FROM THE LAND TO THE SUPREME COURT, AND BACK AGAIN: DEFINING MEANINGFUL CONSULTATION WITH FIRST NATIONS IN NORTHERN BRITISH COLUMBIA

by

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Abstract

Jurisprudence on Aboriginal title and rights is placing increased emphasis on the importance of consultation and accommodation with First Nations when government activity may infringe on Aboriginal title and rights. While consultation may appear to increase dialogue and relationship building between government and First Nations, litigation and further conflict continues over what constitutes meaningful consultation. In a political climate of natural resource development absent of treaties, many of the legal cases on Aboriginal title and rights have emanated from the Northern British Columbia region. This research addresses the lack of literature outside of legal discourse on the principles and process of meaningful consultation by incorporating literature on general public participation and First Nations co-management. Exploring the perspectives of the Government of BC, First Nations in Northern BC and the Supreme Court of Canada on meaningful consultation, this thesis identifies key issues including: the importance of consent, trust and relationship building, financial assistance for participation, joint development of consultation processes, and the level at which consultation takes place. Looking to environmental dispute resolution processes as a possible starting point for consultation, this thesis highlights some of the inherent conflicts between government and First Nations underlying consultation and accommodation.

TABLE OF CONTENTS

List of Figures and Tables

Figures

Tables

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Introduction

Research Topic

> *Consult*: v. 1. seek information or advice from. 2. seek permission or approval from.[1]

Provincial consultation with and accommodation of First Nations[2] in Northern B.C. is a political, legal and cultural issue that is in the midst of development and change. While the Province interprets their duty to consult First Nations in accordance with the first definition of consultation noted above, First Nations' interpretation more closely reflects the latter. The legal underpinnings of consultation emanate from the Supreme Court of Canada through landmark decisions such as *Sparrow*, *Delgamuukw* and most recently *Haida* and *Taku*. In examining the range of approaches to meaningful consultation, the Court has been largely silent on the process that government and First Nations should engage in. Yet, government has wasted no time in developing its own policies and procedures, albeit without the involvement of First Nations. First Nations, too, have been quick to respond to provincial policies and to provide their own interpretations of court decisions and in some cases are developing their own consultation and accommodation policies and procedures.

The result is that disputes over what constitutes meaningful consultation and when consultation is required, continue - many of which are within the Northern B.C. region. While the Supreme Court has called for the resolution of competing title and rights through negotiation, as opposed to litigation, it appears that litigation is not abating, indicating impasses in negotiation.

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[1] Oxford Dictionary, s.v. "consult".

[2] The term "First Nations" will be used in this research when the reference is to the First Nations on which the research is based. The term "Aboriginal" will be used in discussing Aboriginal rights and title, as so established in the *Constitution Act, 1982* and in Supreme Court decisions on Aboriginal rights and title. The term "Indigenous" will be used only when a specific author uses such a term. However, both "Aboriginal" and "Indigenous" include First Nations.

Interest in Research Topic

My interest in this research topic stems from my personal, academic, and professional background. As a member of the Gitxsan (Gitanyow) First Nation, born in and raised throughout Northern B.C., my personal background has led me to pursue an academic career focused on the exploration and resolution of the political divide that exists in our Northern B.C. communities between First Nations and non-First Nations. As a graduate in First Nations Studies, with a Minor in Political Science I found that the Province is a key actor in First Nations politics, leading me to pursue professional experience with the Provincial Government of British Columbia. During my B.C. Legislative Internship, and subsequent employment with the Province, I was able to witness firsthand as key legislation on land and resource management and First Nations relations was introduced, debated, and passed. At a time when the historic *B.C. Referendum on Treaty Negotiation Principles* (July 2002) was taking place, sweeping forest legislation was being introduced, and the *Provincial Policy for Consultation with First Nations* (October 2002) was established, I became acutely aware of the complex and deep conflict that existed between the Province and First Nations.

During the course of my Masters degree I have also been able to work as an analyst for a large First Nations political organization in the Prince George area, with involvement in consultation and accommodation, but primarily in treaty negotiations. With knowledge of the apparent court 'victories' of First Nations on consultation, it was difficult to understand why consultation was not more successful for both parties involved. Therefore, this research is a reflection of these questions and problems. It is an attempt to look not only at the legal principles established by the Supreme Court, but to also look at how the various parties involved, and the academic discourse, are defining meaningful consultation and accommodation.

Research Question

This research examines the range and diversity of approaches to meaningful consultation and accommodation. The research question posed is: *How do the Supreme Court of Canada, First Nations within Northern B.C., and the provincial government define meaningful consultation?* Subsequently: *What are the gaps or inconsistencies between these definitions, according to criteria identified in the literature on public participation and First Nations' involvement in natural resource management?*

Research Rationale

In discussing and examining what has largely been a legal debate thus far, the incorporation of criteria based on academic literature broadens the discourse and provides insights from both practical and theoretical sources. The literature review in Chapter One establishes a set of criteria that informs the comparative analysis of the three actors' approaches to meaningful consultation. The following three chapters seek to answer the main research question, and the final two chapters explore some of the fundamental gaps in interpretation, understanding and political objectives between the Province and the First Nations in Northern B.C. on consultation and accommodation.

Further and perhaps immediate developments in this area are certainly guaranteed, whether in the legal or political arena. This research was, opportunely, conducted in the months prior to, and in the wake of the *Haida* and *Taku* decisions at the Supreme Court of Canada. Thus, the spirit of change, volatility and debate will hopefully be captured here. However, because these issues are still largely in flux, this research is limited to this immediate time period.[3] Consequently, the conclusions and recommendations will certainly be judged by time.

In examining this research topic, there are numerous different academic contexts that inform the debate. The most relevant to the discussion of First Nations consultation and

[3] Up to and including June 2005.

accommodation in Northern B.C. can be described as follows: Politics in Northern B.C., Treaty Negotiations and First Nations-B.C. relations, Legal Discourse on Aboriginal Rights and Title, and the Importance of Consent for First Nations.

Politics in Northern British Columbia

Communities in Northern B.C. are at an economic, social, political and inter-cultural cross-road. As non-Native populations dwindle due to lack of economic opportunities, and First Nations communities continue to grow due to high birth rates, the social dynamic of the region is changing. This factor, compounded with an increase in litigation between Northern B.C. First Nations and government on land title and natural resource decision-making creates a unique opportunity to research the practice of consultation between the provincial government and First Nations. Natural resource extraction and development has long been the backbone of northern communities, for both Native and non-Native populations. In addition to external economic factors, the issue of land title and resource management authority presents serious challenges to the survival of Northern B.C. communities. The reconciliation of Crown sovereignty with Aboriginal title has been one of the North's most critical challenges to date, and will undoubtedly continue for years to come.

Coates and Morrison stress the importance of building better relationships between First Nations and non-Natives for the long-term stability and survival of northern communities. They also indicate that non-Native communities can learn from the political positions of First Nations:

> *There is a lesson to be learned from those First Nations people who live in the Provincial Norths. The lesson arises from their continuing efforts to secure a fair share of the benefits arising from the economic development of their homelands...Indigenous inhabitants, who are permanent residents of the region, wish to ensure stability and prosperity for themselves and their children, and thus come to the question of resource development from a different perspective. For them, resources are to be developed as the people who own them – the Native community – require, and according to*

a schedule which maximizes returns to the community rather than quick profits for investors."[4]

For Coates and Morrison, this type of approach would help to break the cycle of "boom and bust" development and stabilize the economic, social and political well-being of the region. Elsewhere, Coates reiterates the central importance of First Nations involvement and partnership in resource management. He states that "without a settlement of First Nations claims, and without a climate of certainty that successful treaties create, resource companies will shy away from the region, weakening an already vulnerable economy."[5]

Treaty Negotiations and First Nations-B.C. Relations

The larger context of treaty negotiations, and what has been termed "the Indian Land Question," reaches back into the history of the province, and the current legal debate on consultation can be seen as its most recent manifestation. Geographer Cole Harris, who documents the history of the creation of Indian reserves in British Columbia in his book *Making Native Space,* has stated that "the heart of the Native land question in British Columbia lies in two basic stories about land, one about dispossession, the other about development."[6] For First Nations, the driving force behind their political life has been prevention or reversal of their dispossession of land. For the Province, the driving impetus has been the development of the land and resources, to both sustain settler populations and to utilize land deemed underdeveloped.

Harris characterizes the current political situation between First Nations and the Province as the outcome of this historical and continuing division:

For 150 years a contested division of land between Native and non-Natives has underlain the Canadian province of British

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[4] Ken Coates and William Morrison, *The Forgotten North: A History of Canada's Provincial Norths*, (Toronto: James Lorimer & Company, 1992), 124-125.
[5] Kenneth Coates, "Northland: The Past, Present and Future of Northern British Columbia in an Age of Globalization," in *Writing Off the Rural West: Globalization, Government, and Transformation of Rural Communities*, (Edmonton: University of Alberta Press, 2001), 122.
[6] Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002), 294.

> *Columbia. Recently, as a result of decisions of the Supreme Court of Canada, the treaty process in the province, the signing of the Nisga'a treaty, and, underlying them all, increasingly forceful Native voices, the Native land question is more to the fore than ever. Lawyers, consultants, and researchers gather around the issues involved. Protracted and expensive court cases generate mountainous collections of evidence and reports. The political temperature rises, not always overtly, because people are afraid to be thought racist, but to the point where throughout the province the Native land question is probably now more volatile than at any time since the 1870's.*[7]

For Harris, the choice that currently exists before the parties is between a "politics of difference" and a "politics of assimilation."[8] Because of the dismal failure of past attempts at assimilation (i.e. residential schools), Harris contends that to truly recognize and respect the differences of First Nations, that reallocation of land and resources must occur. He warns that "if the reallocation of resources does not occur, then, essentially, a passive politics of assimilation will have prevailed."[9]

In looking to the courts for resolution of the land question, Harris feels that the Supreme Court is limited in its ability to provide the justice that First Nations seek. Radical Supreme Court decisions in favour of First Nations are not likely because it would undermine the court itself, if not the entire country. Decisions provide some guidance, but ultimately "return the issue to the theatre where, finally, it has to be resolved, that is, to the realm of politics and to negotiations." However, he is not confident that a final solution or resolution is possible, nor necessarily desirable. The lessons of the last 150 years illustrate that previous efforts at finality have failed, and where final agreements have been reached, they have been subsequently challenged by both First Nations and government (i.e. James Bay Agreement and Nisga'a Final Agreement). More likely, is that the Native land question

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[7] Harris, *Making Native*, 293.
[8] Harris, *Making Native*, 297.
[9] Harris, *Making Native*, 316.

in B.C. will remain "an ongoing axis of tension...partially addressed constitutionally, or politically...but inevitably part of what Canada is."[10]

While not overly confident in the legal system in resolving the land question, Harris does note that First Nations have used the courts "because a respectful political dialogue was not open to them, and also that the possibility of such dialogue still exists – if the settler society of British Columbia has the will for it."[11] The political will of settler society is paramount for Harris, in his concluding recommendations he thus calls on settler society to reconcile with the historical and current reality of the province. "The Native land problem grew out of settler society itself," the policies of past and present provincial governments "were little more than reflections of the dominant values around them."[12]

While treaty negotiations in B.C. remain the primary vehicle for the resolution of the land question, consultation and accommodation has become increasingly important because of the protracted and lengthy negotiations towards treaties. Nonetheless, understanding some of the debate around treaty negotiations is necessary for this research. While Harris makes it clear why First Nations desire treaty negotiations, McKee identifies why the Province has come to the negotiating table. He explains that "the reasons for negotiating treaties with Aboriginal peoples are grounded in a combination of legal requirements, political imperatives, and historical precedents." However, the primary "motivating force behind the initiation of the current treaty-making process in the province, [is] the cumulative effect of court rulings on the Aboriginal policies of the federal and provincial governments."[13]

The importance of legal imperative also guides the consultation and accommodation process, and rests on the larger discourse on First Nations' place in the Canadian

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[10] Harris, *Making Native*, 321.
[11] Harris, *Making Native*, 322.
[12] Harris, *Making Native*, 323.
[13] Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* 2nd ed. (Vancouver: UBC Press, 2000), 110-111.

Constitution and the federation of Canada. Poelzer explains a favorable view of First Nations existing *within* the sovereign of Canada as follows:

> *If the current treaty process is successful, it will lead to the accommodation of First Nations political communities within the federal political order. Contrary to the mistaken view that non-aboriginal Canada is built on the principles of "One Country, One People, One Law," the federal political order is very much a collection of political communities, some with very distinct cultures, joined together by a "treaty" called the Constitution. The creation of another order of territory-based government within the Canadian federation would be an extension of an already-existing practice, one that promotes integration and accommodation.*[14]

Others have problematized the notion of a 'domestic' notion of treaty negotiations. Taiaiake Alfred states that even using the term 'treaty' to characterize current negotiations is misleading because the process is "structured and intended, in its promotion of federal and provincial legal supremacy, to terminate the heretofore independent political existence of indigenous nations."[15] Alfred questions the true intention of treaty negotiations, specifically if they can actually produce self-determination for First Nations; he asks "what can self-determination and self-government really mean for indigenous peoples if all federal and provincial laws apply on indigenous lands?"[16]

Similar to Harris, Alfred emphasizes the limitations of court decisions in achieving justice for First Nations. He encourages First Nations to follow legal victories with action to ensure their implementation, and "to consider the practical ways that the apparatus of government counters the evolving law of Aboriginal title, and how government personnel...develop strategies to undermine even minimal court-mandated recognitions of indigenous rights."[17]

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[14] Greg Poelzer, "Land and Resource Tenure: First Nations Traditional Territories and Self-Governance," in *Prospering Together: The Economic Impact of the Aboriginal Title Settlements in B.C.*, 85-110, (Vancouver: Laurier Institution, 2001), 101.
[15] Taiaiake Alfred, *Deconstructing the British Columbia Treaty Process* (University of Victoria: 2001), 4.
[16] Alfred, *Deconstructing*, 8.
[17] Alfred, *Deconstructing*, 15.

While Alfred's arguments rest on the existence of First Nations' sovereignty as the impetus behind negotiations, Tom Flanagan argues that Aboriginal people in Canada have never possessed sovereignty. Flanagan challenges what he has termed "The Aboriginal Orthodoxy", a kind of consensus in policy and public discourse on Aboriginal issues. He warns against the constitutional entrenchment of Aboriginal self-government, and targets many of the authors and political leaders cited here.

To support his arguments, Flanagan claims that Aboriginal people cannot hold title to land because they were simply the "first wave of immigrants" in Canada, and therefore have no right to the land they claim as their territories. Moreover, that:

> *European civilization was several thousand years more advanced than the aboriginal cultures of North America, both in technology and in social organization. Owing to this tremendous gap in civilization, the European colonization of North America was inevitable and, if we accept the philosophical analysis of John Locke and Emer de Vattel, justifiable.* [18]

Once these two facts have been established, Flanagan concludes that Aboriginal people do not possess sovereignty, nor did they ever. Flanagan contends that because "sovereignty is an attribute of statehood, aboriginal peoples in Canada had not arrived at the state of political organization prior to contact with Europeans."[19]

In addition to challenging the aspirations for Aboriginal self-government, Flanagan also condemns the current Indian Act band governments throughout Canada claiming they produce "wasteful, destructive, familistic factionalism," and calls for more accountability in Aboriginal governments. [20] In addition, if Aboriginal governments are to be successful, Flanagan recommends Aboriginal people:

> *Acquire the skills and attitudes that bring success in a liberal society, political democracy and market economy. Call it*

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[18] Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000), 6.
[19] Flanagan, *First Nations*, 7.
[20] Flanagan, *First Nations*, 7.

assimilation, call it integration, call it adaptation, call it whatever you want: it has to happen.

The notion of assimilation is also at the core of the land question in British Columbia. While those such as Flanagan encourage the assimilation of First Nations people, successful assimilation in their eyes can also be used as an argument against their aspirations for distinct rights and governance. Paul Tennant, in his account of Aboriginal politics in British Columbia, explains that there are two common and complementary beliefs that mainstream British Columbia holds. The first denies the existence of Aboriginal rights "on the grounds that Indians were in the beginning too different from Whites." The second "denies Aboriginal rights on the grounds that Indians have become too similar to Whites."[21] Tennant maintains that these public perceptions have instructed and allowed governments to develop policies and positions of denial and refusal to address Aboriginal rights and title.

Legal Discourse on Aboriginal Rights & Title

While there is vast literature available on Aboriginal rights and title in Canada, as noted earlier, it is largely devoted to detailing and analyzing the available case law. Because this research includes a chapter on the Supreme Court of Canada's account of meaningful consultation, and attempts to focus more on the political arena of consultation (albeit informed by the legal arena), this is not meant to be an exhaustive discussion of the legal discourse on Aboriginal rights and title.

The legal and political discourse on Aboriginal rights and title is in the process of evolution, and the primary catalyst for their re-conceptualization was their recognition and affirmation in section 35 of the *Constitution Act, 1982*.[22] While the constitutional entrenchment of Aboriginal rights provided some political leverage for First Nations, land

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[21] Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990), 15.

[22] Catherine Bell and Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation", in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997), 38-74.

and resource issues remain tenuous because of the provincial jurisdiction over Crown land and resources under section 92 of the Constitution. Bartlett raised this fundamental dilemma and posed the question, which title, Crown or Aboriginal, is dominant under the constitution? While he did not provide his own answer, he does allude to the fact that government must "give up" some of its jurisdiction and privileges of economic rent, in order to operate within the new Constitutional framework.[23]

Writing after the Supreme Court decision on *Delgamuukw* and the following cases before the lower courts on consultation, Macklem and Lawrence emphasized the need for jurisprudence that provides incentive for the parties to negotiate and decreases litigation. The problem they identify is that the Supreme Court established such broad parameters for consultation that "lower courts have been left with the unenviable task of determining many of the practicalities of the duty to consult, including questions relating to the *who*, *when*, and *how* of consultation." Their analysis of lower court decisions also found that "most decisions also fail to vest the duty with any meaningful content. The result is a duty that is essentially procedural in nature, stripped of its ability to foster negotiated settlements."[24]

Also following the *Delgamuukw* decision, Gurston Dacks carried out research to examine the impact of the ruling on political negotiations in British Columbia between First Nations and government. He found that government positions had actually become more entrenched, and the resulting impasse had frustrated First Nations.[25] Dacks notes the increase in consultation activity post-*Delgamuukw* as representing "a measure of recognition of Aboriginal rights and title, but it does not amount to the co-management of lands and resources that many British Columbia First Nations seek." Moreover, that First Nations do

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[23] Richard Bartlett, *Resource Development and Aboriginal Land Rights* (Calgary: Canadian Institute of Resources Law, 1991).
[24] Patrick Macklem and Sonia Lawrence, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult," Canadian Bar Review 79 (2000): 258.
[25] Gurston Dacks, "British Columbia after the *Delgamuukw* Decision: Land Claims and other Processes," *Canadian Public Policy* 28 (2002): 239.

not "feel that this consultation has significantly slowed the pace of resource development or protected their basic interests."[26]

Dacks notes the increasing emphasis on litigation to resolve disputes, and the resulting dynamic between negotiations and litigation within which government and First Nations find themselves operating. He claims, however, that governments will always have the advantage in litigation:

> *Governments can take considerable comfort in the Delgamuukw decision. While their resources are not endless, they are better able to fight a war of legal attrition than are most First Nations. Moreover, the governments are in an excellent position to influence the First Nations' calculations as they contemplate the appropriate balance between litigation and negotiation.*[27]

Since the time Dacks wrote his article in 2002, it is clear that the 'war of legal attrition' has no immediate end in sight. As the discussion in this thesis on the more recent Supreme Court decisions shows, there are still many questions left unanswered, which will likely lead to further litigation to clarify the issues that First Nations and government bring forth. One of the driving issues for First Nations is that of consent. In the historical, legal and political context canvassed here, First Nations' consent to any political arrangement with government is paramount, and consultation is one manifestation of this outstanding issue.

The Importance of Consent for First Nations

Frances Abele, in looking at the patriation of the Canadian Constitution, and the ensuing debate on Aboriginal rights, including the Royal Commission on Aboriginal Peoples, observes that Indigenous consent is one of the common threads throughout the variety of expressions of Aboriginal peoples' right to self-determination. She states that "the consent of indigenous collectivities to the form of government in which they participate" remains

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[26] Dacks, *British Columbia*, 252.
[27] Dacks, *British Columbia*, 251.

crucial because "it is the absence of consent that has caused the greatest difficulty."[28] However, similar to consultation, the scope of consent is broad and complex. She states that "attempting to base a polity on consent rather than coercion always raises important questions," including who consents, and how to define what is being consented to.

Clearly, the topic of consultation and accommodation between the Government of British Columbia and First Nations in Northern B.C. can be researched in a wide-ranging context and is linked to numerous other topics. In an attempt to examine the process and principles of meaningful consultation and accommodation, however, the following chapter draws on literature on public participation and First Nations and co-management to construct a set of criteria that can be used in a comparative analysis of the involved parties' accounts of meaningful consultation and accommodation.

[28] Frances Abele, "The Importance of Consent: Indigenous Peoples' Politics in Canada" in *Canadian Politics* eds. James Bickerton and Alain-G. Gagnon (Peterborough: Broadview Press, 1999), 458.

Chapter One
Criteria to Gauge Meaningful Consultation

In order to examine the principles and process of meaningful consultation different types of literature may be appropriate. Thus far, the majority of literature on the topic focuses primarily on the legal framework established by the Supreme Court of Canada. First Nations authors are also instrumental in explaining First Nations' relationships to the land and the resources of their territories. However, because a wealth of literature on the actual *process* of meaningful consultation has yet to emerge, the literature on public participation serves as a good starting point. Literature on First Nations and co-management will also be drawn on to examine some of the higher levels of consultation, and also because it resonates with the main tenets found in public participation literature.

The purpose of this chapter is to establish a clear set of principles and a reasonably prescriptive approach to the process of consultation. The literature reveals both best practices and critiques of previous or existing public participation practices. From this a set of principles of meaningful consultation and a minimum standard of meaningful consultation process emerges and serves as the criteria for the comparative analysis in Chapter Five. Many of the authors examined here have utilized a form of spectrum in their analysis of the degrees of public involvement in decision making. This parallels the spectrum of consultation that the Supreme Court of Canada established in *Delgamuukw,* and has maintained in subsequent decisions.[29] Finally, it is recognized that certain gaps exist in some of the selected literature because the focus is on general public participation, and does not consider the unique historical, legal and political situation of First Nations. These gaps will be explored in the analysis in Chapter Five, and recommendations will be made on the need for a renewed discourse that incorporates a broad interpretation of consultation from both legal and political perspectives.

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[29] Stan Persky *Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title* (Vancouver: Greystone Books, 1998).

In another light, one may argue that the involvement of Aboriginal people in such initiatives as the Berger Inquiry in the 1970's was instrumental in propelling public participation in natural resource management beyond minimal levels in Canada.[30] The predominance of Aboriginal involvement in the Berger Inquiry on the proposed Mackenzie Valley Pipeline shifted the focus of impact assessment to include social and cultural impacts and effectively halted a development that was enormous in scope. Thus, there may be reason to believe that any further development of theory and practice on First Nations' consultation, may contribute again to the broader field of public participation.

Finally, the courts, and in turn the legal literature, have been reluctant to prescribe specific processes for government and First Nations, choosing instead to "decide on a case-by-case basis whether the consultation carried out is adequate."[31] This leaves the development of meaningful and adequate processes up to government and First Nations. Thus, the literature on public participation is a helpful context in which to explore First Nations' and government's accounts of such meaningful processes.

This chapter draws key themes from the following categories of literature:

- **General Public Participation:** This category includes authors with a variety of approaches. Some are quite critical of existing practices, and describe their weaknesses in an effort to improve them. Others use case studies to glean best practices and develop analytical models to improve existing processes. Finally, some take a more prescriptive approach through the development of handbooks or manuals for practitioners to use in their public participation processes.
- **Public Participation in Environmental Impact Assessments:** This category is distinguished here from general public participation because as a specific process, it was cited by the Supreme Court of Canada as one that meaningfully involved the Taku River Tlingit, and fulfilled the Crown's duty to consult.[32] This includes research on First Nations involvement in the environmental assessment process in British Columbia.
- **First Nations and Co-management:** While there is a wealth of literature on First Nations' culture and approaches to land and resources, this section focuses primarily on their involvement in a range of joint decision-making arrangements. Further

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[30] See for example Bruce R. Mitchell and W.R. Derrick Sewell, eds. *Canadian Resource Policies: Problems and Prospects.* (Agincourt, ONT: Methuen Publications, 1981). 20.
[31] Michael Robinson, Monique M. Ross, and Cheryl Sharvit. *Resource Developments on Traditional Lands: The Duty to Consult.* (Calgary: Canadian Institute of Resources Law, The University of Calgary, 1999), 1.
[32] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.

depiction of First Nations perspectives and positions are the focus of the fourth chapter dedicated to First Nations in Northern B.C.

- **Environmental Dispute Settlement:** Some of the abovementioned literature suggests the inclusion of dispute resolution processes in public participation initiatives. This approach may also be helpful in developing First Nations' consultation processes because of the inherent and underlying conflict of competing land title claims between First Nations and government.

1.1 Literature on General Public Participation

One of the seminal works on public participation is Arnstein's *A Ladder of Citizen Participation.*[33] Her ladder is a visual critique of government attempts to incorporate the public into decision-making (See Figure 1.0). Drawing from experience in inner-city planning in the United States, Arnstein constructs a ladder that "juxtaposes powerless citizens with the powerful."[34] She makes it clear that her ladder is a simplification, but that such simplification is needed to make planners and citizens aware that there are "gradations of citizen participation". Moreover, that knowing that such gradations exist, allows people to "cut through the hyperbole" of citizen participation initiatives.[35]

The base rung on the ladder is *manipulation*, which is a form of "non-participation" in which citizen support is "engineered" through activities such as token spots on committees that have no legitimate function or power.[36] Following this rung is *therapy*, characterized by an assumption that "powerlessness is synonymous with mental illness."[37] This is also a form of "non-participation" aimed at "curing" marginalized groups of their "pathology" rather than changing the system which marginalizes them.[38]

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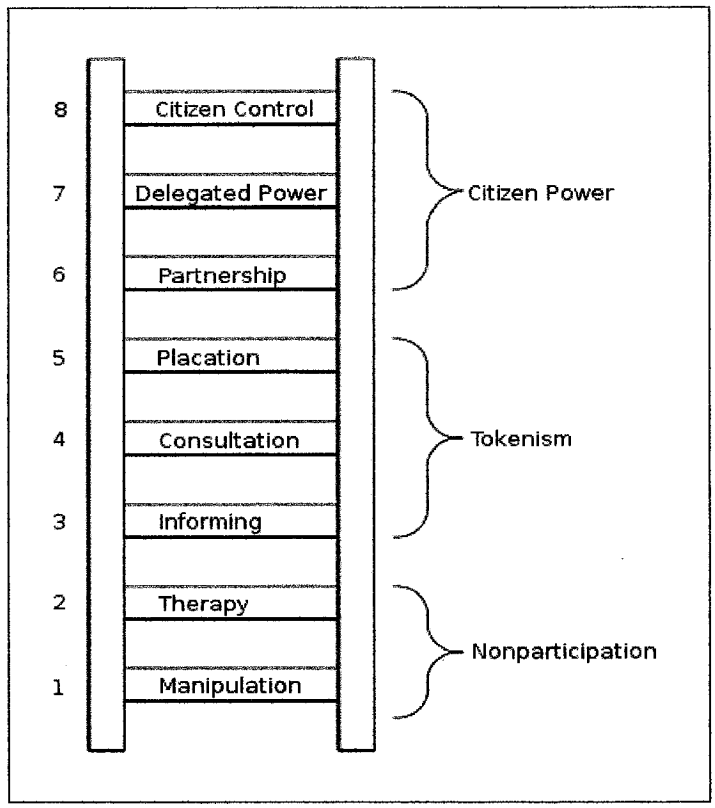
[33] Sherry R. Arnstein, "A Ladder of Citizen Participation," *Journal of the American Institute of Planners.* 35 (1969): 216-224.
[34] Arnstein, "Ladder", 218.
[35] Arnstein, "Ladder", 217.
[36] Arnstein, "Ladder", 217.
[37] Arnstein, "Ladder", 218.
[38] Arnstein, "Ladder", 219.

Figure 1.0 Source Arstein. (1969) 217.



The next three rungs fall under the category of "tokenism". The first is *informing*, consisting of a one-way flow of information, provided at a late stage in the project planning, and with no room for negotiation. The common example of this is where a public meeting is called late in the process to provide largely superficial information, with little opportunity for questions and discussion on substantive issues.[39] Following this is *consultation* which marks the beginning of two-way communication. However, there is still "no assurance that citizen concerns and ideas will be taken into account."[40] Examples of this include surveys and public hearings. Arnstein describes much of this type of activity as ensuring that citizens have "participated in participation", to produce a trail of evidence indicating decision-makers have "gone through the required motions."[41]

Finally, *placation* refers to increased involvement, but still in a token role. For example, "hand-picked" members of the public are put on boards and advisory committees who have some degree of power.[42] Issues around representation become crucial at this level, where members are picked because of their support for the project or decision, and not for their ability to effectively represent their community. While these members may have

[39] Arnstein, "Ladder", 219.
[40] Arnstein, "Ladder", 220.
[41] Arnstein, "Ladder", 220.
[42] Arnstein, "Ladder", 220.

more input, they do not enjoy any form of veto power, nor are they sufficiently compensated for their time and participation.

The top three rungs fall under the category "citizen power" beginning with *partnership.* This is the first level where some degree of power sharing occurs, through negotiated agreement. This is usually the result of some form of outcry from the public, not out of natural inclination on behalf of decision-makers. Examples include joint policy boards and planning committees, whose rules of operation are neither established nor can be changed, unilaterally.[43] Arnstein is clear that a partnership is most meaningful when citizen leaders are accountable to their community; when financial resources are provided for citizen involvement; and when appropriate technical assistance is available to citizens (i.e. lawyers, researchers etc).[44] These are the key "ingredients" needed for citizens to exercise "some genuine bargaining influence over the outcome of the plan."[45]

The following rung is *delegated power* where citizens may form groups that hold significant control and responsibility over a particular program or portion of a larger project. While the power is delegated, these groups necessarily enjoy some form of veto over important decisions impacting their program. While not particularly common, an example is a sub-contract granted to a citizen group to carry out a program that is important to them, including the funding to implement the program, enabling them to hire staff and technical experts. The final rung is that of *citizen control* which translates into some form of neighborhood corporation, in the city planning context, "with no intermediaries between it and the source of funds."[46] While Arnstein sets this out as the ideal, initiatives at this level are still placed in the context of the "pluralistic scene", and remain reliant on government funding for their existence.

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[43] Arnstein, "Ladder", 221.
[44] Arnstein, "Ladder", 221.
[45] Arnstein, "Ladder", 221.
[46] Arnstein, "Ladder", 223.

Beierle and Cayford also evaluate the practices of public participation in the United States, but do so by examining a large number of case studies in environmental decision making.[47] In assessing the success of the cases, the authors identify five main "social goals" for public participation, and rate the cases in their ability to achieve these goals:

1. Incorporating public values into decisions
2. Improving the substantive quality of decisions
3. Resolving conflict among competing interests
4. Building trust in institutions
5. Educating and informing the public[48]

While these goals appear broad, and may in fact compete with one another in some circumstances (i.e. "focusing on extensive public education may be perceived as manipulative, leading to a loss in trust), the authors maintain that they are key in determining whether public participation initiatives are successful.[49]

In examining various forms of processes, the authors concluded that the best processes were found where:

- Agencies are responsive to the public;
- Participants are motivated to participate;
- The quality of public deliberation is high; and,
- Participants have at least a moderate degree of control over the process.[50]

They also found that where processes exhibited these characteristics, they were able to "overcome some of the most challenging and conflicted contexts."[51]

In their recommendations for improvement to public participation processes, Beierle and Cayford suggests that decision makers need to recognize that the role and goals of public participation are central to sound public policy. Moreover, they suggest that the

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[47] Thomas C. Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions*, (Washington: Resources for the Future Press, 2002).
[48] Beierle, *Democracy*, 6.
[49] Beierle, *Democracy*, 15. The authors use an empirical and quantitative "aggregate measure of success" in their final analysis.
[50] Beierle, *Democracy*, 74.
[51] Beierle, *Democracy*, 74.

"grudging view" of many decision makers must be turned on its head. The "grudging view" can be described as follows:

> *...Public participation is a marginal addition – or even an afterthought – to a fundamentally technical decision process...the most that can be hoped for from members of the public is that they do no harm – that they do not degrade the quality of decisions as measured by risk minimization, economic efficiency, cost-effectiveness, or other technical criteria...agencies see active citizens...as opponents and impediments to sound decisions. This unenthusiastic tolerance of a public role easily degenerates into mere public relations whereby decision makers attempt to sell their favored outcome to an uninformed public.*[52]

The authors conclude that a primary shift must occur, from seeing environmental decisions as "fundamentally technical with some need for public input," to seeing many more decisions "as fundamentally public with the need for some technical input."[53]

Pring and Noe, in their discussion of mining and energy development in an international context, identify some of the rationales in support of public participation, as well as the common criticisms of its inclusion in environmental decision making. They point to a "participation explosion" occurring throughout the world over the last four decades, and highlight the increased focus on Indigenous peoples as a part of it.[54] In support of the importance of public participation, the authors distinguish between the *process-based perspective* and the *substantive-based perspective*. The former perspective advocates for 'process for the sake of process', whereas the latter emphasizes the outcomes or results of processes as the basis for public participation.

A process-based perspective maintains that public participation is beneficial because: a) it raises awareness and educates public, b) it provides the public the

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[52] Beierle, *Democracy*, 74.
[53] Beierle, *Democracy*, 74.
[54] George (Rock) Pring and Susan Y. Noe, "The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development," in *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, eds. Zillman et al. (Oxford: Oxford University Press, 2002), 11-76.

opportunity to express concerns, c) it fosters a sense of empowerment, d) it strengthens communities, d) it reduces conflict among competing interests, e) it facilitates government accountability, and f) it contributes to the legitimacy of the decision. On the other hand, substantive based perspectives demand that processes are able to deliver decisions that are: a) substantively better, b) more equitable, c) more environmentally protective, d) more reflective of local needs, and e) more reflective of public values.[55]

The authors also present some of the criticisms aimed at public participation in environmental decision making. They argue that:

- The public is emotional and ill equipped to deal with technical matters;
- Processes demand large amounts of time and administrative resources;
- Consultation can result in lowest common denominator decisions in accommodating all interests;
- Consultation hinders agency creativity in problem solving;
- Large amounts of data can overwhelm lay participants;
- Special interest groups can dominate, with opposing views to that of general public;
- It can be elitist because participants often from upper socio-economic classes; and,
- The public can become frustrated and distrustful if views are not incorporated.[56]

Despite the validity of some of these criticisms in certain circumstances the authors maintain that the benefits outweigh the criticisms and that public participation has become too entrenched in most jurisdictions to be seriously compromised or questioned.

Guidebooks and manuals on public participation provide practitioners and decision-makers with simple, step-by-step instructions on carrying out public participation processes, and tend to be less critical and analytical than the other categories explored in this chapter. The example used here does draw on the more critical literature, but does so in an attempt to provide decision makers with consultation processes that work. Robinson appears to have built on the concept of the public participation ladder, and constructed a "public participation matrix" (See Figure 1.1) which juxtaposes the levels of risk in the situation and

[55] Pring, *Emerging*, 22.
[56] Pring, *Emerging*, 25.

the complexity of information to be understood by the public, with the degree and type of participation activity.[57]

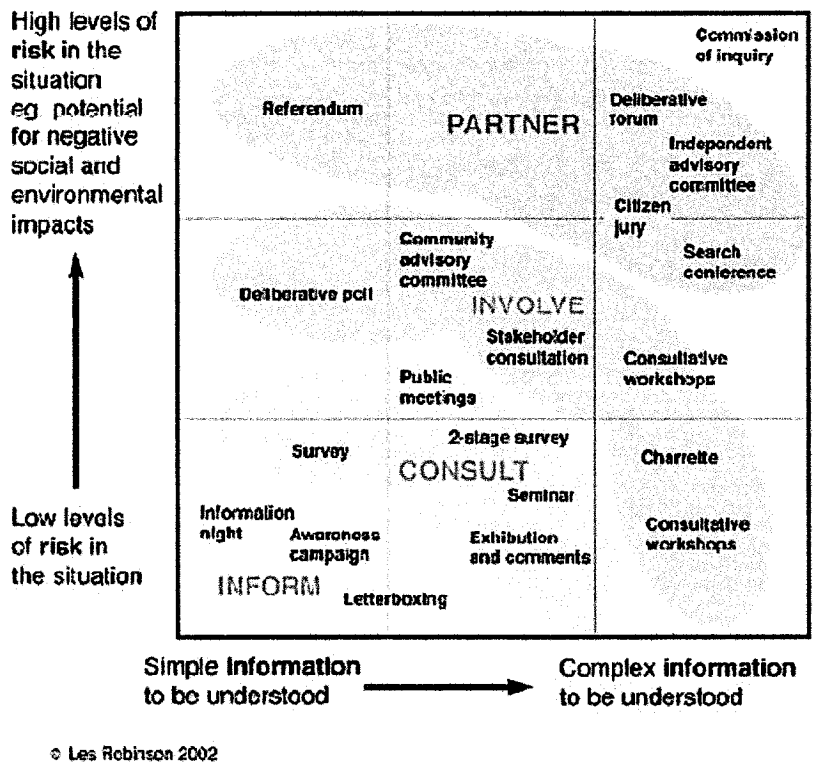

Figure 1.1 Source Robinson. (2002)

Robinson provides this matrix to assist decision-makers in government to determine "what is the right depth of public participation for a given situation?"[58] This approach assumes that it is the sole discretion of government decision makers to determine the depth and type of consultation that will occur.

While many authors writing on public participation often refer to Aboriginal or Indigenous peoples as one segment of the public that may be involved in such processes, there are fewer who focus exclusively on their involvement. However, Alistair Lucas does focus on the importance of Aboriginal constitutional rights and their interaction with mining

[57] Les Robinson *Pro-Active Public Participation: A Strategy for IRR in Western Australia* (Manly: Nolan-ITU, 2002), 10.
[58] Robinson, *Pro-Active*, 1.

development in Canada. In "Canadian Participatory Rights in Mining and Resource Development: The Bridges to Empowerment?" Lucas notes that the only participatory rights enjoyed under the Canadian Constitution are elements of the s.35 Aboriginal and treaty rights. Drawing on Arnstein's notion of 'citizen power' (See Figure 1.0), he asks whether citizen groups and Aboriginal people have achieved some level of empowerment in mining and resource development decision making. He concludes that with the exception of some of the co-management arrangements in the territorial north, that empowerment has yet to be achieved. Lucas also notes that empowerment would be achieved when government seeks Aboriginal peoples' consent where serious infringements of Aboriginal rights and title are at stake. This would meet the requirement for consent established in *Delgamuukw.* He does not, however, provide a specific example of where Aboriginal peoples' consent has been sought and achieved.[59]

1.2 Public Participation in Environmental Impact Assessments

Richard Roberts' chapter titled "Public Involvement: From Consultation to Participation,"[60] provides an informative overview of the evolution of public involvement in Canada, identifies the degrees of public involvement, outlines how to develop a public involvement strategy and framework, specifies the stages in public involvement, discusses some of the current issues facing practitioners in the field, and looks ahead to the future of public involvement. The author makes a clear, yet subtle, distinction between public consultation and participation, both of which are types of public involvement. The key difference is the degree to which those involved in the process are able to influence it and share of control of the decision-making process. While consultation is aimed at informing

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[59] Alistair Lucas, "Canadian Participatory Rights in Mining and Resource Development: The Bridges to Empowerment?" Donald N. Zillman, et al eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources.* (Oxford: Oxford University Press, 2002), 305-353.

[60] Richard Roberts, "Public Involvement: From Consultation to Participation," in *Environmental and Social Impact Assessment,* eds. Frank Vanclay and Daniel A. Bronstein (Chichester: Wiley and Sons, 1995), 221-249.

the public and does involve negotiation, participation "actually brings the public into the decision-making process."[61] Roberts notes there is some confusion around this distinction and that consultation initiatives can raise public expectations as to their involvement.

Roberts reiterates some of the same issues that were discussed by the authors previously mentioned here, including representation – who is the public and how can decision-makers be certain they are contacting a broad cross-section of the public? He suggests the use of a number of strategies rather than a formulaic approach that views the public as an homogenous entity.[62] Another significant factor is timing – when will the public become involved? As already indicated, Roberts also states that the earlier on in the planning process the public is involved, the better. Roberts also outlines a seven point gradation of the degrees of public involvement, beginning with *persuasion,* and ending in *self-determination.*[63] This version does not vary significantly from Arnstein's *Ladder of Citizen Participation* and therefore does not warrant further discussion.

Roberts identifies the minimal stages that any public involvement strategy should consist of:

1. *Early Consultation:* A scoping stage in which the publics and stakeholders and their issues are identified, two-way communication processes are established, and the gathering of relevant social, economic and environmental information is complete.
2. *Initial Planning:* Determining the consultation process itself, whether jointly or with public input only. The public is to be informed of the overall cycle and how and when they can be involved.
3. *Developing the Public Involvement Action Plan:* A further development of Stage II, the specific methods of participation are chosen, including a method of evaluating the process and its outcomes. At this stage, the necessary human and financial resources are allocated to the process.
4. *Implementation:* This is the actual implementation of the process, monitoring, and evaluating the results. If adjustments are necessary, they should be determined here.
5. *Post-Decision Follow-Up:* There is no specific directive here, but a strong encouragement to ensure this stage does not go unplanned. Most public

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[61] Roberts, "Public", 224.
[62] Roberts, "Public", 229.
[63] Roberts, "Public", 230.

> involvement does not include a significant follow-up stage, either in the case of a project that goes ahead, or one that is halted due to public opposition.[64]

Roberts also identifies some of the prominent issues and challenges facing practitioners today. Those with specific relevance to the topic at hand, include "public overload", "paying the public to participate" and "Indigenous and ethnic group consultation." Public overload is a Catch-22 situation, in which the rise in public participation causes the public to be overwhelmed and limits their ability to respond. In turn, when participation wanes because of overload, there is a danger of this being interpreted as a lack of interest in the issue at hand.

The issue of financial resources has not been resolved in most jurisdictions. There has been significant demand for such 'intervener funding', targeting both government and proponents, and in some cases it is allocated. However, "there is no broad-based policy covering the cost of participation."[65] To this end, Roberts states that "it is only appropriate that developers reimburse the out of pocket expenses of those participating, if not paying them for their participation."[66] Lastly, Roberts does acknowledge the unique situation of Indigenous involvement, but unfortunately his analysis is limited because it is lumped together with "ethnic group consultation." He recognizes the need for "rethinking" of involvement strategies in Indigenous contexts, yet this is limited to adjusting procedures and techniques to suit cultural differences, and does not highlight any of the distinct constitutional parameters of Aboriginal peoples' involvement in decision making.

In looking to future directions of public involvement, Roberts notes that the traditional "project-by-project" approach is no longer the extent of public involvement, especially in natural resource issues. This is dramatically shifting "to include ongoing consultation and

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[64] Roberts, "Public", 232-235.
[65] Roberts, "Public", 238.
[66] Roberts, "Public", 238.

participation in the development of policy, legislation, [and] regulations."[67] Moreover, the approaches to public involvement that were developed in the EIA field are now being transferred over into other policy arenas, with much success.[68]

Shepherd and Bowler echo many of the authors cited here and call for decision makers to go above and beyond minimal requirements of public participation in EIA. [69] Claiming that "citizen involvement is often reduced to a procedural exercise instead of a substantive process to include the public in environmental decision making," the authors develop an analytic framework based on the rationales of democracy, suitability, conflict resolution, and improved planning to assess the strengths and weaknesses of current practices.[70]

For Shepherd and Bowler, the democratic ideal and the notion of citizen representation is at the heart of public participation processes. Drawing on the works of Benjamin Barber, the authors state that legitimate decision-making relies on a process that incorporates "the public will."[71] Once this foundation is established, the affected public has the ability to shape the most suitable project for their community. A project that is suitable to the affected public will promote a sense of "project ownership" by citizens, which must be carried through to the implementation stage and beyond.[72]

Any effective public participation process must have a conflict resolution process built into it. This includes alternative dispute resolution (ADR) strategies involving negotiation and mediation.[73] The authors do not recommend avoiding conflict, but allowing it to come into an open forum where disagreements "can be addressed before documents

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[67] Roberts, "Public", 243.
[68] Roberts, "Public", 243.
[69] Anne Shepherd and Christi Bowler "Beyond the Requirements: Improving Public Participation in EIA," *Journal of Environmental Planning and Management* 40 (1997): 725.
[70] Shepherd, "Beyond", 725-726.
[71] Shepherd, "Beyond", 728.
[72] Shepherd, "Beyond", 729.
[73] Shepherd, "Beyond", 729.

are prepared and decisions are made."[74] This can only occur when citizen input is valued as local expertise, and citizen involvement is viewed as a two-way exchange of information.[75] The authors employ these four rationales in two case studies in environmental decision-making in the United States, and conclude with four key recommendations.

1. *Timing:* Public involvement must begin at the earliest stage possible, before planning is so far along that input will be largely irrelevant.
2. *Modification:* Public involvement must be aimed at ensuring the most suitable planning process and project. This means that proponents must expect and plan for modification of their project.
3. *Conflict Resolution and Trust Building:* A central goal must be long-term relationship building, and not just a procedural rubber-stamping of the project. If this is the goal, conflict may lessen.
4. *Continuous Cycle of Planning:* Public participation works best when it "becomes a substantive part of life-cycle environmental management, rather than a procedural obligation to complete."[76]

Beyond the general literature on public involvement in environmental assessment processes, there is also a smattering of literature on First Nations involvement in EIA. Of specific relevance to the research topic at hand, are two case studies from Northern British Columbia. The first article examines three mining developments in Carrier and Sekani territories in north central B.C., and the affected First Nations involvement in the provincial environmental assessment process.[77] In all three cases – Huckleberry Mine, Kemess South Mine, and Mt. Milligan Project – it was found that the "relatively recent Environmental Assessment Act (1995), reflect[ed] a poor integration of First Nations people in the EA decision-making process with respect to mine development."[78]

This conclusion was arrived at by measuring the effectiveness of the EA process, determining criteria to integrate First Nations into a decision-making role, and assessing the

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[74] Shepherd, "Beyond", 729.
[75] Shepherd, "Beyond", 730.
[76] Shepherd, "Beyond", 735-736.
[77] Doug Baker and James N. McLelland "Evaluating the Effectiveness of British Columbia's Environmental Assessment Process for First Nations' Participation in Mining Development," *Environmental Impact Assessment Review* 23 (2003): 581-603.
[78] Baker, "Evaluating", 581.

barriers they experience to full participation.[79] The author identified several key areas in need of improvement in the EA process. First, government and the proponent must do a better job in conveying how the results of First Nations participation will be incorporated into the final decision-making. Second, First Nations need to be involved in the development of the participation process and techniques; this means they must be asked what techniques they actually prefer. Third, government must minimize preferential treatment of one First Nation over another. This causes division, and limits the possibility of consensus.[80]

Another recommendation is that participant funding must be proportional to the technical capability of the First Nation and to the legislated timeline of the process – the shorter the timeline, the more funding is required. Baker's last recommendation may be somewhat problematic, especially from First Nations' point of view – that "government must define First Nations' limits of authority."[81] Given his previous recommendations, one might expect that the 'limits of authority' should be jointly defined, or at least negotiated. If this is done unilaterally, then it may undermine First Nations involvement in the entire process.

The second case study is Shapcott's "Environmental Impact Assessment and Resource Management, A Haida Case Study: Implications for Native People of the North."[82] Similar to Baker, Shapcott interviewed First Nations representatives that were involved in Environmental Assessment processes in an attempt to assess the effectiveness and suitability of this process for First Nations. The author found that, because of unresolved land title, that Haida participation in EA only served to "legitimize and perpetuate" the status quo: "the marginalization and commodification of Native people and the environment

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[79] Baker does employ a policy analysis ("Components of Policy Effectiveness", 585) to arrive at his conclusion which invokes broader issues of policy analysis that are beyond the scope of this research.
[80] Baker, "Evaluating", 599.
[81] Baker, "Evaluating", 600.
[82] Catherine Shapcott "Environmental Impact Assessment and Resource Management, A Haida Case Study: Implications for Native People of the North," *The Canadian Journal of Native Studies* 9 (1989): 55-83.

continues with minimal disruption."[83] This is due to the fact that "until land claims are settled, externally generated assessments will be exercises in frustration and confusion for many Native people. Their own assessments, without land ownership, will also be of limited value."[84]

Thus, Shapcott explains the ambivalence surrounding the decision of whether or not to participate in participation initiatives. Haida leader Guujaw expressed concern for EIA practitioners' intention to achieve the "appearance" of addressing public concern rather than actually addressing it.[85] However, some Haida representatives did offer recommendations on how to improve the process. For example, Margaret Hearne suggested that "if Native people are involved in setting up the panel, the terms of reference and how the panel is used, environmental impact assessment would be relevant."[86]

Shapcott also stressed cultural differences and worldview as being barriers to meaningful involvement. She claims that resource management is a foreign concept to First Nations that implies "a human superiority incompatible with the holistic values expressed by many traditional Native people."[87] Moreover, that "the values of the dominant culture are so imbedded in the process...that alternative values cannot even be considered. As noted earlier, the underlying values – both of the culture and the process – must be changed to make environmental impact assessment meaningful to Native people."[88] Thus, Shapcott's piece provides an overarching critique of the government's approach to First Nations' involvement in environmental assessment, but does not provide specific recommendations on improving participation processes.

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[83] Shapcott, "Environmental", 79.
[84] Shapcott, "Environmental", 60-61.
[85] Quoted in Shapcott, "Environmental", 62.
[86] Quoted in Shapcott, "Environmental", 63.
[87] Shapcott, "Environmental", 72.
[88] Shapcott, "Environmental", 68.

In examining some of the shortcomings of environmental assessment processes in addressing Indigenous peoples' issues, Howitt recommends a distinct *social impact assessment* process.[89] A social impact assessment process should focus on the many "cross-cultural factors"; both "methodological and conceptual" which are largely ignored or hidden in many impact assessments. Drawing on the field of human geography, Howitt claims that social impact assessments are one way of "pursuing applied peoples geography."[90] The main steps of a successful social impact assessment process are as follows:

1. *Scoping*: Identification of issues, specification of key variables to be described and/or measured, identification of populations and groups likely to be affected, setting of temporal and spatial boundaries of the study, setting the terms of reference, securing resources for the study.
2. *Profiling*: Overview and analysis of the current social context and relevant historical trends, preliminary interpretation of descriptive statistics, review existing literature relevant to the study area and issues, refinement of proposed study methods, data sources and study plan.
3. *Formulating Alternatives:* Identifying alternative project configurations (and/or alternatives to the project as proposed) including a 'no development' option, reviewing the proposal in terms of local, regional and national development goals, comparing merits of alternatives.
4. *Predicting Effects*: Estimating the possible and probable effects (positive and negative) of one or more options against specific significant criteria, comparing predicted outcomes to baseline studies and projected growth/change without the proposal, estimating scale, intensity, duration, distribution and significance of predicted effects.
5. *Monitoring and Mitigating:* Collecting information about actual effects and applying this information to mitigating negative impacts and enhancing positive impacts.
6. *Evaluating:* Reviewing both the social effects of the change and the SIA process used systematically after the event.[91]

Apart from the emphasis on social and cultural impacts, this process is somewhat distinct from those mentioned above because of the process of *formulating alternatives* occurs relatively early on in the overall process. Moreover, it ensures that the 'no development' option is included in the formulation of alternatives.

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[89] Richard Howitt. *Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples.* (London: Routledge, 2001) 324.
[90] Howitt, *Rethinking*, 324.
[91] Howitt, *Rethinking*, 334.

1.3 First Nations and Co-management

Co-management, like 'public participation', is a term that has numerous meanings, and authors on the topic also delineate several degrees of co-management. Berkes has referred to co-management broadly as "bridging the two solitudes"[92] - where attempts are made between government and First Nations to come to some sort of power-sharing arrangement over a resource management issue. The reason that this literature is being used here is that it looks at various forms of power-sharing over natural resources, and is informative in discussing the higher levels of First Nations' consultation. The limitations of this literature, is that most of it is derived from post-treaty contexts, whereas the research at hand is focused on pre-treaty or non-treaty contexts in Northern B.C.

In the way that Arnstein was seminal in the area of general public participation, Fikret Berkes is somewhat seminal in the literature on co-management.[93] It was Arnstein's *Ladder*, however, that inspired Berkes' *Levels of Co-Management*. Similar to other authors mentioned here, Berkes identified a gradation scheme of the types of co-management initiatives and activities drawn from his experience in the territorial north, with the Inuit and other Aboriginal peoples. His version is as follows:

7. *Partnership/Community Control*	Partnership of equals; joint decision-making institutionalized; power delegated to community where feasible.
6. *Management Boards*	Community is given opportunity to participate in development and implementing management plans.
5. *Advisory Committees*	Partnership in decision-making starts; joint action on common objectives.
4. *Communication*	Start of two-way information exchange; local concerns begin to enter management plans.
3. *Co-operation*	Community starts to have input into management, e.g. use of local knowledge, research assistants
2. *Consultation*	Start of face-to-face contact; community input heard but not necessarily heeded.
1. *Informing*	Community is informed about decisions already made.

Figure 1.2 Source Berkes. (1994) 19.

[92] Fikret Berkes, "Co-management: Bridging the Two Solitudes," *Northern Perspectives* 22 (1994) 18-20.
[93] Obviously, First Nations and other Aboriginal people may be credited with the advancement of co-management, but Berkes is known for developing the literature on it.

Berkes avoids any clear cut definition of co-management, because of the range of co-management arrangements in place (as indicated above), but does offer a loose definition. "Real co-management involves shared decision-making power by the partners and requires governments to devolve some of their power to the partners."[94] Thus, it may be assumed that the lower four points on his scale, do not actually reflect 'real co-management', but rather more of an appearance of some form of co-management arrangement.

Berkes notes some of the skepticism that Aboriginal people may have about co-management arrangements, based on negative past experiences. These include overriding concerns on the possible co-optation of First Nations through any agreement with government, and with the notion that many initiatives with government are simply smokescreens for business as usual.[95] Berkes, however, is confident that co-management is one of the best ways forward in resolving long-outstanding issues of lands and resources. He concludes that "co-management creates the potential for some healthy synergy between the kinds of knowledge held by the two solitudes," but that the fundamental challenge remains in the willingness of government and Aboriginal people to "recognize the complementary strengths of the two systems."[96]

Another author who echoes Berkes' work on co-management is Claudia Notzke. Her article, "A New Perspective in Aboriginal Natural Resource Management: Co-management,"[97] focuses mostly on the co-management arrangements as a result of land claim settlements in the territorial north of Canada. Similar to Berkes, Notzke is hesitant to use any detailed definition of co-management, because "in practice there is a wide spectrum of co-management arrangements, ranging from the tokenism of local participation in

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[94] Berkes, "Co-management", 18.
[95] Berkes, "Co-management", 20.
[96] Berkes, "Co-management", 20.
[97] Claudia Notzke "A New Perspective in Aboriginal Natural Resource Management: Co-Management" *Geoforum* 26 (1995): 187-209.

government research to local communities retaining substantial self-management power."[98] To illustrate this point, she references and includes Berkes' scale outlined above. However, she does note that none of these points on the continuum are easily distinguishable in practice, but that they are still helpful in studying co-management arrangements.

Notzke wrote in a post-*Sparrow*[99] context, and observed that an influx in attempts towards co-management agreements was a direct result of the Supreme Court's affirmation and recognition of the constitutional protection of Aboriginal rights, in dealing with natural resource management. Thus Notzke concludes that the future of Aboriginal peoples' involvement in natural resource management will "draw their legitimization...from a constitutionally entrenched right."[100] Once again, similar to Berkes, she supports an approach to co-management that effectively melds government and Indigenous systems together, to ensure that both groups gain.[101]

1.4 Environmental Dispute Settlement (EDS)

Many of the authors surveyed here have called for the inclusion of a dispute resolution process in any meaningful participation process. In a public participation process, when discussions break down or come to an impasse, the intention is to have a plan for how the parties can resolve the dispute. Literature on this topic tends to focus on disputes between community or environmental groups and government, but if the suggested process is looked at in a different light, it may be uniquely applicable to the question of First Nations consultation. The underlying conflict over land title and resource management between First Nations and government is well known throughout British Columbia, and the treaty negotiation process is meant to be the primary resolution of this conflict. Thus, if this

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[98] Notzke, "New Perspective", 187.
[99] *Sparrow v. R* (1990) 3 C.N.L.R. Affirmed Aboriginal fishing and other rights, but also constructed a test for how infringement of Aboriginal rights can be justified. This will be elaborated on in the next chapter on the Supreme Court decisions on consultation.
[100] Notzke, "New Perspective", 207.
[101] Notzke, "New Perspective", 191.

underlying conflict is assumed in assessing appropriate consultation processes, then the goals and principles of a dispute resolution process may be useful in guiding the overall consultation process – not simply as an additional option should the parties reach an impasse.

Crowfoot and Wondolleck describe EDS processes as a "collaborative problem-solving effort to all parties to a dispute" that can be used in policy-making processes and site-specific decision-making.[102] The goal is to reach a decision that is agreeable to all parties and thus results in "deeper commitment to implementation by all those involved."[103] In traditional decision-making processes, public input is certainly welcome, but whether or not action is taken on such input, is the ultimate decision of government authorities. In contrast, issues raised in an EDS process "are acted upon (or purposefully not acted upon) with the citizen group participating."[104] Moreover, the data acquired in assessing impacts is protected by agreements on information-sharing, and inform the joint development and evaluation of alternatives.[105]

Other characteristics that distinguish EDS from other decision-making processes include the following:

- Voluntary participation by the parties involved in the dispute;
- Direct or 'face-to-face' group interaction among the representatives of these parties; and
- Mutual agreement on consensus decision by the parties on the process to be used and any settlement that may emerge.[106]

With these key elements, the authors note through their case studies of various EDS processes that some of the ongoing benefits include "improved communications and

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[102] James E. Crowfoot and Julia M. Wondolleck, *Environmental Disputes: Community Involvement in Conflict Resolution.* (Washington: Island Press, 1990) 20.
[103] Crowfoot, *Environmental*, 20.
[104] Crowfoot, *Environmental*, 22.
[105] Crowfoot, *Environmental*, 22.
[106] Crowfoot, *Environmental*, 19.

working relationships", where "adversarial relationships may evolve into cooperative ones."[107]

1.5 Conclusion

The literature reviewed here on general public participation, public participation in environmental impact assessments, First Nations and co-management, and environmental dispute settlement, suggests that determining a meaningful consultation process involves identification of prescriptive principles and processes, as well as a thorough critical examination of processes that are inadequate, are not meaningful, or are unsuitable to the public in question. In surveying the literature the following principles of meaningful consultation emerge:

Principles of Meaningful Consultation

- *Relationship-Building:* The underlying goal of consultation must be improving the long-term relationship between the parties. This includes increasing mutual trust, especially increased trust in government institutions. This is facilitated by a collaborative approach, as opposed to a strictly consultative one.
- *Pro-Active, Not Re-Active:* The parties, especially government, should not await further direction from the courts to initiate or engage in enhanced consultation. A pro-active strategy with the common good at the forefront may actually prevent further litigation.
- *Representation:* Representatives need to be involved based on their ability to represent and be accountable to their community, not on the basis of the support for the proposed project or development. If there is a division within the community, then all segments must be included on an equal basis. Where possible, consultation should be carried out with the affected people themselves, not people who are hired to represent them.
- *Continuous Cycle of Consultation:* In order to prevent consultation overload, time and resources may be saved by involving participants at higher level, strategic points in planning and policy development. When participants must respond to a high volume of site-specific consultations, this may tax their human and financial resources. Moreover, if they are unable to participate due to consultation overload, this should not be construed as a lack of interest or as a signal of consent to the project or development.
- *Ability to Modify Decision:* The parties must have a mutual understanding of the abilities to modify the decision or project in question, including the possibility of a 'no development' option. If there is limited ability to modify, this may render the process meaningless.

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[107] Crowfoot, *Environmental*, 256.

- *Respecting the Right of Non-Participation:* For the abovementioned reason, or other reasons, if a group chooses not to participate in consultation, this should not be viewed as an indication that their interests are not potentially impacted by the project or development.
- *Financial Resources:* At a minimum, participants need to be compensated for their out-of-pocket expenses resulting from participation, by the proponent. Government must also work out funding arrangements for on-going consultation, to ensure that their duty to carry out meaningful consultation is fulfilled. Funding should be proportional to the existing technological capabilities and capacity of participants, where the assessment of the project requires more technical data gathering and analysis. Where legislated timelines are in place for the consultation process, funding should also be proportional to the amount of time allotted (i.e. in some cases, the less time available, the more funding will be required to ensure the consultation process is complete.)
- *No Unilateral Changes:* Once any kind of agreement has been reached between the parties, there can be no unilateral changes to it. This includes agreements on the structure of the consultation process, funding, the rules of conduct etc.
- *Two-Way Process:* A successful participation process depends on the responsiveness of the government agency, the motivation of the participants, and the quality of their deliberation.
- *Equal Value of Inputs:* 'Technical' input and advice from scientific, economic, or other such experts should not prevail over less technical input from participants.
- *Balance of Substantive and Process-Based Approaches:* Equal importance to be placed on process (i.e. informing public, incorporating values), as on substantive outcomes (i.e. quality of decisions).
- *Sound Research:* If either scientific or social science research is to be incorporated into the assessment of a proposed project or development, it must be conducted according to sound research principles.
- *Legitimate Decision-Making:* The focus should be on ensuring government decision making is legitimate, not on legitimizing decisions already made by government.

The main stages of a meaningful consultation process, as described in the literature, at a minimum must include the following:

Process of Meaningful Consultation

1. **Pre-Consultation Scoping:** This stage should be initiated as early as possible, before comprehensive plans are developed. Here the potentially affected participant groups are identified. Two-way communication is established and any research is carried out, preferably as a joint effort.

2. **Joint Development of the Consultation Process:** Issues such as timelines and funding should be dealt with before significant planning occurs. Once these two factors are determined, then the selection of preferred consultation techniques can occur. If the First Nation has traditional forums where consultation is preferred to be carried out, this should be incorporated into the techniques. At this stage, all parties need to be clear on how input will be incorporated into decision-making. If the participants are given no indication that they have any ability to actually modify the outcomes of the project, then they may choose to exit the process at this point, as

further involvement may tax their limited human and financial resources. A conflict resolution process may also be incorporated in the overall consultation process here.

3. **Consultation:** Using the preferred consultation techniques determined in Stage Two, the joint consultation process is implemented. Two-way communication must be ensured at all times, and face-to-face communication should be used where possible. At this stage, there must be sufficient time allocated for critical reflection of the proposed development. This may include internal consultation within the First Nation.

    a. **Formulation of Alternatives:** Joint identification and evaluation of alternatives within the proposed project, as well as the 'no development' option.
    b. **Predicting Effects:** Joint identification of potential impacts and benefits (environmental, social, cultural, economic).
    c. ***Conflict Resolution Process, where necessary.***

4. **Post-Decision Follow-Up:** If the project goes ahead, then First Nations should be involved in the implementation, through their preferred methods.
    a. **Monitoring and Mitigating:** There also must be a plan in place (developed in Stage 2) for monitoring the impacts and follow through on any rehabilitation or reclamation that must occur.
    b. **Evaluating:** If the project does not go ahead, there may be conflict resolution follow-up required, or an evaluation of the process to assess whether it was a fault of the consultation process, or simply the gravity of the potential impacts.

These key themes have been drawn from the literature in order to establish a set of criteria that can inform the comparative analysis of the competing interests of First Nations in Northern B.C. and the provincial government in developing and implementing meaningful consultation processes.

Chapter Two
Meaningful Consultation with First Nations, as Established by the Supreme Court of Canada

While First Nations and governments may be the political actors who carry out the process of consultation and accommodation, it is the Supreme Court of Canada that is responsible for imposing it as a *legal* duty upon government when an activity is contemplated that may infringe Aboriginal title and rights. Consultation is not necessarily the end result or goal of numerous landmark decisions involving Aboriginal rights and title, but is rather a tool to further the ends of reconciliation of competing notions of sovereignty, title, jurisdiction and rights. In cases before the Supreme Court on both the existence of Aboriginal rights and title, and their infringement by federal and provincial governments, consultation has arisen as a means to mitigate and justify such infringement, and to more generally uphold the Honour of the Crown in its dealings with Aboriginal people.

This chapter examines the jurisprudence emanating from the Supreme Court of Canada on consultation with Aboriginal people in order to determine the legal basis on which the B.C. government and First Nations within Northern B.C. found their notions of what constitutes meaningful consultation. While consultation may be emerging as its own legal framework within which Aboriginal people and governments must now operate, it does exist within a much larger legal context that is beyond the scope of this research. This includes constitutional law, the fiduciary relationship between the Crown and Aboriginal people, the nature of Aboriginal rights, the nature and content of Aboriginal title, the extinguishment of Aboriginal title and rights, and the general legal discourse on treaties between Aboriginal people and government. Finally, the focus on Canadian jurisprudence, rather than international law[108] or First Nations systems of law[109], is not an assumption that Canadian law is the only context in which this topic should be considered.

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[108] For an examination of participatory rights in international law, see for example:

The first legal duty to consult arose in 1990, from the Supreme Court decision on *R. v. Sparrow.* Consultation was one of the possible activities that could help government to satisfy the justification requirements where an Aboriginal right is infringed by government action. Now known as the "*Sparrow* test", this decision laid out a two-part test that government must satisfy when an infringement of Aboriginal title or rights occurs. This was the first time that the court established that such rights could in fact be justifiably infringed since they were first enshrined in the constitution. Because they were placed in section 35, outside of the *Charter of Rights and Freedoms*, they are not subject to the "notwithstanding clause", which allows government infringement of rights when weighted against larger societal interests.[110] Thus, the test identified in *Sparrow* remains the only legal avenue through which Aboriginal rights and title can be justifiably infringed.[111]

The issue at hand in the *Sparrow* decision was Aboriginal fishing rights, and the interference of those rights by federal fisheries regulations. Thus, the test detailed how regulations aimed at conservation could justifiably infringe upon a member of the Musqueam First Nations' Aboriginal right to fish for sustenance purposes. The Court placed the burden of proof of justification on the Crown, consisting of first establishing that there is a "valid legislative objective."[112] Two instances of such objectives are the "preserv[ation] [of] s.35(1) rights by conserving and managing a natural resource" and the regulation of the right that might prevent harm to the general public or to the Aboriginal people themselves.[113] The first identifies a situation where government regulates the exploitation of a resource for

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Donald Zillman et al. eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002).

[109] For an account of different forms of Indigenous law in Canada, see for example:
John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

[110] Kent McNeil. *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan, Native Law Centre, 2001), 302.

[111] Since the *Sparrow* decision, the test has been somewhat modified through cases such as *Gladstone*, which will be discussed later in this chapter. However, it is still largely known as the "*Sparrow* test".

[112] *Ronald Edward Sparrow v. Her Majesty the Queen* (1990) S.C.R. 20311, 1113.

[113] *Sparrow*, 1113.

conservation purposes, which in turn ensures that Aboriginal people can continue to utilize such a resource in accordance with their Aboriginal right. The second identifies a situation in which regulation may be required for prevention of harm, such as in firearms regulations that may infringe Aboriginal hunting rights.

The Crown must be able to satisfy the requirement of a valid legislative objective before continuing to the second part of the test. If it is a determined to be a valid legislative objective, the Crown must then "prove that the measures taken to meet that objective are consistent with its fiduciary duty towards the aboriginal people" bearing in mind that "the honour of the Crown is at stake in dealings with aboriginal peoples."[114] In fulfilling this duty, the court identified the following considerations, but not as an exhaustive list, and with the expectation that circumstances would vary from one case to the next: "whether there has been as little infringement as possible...; 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."[115] Finally, the Court was quite clear that infringements could not be justified on the basis of "public interest", because such a rationale is "so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."[116]

Thus, *Sparrow* dealt with consultation only in a cursory fashion as a possible means through which infringement might be justified. No specific process or principles of consultation were identified, nor the type of outcome that should result from consultation efforts. Moreover, it established that consultation would be determined on a case-by-case basis, leaving questions of process and principles largely unanswered. But the decision did alter the way in which government dealt with First Nations on the regulation of fisheries.

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[114] *Sparrow*, 1113.
[115] *Sparrow*, 1119.
[116] *Sparrow*, 1118.

Furthermore, the inclusion of consultation in the justification test did set a precedent that would be picked up on in subsequent cases that further elucidate the legal duty to consult.

In 1996 the Supreme Court handed down three decisions which somewhat modified and elaborated the findings of the *Sparrow* decision, relating to justification of infringement and consultation, among other things. *R. v. Van der Peet, R. v. Gladstone,* and *R. v. N.T.C. Smokehouse Ltd.* (also known as the "*Van der Peet* trilogy") all dealt with Aboriginal fishing rights in British Columbia, but for commercial as well as sustenance purposes. In these decisions the notion of "public interest" resurged, but this time as a possible means of justification, straying from its treatment under *Sparrow.* The following passage highlights this attempt to 'balance' competing interests:

> *Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation....With regards to the distribution of fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the types of objectives which can...satisfy this standard.* [117]

While not particular to the process of meaningful consultation, this is significant because the balancing of Aboriginal constitutional rights with broader 'societal interests' is at the core of the issue of consultation, as will be seen in subsequent decisions with more detailed attention paid to the process of consultation. Passages such as this impart the underlying limitations on consultation, as dictated by the courts – that while First Nations input is important, it will always be weighted against economic interests of non-Aboriginal people, among other factors.[118]

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[117] *Donald Gladstone and William Gladstone v. Her Majesty the Queen* (1996) S.C.R. 23801, 774.

[118] Kent McNeil criticized Chief Justice Lamer on this issue, noting that "we need to be clear that what Lamer C.J.C. was referring to here was not reconciliation through agreements negotiated with Aboriginal peoples, but

However, Justice McLachlin, in her dissent did raise this issue and in the *Van der Peet* decision noted that:

> *Until we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.*[119]

Justice McLachlin characterized Chief Justice Lamer's approach to the issue of justification as "indeterminate and ultimately more political than legal," where government need only "take into account aboriginal rights."[120] The problem presented was that it was largely uncertain to what degree Aboriginal interests must be heeded, and at this point, only a vague spectrum had been laid out for government. For example, she went on to warn that:

> *At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass the muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed.*[121]

In the *Gladstone* case, there was specific mention of the consultation activities involved, but it was noted that "evidence regarding consultation is somewhat scanty."[122] The only evidence cited was correspondence between the Native Brotherhood and the Department of Fisheries and Oceans, as being indicative of the government's "cognizan[ce] of the views of aboriginal groups with regards to the herring fishery."[123] Moreover, consultation on the fisheries regulations that impacted the First Nations was not at issue in

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rather reconciliation through unilaterally imposed legislative infringements of their constitutional rights...Moreover, while one can appreciate that the interests of non-Aboriginal groups in the fishery are also involved, the fact is that if those interests are in conflict with Aboriginal fishing rights today, then the historical reliance upon and participation in the fishery by those groups in the past was probably in violation of Aboriginal rights as well."
McNeil, *Emerging Justice*, (284).

[119] *Dorothy Marie Van der Peet v. Her Majesty the Queen*, (1996) S.C.R. 23803, 666-67.
[120] *Van der Peet*, 665.
[121] *Van der Peet*, 663.
[122] *Gladstone*, par. 84.
[123] *Gladstone*, par. 84.

the case because the question of whether infringement was justified was sent back for a new trial.

Following the "*Van der Peet* trilogy", the next Supreme Court decision to deal with consultation was the landmark *Delgamuukw* decision in 1997. While previous cases have dealt with consultation pertaining to the potential infringement of Aboriginal rights, *Delgamuukw* dealt with Aboriginal title.[124] The Court did not rule on the question of the existence of Aboriginal title, ordering a new trial instead, but did reject the B.C. government's argument that Aboriginal title had been extinguished through the assertion of Crown sovereignty in British Columbia. Leaving open the question of where Aboriginal title actually exists, the Court emphasized the need for the negotiated settlement of outstanding land title issues; consultation was again referred to as a means to justify potential infringements of Aboriginal title.

Continuing the approach to justification employed in *Gladstone*, Chief Justice Lamer presented a lengthy and all-encompassing list of objectives that could qualify as valid in justifying infringement of Aboriginal title and rights.

> *In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.*[125]

This passage drew much criticism for allowing a 'business-as-usual' treatment of Aboriginal title, where infringement of constitutionally protected rights was so easily justified by objectives such as economic development that constitutional entrenchment was to be guarding against. In this case, the notion of *proportionality* was first introduced as a basis

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[124] *Delgamuukw v. Her Majesty The Queen in Right of the Province of British Columbia*, (1997) S.C.R 23799. Thirty-eight Hereditary Chiefs of the Gitxsan and Wet'suwet'en First Nations, both individually and on behalf of their House groups, claimed Aboriginal title of 58,000 square kilometers in Northern BC.
[125] *Delgamuukw*, par. 165.

for consultation. The Court did not prescribe any specific consultation process, but noted that:

> *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 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.*[126]

While not dissenting from the decision in *Delgamuukw*, Justices La Forest and L'Heureux-Dube made a slightly stronger case for the involvement of Aboriginal people in decision-making processes affecting Aboriginal lands. The following passage indicates that Aboriginal title requires a different approach to consultation and accommodation:

> *...when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licenses have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of "aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of expropriation, one asks whether fair compensation is available to the aboriginal peoples...Indeed, the treatment of "aboriginal title" as a compensable right can be traced back to the* Royal Proclamation, 1763.[127]

This passage signifies a greater weight afforded to consultation activities than had been previously expressed by the Court, specifically where Aboriginal title is at stake. The issue of compensation being linked to the *Royal Proclamation, 1763* also highlights the Crown's historical treatment of Aboriginal title as favorable. However, Justices La Forest and

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[126] *Delgamuukw*, par. 168.
[127] *Delgamuukw*, par. 203.

L'Heureux-Dube did not detail any specific process that should be employed. As will be examined in the *Haida* and *Taku* decisions, this approach goes above and beyond the more site specific approach to consultation.

Ultimately, what *Delgamuukw* did for consultation was to reiterate and emphasize its importance in justifying infringement, but at the same time diminishing the principle of infringement itself by giving government considerably more latitude in terms of the types of objectives that would be considered justifiable. Kent McNeil, who has written extensively on Aboriginal law and specifically Aboriginal title, has criticized this shift because it places the economic interests of non-Aboriginals above constitutionally protected Aboriginal rights, and questions the value of constitutional rights under this approach. Finally, McNeil points out that "the only check on this seemingly arbitrary authority of government to infringe on constitutional rights is that Aboriginal people must be consulted before this infringement will be justifiable."[128] With a broad spectrum of justifiable objectives, coupled with a broad spectrum of consultation – including a possible requirement of Aboriginal consent – it would appear that the door would be left open for a profusion of litigation on consultation practices, processes, and principles in the years to come.

Indeed since *Delgamuukw,* throughout Canada's lower courts there have been numerous cases which have dealt specifically with the question of what constitutes adequate consultation.[129] Other decisions had been put on hold pending the Supreme Court of Canada decisions on the *Haida* and *Taku* cases which both dealt with consultation requirements with First Nations from the Northern B.C. region.

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[128] Kent McNeil. *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?* (Toronto: York University Press, 1998), 21.

[129] See for example: *Halfway River First Nation v. B.C. Minister (Minister of Forests)*, (1997) C.N.L.R. 45. *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, (1998) B.C.J. 2440. *Kelly Lake Cree First Nation v. Canada (Minister of Energy and Mines),* (1998) B.C.J. 2471. *Mushkegowuk Council et al. v. Ontario*, (1999) O.J. 3170.

The *Taku* decision, while not lauded as extensively as *Haida*, has perhaps been the most informative on what the Court expects from a consultation process. Because the Court found that the Taku River Tlingit First Nation (TRTFN) had been adequately consulted, much can be learned from the process that was undertaken by the B.C. government approving the construction of a road through their territory. However, in this case it was continuously reiterated that the scope and depth of consultation, and its eventual adequacy, must be determined on a case-by-case basis. Moreover, the Court was explicit that "it is impossible...to provide a prospective checklist of the level of consultation required."[130] Thus, while it was found that the consultation efforts were adequate, *in this case*, there still exists variation from one First Nation to the next, from one proposed development to the next.

Nonetheless, there are key elements of the consultation process in which the TRTFN were engaged, that are indicative of what the Supreme Court views as fulfilling the legal duty of meaningful consultation; they can be summarized as follows:

- *Proportionality*: It was found that the TRTFN were to be engaged at the higher end of the spectrum of consultation because they had strong *prima facie* evidence of Aboriginal title and rights to the land in question, and the impacts of the proposed road construction to access the mine would be significant. To uphold the Honour of the Crown, the TRTFN were owed something greater than "minimum consultation...and to a level of responsiveness to its concerns that can be characterized as accommodation."[131]
- *Participation in 'Meaningful Process' vs. Consent*: At the end of a three and half year process, under the *Environmental Assessment Act*, the TRTFN did not agree with the ultimate certificate of approval for the mine, nor did they believe that they had been involved in a meaningful consultation process. Yet, the Court ruled that "where consultation is meaningful, there is no ultimate duty to reach agreement."[132]
- *No Distinct Aboriginal Process Required*: Because there were specified procedures for Aboriginal involvement in the environmental assessment, that were followed and in some cases exceeded, the Court found that "the Province was not required to develop special consultation measures to address TRTFN's concerns."[133]
- *Participation in the Project Committee*: The TRTFN were invited to and participated in the project committee, which "becomes the primary engine driving the assessment

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[130] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004) S.C.R. 29146.
[131] *Taku*, Introduction.
[132] *Taku*, par. 2.
[133] *Taku*, par. 40.

process."[134] They were granted financial assistance to participate, although this was not explicitly referred to as a requirement for adequate consultation by the Court in this case.

- *Partial Joint Process Design:* While the process was guided entirely by the *Environmental Assessment Act*, "the Act permitted the Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report." Moreover, "the TRTFN was at the heart of decisions to set up a steering group to deal with Aboriginal issues and a subcommittee on the road access proposal."[135] Furthermore, the independent consultant hired to carry out ethnographic and land use studies was approved by the TRTFN.
- *Additional Time Where Requested:* On more than one occasion, additional time was allotted to the assessment timeline upon request of the TRTFN.[136] However, it appears acceptable that "the project committee was directed to review and sign off on the Recommendations Report on March 3, the same day that it received the last 18 pages of the report." Moreover, it was the unilateral decision of the EAO that "consultation must end by March 4, citing its work load."[137] To this end, the Court conceded that "it is clear that the process or project approval ended more hastily than it began."[138]
- *Acknowledgement of Disagreement:* Because the TRTFN did not agree with the majority Recommendations Report of the project committee, it produced its own minority report which was submitted to the Ministers alongside the majority report. The Ministers considered this report in their final decision.
- *Assistance with Other Government Agencies:* "The TRTFN was informed that not all of its concerns could be dealt with at the certification stage or though the environmental assessment process, and assistance was provided to it in liaising with relevant decision makers and politicians."[139]
- *Expectation of Further Consultation & Accommodation:* In this case, the Court was only asked whether consultation was adequate pertaining to the process undertaken by the Environmental Assessment Office, which is only one stage of a multi-stage approval process. For future stages, it was expected that recommendations for accommodation and mitigation of impacts would be implemented, including the establishment of a joint management authority. The Court concluded that "it is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN."[140]

While these key findings are more specific to the actual type of process that would satisfy the legal duty to consult, they rest on more fundamental legal principles that were identified

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[134] *Taku*, par. 8.
[135] *Taku*, par. 41.
[136] *Taku*, par. 41.
[137] *Taku*, par. 38.
[138] *Taku*, par. 39.
[139] *Taku*, par. 36.
[140] *Taku*, par. 46.

in the *Haida* case, which was cited extensively in the *Taku* decision and was delivered concurrently with the case.

The Haida First Nation brought their original case forward to challenge the transfer of a significant Tree Farm License within their territory from MacMillan Bloedel Ltd. to Weyerhaeuser Ltd, because it was made without their consent and over their objections. The Court was asked first if the Crown, in this case the Minister of Forests and the Attorney General, owed the Haida a duty to consult; and second, if the forest company Weyerhaeuser owed them a similar duty. The Court's findings are summarized as follows:

> *...the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations.*[141]

This ruling answered the key question that government did owe a duty of consultation, prior to the Aboriginal people 'proving' their rights and title. It also answered another key question regarding an equivalent duty on industry – because the source of the duty is the Honour of the Crown, this can cannot be placed on private companies. Moreover, it was found that "the duty flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group."[142] Finally, the *Haida* decision laid to rest government fears of an 'Aboriginal veto' by partially clawing back the possibility of 'consent' that was ordered in *Delgamuukw*.

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[141] *Haida Nation v. British Columbia (Minister of Forests)* (2004) S.C.R. 29419, par. 10.
[142] *Haida,* par. 53.

The requirement of consent was seen to be necessary "only in cases of established rights, and then by no means in every case."[143] This was the perhaps the biggest departure from recent Supreme Court decisions, and may indicate a continuing trend of minimizing any Aboriginal advantage in consultation, that began with the treatment of the *Sparrow* decision under subsequent *Van der Peet* trilogy. However, the recognition of the duty to consult prior to Aboriginal proof did come out in favour of the Haida Nation in this case.

As will be shown in Chapter Four on the B.C. government positions on consultation, they argued in this case that they do not owe any duty of consultation, beyond a duty of fair dealing, until rights and title are proven through litigation or negotiation. The Court flatly refused this claim as follows:

> *Is the Crown under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants? The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof....To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.*[144]

What this meant for the Court, is that the aspect of proportionality that was outlined in *Delgamuukw* is even more applicable because the scope and depth of consultation, in a "pre-proof" context relies on an initial assessment of the *prima facie* evidence of rights and title. The stronger the evidence, and the more significant the potential impact is on such rights and title, the greater the depth and scope of the consultation efforts.

This places on the government a two-stage assessment process in order to "discharge" its legal duty. The government has the initial discretion in determining at what

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[143] *Haida,* par. 48.
[144] *Haida,* par. 26-27.

point along the Court-created spectrum of consultation the First Nation will be engaged. Following that, what type of consultation activity will be adequate to satisfy the duty must be determined. If the government is mistaken in its initial assessment, then it will be legally held to the standard of correctness and the consultation will not be adequate. If, however, they are correct in their initial assessment, the consultation process will only be held to the standard of reasonableness. The standard of reasonableness means that the process need not be perfect, but that the Crown must prove it has made all reasonable efforts to inform and consult the First Nation. Thus, if the initial assessment is correct the Crown decision will only be put aside if the process of consultation is unreasonable. "The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation."[145]

To develop this two-stage process, the Court drew on the "general principles of administrative law."[146] The explanation of this process found in *Haida* appears to be clear that this is the test that will be applied in any future challenges to Crown decisions on the basis of a failure to "discharge its duty to consult and accommodate pending claims resolution."[147] The first example of this approach can be found in the case of *Taku*, where government was correct in assessing that the TRTFN had a strong *prima facie* case for Aboriginal rights and title to the area in question, and that the mine and road development would have a major impact. The Court thus held the consultation process to a standard of reasonableness, not correctness. Because the consultation process was seen to be reasonable, the consultation was deemed adequate.

In its initial assessment of the *prima facie* evidence of the First Nation, government is not solely responsible for determining the scope and nature of Aboriginal title and rights in question, but it does maintain the final discretion. Chief Justice McLachlin stated that to "facilitate this determination, claimants should outline their claims with clarity, focusing on

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[145] *Haida*, par. 61-63.
[146] *Haida*, par. 60.
[147] *Haida*, par. 60.

the scope and nature of the Aboriginal rights they assert and on the alleged infringements."[148] This is necessary to engage in meaningful consultation. On the other hand, the Court did also suggest the possibility of an independent tribunal assuming the responsibility for the initial assessment, rather than a government official.[149] Further duties placed on First Nations by the Court in *Haida* were to deal in good faith, including "not frustrat[ing] the Crown's reasonable good faith attempts", or to "take unreasonable positions to thwart government from making decisions."[150]

With respect to the actual consultation process, meaning the specific activities undertaken to carry out the legal duty, the Court in *Haida* was once again largely silent, beyond reiterating the spectrum of activities outlined in *Delgamuukw*. However, the Chief Justice did cite *A Guide for Consultation with Maori*, from the New Zealand Ministry of Justice, as source of "insight" for meaningful consultation that might lead to a change in government course of action based on consultation efforts. The following passage from the *Guide* was cited in *Haida*:

> *Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed...genuine consultation means a process that involves...*
>
> - *gathering information to test policy proposals*
> - *putting forward proposals that are not yet finalized*
> - *seeking Maori opinion on those proposals*
> - *informing Maori of all relevant information upon which those proposals are based*
> - *not promoting but listening with an open mind to what Maori have to say*
> - *being prepared to alter the original proposal*
> - *providing feedback both during the consultation process and after the decision-process.*[151]

However, the Court was clear that any amendment of Crown policy would constitute accommodation, which is not always required alongside consultation. Throughout both the

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[148] *Haida*, par. 36.
[149] *Haida*, par. 37.
[150] *Haida*, par. 42.
[151] *Haida*, par. 46.

Haida and *Taku* decisions, the Court refers to consultation, "and where indicated, accommodation." Moreover, the Court does not suggest that accommodation is required even in the cases at the upper end of the spectrum:

> *Where a strong prima facie case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.*[152]

Finally, the *Haida* decision provided some guidance on the appropriate level of consultation in relation to the level of government decision-making. The distinction was made between site-specific, or "operational level" consultation, and consultation at the "strategic planning" level. Because the Haida Nation had not been consulted at the strategic planning level where decisions could have "potentially serious impacts on aboriginal rights and title", the consultation being offered at the operational level "has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms." The Court concluded, at least in this case, that "if consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licenses."[153]

While the emerging jurisprudence on consultation has received significant attention, and will likely change the political, legal and economic landscape in Northern B.C. for years to come, it remains nearly devoid of clear instructions to government and First Nations on the type of consultation process that should be followed. The Supreme Court has been clear that this is a purposive omission. What may be gleaned from this marked absence, is that government, acting honourably, and First Nations should work together to establish procedures and principles of meaningful consultation that meet the needs of both parties and ensure protection of the constitutional rights held by Aboriginal people.

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[152] *Haida*, par. 47. Emphasis added.
[153] *Haida*, par. 76.

The Court, however, has also looked favorably on processes and policies designed solely by government and found them acceptable, indicating that jointly developed processes are not legally required. One of the key findings in the recent *Taku* and Haida decisions is the emphasis on process, and not on outcomes. Government is not instructed to reach agreement when consulting First Nations, but to fulfill a largely procedural duty. Finally, the absence of clear instruction on funding for First Nations participation may lead to further litigation in order to answer this question. Thus, the Supreme Court has given government and First Nations some broad parameters in which they must operate. The next chapter will examine how the Government of British Columbia has interpreted the case law to formulate their consultation and accommodation policies and procedures.

Chapter Three
Meaningful Consultation, as Described by the Province of British Columbia

> *This...framework of principles that the Court gave us in* Delgamuukw *[is] a recipe for bureaucratic, if not economic, paralysis. As a framework of legal principles that are intended to guide the actions of government, it is entirely impracticable. It is, I suggest, a nightmare.*
>
> -Geoff Plant, former Attorney General of British Columbia, (then opposition critic of the Attorney General, Member of Legislative Assembly of British Columbia), and legal counsel for B.C. government for the *Delgamuukw* trial, commenting on the duty to consult.[154]

> *The policy is, basically, that we consult with aboriginal people as required by the Supreme Court decision, and then we carry on and do business. Consultation doesn't mean that we give veto power to aboriginal people, consultation means we consult with them.*
>
> -Glen Clark, then Premier of British Columbia, following the Supreme Court decision on *R. v. Delgamuukw.*[155]

The above quotations illustrate some of the underlying sentiment of the Provincial Crown with respect to the legal duty to consult. The former represents the sense of bureaucratic burden the current government feels with the legal framework under which it has been placed. The latter reflects a parallel notion that consultation is simply a procedural exercise that must not impede the practice of Crown sovereignty. This chapter will first describe B.C.'s approach to consultation outlined in their various policies and procedures. Second, this chapter will outline the legal arguments Crown counsel has made before the Supreme Court of Canada in landmark decisions on consultation and accommodation. Finally, this chapter will summarize the key elements of the Province's position on consultation and accommodation that will be used in the comparative analysis in Chapter Five.

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[154] Geoff Plant and Melvin H. Smith. "Solution or Problem?" *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision.* Edited by Owen Lippert (Vancouver: Fraser Institute, 2000), 79.
[155] Quoted in Justine Hunter, "Clark denies aboriginal veto power," *The Vancouver Sun,* 11 April 1998, A1.

3.1 Consultation Guidelines, September 1998

In the wake of the Supreme Court of Canada decision on the *Delgamuukw* case in 1997, the provincial government updated and expanded upon the *Province's Crown Lands Activities and Aboriginal Rights Policy Framework* to include the *Consultation Guidelines, September 1998.* The most significant development in this policy was the consideration of Aboriginal title as the basis for consultation. Previously, government only had to consider consultation in the context of infringement of Aboriginal rights in order to meet the legal requirements established in the *Sparrow* decision.

These guidelines immediately preceded the *Provincial Policy for Consultation with First Nations (October 2002)*, which is the most current policy and thus will be described in greater detail in the following section. The main stages of consultation and their legal basis have remained the same from one government to the next[156], however there are some key discrepancies between the two which will be noted here.

The *Crown Land Activities and Aboriginal Rights Policy Framework* is an appendix to the guidelines and serves as a policy foundation. Most significant is the following "policy statement":

> *The provincial government will endeavour to make its best effort to avoid any infringement of known aboriginal rights during the conduct of its business. Infringement will be avoided where Crown and aboriginal interests can co-exist either as a matter of fact, or as the result of a negotiated settlement.*

This notion of "co-existence" of aboriginal and Crown interests is largely absent from subsequent policies and procedures. Instead, it will be shown that the Province seeks to justify its infringements, and consultation is one requirement of justification. Another significant statement of policy that is absent from the subsequent 2002 policy is on

[156] The 1998 guidelines were introduced by the New Democrat government, while the 2002 Policy was implemented by the BC Liberal government.

compensation. The stated position of the Province in 1998 was that "compensation is the exclusive responsibility of the federal government."[157]

This policy also identifies the absence of "a precise legal test for sufficient consultation", and instructs decision-makers to assess the adequacy of consultation by considering whether:

> *All First Nations' aboriginal rights concerns about the proposed activity have been identified; and every effort has been made in project or activity design or modification to avoid infringing all the aboriginal rights identified.*

Finally,

> *Where the Province has made repeated unsuccessful efforts to engage in consultation with First Nations, legal advice should be sought from the Ministry of Attorney General. Non-participation itself does not give the Province the legal justification to infringe an aboriginal right, but may limit the legal remedies available to First Nations.*[158]

One instruction to decision-makers that is notably absent from subsequent policies and guidelines is the suggestion to go above and beyond the guidelines. It is noted that the guidelines represent "the minimum requirements" and that "efforts to exceed these minimum consultation requirements are encouraged."[159]

Another element that was included in this policy, but that was subsequently left out of the 2002 policy is a passing reference to the capacity of First Nations in participating in consultation. The guidelines state that "First Nations often state that they are not able to keep up with the volume of referrals sent by the Province," and that "the Province shares this concern." This is compounded by the fact that provincial agencies often receive either no response from referral letters or receive "blanket opposition to any development within traditional territories." There is no mention, however, of funding or other capacity building

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[157] *Consultation Guidelines*, 32.
[158] *Consultation Guidelines*, 54.
[159] *Consultation Guidelines*, 33.

opportunities to address this. Instead, decision-makers are encouraged to limit the instances of consultation through their own internal "pre-consultation assessment."[160]

The guidelines provide various instances where consultation may not be warranted, based on the type of permit being granted or the type of activity that is proposed, or the nature of the land in question. For example, consultation may not be required where government is renewing an existing tenure or permit with no changes. Other examples include "seasonal use of the land", "survey work", and "activities on private land".[161] Additionally, if it is a "small amount of land, especially where land is inaccessible" or there is "low land value (economic or intrinsic)" this may preclude consultation. This section of the pre-consultation assessment is significantly more generous than in the 2002 policy, and leaves significant discretion to the decision-maker as to when and where consultation is required.

The final key difference between the 1998 and 2002 policies is the treatment of consent as a possible requirement. In the 1998 guidelines, consent is included in the possible types of accommodation contemplated at Stage Four:

> *In exceptional circumstances, this step may also involve seeking First Nations' consent. Seeking consent should be reserved for situations where the proposed activity is of critical economic importance to the Province and the indicators of aboriginal* [sic] *title are strong. Consent should only be sought after senior level review is completed in conjunction with legal advice.*[162]

As will be shown in the subsequent 2002 policy, consent of the First Nation is not identified as an objective of decision-makers in any circumstances. Moreover, as has been shown in Chapter Two of this thesis, the Supreme Court has more recently indicated that government does not have to reach agreement with First Nations before proceeding with decision-making.

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[160] *Consultation Guidelines*, 35.
[161] *Consultation Guidelines*, 37.
[162] *Consultation Guidelines*, 44.

3.2 Provincial Policy for Consultation with First Nations (October 2002)

The *Consultation Guidelines, 1998* have since been replaced by the *Provincial Policy for Consultation with First Nations (October 2002)*. The policy was developed after the B.C. Court of Appeal decisions on the *Haida* and *Taku* decisions. Most of the provincial ministries have their own guidelines for consulting with First Nations, but all must conform to the main provincial policy, as it is government-wide in its application.

The policy is characterized as "a policy to consult with First Nations on aboriginal rights and title that are asserted but unproven."[163] The provincial government emphasizes the terms "unproven" and "asserted" in describing Aboriginal rights and title which have not been proven through court proceedings, the overall term for unproven Aboriginal rights and title in this policy is "Aboriginal interests."[164] The policy lays out the legal and constitutional framework underlying consultation, and states that "until aboriginal rights and/or title are proven through a Court process, the Province has an obligation to consider aboriginal interests in decision-making processes that could lead to impacts on those interests."[165]

A new approach to governing and decision-making is evident in this policy. A warning of sorts is presented to statutory decision-makers in the introduction: "while many activities on Crown land can co-exist with aboriginal rights, almost all activities on Crown land will infringe aboriginal title."[166] For this reason, the focus of this policy is "on whether the infringement is justifiable (in accordance with the principles set out in *Delgamuukw*)."[167]

The policy identifies key principles that *must* guide all consultation activities across government, regardless of individual guidelines developed within ministries. They can be summarized as follows:

- the onus of proving aboriginal title and rights is on the First Nation in question;

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[163] British Columbia. *Provincial Policy for Consultation with First Nations*, October 2002, 4.
[164] *Provincial Policy*, 4.
[165] *Provincial Policy*, 5.
[166] *Provincial Policy*, 12.
[167] *Provincial Policy*, 12.

- the Province must consider aboriginal interests that are sound in its decision-making, and any activity on Crown land that may impact such sound interests, and work to address or accommodate aboriginal concerns;
- consultation is to be carried out as early as possible in the decision-making process;
- the Crown is responsible for ensuring the adequacy of consultation efforts;
- consultation must involve representatives from all potentially affected First Nations;
- consultation must be efficient and carried out in good faith, meeting applicable legislative timelines where possible;
- the consultation process must involve the assessment of the soundness of aboriginal claims, the potential infringement, and whether or not the infringement of aboriginal interests can be justified;
- consultation among several government ministries or agencies must be integrated to ensure clarity and efficiency;
- consultation processes should be clearly defined to the First Nations in question;
- decision-makers must illustrate how information given by First Nations has been considered;
- the methods of consultation will vary on a case-by-case basis. First Nations requests on methods can be considered, only "where those are reasonable." The soundness of the aboriginal interests must also be considered in determining methods;
- information given to First Nations must identify the potential impact of the proposed activity in a clear and understandable format;
- all communication with First Nations is considered part of the consultation process, and records must be kept of any phone calls, meetings, site visits, and any effort by the Crown to communicate with the First Nation.[168]

While most of these principles reflect the legal principles established in case law thus far, the policy does also detail "What the Courts Say About Consultation," most of which has been outlined in Chapter Two of this thesis, and thus does not require further description here.

The policy lays out a broad consultation process comprised of four main stages, and a Pre-Consultation Assessment:

Pre-Consultation Assessment: Decision-makers are responsible for assessing whether or not the proposed activity will require consultation with First Nations. A list of several indicators is provided, and where one or more is present, consultation may not be required. Decision-makers, however, are instructed to exercise caution in deciding not to consult. The factors include:

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[168] *Provincial Policy*, 19-20.

- no evidence of historical aboriginal presence in the area exists;
- First Nations have indicated they have no interest in the area;
- the land has been alienated to a third party;
- the land has been developed in a manner that precludes aboriginal use (e.g. urban lands);
- an agreement is in place with the First Nation that specifies certain types of activities do not require consultation;
- if the use of the land is for emergency purposes, or for public health and safety.[169]

Stage 1 - Initiate Consultation: If it is found that consultation will be required, the decision-maker proceeds to initiating consultation. From this stage on, a continuum of consultation mechanisms must be used, which will be "proportional to the soundness of that [aboriginal] interest." This stage consists of determining whether or not the "aboriginal interests" are "sound", which means asking First Nations to identify their interests and to consult other sources of information to confirm if those interests are sound. Sources are those available upon "reasonable inquiry" and include "archaeological studies, local knowledge, archival studies, existing traditional use studies, and legal advice."[170] While staff are to assess the "soundness" of the Aboriginal claim, they "cannot make legal determinations of the existence of aboriginal rights or title and may need legal and/or research advice in order to properly assess the soundness of aboriginal interests."[171]

Not only is the requirement that aboriginal interests appear sound, before consultation is required, but decision-makers must also consider whether or not those interests "may be subsequently proven to be existing aboriginal rights and/or title."[172] Being that the only way a First Nation can prove title or rights is through a court process, this factor may allow legal advice to outweigh other elements of the consultation process. Just as there are indicators against the possibility of rights and title, when considering aboriginal interests the following indicators must be used:

- land has been continuously held by the Crown;

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[169] *Provincial Policy*, 23-24.
[170] *Provincial Policy*, 26.
[171] *Provincial Policy*, 26.
[172] *Provincial Policy*, 27.

- land is near or adjacent to Indian reserves or former village sites;
- land is used for aboriginal activities;
- notice of aboriginal title or rights has been given from First Nation already, even to another ministry within government;
- land is subject to a specific claim.
- land is undeveloped and close to known fishing, hunting and gathering sites.[173]

It should be noted here that while only "one or more" of the indicators *against* aboriginal title or rights is required to nullify the need for consultation, a *combination* of the above indicators is required to necessitate "more in-depth consultation."[174] The final decision at the end of this stage is whether or not to proceed to the second stage. If there is a strong indication that aboriginal title and/or rights "may be proven subsequently" then the decision-maker must proceed to Stage Two. If not, the "decision-maker may choose to conclude the consultation process."[175]

Stage 2 - Consider the Impact of the Decision on Aboriginal Interests: At this stage, the infringement of aboriginal interests must be considered. A list of considerations is provided, but it is not clear whether these are absolute indicators that infringement will occur. They are as follows:

- Does the activity interfere with aboriginal activities?
- Will the First Nation benefit from the activity (either through involvement or economic benefit)?
- Will the nature of the land be damaged and to what extent?
- In the case of aboriginal rights and resource extraction, is the resource renewable or non-renewable?
- Will the land be sold, leased or tenured to third parties? If leased or tenured, are they renewable and/or involve further impacts?

If it is found that the proposed activity will infringe aboriginal title and/or rights, then the decision-maker must proceed to the next stage. If no infringement is likely, then he or she may choose to conclude the consultation process. It is noted here, though, that if the potential of aboriginal title is strong, then infringement will be highly likely.

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[173] *Provincial Policy*, 27.
[174] *Provincial Policy*, 27. The same set of indicators against the existence of aboriginal title and rights is used again in Stage 1b to reduce the need for "more rigorous" consultation.
[175] *Provincial Policy*, 30.

Stage 3: Attempt to Justify Any Possible Infringement of Aboriginal Interests:

If it has been determined that infringement is likely to occur as a result of the proposed activity, then decision-makers must then attempt to justify such infringements. Here the Province relies on the lengthy and nearly exhaustive list of "compelling objectives" that were laid out in the Supreme Court *Delgamuukw* decision. To justify an infringement of aboriginal title, government can draw on "the development of agriculture, forestry, mining, hydroelectric power, the general economic development of the Province, protection of environment or endangered species, the building of infrastructure, and the settlement of foreign populations."[176] As has been noted earlier in Chapter Two, this list leaves government ample room to operate while ensuring any potential infringement can be justified legally.

To add to this fairly exhaustive list, if it is an aboriginal right in question, then decision-makers can turn to the objectives identified in the *Sparrow* and *Gladstone* decisions, which include "conservation, public safety, historical reliance on a resource by non-aboriginal people and regional economic fairness."[177]

In accordance with both the abovementioned decisions, part of the justification process is the assessment of whether consultation was adequate, which also must be conducted at this stage. This consists of a unilateral assessment to be carried out by the Province. Essentially, if the consultation meets the following requirement, then it can support justification purposes:

> *Whether consultation has been carried out diligently and meaningfully in a manner that attempts to address and/or accommodate aboriginal interests, and the extent to which workable accommodations of those interests are necessary and provided in a manner that is proportional to the soundness of the aboriginal interests at issue.*[178]

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[176] *Provincial Policy*, 32-33.
[177] *Provincial Policy*, 33.
[178] *Provincial Policy*, 34.

Once again, if it is found that the infringement may not be justifiable then the decision-maker must proceed to Stage Four. If, however, it is found that the infringement can be justified then the consultation can be concluded and proceed with the approval of the proposed activity.

Stage 4 - Look for Opportunities to Accommodate Aboriginal Interests: The final stage is the least developed in this policy, and appears to be left open to more political negotiation of accommodation measures, which is likely to occur in "the broader government context."[179] Possible accommodation measures include "treaty related measures, interim measures, programs, training, economic development opportunities, agreements or partnerships with industry."[180] However, in negotiating accommodation solutions, decision-makers are warned of the "potential precedent-setting nature" of such solutions.[181]

The fourth and final decision to be made under this policy is whether to proceed with the proposed activity, with or without a negotiated accommodation solution. If a resolution is not reached, then the decision-maker may choose to "re-evaluate the project or decision," "and/or seek legal advice from the Legal Services Branch, Ministry of Attorney General before proceeding further."[182]

The types of consultation activities are largely general in this policy, leaving more detailed guidelines up to individual ministries to determine. These include:

- meetings and correspondence with First Nations;
- exchanges of information related to proposed activities;
- the development and negotiation of consultation protocols;
- site visits to explain the nature of proposed activities in relation to aboriginal interests;
- researching existing studies or carrying out new ones, if appropriate;
- participation in local advisory bodies; and
- in some cases, combinations of the above.[183]

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[179] *Provincial Policy*, 35.
[180] *Provincial Policy*, 35.
[181] *Provincial Policy*, 36.
[182] *Provincial Policy*, 36.
[183] *Provincial Policy*, 13.

3.3 First Nations Consultation Guidelines: Sustainable Resource Management Planning, July 2004

If the *Provincial Policy for Consultation with First Nations* is the overarching consultation policy on land and resource decision-making, then the guidelines for consultation in land use planning are the next most significant within the provincial government. While these guidelines, as all provincial policies or guidelines, must conform to the main *Provincial Policy*, there are certain noteworthy portions in these guidelines that further elucidate the Province's position on consultation.[184] Moreover, because land use planning encompasses multiple types of land use and their harmonization, consultation at this level may cover numerous types of development.

These guidelines provide more instruction to decision-makers and ministry staff on the cross-cultural context of consultation and other aspects of relationship-building than other agencies. The document also includes more specific instructions in the form of 'templates' (i.e. referral letters, telephone call logs, a record of decision maker's rationale etc). Finally, included in these guidelines is an appendix titled "Legal Advice - Confidential", which is not available to the general public.[185]

The purpose of consulting in this context is part of the overall commitment to "building good relationships with First Nations." Moreover, "transparent consultation processes and the recognition that First Nations may have unique constitutional rights and are more than another stakeholder, are critical to building these relationships."[186] While the Ministry of Sustainable Resource Management is responsible for the Land and Resource Management Planning process (LRMP), it is stated in this document that the "preferred approach" is to consult at the lower Strategic Land and Resource Management Plan level

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[184] The main body of this document is the "Four Stage Consultation Process" outlined in the main *Provincial Policy* applied in the land use planning context.
[185] "The information contained in this section constitutes legal advice and is subject to solicitor/client privilege. It is not to be circulated outside of the provincial government. To ensure this, it is contained in a separate document," 59.
[186] *First Nations*, 3.

(SRMP). SRMPs include local, watershed, and landscape unit planning aimed at balancing economic development and environmental conservation providing certainty, and expediting resource development approvals.

Beyond the principles of meaningful consultation, which are strictly legal principles established in the main provincial policy, these guidelines set out further principles on the nature of consultation. For example, consultation should be carried out in-person wherever possible, and follow-up on final decisions must include an explanation of how First Nations input was incorporated. It is also noted that a lack of participation should not be construed as a lack of interest, but rather as indicative of larger barriers between the First Nation and the Province.

While echoing the main provincial policy in the emphasis on keeping accurate records of consultation, the guidelines are even more explicit in the importance of record-keeping for the legal interests of the Province, as it will be "essential for proving due diligence if required for court proceedings." The "Template for Record of Consultation" even includes a category of "chance encounter" where, for example, a ministry staff member offers a community member "a ride into town" and informs them they are having trouble reaching someone regarding the SRMP.[187] Yet, the same type of "chance encounter" is also referenced elsewhere as a form of "trust-building."[188]

Unlike other policies and guidelines, these guidelines deal with the issue of representation within First Nations communities. Staff members are encouraged to ascertain who is the most appropriate to consult – Chief and Council, Tribal Council, or some other level. However, there is no direct reference to consulting traditional leadership and any body other than the band must be have "explicit authorization", "in writing" from the band government that they are permitted to represent them in consultation.

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[187] *First Nations*, 50.
[188] *First Nations*, 41.

A key distinction of this document is the emphasis on accommodation throughout the consultation process, rather than as the last effort following attempted justification of infringement. Through the development of "practical planning solutions" from stages one through three, staff members are encouraged to offer more modest accommodation to "avoid stages three and four" entirely.[189] Examples of such solutions include "relocating or modifying management areas, recommending restrictions on resource use, and extending SRMP timelines."[190] As always the *offer* of such solutions is considered part of the Province's due diligence.

While not explicitly statements of policy, some of the more telling provincial positions are found in the "Questions & Answers" section. For example, when asked for a guarantee that First Nations input will be reflected in the SRMP, staff are told to reply:

> *I cannot make this guarantee, but MSRM will certainly attempt to incorporate your input, address your interests, and consider your recommendations, within the targets, goals, and limitations of the SRMP.*[191]

Another key example is in response to the questioning of provincial authority to resource management within the First Nations' traditional territory. Here the staff must assert that "the province maintains that it does have authority" and that "a general refusal to participate in an SRMP makes it difficult for MSRM to attempt to address any interests or concerns your community may have."[192] This indicates the position of absolute authority held by the Province, and conveys to First Nations that if they do not participate in a Province-directed process that it will go on without them.

Finally, with respect to the issue of capacity building, or funding, for First Nations to participate in consultation the answer is:

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[189] *First Nations*, 16.
[190] *First Nations*, 16.
[191] *First Nations*, 31.
[192] *First Nations*, 31.

> *Unfortunately, MSRM does not have funding to assist your community with capacity development....We are open to your suggestions and to working with you to make the process as easy and efficient as possible.*[193]

These guidelines are one of the few provincial documents to detail the types of information sources and databases that are now essential in the current legal framework. Former Attorney General Geoff Plant has commented that consultation is extremely difficult because there is "no 'aboriginal rights and title registry'– and therefore no straightforward means of establishing certainty in the absence of negotiated agreements."[194] Instead, the Province is actually building its own version of such a registry, the *Consultative Areas Database,* but is maintaining it for "internal government use only."[195]

The database is meant to guide provincial decision-makers in determining which First Nations to consult by providing a geographic overview based on information given by First Nations and operations staff and traditional use studies. However, the actual content of the database has not been reviewed by First Nations, nor has it been verified through ethnographic research.[196] Moreover, as consultation continues throughout the province, staff members are instructed to add information to the database on their experience consulting with individual First Nations. The Province is clear that the database, while outlining Aboriginal title and rights that may *potentially* exist, is "not intended to create, recognize, limit or deny aboriginal rights, including title...or alter the legal status or resources within the province or the existing legal authority of British Columbia."[197]

3.4 Forestry Consultation and Accommodation Guidelines

A significant amount of consultation with First Nations revolves around forestry or forestry related activities on the land. As with all province-led consultation, the policies of

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[193] *First Nations*, 31.
[194] Geoff Plant. *Balancing Interests a Challenge, but Necessary*, Op-Ed (March 22, 2004).
[195] *First Nations*, 34.
[196] *First Nations*, 33.
[197] *First Nations*, 34.

the Ministry of Forests (MOF) conforms to the main *Provincial Policy*, but MOF has placed more emphasis on the accommodation aspect of consultation. Through *Forest and Range Agreements* (FRAs), the Province seeks to "discharge [its] obligation to consult and accommodate" by offering First Nations economic benefits in the form of revenue sharing and direct tenure awards. As "quid quo pro"[198] for such economic benefits First Nations must agree to not engage in or support "civil disobedience" on their traditional territory for the term of the agreement.[199]

In this policy the total amount of direct award tenure available is unilaterally pre-set by the Minister of Forests at eight per cent of the provincial land base, which is roughly proportionate to the Aboriginal population in B.C. Additionally, the revenue sharing is based on a per capita calculation also predetermined by the Minister.[200]

In exchange for predetermined revenue and/or tenure, First Nations not only must agree to not engage in direct action to exercise their rights and title, but must also agree to the MOF-led consultation process and are bound to participate in it. Where they choose not to participate, the Forest and Range Agreements ensure that the Province will be able to proceed *legally* with forest and range activities without consultation.[201]

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[198] Hon. G. Plant. *For Information: Report on Accommodation with First Nations, Transcript of the Open Cabinet Meeting, June 30, 2003* (Victoria: Province of British Columbia, Executive Council).
[199] Ministry of Forests, Province of British Columbia. *Strategic Policy Approaches to Accommodation, Final Draft, July 31, 2003*, 8.
[200] *Strategic Policy*, 5-6.
[201] Government of British Columbia, Ministry of Forests. *BC Template for Forest and Range Agreements, Confidential – for Internal Use Only*. This document was leaked by a provincial employee and distributed among First Nations in BC as "Leaked BC Template for Forest and Range Agreements."
In the Preamble: "X First Nation has a responsibility to participate in any consultation initiated by the Government of British Columbia or a Licensee, in relation to forest and/or range resource development activities proposed within the X first nation Traditional Territory."
Section 4.2: "During the term of this Agreement, X first nation agrees that the Government of British Columbia has fulfilled its duties to consult and to seek interim workable accommodation with respect to the economic component of potential infringements of X first nation's Aboriginal Interests or proven aboriginal rights in the context of Operational Decisions that the Government of British Columbia will make and any forest practices or range practices that may be carried out under an Operational Plan in X First Nation's Traditional Territory.
And in Section 4.6: "If no response is received from X first nation within the Response Period, then the Government of British Columbia may assume that x first nation does not intend to respond or participate in the

Finally, this approach places the economic accommodation ahead of the consultation process, temporally. The economic accommodation is not the result of consultation and negotiation, but of a unilaterally developed formula. Acceptance of and participation in the consultation process is part of the trade-off to which First Nations must agree. In addition, while First Nations are given the discretion over how the funds will be allocated, they are expected to cover the costs of participating in the consultation process.[202]

3.5 Land & Water B.C. Aboriginal Interests Consideration Procedures, September 8, 2003

Another provincial Crown agency whose decision-making has significant implications for First Nations consultation is *Land and Water British Columbia Inc.* (LWBC), a Crown Corporation that receives and decides on applications for Crown land sales and tenures, and water licenses and tenures. The sale and tenuring of land that is under legal dispute through litigation and treaty negotiation has even greater implications when the Province asserts the negotiating position that "Private property should not be expropriated for treaty settlements."[203]

The LWBC *Aboriginal Interests Consideration Procedures, September 8, 2003* follows the main *Provincial Policy* but does appear to weigh the option of disallowing a proposal more heavily than in other decision-making. Specifically the document states that:

> *Proposals can be disallowed by LWBC decision makers at any time during the consideration of aboriginal interests where a significant potential for infringement of aboriginal rights or title is identified, and where the cost of further assessment exceeds the future economic and social benefits from the proposal.*[204]

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consultation process in respect of the Operational Plan and that a decision on the Operational Plan may proceed."

[202] *Strategic Policy*, 9. "The First Nation will be able to use the funds from revenue sharing to support its capacity development, economic development and participation in consultation processes. As a result, in the absence of alternative sources of funding, the Ministry of Forests will still expect that the First Nation will meet its obligations under the FRA."

[203] Government of British Columbia, Treaty Negotiations Office. *Instructions to Negotiators, Treaty Principles.* July 31, 2002. Available at: http://www.gov.bc.ca/tno/negotiation/instr_for_negotiatiors.htm

[204] Land and Water British Columbia, A Corporation of the Government of British Columbia. *Aboriginal Interests Consideration Procedures, September 8, 2003*, 6.

Indeed, the economic benefits of land and water sales and tenuring are of primary importance to LWBC. In the 2003/2004 fiscal year, LWBC generated $93 million in provincial revenue in its pursuit of "...revenue generation by aggressively pursuing and encouraging investment and optimal use of Crown land and water resources."[205]

3.6 Mining Task Force Report and B.C. Mining Plan

This type of risk-benefit analysis can also be found in a report produced by the B.C. Mining Task Force which was struck in 2003 by the Premier and Minister of Energy and Mines to find ways to revitalize the mining industry in British Columbia. The issue of Aboriginal title and rights was one of the key concerns addressed, but the actual report of the Task Force was eventually suppressed by Cabinet.[206] Instead, the government released its *B.C. Mining Plan* in early 2005. However, the Chair of the Mining Task Force Ralph Sultan did highlight one of the report's key features in a speech before the Canadian Institute's *Improving B.C. Land Access and Community Consultation* forum. The task force commissioned PriceWaterhouse Coopers to collect data on the economic benefits and risks associated with increased mining activity on land that is claimed by both the Crown and First Nations. What the study found was that "the government has a larger net revenue stake than does the investor."[207] What this means, to the Mining Task Force, is as follows:

> *The implication is that government should proceed with the permitting of mines on lands subject to uncertain tenure confident that if subsequently it turns out "Oops that mine is actually on aboriginal ground" it is no big deal for the taxpayer. For thanks to Tulsequah and Weyerhauser, it seems...that title is the governments' problem, not the company's, and should the issue become investor compensation, well then...even under the worst case the taxpayer is still ahead of the deal.*[208]

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[205] Land and Water British Columbia, A Corporation of the Government of British Columbia. *Service Plan: 2003/2004, Financial.* Available at: http://lwbc.ca

[206] Vaughn Palmer, "Kinder, gentler mining plan released," *Prince George Citizen*, 21 January 2005, 4. "When the committee of MLAs reported back in the fall of 2003, the government suppressed its report."

[207] Ralph Sultan. "Resource Development, Land Use, and First Nations Treaties." Nov. 25, 2004. Available at: www.ralphsultan.com/Speeches

[208] Sultan, *Resource Development.*

While this risk-benefit breakdown was not included in the official *B.C. Mining Plan*, the Plan did proclaim that under its new "two-zone land system", more than "85 per cent of the province is open to [mineral] exploration."[209] On the remaining lands - "parks, ecological reserves and other sensitive areas" – "mining is prohibited."[210]

3.7 Environmental Assessment Procedures

In formulating its argument for the *Taku* case at the Supreme Court of Canada, the Province drew on the existing *Environmental Assessment Act* and its provision for consultation with First Nations, including its conformity with the *Provincial Consultation Policy*. A *Supplementary Guide to First Nations: The British Columbia Environmental Assessment Process* is also available to provide details on First Nations involvement. The key difference between this type of consultation process compared to others discussed here, is that capacity funding is often available to First Nations to participate in the assessment process. Because a precedent for general public participation funding already exists, it would be unlikely that First Nations would be denied similar opportunities.

There is no blanket First Nations funding allocations, but case-by-case funding is "available subject to appropriations." Proponent funding is also relied upon to address capacity needs, but First Nations are reminded that "there is no legal requirement for proponents to do so."[211]

3.8 Factum of the Appellants – Norm Ringstad et al, Appellants in *Taku River First Nation v. B.C.*, and, Factum of the Appellants – The Minister of Forests and the Attorney General of British Columbia, in *Haida Nation v. B.C.*

While the policies and procedures of the provincial government indicate the official position on consultation in practice, the legal arguments made by Crown counsel in

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[209] Government of British Columbia. "BC Mining Plan". Available at: www.gov.bc.ca/em
[210] *Mining Plan*, 32.
[211] Environmental Assessment Office, Province of British Columbia. *Supplementary Guide to First Nations: The British Columbia Environmental Assessment Process*, 8.

landmark cases also reveals their political position on consultation and accommodation. In the landmark *Taku* case, as discussed in Chapter Two, the provincial decision-makers employed by the Environmental Assessment Office argued several key points which further highlight the Province's position on consultation. The following passage is central to their argument as it was largely adopted by the Supreme Court in its final decision:

> *Prior to the determination of aboriginal rights and title, the duty of the Provincial Crown is best characterized as a duty of fair dealing with First Nations. The components of that duty include to inform the First Nation, and to consult with them regarding the potential impact of statutory decisions on aboriginal interests. However, it stops short of a duty to ensure that all First Nations' concerns have been substantially addressed...the Provincial Crown's duty...is not a duty to obtain the consent of First Nations to resource management decisions which may affect interests which they have asserted, but not yet established.*[212]

In assessing whether or not consultation has been adequate, the Province also argued that final decisions should be upheld by the courts so long as the "decision makers have considered the correct factors, including potential impacts on aboriginal interests."[213] In the case of the Redfern Mine and the Taku, they argued that the Minister responsible was aware of the Tlingits' concerns, took them seriously, and sought to both mitigate impacts and to "balance those interests with other public policy considerations." For these reasons, it was argued that they fulfilled their duty of fair dealing.[214]

To go above and beyond a duty of fair dealing, the Province argued, would "effectively reverse th[e] onus" of proof of title and rights – from the "aboriginal group making the claim" to the Provincial Crown. It was argued that "the Crown should not have to meet the onerous burden of justification before the First Nation has proven the right, or the extent of the infringement."[215] Thus, "before the Petitioners have proven the aboriginal rights and

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[212] Norm Ringstad et al. *Appellants' Factum*. In the Supreme Court of Canada, Court File No.: 29146, 8.
[213] *Appellants'*, 8.
[214] *Appellants'*, 30.
[215] *Appellants'*, 20.

title they claim, no reciprocal, fiduciary obligation of accommodation should be imposed upon the Crown."[216]

In the *Taku* case, the Province had to defend their consultation practices with the Taku River Tlingit in the environmental review process; in the *Haida* case the Province attempted to justify why the Haida Nation should not have been consulted in the transfer of TFL 39. The argument presented was that the duty of fair dealing had been satisfied through consultation with the Haida at the operational level, where the Province had taken "into account ongoing aboriginal land uses and cultural interests prior to making decisions regarding the allocation of Crown lands and resources."[217] Instead of the existence and infringement of constitutional rights as the trigger for consultation, the Province argued that the duty of fairness is triggered by "an administrative decision that affects the rights, privileges or interests of an individual."[218]

Similar to the argument mentioned above on the onus of proof, the Province argued that instituting a constitutional duty of consultation is "not compatible with the Crown's sovereign rights as owner of the soil to grant tenures, and the exclusive legislative powers of Province under ss. 92 and 92A to manage the lands and resources."[219] In other words, to establish a constitutional duty to consult would shift the balance between Aboriginal rights under s. 35 and the rights of the Province under s. 92, in favor of Aboriginal people.

The Province did detail how the reconciliation and balancing of these two competing constitutional rights should occur in their factum to Supreme Court. Their vision of reconciliation was described as follows:

> *The reconciliation mandated by s.35 does not mean that the Crown may not enact laws in relation to its lands and resources without first obtaining the approval of each affected*

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[216] *Appellants'*, 20.
[217] The Minister of Forests and the Attorney General. *Appellants' Factum*. In the Supreme Court of Canada, Court File No.: 29419, 44.
[218] *Appellants* (MOF), 24.
[219] *Appellants* (MOF), 36.

> *First Nation, or that every tenure and land management decision must have the prior approval of First Nations. Reconciliation must take into account both the interests of aboriginal peoples and the reality of Crown sovereignty.*[220]

Finally, because the Province "disputes the Haida title claim," they argued that until that claim was ruled upon by the courts that "there can be no full reconciliation of the Haida demand for control of tenure allocation and management, with the Province's legislative and constitutional authority."[221]

3.9 Conclusion

The Province of British Columbia's account of meaningful consultation, in the form of policy and procedure has developed rapidly over the last decade. In the wake of landmark court decisions, government has constructed policies that touch upon nearly every aspect of provincial decision-making. Key elements of the Province's approach to meaningful consultation can be summarized as follows:

- **Proportionality and Proof:** First Nations must prove their title and rights, either in a court of law or must provide evidence of their claims to decision-makers in order to engage in consultation. Provincial decision-makers enjoy the discretion to assess the soundness of those claims and to devise consultation methods that they feel are proportionate to the soundness of the claim.
- **Consent, Vetoes and Sovereignty:** First Nations consent to any development or project should never be required. Because the Province has constitutional authority over land and resource management for the betterment of all British Columbians, First Nations constitutional rights cannot be considered absolute.
- **Justification vs. Accommodation:** The attempted justification of an infringement almost always precedes the avoidance of infringement through accommodation of First Nations. Accommodation is usually the last effort in the consultation process. Accommodation should yield stability on the land base, and provide certainty for investors.
- **Timing:** Consultation should occur as early as possible; this both improves the quality of consultation and assists decision-makers in meeting legislated timelines.
- **Non-Participation:** Decision-makers will document all attempts to consult and accommodate, and where First Nations choose not to participate the process will go on without them. (This includes the assessment of their potential rights and title, and the impact of the activity.)
- **Documentation:** Because of the litigious nature of consultation, decision-makers must document all communication and attempted communication with First Nations.

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[220] *Appellants* (MOF), 37.
[221] *Appellants* (MOF), 30.

All communication is *with prejudice* to future legal disputes. This documentation also contributes to the provincial database on consultation, which is accessible only to provincial government employees.

- **Consultation Overload and Capacity Building:** The Province does not provide any blanket funding for First Nations to participate in consultation. To prevent overload, the preferred approach is prioritizing consultation initiatives and streamline processes. Some funding is available in certain circumstances, to be negotiated on a case-by-case basis.
- **Risk(Cost)-Benefit Analysis:** In certain circumstances, the costs and risks of consulting and accommodating First Nations will be weighted against the economic benefits that government will gain as a result of the development in question. This may influence the consultation process.

These key elements of the provincial position highlight the official positions as presented in government policy, but also incorporate the legal arguments made by the Province in landmark court cases on consultation and accommodation. They have been surveyed in this chapter to provide an account of the provincial position which can be compared and contrasted to the positions of various First Nations in Northern B.C., and the legal principles from the Supreme Court, using the criteria gleaned from the literature in Chapter One as the basis for analysis.

Chapter Four:
Meaningful Consultation, As Described by First Nations in Northern B.C.

First Nations in Northern B.C. have been at the forefront of the development of the legal framework on consultation and accommodation. As has been shown in the second chapter, a significant number of court cases on Aboriginal title and rights have emanated from the Northwest region of British Columbia, and because this region has no settled treaties aside from the Nisga'a Final Agreement, the issue of pre-treaty negotiation and consultation is all the more prevalent. This chapter will first examine some of the legal arguments made before the Supreme Court by First Nations within Northern B.C. Second, this chapter will look at some of the critiques of various First Nations within Northern B.C. on the procedural and process-oriented aspects of current consultation practices and some of their statements of principle that should guide consultation processes. Finally this chapter will present some of the developments in First Nations designed consultation processes. The key elements of all three sections will then be summarized in the conclusion.

The First Nations surveyed here are First Nations who do not have treaties with government (i.e. non-Treaty Eight and Nisga'a Final Agreement). While there may be similar issues and approaches between treaty and non-treaty First Nations, the legal framework within which the two operate, and the historical development of the political positions among the First Nations differs significantly enough to warrant distinct research on the two. Thus, the focus of this chapter is First Nations in Northwest and North Central British Columbia and their approach to meaningful consultation and accommodation.

4.1 Legal Arguments

Taku River Tlingit First Nation Factum of Respondents, *Taku River Tlingit First Nation et. al v. B.C.*

In their Supreme Court case the Taku River Tlingit (TRTFN), whose traditional territory surrounds the Northwest B.C. town of Atlin, argued that the provincial *Environmental Assessment Act* (EAA) process which culminated in the issuing of a permit

for the Tulsequah Chief Mine was flawed according to legal principles of procedural fairness. Their main point of contention was that the road that would be built to support the mine's transportation needs would impact TRTFN's hunting and gathering area.

In response to the Province's argument, that the Tlingit must first prove their Aboriginal title and rights in court before a constitutional or fiduciary duty of consultation is triggered, the TRTFN argued the following:

> *Legally and practically, if the Crown has no fiduciary obligations until specific rights are adjudicated, Aboriginal peoples will have no constitutional protection unless they flood the courts with applications for declarations of all their Aboriginal rights and corresponding interlocutory relief. That would be the only way to stop Crown officials from alienating Crown lands and resources or authorizing impacts to land-related Aboriginal interests as if s.35 had not been added to the constitution.*[222]

For the TRTFN, the duty of consultation must be placed in the larger context of protecting Aboriginal rights, not justifying their infringement, or requiring proof that they exist. They submitted "that the Crown has a fiduciary obligation to protect and accommodate land-related interests on which Aboriginal peoples rely to sustain themselves currently or into the future."[223] Moreover, consultation serves the overall purpose of s.35, which is to act as a "**constitutional restraint** on the Crown's exercise of its legislative and administrative powers."[224]

If the Tlingits were only owed a duty of 'fair dealing', which means that there is "no duty to substantially address Tlingit concerns," this would allow government to continue "business as usual, thereby legitimizing the same practices that s.35 was enacted to end, by which the rights of the Aboriginal peoples were so often "honoured in the breach."[225] Instead, the consultation process must consist of government-to-government discussions

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[222] *Taku Factum*, 12.
[223] Taku River Tlingit First Nation. *Factum of the Respondents in Taku River v. B.C,* 10.
[224] *Taku Factum*, 12. (Author's emphasis.)
[225] *Taku Factum*, 11.

between the Crown officials and the Aboriginal people affected in order to "consider the information obtained and the resulting options" following "the information gathering or environmental assessment process."[226]

The TRTFN also claimed that the decision to approve the mine certificate failed the EAA standard for procedural fairness. Many of their concerns were directed at the wildlife sub-committee, regarding impacts to the local caribou herd. While the wildlife sub-committee acknowledged that the TRTFN issues had yet to be dealt with, they did not follow through, and failed to note any outstanding issues in the final Recommendations Report that was submitted to the Ministers responsible.[227]

Moreover, the TRTFN were not allowed to be full participants in decisions on the Recommendations Report, and the committee did not have a final meeting with them to discuss their concerns. For the TRTFN this was a breach of sections 2(d) and 9(2) of the EAA, requiring procedural fairness, that the "environmental review be conducted by procedures that are open, accountable and neutrally administered."[228] The TRTFN argued that "because the Recommendations Report was meant to reflect the investigative phase of the review process and also constituted the reasons for the Ministers' decision, any procedural breach in preparing that report would taint the decision itself."[229] Finally, when the process was prematurely and inexplicably cut off, the TRTFN voiced their concern, but "received no reply" from the committee or the sub-committees.[230]

Haida Nation – *Factum of the Respondents in Haida Nation v. B.C.*

Similar to the TRTFN, the Haida Nation argued that the Province owed First Nations a fiduciary and constitutional duty to consult and accommodate, prior to the proof of their rights and title. For the Haida, "the objective of consultation is to attempt to reach an

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[226] *Taku Factum*, 30.
[227] *Taku Factum*, 38.
[228] *Taku Factum*, 39.
[229] *Taku Factum*, 40.
[230] *Taku Factum*, 39. For the Supreme Court's treatment of this issue, see Chapter Two, pg. 10

accommodation by agreement." This is based on the nature of Aboriginal title, established in the *Delgamuukw* case. The court has established that Aboriginal title includes "the right to *exclusive use*, the right to *choose to what uses the land can be put*," thus consultation on Aboriginal title must require an agreement between First Nations and the Crown. [231]

The Haida maintained that the arguments of the Province must be placed within "the context of [their] historical and continuing denial and resistance of the reality of Aboriginal Title." The demand for First Nations to prove their rights and title in court contradicts the fact that the basis of Aboriginal title is prior occupation (as in *Delgamuukw*), not Crown recognition of title. It was further argued that by the time rights and title are proven through litigation, there will be nothing left to consult about, because of the rate and extent of exploitation of natural resources. The Haida contended that the Province was seeking a decision making process that was expedient, not legally sound and that "convenience is not a valid reason to turn a blind eye to constitutional and pre-existing rights, and it cannot trump justice." [232]

In order to adequately consult and accommodate, the Haida argued the following:

> *The goals should be to avoid infringements, minimize infringements necessary to achieve a 'valid and substantial objective', compensate for necessary infringements and involve the Haida in decision making in a meaningful way. The goal should be to reach agreement, but at the least, accommodation should be reflected in the end result and not merely in the process of decision making.*[233]

Finally, the arguments made by the Haida Nation with respect to consultation on impacts of Aboriginal title were compounded by the fact that the Haida currently have a title case pending in the courts.

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[231] Haida Nation. "Factum of the Respondents, *Minister of Forests et al v. Council of the Haida Nation et al*, Supreme Court of Canada Registry No. 29419, 3 (Author's emphasis).
[232] EAGLE. Argument Summaries for the Supreme Court, 4. Available at: http://www.ubcic.bc.ca/files/PDF/ArgumentSummaries_HaidaSCC_prepEAGLE.pdf
EAGLE is the "Environmental Aboriginal Guardianship Through Law and Education" legal group that represented the Haida Nation in the *Haida* case.
[233] EAGLE, *Argument,* 2.

Haisla Nation and Lax Kw'alaams First Nation – Interveners in *Haida v. B.C.*

Two other coastal First Nations were interveners in the *Haida* case before the Supreme Court – the Haisla and the Lax Kw'alaams First Nations. The Haisla occupy a traditional territory in the Kitimat area, and Lax Kw'alaams is a Tsimshian village also known as Port Simpson, near Prince Rupert. The Haisla intervened independently and based most of their argument on the requirement for proof of Aboriginal title and rights for consultation and accommodation. As a First Nation in the B.C. treaty process, the Haisla argued that once committed to treaty negotiations, First Nations are prevented from litigating to protect their aboriginal rights. If the Crown was under no pre-litigation obligation to consult, First Nations would have no way to prevent continuing infringement of their rights, and governments would have no incentive to negotiate.[234] Similar to the Haida and the Taku, the Haisla also maintained that requiring First Nations to prove title and rights before consultation would force First Nations into years of litigation.[235]

The Lax Kw'alaams First Nation jointly intervened with the Squamish Nation of southern British Columbia. Similar to the other First Nations, they argued that without a fiduciary or constitutional duty to consult that the Province would have no incentive to deviate from the status quo. They also argued that despite the opposition of the Province to the B.C. Court of Appeal decisions on *Haida* and *Taku* (the decisions that the Province were appealing to the Supreme Court), that those decisions had already an immediate and practical effect in encouraging positive reconciliation agreements.[236]

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[234] Haisla, *Factum*, 2.
[235] Haisla Nation. *Factum of the Intervener, Minister of Forests et al v. Council of Haida Nation et al.* Supreme Court of Canada Registry No.: 29419.
[236] Lax Kw'alaams Indian Band and Squamish Indian Band. *Factum of the Intervener, Minister of Forests et al v. Council of Haida Nation et al.* Supreme Court of Canada Registry No.: 29419.

Factum of the Intervener - Tenimgyet, also known as Art Matthews, Gitxsan Hereditary Chief, in *Haida v. B.C.*.[237]

As with the other First Nation interveners, Tenimgyet of the Gitxsan First Nation located in the Skeena and Bulkey River watersheds, argued strongly against a requirement of proof of Aboriginal title and rights before consultation is required. It was claimed that "given the delay, costs and uncertainties attached to the judicial process," requiring First Nations to prove their title and rights in court would "render the promise of s.35, as well as the concepts of consultation and accommodation, hollow and largely meaningless."[238] Moreover, it was noted that "no other constitutional rights come into existence once they are recognized by a court."

Tenimgyet also argued that the Crown cannot rely on the argument that they must recognize the competing interests of non-First Nations interests because it is they who have "created a complex web of competing interests and rights." Moreover it is the Province who has "created interests and expectations in land and resource use without first obtaining meaningful consent from Aboriginal peoples or at least instituting mechanisms to accommodate their rights." Finally, the Province has "created the inadequate administrative decision making process in the first place."[239]

4.2 Critique of Consultation Processes and Statements of Principle

Through their experience of previous and current consultation practices with the provincial Crown, First Nations have articulated various critiques of such processes and also issued statements of principles that should improve and guide such processes. These range from commentaries and analysis from First Nations consultation practitioners, to public statements issued by political leaders and Elders, to official moratoria on certain

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[237] Tenimgyet. *Factum of the Intervener, Minister of Forests et al v. Council of Haida Nation et al.* Supreme Court of Canada Registry No.: 29419.
[238] Tenimgyet. *Factum*, 1.
[239] Tenimgyet. *Factum*, 2.

developments in the traditional territories pending the development of more desirable consultation processes.

Two such consultation practitioners, from the Gitxsan and Lheidli T'enneh First Nations, discussed their experience with the Ministry of Forests Traditional Use Study program (TUS), implemented in the late 1990's, at the *Implementing Delgamuukw Conference, March 1999*, hosted by the Union of B.C. Indian Chiefs. Although the TUS program is no longer in operation, the results of the program are still being used in consultation activities.

Russell Collier of the Gitxsan expressed that "our biggest fear was that the information we provided would be used against us, or in place of acceptable consultation." By providing detailed information in the TUS on locations of fishing, hunting, gathering and sacred sites, it was feared that "the province would somehow either subvert the consultation process and use it in place of actually talking to us, or that they would find a way to turn it around and use it against us. And they did." After they identified sensitive areas to be protected from logging, the Province "found ways to legally make it, through their consultation process, make it useless information," they would go on to target those areas for logging that had been specified as sensitive or needing protection.[240]

The issue of ownership and access to information was also prevalent for the Gitxsan. Collier explained the discrepancy between the Gitxsan and the Province's positions as follows:

> *We didn't want government branches just accessing it without permission from our House Chiefs. That's our information, and ownership of our information was a really big issue. They maintained at that time...that they were paying us to provide them information to get them through the legislative requirements for consultation. Difference of interpretation.*[241]

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[240] Russell Collier, Gitxsan Strategic Watershed Analysis Team, Presentation at the : "Implementing Delgamuukw Conference, March 1999", hosted by the Union of BC Indian Chiefs. (Verbatim transcript available at: www.ubcic.bc.ca)
[241] Collier, 2.

In retrospect to the entire TUS process, Collier concluded that "we have got around 400 meticulously documented and fairly useless referrals to show for it, with no change on anything." He added that "it is leading us down the path we didn't necessarily want or expect we have to go through. This is the "going back to court thing." [242]

Don Bain of the Lheidli T'enneh First Nation provided some observations on the issue of the capacity of First Nations to deal with the volume of consultation referrals. He summarized his experience as follows:

> *In terms of consultation...on the ground, what's happening in our community amounts to about a thigh-high pile of papers. We get letters, faxes, and phone calls. Mainly the letters and faxes are filled with such jargon that we can't understand them – talking about five year development plans all the way up to archaeological impact assessment permits to mining plants, hydrology permits. We're a small community of about 250 people. We just don't have the capacity within our community to address these consultation purposes. Consultation is a good step, but right now all we can do is respond with a letter.*[243]

Bain went on to describe an instance where they had invested heavily in the consultation process of one of the proposed developments in their territory. After writing letters and meeting with the local forest district to present their input, and participating in the archaeological impact assessment, they found out that "they [had] cut a deal with the other [neighboring First Nation] community and made their management decision based on this deal, without talking to us. We found out about the management decision after the fact."[244]

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[242] Collier, 2.

[243] Don Bain, Lheidli T'enneh Traditional Use Study Coordinator, Presentation at the: "Implementing Delgamuukw Conference, March 1999", hosted by the Union of BC Indian Chiefs. (Verbatim transcript available at: www.ubcic.bc.ca) The LTN were able to secure an information-sharing agreement, to head off some of the issues that Russell Collier raised above, specifically that "information maintained in the provincial heritage register database will be accessible to provincial ministries and agencies for review prior to making land-use planning and allocation decisions provided that such review will not alone fulfill provincial requirements for consultation with the Lheidli T'enneh."

[244] Bain, 2.

Title & Rights Alliance – Opposition to B.C. Forest Legislation Changes, 2003

The Title and Rights Alliance was struck in 2003 between First Nations[245] throughout British Columbia to oppose the sweeping forestry changes of the provincial government in 2003. Holding several forums and gatherings throughout the province, the Alliance issued statements to the provincial government on their opposition to the legislation and proposed alternative ways forward. The focus of the opposition was the *Forest and Range Practices Act*, *Results Based Code*, and the *Working Forest Initiative*.

In a letter to the Premier and the Minister of Forests, the members of the Title and Rights Alliance Steering Committee stated that:

> *This unilateral approach without consultation and accommodation within our territories will continue to increase legal uncertainty on the land. First Nations have jurisdiction of land and resources and recent court decisions support our claims. The Province has now translated its negotiating position into law and policy. You purport to be limited in further negotiations with First Nations by your unilateral actions (i.e. limited revenue sharing and forest tenure opportunities) while attempting to abrogate your fiduciary duty to consult.* [246]

The criticism here was aimed at the development of high-level legislation and policy with broad impacts, without the consultation of First Nations in the province. Moreover, the Alliance claimed that the Province, by not consulting on such important legislation and policy, was turning a negotiating position into law. Thus, when First Nations seek to negotiate forestry arrangements beyond the Province's position, they are told that the Province cannot exceed their own unilaterally imposed limits.

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[245] While the use of statements and analysis of the Title and Rights Alliance is not meant to be representative of all First Nations in Northern BC, it should be noted that four of the Steering Committee members are from Northern BC First Nations. (See www.titleandrightsalliance.org) Also, while the criticism of the Forest and Range Agreements presented below may be shared by many First Nations in the Northern BC region, it should also be noted that many First Nations in the region have signed FRAs with the Province. For a complete list of First Nations who have such agreements go to: http://www.for.gov.bc.ca/haa/FN_Agreements.htm

[246] Letter dates November 25, 2003. Available at: www.titleandrightsalliance.org

In response to the proposed Forest and Range Agreements (FRAs)[247], the Alliance raised numerous issues on the Province's position, including the following:

- The agreements place serious limitations on the ability of Aboriginal peoples to exercise and defend Aboriginal Title and Rights during the term of the agreement;
- Uses unreasonable per capita formulas to limit economic benefits;
- Consultation requirements fail to meet minimum legal requirements. Instead of committing the Province to "substantially address" the concerns of Aboriginal people, they must only provide a response to Aboriginal concerns and to show how they have been addressed.
- Provides for consultation on site-specific impacts only. Consultation at the operational level does not adequately account for impacts on cultural and ecological values that extend beyond forestry designated sites.
- Does not reflect best practices in consultation, such as the "Clayoquot Sound Interim Measures Extension Agreement" which provides for a board with 50-50 provincial and Nuu-chah-nuulth appointees.
- Does not provide for adequate consultation on important decisions on allowable cuts (how much is cut and how fast). Here First Nations can only participate in the general public consultation process, alongside other "stakeholders."
- Yet, by signing the agreements, First Nations must agree that the consultation process developed by MOF is adequate, and are bound to participate in it.
- If an offer of a FRA is made it is considered *with prejudice* as part of their due diligence. This is problematic because the FRAs are unilaterally developed, and leave no room for negotiation. First Nations who signed these agreements, and those who attempted to negotiate better terms, have noted the 'take it or leave it approach' of the Province.
- The focus is only on the 'economic component' of Aboriginal title. One of the key legal components of Aboriginal title – "the right to decide the uses to which Aboriginal Title lands are put" is absent from the agreements. There is no possibility that First Nations can say no to activities that will undermine the ability of the land to sustain future generations of Aboriginal peoples.
- Yet, the agreements justify "any infringements" that may occur as a result of all forestry activity within the traditional territory of the First Nation, not only infringements of the economic component of Aboriginal title.[248]

More generally, the Title & Rights Alliance identified changes in forest legislation that impedes the Crown's ability to carry out its duty to consult and accommodate. In the *Forest and Range Practices Act*, the "Province has attempted to remove legal "triggers" for its duties to consult and accommodate," through changes "that reduce or eliminate statutory

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[247] For the BC government description of the Forest and Range Agreements, see Chapter Three, pg. 14.
[248] Title & Rights Alliance. "Title and Rights Alliance Background Paper: Forest and Range Agreements," May 2004, Prepared for the Title and Rights Alliance Conference: Moving Forward in Unity, May 19, 2004, 1-2. Available at: www.titleandrightsalliance.org

decisions about forest tenure, planning and practices."[249] Once again, it is noted that these were unilateral changes, made without consultation or notification of First Nations. "For example after repealing *Forest Act* provisions that required ministerial consent to tenure transfers, the Ministry of Forests has taken the position that the fundamental issue of who controls indigenous lands is now just a "business transaction" which gives rise to no Crown duty to consult and accommodate."[250]

Haida Nation, Taku River Tlingit First Nation, and Land Use Planning

Prior to, during, and following the *Haida* and *Taku* Supreme Court cases, the two First Nations both sought resolution to the disputes in question through a joint comprehensive land use planning process with the Province. Meaningful consultation at this level would prevent disputes at the lower operational levels, and possibly could prevent further litigation. Following the decisions, TRTFN Spokesperson and Clan Director of the Crown Clan John Ward remarked that:

> *We have always argued that Land Use Planning had to happen before this project goes ahead, and the decision supports that. We still believe that the way forward is through cooperation and dialogue and we ask that government and industry accept this ruling and our longstanding invitation to work constructively with us.*[251]

He went on to note that the TRTFN had asked the Province to engage in joint planning process in 2002, but that "they snubbed us and chose to ram through a new Project

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[249] *Title and Rights*, 4.

[250] *Title and Rights*, 4. These concerns have been raised by individual First Nations party to this alliance, such as the Haida Nation: "as the [Haida] case was making its way through the courts, the provincial government was repealing, rewriting or amending virtually every forest and environmental law in BC to reduce the role of the provincial government and place increased control in the hands of resource companies. Having eliminated or reduced its role in decisions about land and water, the Crown claims that is has no duty to consult and accommodate First Nations when such decisions are made."
"Background Information on Changes to Forestry Laws." Available at: www.haidanation.ca

[251] Taku River Tlingit First Nation. "Tlingit Supreme Court Decision Creates New Obligations For Government." Press Release, 18 November 2004.

Approval instead." He pointed to the *TRTFN Land Use Vision and Management Directions Document* as their basis for land use planning when B.C. comes back to the table.[252]

The Haida Nation also point to their Land Use Vision as the basis for their preferred approach to a joint land use planning process. They have entered into such a process with the Province,[253] and thus far have established Haida Protected Areas and are working towards a *1000 Year Plan for Cedar*, because "only a 1000-year plan for cedar will ensure cultural survival for our people."[254] As with their legal arguments provided earlier in this chapter, the Haida maintain in their *Hlk'yan Yahguudangang* (Forest Respect) that:

> *People who wish to carry out activities in the forests of Haida Gwaii will be expected to follow the Haida Forest Policy with the consent of the Haida Nation. The Haida Forest Policy provides direction for Haida and non-Haida alike in the protection and use of the forests of Haida Gwaii.*[255]

While this policy is likely to be monumental in the debate on consultation and accommodation, at this time it is either still in development and/ or unavailable to the public.

Carrier Sekani Tribal Council – Consultation on Mining Developments

Comprised of eight Dakelh and Sekani First Nations located in North Central B.C., the Carrier Sekani Tribal Council (CSTC) represents and assists the bands in treaty negotiations and natural resource issues.[256] Following the decisions at the Supreme Court on the *Haida* and *Taku* cases, the CSTC expressed support for the First Nations involved and highlighted some key issues with respect to consultation and accommodation. Tribal Chief Harry Pierre remarked on the Province's limited approach of dealing with First Nations issues only upon instruction from the courts:

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[252] A copy of the *Taku River Tlingit First Nation Vision and Management Direction for Land and Resources* is available at www.roundrivercanada.org or www.trtfn.com The TRTFN eventually went on to develop their own land use planning process, beginning with this vision document, without the involvement or support of the BC Government.

[253] For a short description of the Haida Land Use Vision and the proposed planning process see: http://haidanation.ca/land_use_planning/hluv.php

[254] See: http://haidanation.ca/land_use_planning/plan.php

[255] See: http://haidanation.ca/land_use_planning/policy.php

[256] See www.cstc.bc.ca for a description of Carrier Sekani Tribal Council's mandate and responsibilities.

> *Every inch of recognition and accommodation that First Nations have, has come through the courts. Government has made it clear that they are unwilling to recognize and deal fairly with our people unless under court orders. First Nations in the area are calling upon the two levels of government to go beyond the minimal legal requirements, and to build new relationships where decision making on land use is shared and where meaningful consultation and accommodation are a basic part of doing business in B.C.*[257]

A former analyst with the CSTC formulated the following approach to make consultation meaningful, based on the experiences of the member First Nations:

> *The Crown and the First Nation must establish a mutually agreeable referral process and timelines for addressing land uses that may negatively impact aboriginal title. In this process, the Crown states a clear intent to infringe on aboriginal title and justifies this infringement in way acceptable under the terms identified by the Supreme Court...For consultation to be meaningful, the parties need to decide what type of consultation is triggered by a given proposed land use. Aspects of consultation may include notification of a proposed land use, information exchange, research, and joint consideration of mitigation measures. Both the Crown and the First Nation need to agree on the types of information relevant to consultation, how this information is generated and what technical resources the First Nation needs to participate in consultation. They also need to agree on what consultative structures and procedures are used.*[258]

It is clear that the emphasis here is on the *joint* development of all aspects of the process, which means that even before consultation commences, that there must be agreement between the parties on how consultation will proceed.

Recently, two CSTC member First Nations have become involved in challenging mining companies over both past and proposed future mining development in their traditional territories. The Tl'azt'en First Nation, located near Fort St. James, recently

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[257] Tribal Chief Harry Pierre quoted in Carrier Sekani Tribal Council, "Courts Uphold First Nations' Right to be Involved in Land Use Decisions," Press Release 18 November 2004.

[258] Doug Brown, "Carrier Sekani Self-Government in Context: Land and Resources," in *Western Geography* 12 (2002), 21-67, 60.
This is not meant to be a statement from the Carrier Sekani as the author is not a member of those First Nations, but he notes that "this paper is largely the product of the years...spent working for the Carrier Sekani Tribal Council and listening to the Carrier Sekani people speak about the challenges, problems, and opportunities they face." (pg. 64)

imposed a "moratorium on new mining activities in [the] territory" following the failure of a tailings pond dam at the Teck-Cominco mercury mine, which is no longer in operation.[259] The lake affected is major source of food fisheries for the Tl'azt'en and other First Nations in the area.

Tl'azt'en seeks their involvement in the reclamation phase, in the same way as they would be involved in the permitting phase – through consultation and accommodation. "We feel it is only appropriate to be directly involved in all activities that will rehabilitate this lake. Therefore, we will be seeking out meaningful consultation and accommodation from the company and government." In explaining their moratorium on future mining, it was stated that "the B.C. mining industry has much to account for before making further incursions in the territories."[260]

The Takla Lake First Nation, along with the Gitxsan House of Nii Kyap, the Kwadacha First Nation, and the Tsay Keh Dene are seeking meaningful consultation and accommodation in the permitting and environmental review process for the proposed Kemess North gold and copper mine.

After working directly with the company, Northgate Minerals, on a consultation protocol the "4 Nations" sought to be involved in a tri-partite environmental review process – Canada, B.C. and First Nations. Instead, B.C. and Canada continued with their bilateral process, despite opposition from the 4 Nations. The 4 Nations issued the following statement in response:

> *On March 14, 2005, Canada and British Columbia announced they were commencing the formal environmental assessment phase of Northgate Minerals Corporation's Kemess North mine....It is premature for the Crown to proceed without a consultation and accommodation protocol agreement in place that addresses our Aboriginal title and rights. Both levels of*

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[259] Tl'azt'en Nation, "Mercury-Laden Mining Waste Spills into Pinchi Lake, Provincial Chief Mine Inspector Downplays its Significance; Tl'azt'en First Nation Issues a Moratorium on New Mining Activity in Their Traditional Territory," Media Advisory and Statement, 15 February 2005.
[260] *Tl'azt'en*, 2.

government were aware of our intent to negotiate such a protocol before the review commenced.[261]

The 4 Nations are also seeking an Impact Benefit Agreement prior to the initiation of the environmental review process. On their current involvement in the assessment process they remark that "we feel that we are being treated by the Crown as a mere third-party interest group. This is unacceptable."[262]

Tahltan First Nation – Elders Statement

The Elders of the Tahltan are another group which has issued a moratorium on mining activity in their traditional territory recently. This moratorium, however, is in protest to their Chief and Council entering into agreements with the B.C. Government and Shell Canada, who has been conducting exploration work in the headwaters of the Stikine, Skeena and Nass Rivers.

In their official statement, the Elders state that:

> *Agreements have been negotiated in secret between Indian act chiefs, the Tahltan Central Council and government and industry. The promise of jobs does not compensate for loss of land, resources and impacts on the environment and people. This is not only a violation of Tahltan law; it is a fundamental violation of our rights under the Canadian Constitution. Therefore, it is both our right and our responsibility, as Tahltan Elders, to reclaim our legitimate place within Tahltan law and custom.* [263]

The Elders are seeking their direct involvement in the development of "legal agreements" before any development occurs in Tahltan Territory. These agreements must ensure that Tahltan people have equitable share in the revenues generated "and are involved in all

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[261] 4 Nations, "First Nations demand the halt of the Crown's early decision to create an environmental review panel for Kemess North mine application," Press Release 15 March 2005.
[262] 4 Nations, *First Nations*.
[263] Tahltan Elders. "Tahltan Elders Statement: *Dena nenn Sogga neh'ine* (Protectors or Keepers of the Land)," 25 February 2005. Available at: www.miningwatch.ca

aspects of decision-making." Furthermore, because previous agreements with government and industry were in violation of Tahltan Law, they "are hereby declared void."[264]

4.3 Policy Development

In guiding and informing government on the preferred approach to consultation and accommodation, the Gitxsan First Nation has developed a document which describes traditional decision-making structures and processes. The key argument presented in this document, and elsewhere by the Gitxsan, revolves around the question of *who to consult.* They note the following:

> *The convention now is that Crown will consult with bands, pursuant to the Indian Act, and their band councils, pursuant to the Indian Act, because traditional aboriginal entities have been subordinated, forgotten or dismissed by the respective tribes in favour of the band and council entity. The bands and their band councils do not pre-date 1846. Traditional aboriginal entities pre-date 1846 and existed at the time of [C]onfederation. Therefore, the correct entities that must be reconciled with the sovereignty of the Crown are the traditional aboriginal entities that existed at 1846 and beyond, not the bands or the band councils.* [265]

As in their landmark *Delgamuukw* Supreme Court case, and other legal challenges and statements, the Gitxsan have been consistent in the authority of their Hereditary Chiefs as the principle decision-makers on the traditional territories. This document details the process of traditional decision-making, as a process *internal* to the Gitxsan. This serves as a good explanation of traditional internal consultation, but does not go in-depth into a Gitxsan-developed consultation process with the Crown.

However, the Gitxsan are developing "a living consultation process in the form of a Consultation and Accommodation Protocol," on forestry activities which "will be refined with experience and further negotiations." The purpose is "to provide comfort and certainty for

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[264] Tahltan, *Statement.*

[265] Wilp Task Group, for the Gitxsan Treaty Society. "A Preliminary Report: Inside the Gitxsan, The Gwalax Yee'nst, A Cursory Description of Innate Traditional Gitxsan Processes, Structure and Teachings," 7. 02 March 2004. Available at: www.gitxsan.com

the Simgiigyet and MOF related to forestry activity on Gitxsan lax yip [territory]."[266] This process is based on watershed-level planning and seeks to set management directives that are based on the involvement of the Hereditary Chiefs. While the Gitxsan recognize that the Province will not negotiate compensation for past use or damages, they are seeking "a firm and longstanding commitment on behalf of the province to forest restoration and watershed rehabilitation on Gitxsan territories."[267]

With respect to oil and gas development, the Gitxsan have developed a *Draft Gitxsan Oil and Gas Ayookw* (Law). The purpose of this document is to:

> *Provide Huwilp* [House Groups] *in the watersheds with a framework to assert rights and title to oil and gas resources; ensure the environmental and sociocultural impacts of energy exploration, development and transport are addressed and integrated into all policies and programs; and to ensure current and future generations of Gitxsan have secure access to benefits arising from sustainable resource extraction."*[268]

While the full text of the document is currently unavailable, a general summary of its content is as follows:

- Individuals, companies or governments and their agencies who propose to conduct oil and gas activities on the lax yip [territory], or desire to meet with the Gitxsan to discuss oil and gas issues, are responsible for fees for service.
- The Gitxsan will seek to establish a working relationship with all stakeholders.
- In reference to the Gitxsan Oil and Gas Ayookw, any sections that refer to approval of a project with consent from the Gitxsan Resource Management Authority (GRMA), means that the GRMA fully informed and achieved consensus or approval from the Wilp whose lax yip is to be developed.
- The Gitxsan will not allow the removal or utilization or oil and gas resources from the lax yip without an established favorable revenue-sharing or other related benefit agreement.
- The GRMA and other Gitxsan agencies, committees, trusts and bodies and all their employees will incorporate Gitxsan cultural and environmental values into the approval of oil and gas projects.
- Upon the completion of an oil and gas project, the lax yip must be reclaimed as closely as possible to its original state.

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[266] Gitxsan Treaty Office. "Treaty Team Negotiations Activity Update, Gitxsan Chief's Summit October 2004". Available at: www.gitxsan.com

[267] Gitxsan, *Treaty Update*, 3.

[268] Gitxsan Treaty Office. "Draft Gitxsan Oil and Gas Ayookw Summary". 20 July 2004. Available at: www.gitxsan.com

- The Gitxsan will aim to develop and implement a legislative and/or regulatory framework, with consent protocols regarding present and future infringements.[269]

It can be gleaned from this summary, that while the traditional decision-makers maintain the underlying title and rights and a significant role in decision-making, that an intermediary political body (The Gitxsan Resource Management Authority) is intended to provide proponents and/or government with the overall consent, but that this must be based on the internal process aimed at achieving consensus of the affected Wilp.

Gitanyow First Nation – Recognition, Consultation & Accommodation on Forest Development

The Gitanyow, located north of Kitwanga, have been through two legal cases at the B.C. Supreme Court level regarding consultation and accommodation regarding forestry issues. Most recently, the Gitanyow have claimed victory in the B.C. Supreme Court ruling on *Gwasslam v. B.C. Ministry of Forest and Skeena Cellulose*, where it was "declared that the Crown failed to fulfill its duty to consult the Gitanyow with respect to the transfer of control of Skeena Cellulose Inc from its previous owners – one of which was the Province of British Columbia – to NWBC Timber & Pulp Ltd."[270] Hereditary Chief Malii and Gitanyow Chief Negotiator Glen Williams stated that, "after almost two years of negotiation we were forced to apply for further relief from the court in November (2004). The Crown has not followed its own policies and the direction from the court, not only on the Skeena transfer, but on all tenure issues in our territory. Now [Judge] Tysoe is encouraging the parties to resume negotiations."[271]

In an effort to implement the rulings in the *Gwasslam v. B.C.* cases, the Gitanyow produced a working document titled *Developing & Implementing an Interim Agreement on the Recognition, Consultation and Accommodation of Gitanyow Aboriginal Rights and Title*

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[269] Gitxsan, *Oil and Gas*.
[270] Gitanyow Hereditary Chiefs, "Gitanyow Claim Victory in BC Supreme Court", Press Release 01 January 2005.
[271] Gitanyow, *Victory*.

in Relation to Forest Development on Gitanyow Territories. Similar to the Gitxsan Nation, they are implementing consultation and accommodation along the lines of the traditional decision-making bodies – the Wilp (House Groups) and their Simgiigyet (Hereditary Chiefs).

The purpose of the document is as follows:

> *To negotiate and implement an interim forestry agreement on how MOF will fulfill its outstanding legal duty to consult the Gitanyow Huwilp and accommodate Gitanyow interests on decisions that might adversely effect Gitanyow Aboriginal rights and title on Gitanyow territories, so as to preserve Gitanyow aboriginal interests pending a final claims resolution.*[272]

The document cites the Maori consultation guidelines, implemented in New Zealand as indicative of the type of process they are seeking, and has been endorsed by the Supreme Court of Canada.[273] However, for the Gitanyow the "most important element of the content of consultation...is that the Crown must be prepared to alter their original proposal."[274] Moreover, accommodation is required "when the consultation process suggests amendment of Crown policy."[275]

The document details how the Gitanyow have established through court proceedings, negotiation, and direct evidence and their oral histories a good *prima facie* case for Aboriginal title. Thus any activity that occurs within the territory is more than likely to have impacts on their interests, and would therefore require "deep consultation."[276]

One of the key issues raised by the Gitanyow is the "financial hardship and debt" they withstand to "not only protect their interests that are being infringed by Crown forest development...but also to meet the day-to-day costs arising from the planning and decision

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[272] Gitanyow Hereditary Chiefs, "Developing & Implementing an Interim Agreement on the Recognition, Consultation and Accommodation of Gitanyow Aboriginal Rights and Title in Relation to Forest Development on Gitanyow Territories," 02 March 2005, 11.
[273] See Chapter Two page 18 for the key elements of the Maori consultation policy.
[274] Gitanyow, *Developing*, 5.
[275] Gitanyow, *Developing*, 5.
[276] Gitanyow, *Developing*, 6. The Gitanyow may be referring to the passage from the Supreme Court in *Delgamuukw* on the spectrum of consultation, see Note 126.

making activities arising from current and proposed forest development activities."[277] They also point to numerous examples where forest industry companies have been given government funding to be involved in forest management planning and general land use planning. For example in 2003-04, under the Land Based Investment Program, within the Forest Investment Account, forest companies were provided with $46,264,000 for projects on "information gathering and management, restoration and rehabilitation, strategic resource management, and infrastructure."[278] Yet, when Gitanyow has requested funding to participate in land use planning they had been consistently told there is "no money for planning", and "get your own money for planning."[279]

Despite their establishment of a strong *prima facie* case for Aboriginal title and rights, the Gitanyow have found that "none of their concerns were acted on" in a number of reviews of forest development plans.[280] To implement remedies to the existing outstanding issues of the Gitanyow, they propose a process based on a "good faith commitment to a meaningful consultation process" that is guided by a Memorandum of Understanding between Gitanyow and MOF. The overall resolution of these outstanding issues would require the following:

- Joint Planning: Decisions must be based on best scientific information, with equal access to expert advice, available through a neutral body, and appropriate funding.
- Prepare and implement a Gitanyow Sustainable Land and Resource Management and Development Plan that can inform consultation and accommodation processes, and guide development activities.
- Establishment of Gitanyow Forest Consultation Council.
- Implement 'Deep' Consultation: Immediate review of the Annual Allowable Cut (AAC) in Gitanyow Territories, the disclosure and thorough policy analysis of all recent and pending B.C. policy initiatives that have the potential to impact Gitanyow rights and title, and address Wilp Interests:

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[277] Gitanyow, *Developing*, 7.
[278] Gitanyow, 7, quoting the 2003/04 Annual Service Plan – Ministry of Forests.
In Gitanyow Chief Negotiator Glen Williams' Affidavit in the BC Supreme Court Case *Gwasslam v. B.C. Minister of Forests et al* (Vancouver Registry No: L021243), para. 45-46, it is noted that "the Province was providing industry with $2.00 per cubic metre to assist with costs of sustainable Land Use Planning. We were seeking similar assistance so that we could jointly plan the management of the forest resources with the Crown and industry in our Territory."
[279] Gitanyow, *Developing*, 8.
[280] Gitanyow, *Developing*, 8.

    - Environmental sustainability, cultural interests, economic interests, social, health and well-being.
- Develop Accommodation Agreements: Between individual Wilp and MOF on specific territories, and between the Gitanyow Hereditary Chiefs [Office] on policy issues.
- Ensure that the Gitanyow Huwilp are able to participate meaningfully in the consultation and accommodation processes...by ensuring the Chiefs and members of the Gitanyow Wilp are:
    - Fully informed of planned forestry activities on their territories, including the opportunity to identify impacts of that activity on land, its resources and Wilp rights;
    - Provided the opportunity to participate in planning and decision-making processes related to Wilp territories.
- Provide co-ordination and technical support for Wilp land and resource use planning, decision-making and other consultation activities.
- Increase Gitanyow capacity to store, organize, analyze and maintain land and resource data to support consultation processes.
- Ensure that Gitanyow has the technical and financial resources required to fulfill their undertakings as set out in the MOU and contemplated by the Courts.
- Ensure that Gitanyow is provided with a process parallel to industry involvement in provincial land use planning.[281]

In another similar document, the Gitanyow detail their preferred approach to revenue sharing for forestry development, in contrast to the Province's formula of $500 per band member per year.[282] It is noted that what the Province considers 'revenue-sharing' is not revenue-sharing at all, because it is not based on the actual revenues generated from forest development on the traditional territories. Moreover, the Gitanyow echo the Gitxsan rejection of Indian Act structures as the basis for the resolution of Aboriginal title and rights issues:

> *The foundation of B.C.'s revenue-sharing scheme is a per-capita distribution of budgeted funds based on membership in an Indian Act Band. In our case, Gitanyow Band membership and membership in a Gitanyow Huwilp (House) are not coextensive; our aboriginal title and rights arise from the fact that we were born into a Gitanyow Wilp and have nothing to do with the Indian Band to which we belong.*[283]

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[281] Gitanyow, *Developing*, 11.
[282] The Forest and Range Agreements proposed by the Province are discussed in Chapter Three, including this revenue-sharing formula.
[283] Gitanyow Hereditary Chiefs, "Gitanyow Aboriginal Title and Forest Harvesting Tenures on Gitanyow Territories," May 2004.

Whether it is revenue-sharing or funding for their involvement in land use planning, the Gitanyow advocate for their ability to be meaningfully involved in decision-making, according to their own governance structures and membership, and do not accept that funding is available for forest companies, yet not for First Nations.

4.4 Conclusion

Because policy development is not prevalent among First Nations, it is difficult to conduct a comparative analysis between the policies of government and the policies of First Nations. However, because of the litigious nature of consultation and accommodation, the legal arguments made by the parties are equally revealing of their positions. Moreover, First Nations have been active in voicing their critiques and experiences of previous and current consultation practices, which highlight some of their positions on what constitutes meaningful consultation. Where First Nations have begun to put on paper their own policies, for lack of a better word, and procedures, these may lead the way as examples that other First Nations may draw from in improving consultation and accommodation with government.

The following are the key elements of First Nations positions on meaningful consultation and accommodation, as found in data that is currently available:

- **Government-to-Government Consultation:** First Nations are not one of many stakeholders or third-party interests. Thus, consultation must be structured as government-to-government negotiations.
- **Consent:** Most First Nations will advocate strongly for their consent as requirement for development in their unceded territories. At a minimum, the Crown must be prepared to alter its original proposal, otherwise consultation is meaningless.
- **Proof of Title & Rights:** No other constitutional rights must be proven before given effect; proving title and rights through litigation ensures that the Crown can continue to make unilateral decisions unimpeded by the existence of Aboriginal constitutional rights.
- **Constitutional Restraint:** Because the Crown has created competing interests in the land without First Nations consent, consultation must act as constitutional restraint on the Province's decision making authority.
- **Bi-lateral/Joint Development of Consultation Process:** Every aspect of the consultation process must be jointly developed and mutually agreeable to the

parties. Any unilateral changes to the process will call the eventual decision into question.

- **Consultation Level:** As with other aspects of the process, at what level the First Nation seeks consultation should be jointly determined. Consultation should not be limited to the site-specific or operational level.
- **Who to Consult:** Indian Act leaders do not exercise the authority of decision making on impacts to Aboriginal title and rights. This issue, however, is not resolved among many First Nations. At a minimum, it must be considered that if it is Chief and Council who will represent the Aboriginal interests, then this should be knowingly endorsed by the community/traditional leaders.
- **Avoidance and Mitigation of Infringements:** The first goal of consultation cannot be the justification of infringements, but the parties must first work together to avoid and minimize potential infringements of Aboriginal title and rights.
- **Convenience Cannot Trump Justice:** Legislated timelines (unilaterally developed and imposed), and other measures of expedient decision making cannot outweigh the justice that First Nations seek and have been consistently denied.
- **Access to and Ownership of Information:** Information on the existence of Aboriginal title and rights must be considered the property of the First Nation, and the terms of use of such information should be negotiated and agreed upon before access is granted.
- **Financial Capacity and Revenue Sharing:** Whether through blanket capacity funding, revenue sharing based on actual revenues, or fee-for-service arrangements, First Nations require funds to meaningfully participate in consultation.
- ***With Prejudice* Approach Erodes Fragile Relationships:** While consultation and accommodation remains a litigious issue, genuine dialogue is less likely when all interaction is *with prejudice* to future court proceedings.
- ***Quid Pro Quo* Approach Exploitative:** In accommodation agreements, requiring First Nations blanket acceptance and silence (i.e. no direct action) in exchange for financial benefits exploits their financial situations.
- **Pro-Active, not Re-Active:** The Province should not await further court decisions to work together with First Nations on meaningful consultation, and should not be limited to minimal legal requirements in their policies.

First Nations in Northern B.C., who have not entered into treaties with government, have been surveyed in this chapter to provide an account of the key themes which can be compared and contrasted to the positions of the Province of British Columbia, and the legal principles from the Supreme Court, using the criteria gleaned from the literature in Chapter One as the basis for analysis.

Chapter Five:
Analysis and Discussion

The purpose of this chapter is to compare the various approaches to meaningful consultation outlined in Chapters Two, Three and Four against the criteria established in the literature review in the first chapter. This comparative analysis highlights and summarizes the components of the parties' descriptions of meaningful consultation and reveals where the gaps and inconsistencies lie between the legal principles and the parties' approaches in practice. This chapter also explores some of the limitations of the literature used in the criteria in addressing the issue of First Nations consultation.

5.1 Principles of Meaningful Consultation

Table 5.0 looks at the *principles* of meaningful consultation. The data contained in this table is taken directly from the summarizing points at the end of Chapters One, Three and Four, and from the main text of Chapter Two.

Table 5.0 Principles of Meaningful Consultation

Chapter One	*Chapter Two*	*Chapter Three*	*Chapter Four*
Criteria as found in the literature	**Legal Principles established by Supreme Court of Canada**	**As described by the Government of British Columbia**	**As described by First Nations in Northern B.C.**
Overall Purpose of Relationship-Building	• Consultation in context of Honour of the Crown in dealing with Aboriginal people. • Part of larger goal of reconciliation.	• Purpose of discharging legal duty and achieving certainty on land base. • All interaction *With Prejudice.*	• Government-to-Government relationship. • Reconciling First Nation sovereignty (Ab. title & rights) with Crown asserted sovereignty. • *With Prejudice* erodes relationships.
Pro-Active, Not Re-Active	• Emphasize negotiations over litigation.	• Duty of consultation result of litigation. • Policy meets minimal legal requirements.	• Recognition and protection of Aboriginal title and rights prevents litigation.
Representation	• No specific reference.	• Indian Act Chief & Council, or their authorized representative.	• Traditional leaders – legal basis. • No uniform position. • Critical of accommodating only First Nations who support decision.

Continuous Cycle of Consultation	• Strategic level planning consultation may be more effective, in some cases.	• Some high level/strategic consultation. • B.C.'s discretion over what policy, decision, legislation to consult on.	• Multi-level; jointly determined: Planning, policy, legislation, operational – anything with potential to impact.
Ability to Modify Decision	• No duty to reach agreement.	• No consent required. • B.C.'s discretion to incorporate input.	• Consent required. • Need guarantees of incorporation of input, otherwise process meaningless.
Respecting the Right of Non-Participation	• Consultation is "two-way street." (no 'unreasonable thwarting of government process')	• First Nations must participate in government consultation process. • Assessing impacts and process will go on without First Nations.	• May be sign of lack of capacity, lack of trust, or issue with process. • Not to be taken as lack of interest or no impacts.
Financial Resources	• No legal duty on government to provide funding to First Nations. • Compensation may be required for infringement of Aboriginal title.	• No blanket funding for consultation. • Case-by-case basis. • Can be result of accommodation, expected to cover consultation costs.	• Should reflect revenues generated from land base. • B.C. acts as proponent, creates interest in land, should provide funds equivalent to what industry receives.
No Unilateral Changes	• Did not question B.C.'s abrupt end to EAA process in *Taku*.	• Asserts unilateral discretion over most aspects of process.	• Unilateral changes call final decision into question.
Two-Way Process	• Consultation is "two-way street."	• First Nations bound to participate in B.C.'s process.	• No specific reference.
Equal Value of Inputs	• Recognition of oral history.	• Cost/benefit analysis. • Emphasis on economic development.	• Traditional knowledge. • Oral history.
Balance of Substantive and Process-Based Approaches	• Emphasize meaningful process, no duty to reach agreement, no requirements of final decision.	• Emphasize legally adequate process, show due diligence. • No duty to reach agreement. • Final decision must balance interests of First Nations and all British Columbians.	• Frustrated by 'participating in participating' – no substantive outcome or change. • Outcome must be a joint decision.
Sound Research	• No specific reference.	• Consultative Areas Database – Confidential.	• No specific reference.
Legitimate Decision-Making	• Some cases focus more on justification of infringement as purpose of consultation.	• Focus on discharging legal duty. • Justifying infringement before avoiding it.	• Avoid infringements before justifying them. • Recognize and protect Aboriginal rights and title.

Many of the principles examined here rest on the underlying notion of consent. To consult can mean to seek advice or input, or to seek permission or approval. The Province,

now with the support of the Supreme Court through the *Haida* and *Taku* decisions, is seeking to achieve the former in their consultation efforts. On the other hand, First Nations maintain that their consent is integral to resource management decision making, pointing to previous and existing consultation practices which have only resulted in their 'participation in participation.' Now that government is not required to seek First Nations consent in consultation, except in very exceptional circumstances, such processes that demand intensive human and financial resources for First Nations to participate, may appear hollow and meaningless.

In the same pair of rulings, however, the Supreme Court has warned the Province that unilaterally exploiting a resource while dispute and negotiation are concurrently underway is not honourable. These two statements may lead to confusion in consultation and accommodation. If unilateral exploitation does not uphold the honour of the Crown, then one might assume that bilateral management or decision making may be the logical solution. Yet, First Nations are also reminded that there is no duty to reach agreement. For the Supreme Court, somewhere in between, lies meaningful consultation accommodation. Nonetheless, what this middle ground looks like in practice is less clear, and will likely be determined on the case-by-case basis that the Court has established.

While the literature encourages processes where participants are given some form of guarantee that they have the ability to modify the decision, clearly First Nations do not enjoy such a guarantee. Moreover, the Supreme Court has created a distinct separation between consultation and accommodation, where any amendment to Crown policy or decisions constitutes accommodation. The Court is clear that accommodation is not required in every case, and only where indicated.

The onus of proving the existence or potential existence of Aboriginal title and rights on First Nations is an issue that the literature does not address directly. It may represent one of the most significant barriers to effective consultation, as it typifies the assumption of

the superiority of Crown sovereignty. While the Province maintains that legal proof of Aboriginal title and rights is required for recognition and protection, they are internally amassing information on *potentially* existing Aboriginal rights and title, through their *Consultative Areas* database. Although the Province contends that the contents of such a database are not meant to make any legal determinations, its classification as confidential may indicate that its contents could have negative repercussions for provincial sovereignty. On the one hand, the Province requires some form of proof of Aboriginal title and rights in order to carry out consultation processes; on the other hand they are careful to characterize the contents of such a registry as only *potentially* existing Aboriginal title and rights. As is noted in the provincial policy, the hinging factor is the ability or likelihood that First Nations will eventually be able to *prove the rights and title in court* – not only on the overall soundness of their claims.

The onus of proof on First Nations has been further problematized by Anishinabek legal scholar John Borrows, who asks: "Why should Aboriginal groups bear the burden of proving their title while the Crown is presumed to possess it through bare words?"[284] He points to the legal test for Aboriginal title established in *Delgamuukw* and questions whether the Crown could, for example, "establish occupation of land prior to sovereignty", or "show that at sovereignty its occupation was exclusive?" He goes on to state that "the court's acceptance of assertions of Crown sovereignty ensures that the Crown is not held to the same strict legal standard as Aboriginal peoples in proving its claims."[285]

Thus, with this legal advantage, the Province reduces its policy approach to consultation and accommodation to a combination of two key elements. One, that it has the unilateral authority to assess the 'soundness' of First Nations claims, and adjust and design the consultative process proportionately. Two, where strong potentiality exists, any

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[284] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), 101.
[285] Borrows, *Recovering*, 101.

infringements should attempt to be justified. Accommodation of First Nations is the last, and thus least favorable, course of action to pursue.

This of course leads to one of the key challenges in relationship building when the context is a legal framework that remains in flux, and where deeply entrenched political positions become increasingly expressed and disputed through litigation. As indicated in all of the provincial policies and procedures, virtually all interaction – from official meetings, to attempted phone calls, to chance encounters – between provincial officials and affected First Nations, is considered *with prejudice* to any future court proceedings. It is difficult to see how trust can be built in such a litigious environment.

The legal context of First Nations consultation also lends itself to more reactive policies and processes. Government, and to some extent First Nations continue to await the next court decision that will provide further detail on the legal principles that should guide consultation processes. The parties may be hesitant to commit to agreements should they subsequently be undermined as the result of a 'victory' or 'loss' in court. However, it is the reactive nature of government in addressing First Nations issues that is crucial because First Nations consultation is a result of court instruction and not of government's political will.

The issue of representation was emphasized throughout the literature, yet in the data from the Supreme Court, B.C., and First Nations there is clearly disagreement on who in First Nations communities ought to be consulted. While the literature encourages representatives who have the ability to effectively represent public interests from a cross-section of the community, this does not fully speak to the unique situation of First Nations representation. As the Gitxsan, Gitanyow and the Tahltan Elders have explained, the involvement of Indian Act leaders in consultation which impacts the territory beyond Indian reserves violates both their own traditional laws and their constitutional rights. If consultation is being carried out with respect to Aboriginal rights and title, as opposed to

Indian reserves and the benefits received under the Indian Act, then the traditional system which established those rights and title should be respected.

Two key and interconnected issues highlighted in Table 5.0 are the level of consultation and funding for First Nations to participate. Several First Nations identified their preference for participating in strategic land use planning as a way to minimize the consultation overload experienced in the site-specific approach to consultation, and to provide input on higher level decisions. This may reduce costs of consultation over time, and achieve their goal of being involved in key planning decisions (i.e. allocation of annual allowable cut in forestry). While the Province does involve First Nations in land use planning, their preferred avenue is the lower level Strategic Resource Management Planning (SRMP) as opposed to the Land and Resource Management Planning (LRMP). As is the case with most provincial consultation, First Nations are not allocated funding to participate and their input is not guaranteed to be incorporated. This has led First Nations like the Gitanyow to demand involvement at the highest level of planning, with funding equivalent to that of industry to cover the costs of participating.

The issue of trust in consultation also intersects with the broader negotiations between government and First Nations aimed at achieving final agreements. The provincial government has assumed the position in treaty negotiations that:

- Private property should not be expropriated for treaty settlements; and,
- The terms and conditions of leases and licenses should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured.[286]

This means that, while negotiations progress, the lands that are either sold or leased will be 'off the table' as far as the province is concerned. This obviously places greater emphasis on the Land & Water B.C. consultation processes, discussed in Chapter Three, for the

[286] Geoff Plant Attorney General and Minister Responsible for Treaty Negotiations, "Instructions to Negotiators: Treaty Principles" July 31, 2002. Available at: http://www.gov.bc.ca/tno/negotiation/instr_for_negotiators.htm

allocation of such leases and licenses, especially in the sale of lands. This is further accentuated by the shift to a "more entrepreneurial approach" by "aggressively pursuing and encouraging investment and optimal use of Crown land and water resources."[287] The result is that government assumes two roles: decision maker and proponent. Government agencies such as Land & Water B.C. become both the governing body responsible for consulting and protecting Aboriginal interests, and the *corporation* that stands to benefit from the proposed sale or tenure. Once again, it is difficult to see how trust can be cultivated in these types of situations.

Another key issue stemming from Land & Water B.C., as well as the B.C. Mining Task Force, is the use of a cost-benefit analysis in decision making that impacts Aboriginal title and rights. In both cases discussed in Chapter Three, government representatives support decision-making that weighs the economic benefit to government of the decision against the potential costs of consultation efforts and/or the costs arising out of a potential legal dispute over the decision. For example, the Task Force found that the economic benefits to government of mining in B.C. far outweigh the potential costs of litigating with First Nations should they object to mining in their territories. This issue is included in the table under the criteria principle *Equal Value of Inputs* because it provides a stark discrepancy between the parties' definitions of meaningful consultation. First Nations, in many cases, have drawn on their oral histories as the basis for their title and rights, as well as their resource management approaches. The Supreme Court in turn has recognized the validity of oral history as evidence of title and rights. The juxtaposition of oral history with a cost-benefit analysis as two types of input which should be given equal weight in consultation is indicative of the chasm that exists between First Nations and the Province.

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[287] Land and Water British Columbia, A Corporation of the Government of British Columbia. *Service Plan: 2003/2004, Financial.* Available at: http://lwbc.ca

While the literature supports the equal valuing of all types of input into the consultation process, these two types represent a considerable challenge to this principle.

Overall, there are discrepancies between the roles assumed in consultation processes, and how the parties define those roles. These discrepancies inform and complicate the consultation process and, as the data has shown, have frustrated the parties and caused increased conflict. These different roles can be characterized as follows:

- *Government-to-Government:* The approach of First Nations who wish to enter into bilateral dialogue and negotiation where agreement or consensus is the objective.
- *Government-to-Citizen* (or at best Interest Group/Stakeholder): When government assumes this position and approach, First Nations are one of many stakeholders or public groups to be consulted, and whose input and interests is weighted against others, with the final decision left to government.
- *Government/Proponent-to-Citizen:* This is seen in cases where government itself has a vested economic interest in the project or development, and therefore acts as both decision-maker and proponent.

As with many of the characterizations used in this research, these categories are not always absolute in reality, but are useful in understanding the roles that the parties seek to assume and establish in consultation and accommodation. When the parties come to the table with such divergent positions, the breakdown in what may appear to be meaningful consultation processes becomes more understandable. This has been further exacerbated by the Supreme Court's decree that the Province has the ultimate decision-making authority over lands and resources, but in order to uphold the Honour of the Crown should not unilaterally exploit those lands and resources. As with the consultation process itself, it appears that the appearance or perception of government-to-government consultation is sufficient to satisfy legal standards and to uphold Honour of the Crown, when in fact the status quo of unilateral decision-making is being legitimated.

Similar to the discrepancies between the assumed roles in consultation, there are also discrepancies in how the parties define the purpose of consultation and accommodation. This is evident in the first line of Table 5.0, but is also evident in other

principles identified here. While the Province views the overall purpose as discharging a legal duty, First Nations seek to re-establish their authority over their territories through a government-to-government relationship and a reconciliation process based on this renewed relationship. Moreover, First Nations seek some guarantee that their input will be incorporated into the decision and in most cases that their consent is a primary objective of government. Contrastingly, the Province has regaled the fact that the Court has affirmed their status as B.C.'s landlord. Finally, as the last line in Table 5.0 illustrates, the purpose of consultation can be seen as either fostering legitimate decision-making, or as legitimating and justifying government decisions which infringe on Aboriginal rights and title. This is also reinforced by some of the discrepancies found in Table 5.1 on the Process of Meaningful Consultation.

5.2 Process of Meaningful Consultation

Table 5.1 identifies the descriptions of the *process* of meaningful consultation. The data in column one is taken from the summary of Chapter One, while the remaining three columns have been gleaned from the main text of Chapters Two, Three and Four.

Table 5.1 Process of Meaningful Consultation

Chapter One	*Chapter Two*	*Chapter Three*	*Chapter Four*
Criteria as found in the literature	**References by the Supreme Court of Canada**	**As described by the Government of British Columbia**	**As described by First Nations in Northern B.C.**
1. *Pre-Consultation Scoping*	• First Nations must present clear scope of rights and potential infringements to government. This may be possible responsibility of tribunal.	• Contact First Nations • Assess soundness of claims. • Assess possible reasons against consultation.	• Must take place before comprehensive plans in place. • B.C. should not have sole discretion in assessing soundness.
2. *Joint Development of the Consultation Process*	• No specific reference to joint development, some First Nation input on process acceptable. • No distinct Aboriginal process required. • Proportionality and continuum – soundness of claim and level of consultation. • Processes that are acceptable: B.C. *EAA*, *Provincial Policy*, insight from Maori process.	• Predetermined, unilaterally developed process (with some possible variation to suit First Nation). • Continuum of practices, proportionate to soundness, B.C. decides where on continuum to engage.	• Joint development of process; including information sharing agreements. • Funding in place (may be Impact Benefit Agreement). • Identify preferred techniques.
3. *Consultation* a. Formulation of Alternatives b. Predicting Effects c. *Conflict Resolution Process, where necessary.*	• No duty to reach agreement; acknowledgement of disagreement sufficient. • Accommodation only where 'appropriate.' • Link to broader government context/negotiations.	• Consider Aboriginal interests, soundness/likelihood of being proven. • Consider impacts. • Attempt to justify infringements. • Cannot justify, attempt to accommodate.	• Ability to say 'no'. • Avoidance and mitigation of impacts to precede attempted justification. • Accommodation should be proportionate to impacts and revenue generated.
4. *Post-Decision Follow-Up* a. Monitoring and Mitigating b. Evaluating	• a) None • b) Standard of reasonableness.	• a) None • b) Standard of reasonableness.	a) Involvement in entire cycle of project/planning. (i.e. reclamation, rehabilitation). b) Standard of correctness.

The key discrepancies identified here revolve around the development of the consultation process itself. If the consultation process is jointly or bilaterally developed, as the literature encourages, many of the corollary issues such as timing and post-decision follow-up should be addressed, if the First Nation raises them. As it currently stands, the Province has unilateral discretion over virtually all aspects of the process, and it appears that this is supported by the Supreme Court. Pointing to both the *Provincial Policy for*

Consultation with First Nations and the *Environmental Assessment Act* consultation process as good examples of policies addressing consultation and accommodation, the Supreme Court has encouraged the review of the *Maori Consultation Guidelines* as useful for 'insight' only.

While the literature discusses *Pre-Consultation Scoping* in terms of identifying participants and potential impacts, this research has found that the Province has engaged in another stage of scoping which limits the instances requiring consultation. The Title & Rights Alliance and the Haida First Nation point to unilaterally developed forestry legislation that removes legal triggers for consultation as the Province granted industry greater freedom, thus decreasing government accountability on critical decisions impacting First Nations. This action is outside the actual consultation process identified in the table, but further emphasizes First Nations calls for consultation at all levels of decision-making that impacts their title and rights, including such legislation.

In addition, because of the legal framework on First Nations consultation the scoping stage is distinct in this research because of the emphasis on establishing the evidence of title and rights in order to trigger the duty to consult. In practice, this may translate into more time and resources being allocated to this stage on behalf of both parties than in general public participation. As has been previously noted, under current provincial policy, discretion over what constitutes sufficient evidence of Aboriginal title and rights solely rests with government decision-makers and legal counsel.

In the development of the consultation process, the legal context of this research again distinguishes First Nations consultation from other participation processes. Because the Supreme Court has established a continuum of consultation proportionate to the soundness of the First Nations' claims, the development of a consultation process identified in the above table is bound by this legal principle. While the literature encourages the joint development of the process, the jurisprudence here gives government considerable

discretion in assessing both the soundness of the First Nations' claims and determining where on the continuum of consultation they should be engaged.

The issue of information sharing was significant for many of the First Nations surveyed in this research. They sought information sharing agreements in the consultation process guaranteeing that the information they presented as evidence of their title and rights would remain the property of the First Nation, and would not be used later as a substitute for actual consultation talks. While few First Nations secured information sharing agreements, the Province has gone on to gather and restrict access to such information in their *Consultative Areas* database. This creates further uncertainty as to how and why First Nations' information will be used, and does not secure their ownership as they have demanded.

In the 'evaluating' stage the literature points to a more general evaluation of the overall success of the process and the parties' perception of it, in hopes of improving future processes. However, in light of the Supreme Court decisions, the question of how the process and the resultant decision would be evaluated in court becomes a factor. As indicated in the discussion on the *Taku* case (Chapters Two, Three and Four), the Supreme Court ruled that as long as the Province has been successful in assessing the soundness and scope of the Aboriginal rights and the potential infringement posed by the decision, then the standard of *reasonableness* is suitable in evaluating the decisions legality. This is why it was determined that despite the Taku's objections, the permit could be approved. This reinforces the discrepancies in above mentioned principles: a) Balance of Substantive and Process-Based Approaches and b) Legitimate Decision-Making. As long as the Province can demonstrate that it has satisfied the *process* of assessment, then the final outcome (conscious infringement of rights) is largely irrelevant. The infringement can be justified, under the broad range of objectives established in *Delgamuukw*, and thus the decision is legitimated. On the other hand, the Taku argued that the decision making process itself was

not legitimate because of procedural flaws – one of which was a unilateral decision to abruptly end the process. This can also be linked to the principle *No Unilateral Changes* identified in the first table.

The final stage in the consultation process discussed here is obviously linked to the previously mentioned principle of a continuous cycle of consultation and planning. Because there is no post-decision follow-up in provincial policy or prescribed by the Court, this may be seen as a factor in the overall increase in litigation on consultation. If there is no evaluation of the success and suitability of the consultation process, the same issues and conflicts may continue to arise in subsequent consultation processes, which in some cases results in litigation to resolve the dispute.

5.3 Limitations of the Literature as the Basis for the Criteria

As has been noted in the first chapter, the literature used to construct a set of criteria for the comparative analysis has certain limitations in its applicability to the issue of First Nations consultation. The first limitation is that, with a few exceptions, the majority of authors are describing participation as it pertains to a uniform public. There may be distinctions made regarding 'ethnic diversity,' or diverse segments of society, but the underlying assumption is that government is consulting *citizens* who accept that they are participating as *citizens*. First Nations, especially in a non-treaty context as explored in Chapter Four, have contested the sovereignty of Canada and British Columbia and seek government-to-government or nation-to-nation relations with the Crown.

The second limitation is that the majority of literature does not account for the unique legal framework in which First Nations consultation occurs. As has been noted in Chapter One, First Nations enjoy the only constitutional participatory rights in Canada; this further highlights the qualifier in Chapter One that literature on general public participation is only a starting point for analysis of First Nations consultation.

To compensate for some of the limitations of the literature on general public participation, the literature on First Nations and co-management was also utilized. However, this literature is not entirely appropriate in examining First Nations consultation because, while many of the Northern B.C. First Nations cited in Chapter Four have sought co-management arrangements with government, none has been successful. Moreover, the literature illustrated that co-management has only truly taken root in the territorial north of Canada, and even there in a limited capacity. Nonetheless, co-management can be seen as the upper end of the spectrum on consultation and the literature provides further insight on the possible arrangements between First Nations and the Province on natural resource management.

Finally, while not a limitation of the literature, this analysis draws attention to an inherent conflict between the arguments in support of public participation and their applicability to First Nations. The notion of public participation as invoking 'public good' or reflecting the 'will of the people' can support First Nations or work against them. As the Province has argued, they have the responsibility to make decisions on behalf of *all* British Columbians, and First Nations interests must be *balanced* with those of the general public. Therefore, to return to the first limitation mentioned here, it depends on whether First Nations are seen as one segment of the general public, or as a distinct public unto themselves.

Nonetheless, despite the limitations of the literature on public participation and First Nations co-management, it is a starting point in examining First Nations consultation and broadening the scope beyond strictly legal analysis. However, because many of the discrepancies found in this research stem from broader underlying conflicts that have been in existence since at least Confederation, there may also be some value in approaching First Nations consultation as part of a broader dispute resolution process. Thus, literature on Environmental Dispute Settlement (EDS) processes was also utilized to highlight the

differences between traditional participation processes, and EDS. Because the provincial government has approached consultation strictly as a participation process, but conflict continues to surround the process, this thesis concludes with recommendations that incorporate a dispute settlement approach that recognizes the underlying conflict in most interaction between First Nations and the Province. The following final chapter discusses this recommendation, in addition to recommendations addressing the key discrepancies between the parties' definitions of meaningful consultation and accommodation that have been identified in this chapter.

Chapter Six
Conclusions, Recommendations and Future Research Questions

The research question posed in this thesis was: *How do the Supreme Court of Canada, First Nations within Northern B.C., and the provincial government define meaningful consultation?* Subsequently: *What are the gaps or inconsistencies between these definitions, according to criteria identified in the literature on public participation and First Nations involvement in natural resource management?* In examining the spectrum of perceptions of what constitutes meaningful consultation several key gaps have been identified, from which a host of corollary issues emanate. Table 6.0 is an amalgamation of Arnstein's *Ladder of Citizen Participation* and Berkes' *Levels of Co-management*, with the key issues identified in Chapter Five incorporated. This illustrates both provincial policy towards Aboriginal rights and title, including consultation, and the First Nations critique of it.

Table 6.0 Reconciliation of Aboriginal Title and Rights in Northern BC

9. Negotiated Self-Government over Traditional Territories	• Some examples throughout Canada, still under Canadian/B.C. rule of law. • Many would argue ideal not yet realized.
8. Co-Management (Goal of many First Nations, yet to be realized)	• Recognition required. • Joint management of resources; consensus required.
7. Strategic Involvement	• First Nation involvement in government-led planning processes, possibly some policy development. • Some form of recognition required.
6. Consultation	• Court induced duty to consult on broad range of activities across government. • Site-specific, operational level mostly. • Consent not required.
5. Co-optation & *Quid Pro Quo*	• Economic appeals to First Nation leaders who do not have authority to compromise Aboriginal title and rights (i.e. Indian Act elected). Still no official recognition of title and rights.
4. Negotiation Commencement	• Can take many forms (i.e. treaty, consultation, economic development) • Focus on long-term negotiation (final agreements), little interim protection.
3. Official Acceptance of Potentiality/Non-Recognition	• Court rulings compel government to recognize, but without legal proof, government only recognizes the potentiality of the existence of rights and title.
2. Denial	• In official policy or otherwise
1. Unilateral Extinguishment (achieved or attempted.)	• Legislated (Province's argument in *Delgamuukw*) • Conquest

As the table shows, the current level of consultation is posited between *Co-optation* (5) and *Strategic Involvement* (7). Some would argue that the Forest and Range Agreements discussed at length in this research are a primary example of level five because they offer no official recognition of rights and title, but use monetary incentive to secure the cooperation, agreement and silence of First Nations. Moreover, they preclude meaningful consultation by requiring First Nations to agree to the consultation process, including some significant limitations (i.e. time to respond), before consultation has actually begun.

While the current provincial situation may rest somewhere between levels five and six, the minimum most First Nations are seeking is a level seven form of engagement. However, as has been shown in Berkes' analysis, there is also a range of levels within level eight. Therefore, the purpose of this illustration is to contextualize the current issue of

consultation, while reflecting the findings of this research. The key issues of recognition, consent, and legal imperative are carried throughout this illustration. At each step, First Nations have used the legal system to advance their cause, and consequently find that another level of government response stands between them and their ultimate objectives.

Thus, as the jurisprudence on Aboriginal title and rights and consultation and accommodation continues to develop, it becomes clear that many perceived gains by First Nations do not actually fundamentally alter the existing relationship or the ability for First Nations to have a say in what goes on in their territories. Yet, cases continue to amass and to further refine the legal principles at stake,[288] and First Nations do not appear to be losing faith in the legal system. The question remains – are the expectations and objectives of First Nations simply unattainable or unfeasible within the Crown's legal system? Or, does the law on Aboriginal rights and title need to evolve in new directions, if only to prevent the litany of court challenges that does not appear to be dissipating?

As Borrows has proposed the law on Aboriginal rights and title is completely unique to Canada – "it bridges the gulf between First Nations and European legal systems by embracing each without forming a part of them."[289] While the legal system may be foreign to First Nations, the body of law dealing with Aboriginal issues is a result of their initiative and persistence, and is in the end, "indigenous' to Canada." He concludes that "it is therefore incumbent upon Canadian judges to draw upon Indigenous legal sources more often and more explicitly in deciding Aboriginal issues."[290] The recognition and incorporation of Indigenous law in Canadian law may indeed shift the balance in a way that fundamentally alters the status quo. However, this relies on First Nations to present court challenges and

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[288] For example, most recently in *Huu-ay-aht First Nation et al. v. The Minister of Forests et al* (2005 BCSC 697), the BC Supreme Court found that the MOF Forest and Range Agreement (FRA) program "does not constitute good faith consultation and accommodation," specifically the "fixed population-based formula to determine revenue sharing and timber volume."

[289] Borrows, *Recovering,* 5.

[290] Borrows, *Recovering*, 5.

negotiating positions in a manner that reflects and respects their own legal systems. With the predominance of Indian Act leaders representing First Nations in both the courts and in negotiation, this will likely be equally challenging.

The long-term objective of reconciling First Nations and Crown legal systems can be partly facilitated by more specific advances in consultation and accommodation. These can be summarized as follows:

- **Assumption & Recognition of Conflict:** Engaging in a consultation process with an assumption of conflict between the parties is realistic in light of the multi-pronged land and resource management dispute between First Nations and the Province (which is acted out in court, negotiations, competing assertions of sovereignty and direct action). With conflict as the starting point, the resolution process more appropriately invokes the goal of reaching a mutually agreeable solution. With consensus as the objective, any input that is not acted on must be done so with the concurrence of both parties. In many cases, it may be unrealistic to carry on consultation processes in hopes that a conflict or impasse will not occur – waiting until that time to initiate conflict resolution. Framing consultation processes as conflict resolution processes more accurately reflects the historical and present relationship.
- **Strategic Level Planning:** Land use planning at the highest level serves the broad interests of First Nations, and may save both parties time and money by decreasing the amount of site-specific consultation. Formal land use planning arrangements may eventually lead to the co-management arrangements many First Nations seek in treaty negotiations, or otherwise.
- **First Nations Leadership:** Because First Nations have relied extensively on the legal system to support the advancement of Aboriginal title and rights, it is only appropriate that those leaders that have legitimate authority to negotiate on rights and title (not on Indian reserve land and Indian bands) are represented in consultation. The First Nations examined in this research have varying levels of recognition of their traditional leadership, and some are working toward this goal. However, as consultation may involve the endorsement of irreversible impacts on land and resources, those leaders and groups who have legal (both in Canadian and Indigenous law) title and rights need to be represented.
- **Financial Capacity:** There is simply no justifiable rationale why First Nations should not enjoy a uniform standard of financial support to participate in consultation. As the very forest companies that profit from the extraction of forest resources are being compensated in the millions by government for their involvement in forest and land use planning, First Nations have been told that there is no funding available. The discrepancy is exacerbated by the fact that in accommodation agreements (i.e. FRAs) First Nations are required to exchange rights for economic benefit, while companies are granted economic benefits to carry out planning that ensures their harvesting rights and further economic benefit.

Future Research Questions

The issue of consent is central to the discussion on consultation and accommodation. First Nations demand that their consent should be a goal of consultation, while government maintains that to grant such a 'veto' would undermine their exclusive jurisdiction over lands and resources. The notion of consent is an outstanding issue for First Nations that can be traced back to contact. The philosophical and theoretical discourse on consent, legitimacy, and liberal democracy serves as an interesting backdrop to this debate as it raises similar questions to those raised by Borrows in the previous chapter regarding the onus of proof. To what standard does Canadian society and government aspire to for itself, and what standard is deemed acceptable for First Nations? If the consent of the governed is the cornerstone of legitimate authority – how will First Nations consent be negotiated with government, and how are the philosophical underpinnings of liberal democracy played out in the process? These questions may be a natural progression from the legal and process-oriented nature of this research.

Another broader and more complex area of study that has been invoked by this research is the fundamental incompatibility of First Nations' and provincial rights under the Canadian Constitution. Can the provinces maintain exclusive title and management authority over lands and resources (as in s.92); in the face of Aboriginal rights (as in s.35, including title) that are of the substance that warrants constitutional protection? If the current conflict being acted out in consultation and accommodation efforts finds its roots in the larger conflict between competing constitutional rights, what is the way forward? Tully suggests that:

> *Canada should be seen as two confederations rather than one. The first confederation (or federation) is the treaty confederation of the First Nations with the Crown and later with the federal and, to some extent, provincial governments.*

The second confederation (or federation) is the constitutional confederation of the provinces and federal government. [291]

Tully's statement propels the issue of First Nations involvement in natural resource management beyond the clash between the Province and First Nations, and points to a rethinking of the First Nations relationship to the Crown in general. However, such proposals certainly present problems for the Province as it may require their removal from the equation in many cases. Future research may ask if it is possible to reconcile Aboriginal and provincial rights within the constitutional framework, and if not what other options exist within federalism. Ideas such as this can be explored in future research to address some of the deep-rooted gaps and inconsistencies identified in this research between the political actors who are party to the debate on consultation and accommodation.

[291] James Tully, "Aboriginal Peoples: Negotiating Reconciliation" in *Canadian Politics* 3rd ed, eds James Bickerton and Alain-G. Gagnon (Peterborough: Broadview, 1999), 413-443, 424.

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