regulatory authorizations; financial compensation.



Accommodation *Continued*

Consultation may reveal a duty to accommodate when there is an established right or a strong prima facie claim and the potential adverse impacts would be significant.

The scope and content of the duty to accommodate is still an evolving concept in the jurisprudence, with very little direction from the courts thus far.



Consultation Obligations - Modern Treaties

The seminal case with respect to consultation obligations arising in respect of Modern Treaties is the 2010 decision of the Supreme Court of Canada in *Little Salmon Carmacks First Nation v. Yukon*.

This case involved a challenge by the Little Salmon/Carmacks First Nation of the approval of a land disposition decision by Yukon on the grounds that the decision was made without proper consultation with the First Nation.

The Modern Treaty at issue was the Little Salmon/Carmacks First Nation Final Agreement to which the Yukon was a signatory.

The Treaty (like many Modern Treaties) had many provisions expressly setting out a right to consultation in specific situations as well as definition of the terms “Consult and “Consultation.”



Consultation Obligations - Modern Treaties

The Yukon government argued that the Treaty clearly indicates that the parties turned their mind the issue of consultation and expressly set out all the situations to which there was an obligation to carry out consultation. Therefore, if the Treaty did not expressly provide for a consultation obligation there was no such obligation.

The Little Salmon/Carmacks First Nation argued that the common law duty to consult applies to any Crown action that has the potential to adversely impact a Section 35 right, including their rights under their Treaty.



Consultation Obligations - Modern Treaties

In *Little Salmon* the SSC ruled that the fact that consultation is expressly required by the terms of a Modern Treaty in some situations does not mean that consultation is not required in other situations where the Modern Treaty is silent on consultation obligations. The duty to consult is a means (in appropriate circumstances) of upholding the honour of the Crown.

Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people - it is a doctrine that applies independently of the expressed or implied intention of the parties.



Consultation Obligations - Modern Treaties

The Little Salmon decision and subsequent case law have confirmed that the starting point for any analysis of the duty to consult in respect of a Modern Treaty is the text of the agreement itself. Where its terms address the duty to consult in a given situation, then the scope of that duty will primarily, if not exclusively, be shaped by those terms. If the agreement is silent on the duty to consult in that situation, or if the provisions of the Modern Treaty reveal a gap that is not in keeping with the honour of the Crown, then a common duty to consult will apply.



Consultation Obligations - Modern Treaties

The common law duty to consult, therefore, has two important applications in respect of Modern Treaties.

Firstly, it will be an important yardstick against which any express consultative requirements in the Modern Treaty will be assessed to determine if they are sufficient to maintain the honour of the Crown

Secondly, if there are no express consultative requirements, or those that do exist are determined to be insufficient to maintain the honour of the Crown, then the common law duty to consult will apply to the extent necessary to maintain the honour of the Crown.



Modern Treaty right to consultation compared to the Common Law Duty to Consult

Right v. Duty

While the content of common law duty to consult and an express right to be consulted in Modern Treaty will in many cases be very similar, there are some note-worthy potential differences.

In the Little Salmon decision the SCC rejected the proposition that because the common *duty* to consult is “constitutional” there must be a reciprocal constitutional *right* of the First Nation to be consulted. The implication of this is that a failure to fulfill the common law duty to consult is not an infringement of a Section 35 right and there is no *Sparrow* justification analysis involved.



Modern Treaty right to consultation compared to the Common Law Duty to Consult

In contrast, an express right to be consulted set out in a Modern Treaty is a treaty right and a failure by government to consult in the manner mandated by the Modern Treaty has been viewed by as an infringement of Treaty right.

In *Corporation Makivik c. Québec (Procureure générale)*, 2014 QCCA 1455. The Quebec Court of Appeal found that the provincial government had not fulfilled its consultation obligations under the James Bay and Northern Quebec Agreement in respect of changes to the provincial hunting, fishing and trapping regime. Since the consultation obligations were express rights of the First Nations under the Modern Treaty, the Court of Appeal viewed this as an infringement of the Treaty. The Court then engaged in a *Sparrow* analysis to determine if such an “infringement” was justified.

There has been very little case law on this issue. It will be interesting to see how the law develops on this.



Modern Treaty right to consultation compared to the Common Law Duty to Consult

Different Triggers

The common law duty to consult arises when the Crown is contemplating a decision or a course of action that may have a negative effect on a section 35 right, established or asserted.

A right to be consulted under a Modern Treaty is not necessarily limited to a situation where the Crown is contemplating a decision or a course of action that may have a negative effect on a right under the treaty. The trigger for when the right to be consulted is engaged will be dictated solely by the terms of the treaty.



Modern Treaty right to consultation compared to the Common Law Duty to Consult

Consultation on Legislation

In the 2018 decision in *Mikisew Cree* the SCC held that Parliament's law making process, from policy development to Royal Assent, is not subject to the common law duty to consult. Therefore, there is no common law duty to consult with respect to the development and enactment of primary legislation (statutes). The SCC did not rule on the question of whether the common law duty to consult would apply to the making of subordinate legislation (regulations).

In contrast, several Modern Treaties include a right to be consulted on the development of both primary (statutes) and subordinate (regulations) legislation.