



The Duty to Consult

BC Métis Federation- Guide to Métis Consultation

This report has been created to provide knowledge regarding the federal and provincial governments' responsibility to consult with the Métis people of British Columbia. This report will demonstrate why the Crown has a legal obligation to consult with the Métis. This report will also outline the shortcomings of the BC government's approach to Métis consultation. Finally, several components of the consultation process will be explored.



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Why British Columbia's Métis Must be Consulted

The Crown has a constitutional obligation to consult the Métis people of British Columbia. The duty to consult arises whenever a project has the potential to infringe the asserted rights of the Métis. This obligation stems from three Supreme Court rulings and section 35 of the Canadian Constitution.

The unanimous Supreme Court of Canada decision in Haida Nation v. British Columbia [2004] stated that the Crown has an obligation to consult with Aboriginal groups whose rights may be infringed by a project. The Supreme Court stated that this, “duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it”ⁱ. The Supreme Court also ruled that the Crown may be required to accommodate Aboriginal interests when appropriate. Aboriginal groups have argued that the Crown must accommodate when the potential infringement of rights is severe enough.

Two other Supreme Court of Canada cases affirm that the duty to consult lies with the Crown. Taku River Tlingit First Nation v. British Columbia [2004] and Mikisew Cree First Nation v. Canada [2005].

Taku River Tlingit First Nation v. British Columbia: This ruling affirmed the general legal principles in Haida Nation v. British Columbia. The general legal principle affirmed was that the government must consult with Aboriginal groups when the government was contemplating a project that could infringe asserted Aboriginal rights.

Mikisew Cree First Nation v. Canada: This ruling followed the Haida and Taku River cases. This case extended the duty to consult from asserted Aboriginal rights to existing treaty rights. This case also stipulates that consultation is not simply a process in order to relieve tension between Aboriginal groups and the government. The government must be willing to accommodate Aboriginal interests. This case also ruled that consultation must go beyond simply holding a public forum. Attending a public forum is a right held by all Canadians. Consultation must be a meaningful dialogue between the Crown and Aboriginal groups. It must be conducted in good faith by both sides.

Duty to Consult



The Crown must consult with the Métis people of British Columbia.

This duty is a legal obligation that has arisen from Supreme Court rulings and the Constitution of Canada. Consultation is also a means of fostering cooperation and encouraging reconciliation.



Section 35 of the Canadian Constitution recognizes and affirms, “the existing aboriginal and treaty rights of the aboriginal peoples of Canada”ⁱⁱ. Section 35 also states that, “in this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada”ⁱⁱⁱ The Métis are clearly recognized as aboriginal peoples and, therefore, have the right to be consulted by the Crown when projects potentially infringe on their rights or title.

Position of the Federal Government on Métis Consultation

The Duty to Consult the Métis

*“The Government of Canada, in carrying out its activities, will respect the potential or established Aboriginal or Treaty rights of First Nation, **Métis** and Inuit people by consulting with Aboriginal groups whose rights and related interests may be adversely impacted by a proposed Government of Canada activity”.*^{iv}

The federal government recognizes its obligation to consult with Aboriginal groups when their rights may be infringed by a project. Canada also recognizes that the Métis must be consulted along with First Nations and Inuit. This approach to Métis consultation is satisfactory.

Position of the Provincial Government on Métis Consultation

The Duty to Consult the Métis

The British Columbia provincial government outlined its view on Métis consultation in the publication, Updated Procedures for Meeting Legal Obligations When Consulting First Nations [2010]. British Columbia, “does not recognize a legal obligation to consult with Métis people as the Province is of the view that no Métis community is capable of successfully asserting site specific Section 35 rights in B.C.”

This approach to Métis consultation is unacceptable for several reasons. Firstly, the Crown has a legal obligation to consult with the Métis when an action may infringe potential or existing Aboriginal



rights. Second, this view is adversarial and does not promote reconciliation. Finally, the approach of the provincial government constitutes a breach of the ruling in Halfway River First Nation v. B.C. In this case, the British Columbia Court of Appeal ruled that consultation must be done in order to find out what rights are being asserted. The B.C. government is refusing to enter into consultation with the Métis. In doing so, B.C. is refusing to even make an attempt to determine what the asserted rights of the Métis are.

Most provinces with significant Métis populations already recognize that the duty to consult applies to the Métis or are actively attempting to create a consultation framework.^v The federal government already recognizes that the duty to consult applies to the Métis. It is clear that British Columbia is on the wrong side of history in its approach to Métis consultation. The position of the B.C government must be brought in line with the position of the federal government. The provincial government's position must be changed by negotiation or litigation.

The Process of Consultation

The Crown has a constitutional obligation to consult with Aboriginal groups. Consultation, however, is not only a legal obligation. It is also a means to promote reconciliation and cooperation between Aboriginal groups and Canada. Consultation must be done properly and in good faith in order to further the goals of reconciliation and cooperation. This section of the report will outline several key components of the consultation process. Several issues that must be dealt with before beginning the consultation process will also be explored. Finally, the steps of consultation will be outlined.

The Duty to Consult With Collectives

The Crown has a constitutional duty to consult with Aboriginal groups as collectives. The government cannot, therefore fulfill the duty to consult by communicating with individual Métis citizens. For example, communicating with a Métis trapper or hunter would not satisfy the Crown's duty to consult. The Crown would instead have to consult with the Métis community that claims hunting or trapping rights over a specific area. The Supreme Court ruling in *Behn v. Moulton Contracting Ltd.* [2013] rules that, "the duty to consult exists to protect the collective rights of Aboriginal peoples and is owed to the Aboriginal group that holds them".^{vi} Aboriginal groups may authorize individuals to assert Aboriginal rights on the community's behalf.



Consultation Screening Process

There will need to be a type of screening process in order to determine which issues the Métis will be consulted on. The Métis will be unable to engage in consultation regarding every decision made in the province. The administrative burden of this would be too much for the BC Métis to handle. The Métis would not need to be consulted about every single road being built in British Columbia. Examples of decisions that would necessitate consultation with the Métis would be decisions affecting hunting, fishing, or trapping in British Columbia. Large projects such as pipelines and refineries would most likely necessitate consultation with the Métis as well. These projects cover vast areas and can have wide ranging impacts on hunting, fishing, and trapping.

Funding

The government must fund Métis consultation efforts in order to create a level playing field for the Métis. Métis in British Columbia will be unable to conduct meaningful consultation without funding from the Crown.

Obstacles to Overcome Prior to Consultation

There are several obstacles that must be overcome before the process of consultation can begin. The first obstacle is the presence of two Métis organizations in British Columbia. The second obstacle to consultation is the provincial government's position on the duty to consult the Métis.

Provincial Government's Stance on Métis Consultation

The Provincial government's stance on Métis consultation is another obstacle. As stated previously in this report, the British Columbian government does not recognize its constitutional obligation to consult with the Métis. Until British Columbia joins the federal government in recognizing Métis rights to consultation, this stance will be a major obstacle to the consultation process.

Separate Métis Organizations in British Columbia

The BC Métis Federation and the Métis Nation of BC both claim to represent the Métis people in British Columbia. The presence of these two organizations may impede negotiations with the provincial government. A united front would present a clearer and more effective message to the government. The presence of two provincial organizations will only pose a problem during the negotiation phase prior to the implementation of a consultation framework. After the provincial government recognizes their constitutional obligation to consult with the Métis, consultation must occur between the Crown and individual Métis communities. Consultation is a means to increase the power of local communities to protect their rights and interests.



Steps of Consultation

Consultation must follow certain steps in order to be meaningful and effective. Each step must be followed correctly and no step can be left out if consultation is to be considered complete.

The Métis Nation of Alberta and the Métis Nation of Ontario each present five steps of consultation between the Crown and the Métis^{vii, viii}. These five steps are sufficient for a basis for consultation in British Columbia.

1. Notice

The first step in proper consultation is to give notice to the Métis community whose potential or existing Aboriginal rights may be infringed by a proposed project. Notice must be given to the appropriate representative of the Métis community. Notice to an individual Métis citizen does not constitute a completion of this step. The duty to consult is a duty to a collective. Simply holding a public forum or taking out an ad in a local newspaper does not satisfy the community's right to be consulted.

2. Capacity/Funding

The second step involves funding of the consultation process. Consultation is an expensive process which requires extensive research. Funding should be given to the Métis community by the government. This funding essentially levels the playing field between the Crown and the Métis community and allows the consultation process to be meaningful.

3. Information Exchange

The exchange of information between the Métis community and the Crown is the third step of the consultation process. In this step the Crown must fully inform the Métis community about the proposed project. Information about the project's location and potential environmental impact must be disclosed by the Crown. The Métis community also has an obligation to inform the Crown about all Métis cultural and economic activities in the area of the proposed project. These activities can include hunting, fishing or trapping, for example.

4. Understanding Effects

In this step of the consultation process, the Crown, developer, and the Métis community examine the details of the proposed project and attempt to determine how Métis rights may be affected. If the parties determine that there will be no tangible effect on Métis rights, the consultation may be considered complete. The Métis community must be told if there are any changes to the proposed project after this point in the consultation.



5. Accommodation

The final step in the five step consultation process is accommodation. Accommodation involves changes to proposed projects to mitigate or eliminate infringement of Métis rights and damage to Métis communities. Accommodation should seek to avoid negative consequences of projects on Métis cultural and economic practices. Accommodation may also involve compensation to Métis communities. Both sides must show flexibility in this final step.

These five steps may form the basis for consultation with the Métis in British Columbia. These steps are, however, only a framework for Métis consultation. As the various obstacles facing Métis consultation in B.C. are overcome, an expansion of this consultation policy will be necessary.



Conclusion

The Crown has a constitutional obligation to consult with the Métis when a project threatens asserted or existing Métis rights. This duty was created because of the Supreme Court of Canada decisions in *Haida Nation*, *Taku River Tlingit*, and *Mikisew Cree*. Section 35 of the Canadian Constitution reinforces the fact that the duty to consult applies to the Métis.

The federal government recognizes the fact that the duty to consult applies to the Métis. The provincial government, however, does not recognize this fact. Through negotiation or litigation, the stance of the provincial government must be brought in line with that of the federal government.

The duty to consult is a duty to collective Aboriginal groups. It does not apply to individual Aboriginals. The Métis in British Columbia will have to create a screening process in order to determine which projects require consultation. Funding for consultation must also be secured from the Government.

Solutions must be found to the two obstacles outlined in this report. The first obstacle to Métis consultation is the presence of multiple Métis organizations in the province. The second obstacle is the provincial government's approach to Métis consultation.

The consultation process involving five steps is sufficient to act as a framework for future consultation. Expansion of this process will be necessary in the future.

ⁱ <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2189/index.do>

ⁱⁱ <http://laws-lois.justice.gc.ca/eng/Const/page-16.html>

ⁱⁱⁱ <http://laws-lois.justice.gc.ca/eng/Const/page-16.html>

^{iv} http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675#chp1_4_2

^v <http://www.albertametis.ca/getdoc/48e97004-0ce3-4f3e-ab29-9df726595e7d/Metis-Rights---Consultation-MNA2008.aspx>

^{vi} <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/13038/index.do>

^{vii} <http://www.albertametis.ca/getdoc/48e97004-0ce3-4f3e-ab29-9df726595e7d/Metis-Rights---Consultation-MNA2008.aspx>

^{viii} http://www.metisnation.org/media/51968/towards_a_metis_consultation_framework.pdf