# The "Who, What and Where Guide" to Consultation in North-Eastern British Columbia

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*"The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings with aboriginal peoples. It may not lawfully act in a dishonourable way. That is a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps to define the relationship between government and the governed."*

*Chief Justice Finch, British Columbia Court of Appeal,*
*Tzeachten First Nation v. Canada, 2007 BCCA 133 at par. 48*

## Introduction

This paper provides a summary of the law of consultation, and how it may apply to Crown authorized activities in north-eastern British Columbia. The paper is divided into three parts.

Part A examines not only the case law with respect to the Crown's duty to consult the Aboriginal people in the region who hold Treaty rights, but also the recent bilateral agreements between the province and the Treaty 8 First Nations in the area to formalize consultation processes in an effort to improve their relationship and to remove some of the guess work from the consultation process.

Part B reviews the state of the law respecting the Crown's duty to consult the Métis people who also live in the area.

Part C explores whether there are any residual Aboriginal rights held by the First Nations in the area, and what implications such residual Aboriginal rights may have on consultation processes there.

# Part A The Duty to Consult Treaty First Nations

The north-eastern part of British Columbia is subject to Treaty No. 8, which was concluded between Treaty Commissioners of the Dominion of Canada and the First Nation peoples of the former Athabasca District in 1899 on the shores of Lesser Slave Lake. Eight First Nations in British Columbia have adhered or taken the benefits of the Treaty: Blueberry River and Doig River (as the Ft. St. John Beaver Band, in 1900), Ft. Nelson and Prophet River (as the Ft. Nelson Band in 1909-1910), Halfway River and West Moberly (as the Hudson Hope Band in 1914), the Saulteau (in 1914 as well) and McLeod Lake (in 2000).

Since 1982, the rights and benefits under Treaty No. 8 have received constitutional protection under section 35 of the *Constitution Act, 1982*, which provides in part:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Currently, there is active litigation over the extent to which Treaty No. 8 extends westwards into British Columbia. Six of the eight Treaty 8 First Nations are litigating the question of the location of the western boundary of Treaty No. 8.[1] Since 1899, Canada and the Treaty 8 First Nations have understood the western boundary of the Treaty to follow the height of land along the continental divide in generally a north-westerly direction, ending at the 60th parallel. However, in the 1990s British Columbia took the position that the boundary follows the height of land of the eastern range of the Rocky Mountains to where the range ends at the Liard Plateau, and thence in a northerly direction, more or less, over the plateau to the 60th parallel. The difference in area between the two lines constitutes over 100,000 square kilometres. The land at issue effectively includes the massive Rocky Mountain Trench wherein lies not only Williston Lake, but also several First Nations who have never adhered to Treaty No. 8.

Clearly, this dispute has a geographic effect on what consultation happens with respect to proposed activities in the Rocky Mountain Trench. To whom does the Crown owe a duty to consult? What rights are actually in play there - existing Treaty rights or potential but unproven Aboriginal rights? To what degree must the Crown engage in consultations with both groups of First Nations?

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[1] *Willson et al v. Canada et al,* SCBC Victoria Registry No. 05 3802. The hearing of the trial is scheduled to begin October 19, 2009 and last 124 days.

This controversy is an example of how important it is to understand not only the legal principles behind consultation, but also how the First Nations, the Crown and proponents are trying to find practical solutions to move forward.

## 1. Legal Principles informing the Crown's Duty to Consult

The Crown has the duty to consult and must initiate and ensure that a process of meaningful consultation occurs whenever a project or authorization has the potential to infringe or adversely affect the rights of a First Nation.[2] The Crown's duty to consult imposes on it a positive obligation to ensure that a First Nation is provided with all necessary information in a timely way so that the First Nation can express its interests and concerns to ensure that the First Nation's representations are seriously considered, and wherever possible, demonstrably integrated into any proposed plan of action.[3] Crown consultation must occur early in any process, before any important decisions are made. The Crown must consult with the First Nation about the consultation process itself, including the design of any regulatory processes and the role of the First Nation in those processes.[4] Finally, the Crown may be obliged to provide sufficient financial capacity to a First Nation to ensure that the First Nation can participate meaningfully in the consultation process.[5]

In *Mikisew*, the Supreme Court of Canada confirmed that the honour of the Crown is at stake where it contemplates an action that would infringe Treaty rights under Treaty No. 8. The Supreme Court found that Treaty No. 8 contains procedural rights (to be consulted) and as well as substantive rights (e.g. to hunt, fish, trap).[6] For consultation to have real meaning it must occur at an early stage, prior to any Crown decision-makers committing to a particular course of action or authorizing any activity and not afterwards or at a stage where it is rendered meaningless.

Contrary to what some others might say, in my view the Supreme Court of Canada has not limited consultation with Treaty Indians to only their traditional territories. In *Mikisew,* the Court was concerned with determining, for the purposes of the "taking up" provision in the Treaty, what constituted a "meaningful right to hunt". The Court concluded that, for the purposes of the "taking up" provision, the meaningful right to hunt is in relation to the territories over which the First Nations traditionally harvested resources.[7] However, the Court did not overrule an earlier ruling acknowledging the express words of the Treaty that the harvesting rights are to be exercised "on the tract surrendered" i.e. the entire Treaty territory.[8]: Consultation about Crown-authorized activities throughout the Treaty territory must occur, but the extent of that consultation is determined on the "spectrum" described by the Supreme Court from "mere notice" to

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[2] *Haida Nation v. British Columbia*, 2004 SCC 74 *("Haida")*
[3] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 ("*Mikisew*")
[4] *Dena Tha' First Nation v. Canada (Minister of Environment) et al.*, 2006 FC 1354 ("*Dene Tha*")
[5] *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation,* 2007 CanLII 20790 (ON S.C.)
[6] *Mikisew*, at para. 54 to 57.
[7] *Mikisew*, at par. 48
[8] *R. v. Badger* [1996] 2 C.N.L.R. 77 (S.C.C.) ("*Badger*") at par. 40

"deep consultation", according to the significance of potential infringement of the Treaty right in question.[9]

There are two other, recent lower court decisions from the BC Supreme Court which are also note-worthy, particularly in the context of Treaty No. 8. In its *Tsilhqot'in Nation* decision, the Supreme Court of British Columbia held that the province's consultation obligation must ensure that the priority granted to existing rights under section 35(1) of the *Constitution Act, 1982* is preserved when the province authorizes potentially infringing activities.[10] The Crown must provide the First Nation with sufficient resources to ensure that sufficiently credible information respecting the effects of the proposed activities on individual species of wildlife, hydrology, ecology and habitats is generated by the consultation process.[11] Similarly, the Crown must ensure there is a needs analysis done prior to authorizing potentially infringing activities, so the First Nation's needs may be accommodated.[12] Anything less would be an unjustifiable infringement of the section 35(1) right in question.

In the *Wii'litswx* decision,[13] the BC Supreme Court took a very detailed approach to measuring the adequacy of consultation about, and accommodation of, Aboriginal rights protected by section 35(1) of the *Constitution Act, 1982*, by examining the scope of "deep consultation" and the reasonableness of Crown accommodations. The court found that strategic level decisions and the associated likelihood of ongoing extraction of limited resources from a First Nation's traditional territory represents a potential significant infringement on those Aboriginal interests.[14] This language speaks directly to two issues that directly affect most First Nations: high-level strategic plans are potentially significant infringements of Aboriginal or Treaty rights; and cumulative effects of historical resource development on the landscape must be taken into account in the consultation process.

Most importantly, following a process is *not* enough. Consultation must be meaningful. Meaningful consultation is characterized by good faith and an attempt by both parties to understand each other's concerns and move to address them in the context of the ultimate goal of reconciliation of the Crown's sovereignty with the section 35(1) rights at issue.[15] An assessment of whether consultation was meaningful inevitably leads to an examination of what accommodations were reached.[16] Meaningful consultation and accommodation at the strategic level has an important role to play in achieving the ultimate constitutional goal of reconciliation, and should not be supplanted by delegation to operational levels.[17] While this, to some extent, is just an application of the Supreme Court of Canada's decision in *Haida*, this would appear to be by far the strongest

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[9] *Haida*, at paras. 43 and 44
[10] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 ("*Tsilhqot'in Nation*") at par. 1291
[11] *Tsilhqot'in Nation*, at par. 1293
[12] *Tsilhqot'in Nation*, at par. 1293
[13] *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 ("*Wii'litswx*")
[14] *Wii'litswx*, at paragraph 169
[15] *Wii'litswx*, at paragraph 178
[16] *Wii'litswx*, at paragraph 179
[17] *Wii'litswx*, at paragraph 186

language from the courts to date about the requirement to consult First Nations at a strategic level. First Nations with strong claims or proven Aboriginal or Treaty rights can now insist that they have a meaningful voice in higher-level planning and decision-making, and can object to efforts by the Crown to push down such participation to solely the operational level.

## 2. Practical Application of Legal Principles to Treaty No. 8

The challenge to applying the common law principles articulated by the court with respect to the Crown's duty to consult is that each and every proposed activity must be approached on an *ad hoc* basis - the Crown, the First Nation and the proponent must look at the activity, and assess its potential impacts on Treaty rights with reference to the case law. That can be very inefficient, and a source of considerable disagreement over different interpretations of the cases and how they should be applied to specific projects.

Since the late 1990's, the movement in north-eastern British Columbia has been to move away from *ad hoc*, project by project consultation towards formalized consultation processes in bilateral agreements between the Treaty 8 First Nations and the provincial Crown.

### (a) Oil and Gas Consultation Agreements

This process started at the operational level in the oil & gas sector. In 1998, all eight Treaty 8 First Nations plus the Dene Tha' First Nation (located in Alberta but having traditional territories in British Columbia) entered into Memoranda of Understanding ("MoU"s) with the BC Oil and Gas Commission ("OGC").

Each MoU set out a specific consultation process that the OGC and the First Nations would follow respecting operational-level decisions. The MoUs set out detailed processes and timelines for Crown consultation with the eight Treaty 8 First Nations respecting pre-tenure stage application referrals and permit application referrals. They also provided capacity funding to each First Nation, to enable them to have sufficient resources to respond to the referrals. The funding was based on activity contributions for new and existing seismic lines, wells, pipelines, compressor stations and gas plants. The consultation processes were to be applied in each First Nation's critical community use area within Treaty 8 territory. While the MoUs had a five year term, the term was extended twice, ending in 2006.

Each of the MoUs defines an "administrative area" for OGC consultation with the respective First Nation. These geographic areas are smaller in size than the entire Treaty territory and overlap considerably. Many of them extend well into what is known as the Rocky Mountain Trench, the land situated between the easterly range of the Rocky Mountains and the Omineca and Cassiar ranges in the west, encompassing the Liard, Finlay, and Parsnip river systems and watersheds, including the massive Williston Lake. Interestingly and somewhat inconsistently, the province consults with First Nations

respecting oil & gas activities west of the Rocky Mountains and yet denies that it has any obligation to do so.

Starting in 2006 and extending into 2008, all the oil & gas MoUs were re-negotiated and became known as the Consultation Process Agreements (the "CPA"s).[18] Some of the CPAs include a significantly developed "issues resolution" process, a re-vamped vetting and review process for applications, greater technical access and integration of information systems as between the First Nations and OGC, the potential establishment of a Coordinating Land Office for some of the Treaty 8 First Nations, and continued financial capacity contributions. The CPAs each have a term of five years.[19]

### (b) Revenue Sharing Agreements and Resource Management Agreements

The subject matter of the MoUs and the CPAs remained consultation processes at the operational level. As observed above in *Tsilhqot'in Nation* and *Wii'litswx*, the Crown's duty to consult with respect to Treaty rights also includes consultation about higher-level, strategic planning. This aspect of the duty to consult is now being address by much more comprehensive "suites" of bilateral agreements between the Treaty 8 First Nations and the province, in the form of revenue-sharing and resource management agreements.

#### (i) Default Consultation Processes: the Backstop

In February 2008, four of the Treaty 8 First Nations (Ft. Nelson, Prophet River, Doig River and West Moberly) signed a fifteen-year Economic Benefits Agreement ("EBA") with British Columbia. Blueberry River had also signed its own EBA with the province for a similar term in June 2006.[20]

The EBAs provide revenue sharing payments to the five respective First Nations, in the form of equity payments and annual payments based on increases in activity in three key resource sectors (oil & gas, forestry and mining) operating within a smaller, defined geographic area within Treaty 8 territory.[21] Interestingly, the EBAs do not follow the same "administrative areas" as the CPAs.

The EBAs provide a default consultation process for all Crown-authorized activities which may affect the Treaty rights of the five First Nations. The default consultation process represents the minimum legal obligations of the Crown to the First Nations. Importantly, the default consultation process is triggered for Crown-authorized activities and decisions for which there is no other bilateral, resource management agreement

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[18] All of the CPAs are posted on the OGC's website at http://www.ogc.gov.bc.ca/pubdoc.asp_view=9.html

[19] Although the Blueberry River CPA was subsumed within the Long Term Oil and Gas Agreement with the province in January 2007 - see discussion below.

[20] The Treaty 8 EBA and the Blueberry River EBA are both posted on the BC Ministry of Aboriginal Relations and Reconciliation website at http://www.gov.bc.ca/arr/treaty/key/default.html.

[21] Section 7.4 of the Treaty 8 EBA expressly acknowledges the difference in opinion respecting the location of the western boundary of Treaty No. 8, such that the parties may re-negotiate the geographic scope of the EBA for the purposes of the revenue-sharing formula in the event of a final court decision on the issue. The Blueberry EBA contains similar provisions in sections 11(g) and 12(a).

between the province and the First Nations. In other words, the EBAs are forward-looking documents.

For example, the Treaty 8 EBA anticipates a host of sector-specific agreements covering tailored consultation processes for certain resource sectors, such as long-term oil and gas, forestry, mining, wildlife, parks, Crown land dispositions, and cultural and heritage. In addition, the Treaty 8 EBA anticipates a government to government protocol and a strategic land use planning agreement. Should eight of these nine potential agreements be concluded on or before December 2009, the parties will enter a Final Agreement to serve as an umbrella agreement, binding the EBA and the resource management agreements together to form a new relationship between the First Nations and the provincial government.

### (ii) Sector-Specific Consultation Processes: The Future

Although the Treaty 8 resource management agreements are still under negotiation, Blueberry River and the province have concluded seven resource agreements.[22] An example of the kind of resource-management agreements that form this new relationship is the Blueberry River Long Term Oil and Gas Agreement. That agreement provides a specific process for pre-tenure referrals by the Ministry of Energy, Mines and Petroleum Resources ("MEMPR") to Blueberry River, as well as beginning to address issues such as reclamation, compliance and enforcement within the Blueberry River Consultation Area (as defined in the agreement). All of these issues go well beyond the operational decisions subject to the MoU/CPA. Another example is the Blueberry Parks Consultation and Collaboration Agreement, in which Blueberry River is provided an opportunity to participate in the planning of new parks and the management of activities within existing parks within the Blueberry River Consultation Area.

Thus, a key difference between the MoU/CPA-type of agreements and the new resource-management agreements is that the sector-specific consultation processes under the resource management agreements will not be limited only to operational decisions. In other words, these tailored, detailed consultation processes will address higher-level and strategic planning of resource development, as well as operational-level referrals. To this degree, they complement the direction taken by the court in *Tsilhqot'in* and *Wii'litswx* respecting consultation about strategic land use decisions.

### (iii) What Was Left Out

It is critical to note what these bilateral consultation agreements do *not* include.

They do not address the degree to which the province can and will delegate procedural aspects of these agreements to proponents. The Supreme Court of Canada has made it clear that third parties are under no independent obligation to consult with First Nations,

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[22] All of the Blueberry River Resource Agreements concluded to date are posted on the BC Ministry of Aboriginal Relations and Reconciliation website at http://www.gov.bc.ca/arr/treaty/key/blueberry_river.html.

nor can they be held liable for failure to discharge the Crown's duty to consult and accommodate. [23] On the other hand, the Crown may delegate certain procedural aspects of consultation to industry proponents seeing a particular development, and that third party developers are liable where they owe a duty of care. [24] Proponents must be alive not only to the tailored consultation process in each sector-specific agreement, but also whether the affected First Nation is a party to that particular agreement.[25] Failure of a proponent with delegated procedural duties to adhere to a particular consultation process in such an agreement conceivably could result in the province breaching its obligations to the First Nation.

As well, the bilateral consultation agreements do not preclude proponents from engaging the First Nations with accommodation measures independent of the Crown's efforts. For example, section 14.1 of the Treaty 8 EBA provides that the signatory First Nations and their members may enter into business relationships with any proponent who chooses to do so.[26] In other words, proponents and First Nations are free to enter impact benefit agreements and the Treaty 8 EBA does not prohibit such arrangements. Such arrangements may be factors the Crown considers when assessing the adequacy of the consultation and accommodation undertaken pursuant to these agreements.

Finally, the bilateral agreements do not cover the entire Treaty 8 territory. Each is limited to specific geographic areas for the purpose of each specific agreement. None of them cover the Rocky Mountain Trench. Notwithstanding the desire to formalize and make certain consultation processes on the eastern side of the Rockies, the First Nations and the province have yet to apply that same approach to activities within the Rocky Mountain Trench with respect to rights pursuant to Treaty No. 8. For proposed resource activities in this area, the *ad hoc* common law consultation principles are the only guidance proponents, the Crown and the Treaty 8 First Nations have regarding potential infringements of Treaty rights of some of the Treaty 8 First Nations (as well as the unproven but potential Aboriginal rights of the First Nations situated in the Trench who have not adhered to Treaty No. 8).

### (c) Peace Moberly Tract Sustainable Resource Management Plan

Another consultation process in north-eastern BC has been the efforts by West Moberly and Saulteau First Nations to negotiate a Sustainable Resource Management Plan ("SRMP") with the province for an area of land directly south of the Peace River called the Peace Moberly Tract ("PMT").

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[23] *Haida*, at par. 56

[24] *Haida*, at par. 53

[25] The Halfway River and Saulteau First Nations did not sign onto the Treaty 8 EBA. It remains to be seen whether either or both will opt-in before March 2009 (something for which the Treaty 8 EBA provided), or will sign onto specific resource management agreements as they are concluded. The McLeod Lake and Dena Tha' First Nations too are not parties, although in the future they may look to the agreements reached by their Treaty 8 neighbours and may try to negotiate similar arrangements with the province.

[26] See also section 11(m)(ii) in the Blueberry EBA.

The background to this initiative was a judicial review brought by Saulteau against a decision of the OGC to issue an exploratory well permit issued to Vintage Petroleum.[27] Saulteau did not categorically object to the exploration, but argued that the OGC was obliged, as part of the consultation process, to consider the cumulative effects of all existing, proposed and reasonably foreseeable Crown-authorized activities on the ability of the First Nation to exercise their Treaty rights, which it did not do.[28]

The BC Supreme Court held that the OGC had a duty to consult with the First Nations respecting the effect of the activities authorized by the permit on the ability of the First Nation to exercise its Treaty rights, and that the OGC discharged this duty.[29] The OGC properly considered the consultation process itself; considered the direct and indirect environmental, cumulative and socio-economic effects flowing from the permit application (and decided to put off a cumulative effects assessment for future consideration if more extensive development were triggered by the exploration); and recognized the importance of the ongoing ability of the First Nation to practice treaty rights and to protect that practice by the establishment of a planning process and imposition of conditions on the well permit.[30]

Notwithstanding that the First Nation application for judicial review was dismissed by the court, the parties continued to talk about ways to resolve the concerns respecting cumulative effects. Saulteau and West Moberly elected to negotiate a SRMP with the province for the PMT, to try to incorporate Aboriginal and Treaty values for land management and resource decisions within the PMT SRMP.

SRMPs are designed to be landscape specific, focused on medium-sized watersheds. SRMPs are intended to define economic opportunities, delineate and manage environmentally sensitive locations and refine the zoning established in the higher-level Land and Resource Management Plan. SRMPs are meant to design objectives and indicators that promote sustainable economic development afforded by the province's wealth of Crown land, water, sub-surface and biological resources.

While SRMPs are intended to be a "new opportunity" to accommodate First Nations interests, this is achieved primarily in the identification of potential economic and cultural opportunities. SRMPs are a "part" of the spectrum of Crown consultation and accommodation, but are not specifically designed to meet all of the Crown's constitutional obligations. As a matter of legal consultation and accommodation, such opportunities appear to fall short of what the First Nations are legally entitled to according to the case law.

Although the PMT SRMP has been concluded, to date it has not been ratified by either Saulteau or West Moberly.

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[27] *Chief Apsassin v. B.C. Oil & Gas Commission*, 2004 BCCA 286 ("*Apsassin*")
[28] *Apsassin*, par. 16
[29] *Apsassin*, at par. 27
[30] *Apsassin*, at par. 15 and 28

### (d) McLeod Lake Adhesion Agreement

Finally, there is the *McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement*[31] to consider. McLeod Lake adhered to Treaty No. 8 in 2000, 101 years after the Treaty was made. Unlike with previous adhesions, McLeod Lake not only adhered to the Treaty but also agreed to other terms in addition to those contained within the Treaty.

With respect to consultation, section 3.3 of the Adhesion and Settlement Agreement provides as follows:

> Notwithstanding the common law and the geographic extent of rights acquired by McLeod Lake under article 2, McLeod Lake agrees that any obligation by British Columbia to consult McLeod Lake is limited to activities that may have an impact upon McLeod Lake's rights under s. 35 of the Constitution Act, 1982 within the Claimed Traditional Territory and for greater certainty, British Columbia will have no obligation to consult McLeod Lake with respect to activities that may have an impact upon their s.35 rights outside of McLeod Lake's Claimed Traditional Territory.

The "Claimed Traditional Territory" is set out in Schedule A to the Adhesion and Settlement Agreement. For the purposes of this paper, the Claimed Traditional Territory consists of two key portions: the first portion is all of Treaty 8 territory lying to the east of the Rocky Mountains and south of the Peace River, to the Alberta border; the second is territory lying in the southern portion of the Rocky Mountain Trench, including the watershed to the Parsnip River and the southern portion of Williston Lake.

Two aspects of this are noteworthy. First, McLeod Lake agreed that the Crown need only consult with respect to activities which may impact their Treaty rights within not Treaty 8 territory generally, but only within the specified "Claimed Traditional Territories". Second, notwithstanding the province's denial that Treaty No. 8 extends into the Rocky Mountain Trench,[32] McLeod Lake nevertheless now has provincially-affirmed Treaty rights to consultation in the southern portion of the Trench, west of the Rocky Mountains.

## Part B The Duty to Consult the Métis

But the Treaty 8 First Nations are not the only Aboriginal people located in north-eastern British Columbia. There are also Métis people in north-eastern British Columbia.[33]. Their Aboriginal rights are also protected by section 35(1) of the *Constitution Act, 1982*. To what degree are they entitled to be consulted?

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[31] Dated March 27, 2000.

[32] See sections 11.5 and 15.2 of the Adhesion and Settlement Agreement.

[33] The charter communities of the Métis Nation of BC, including the five Métis organizations from north-eastern British Columbia, are listed at http://www.okmcfs.com/index.php?option=com_content&task=view&id=31&Itemid=50.

## A. Who Are the Métis?

The Supreme Court of Canada has held that the term "Métis" in section 35(2) refers only to the distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life and recognizable group identity separate from their Indian or Inuit and European forebears.[34] The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots.[35]

However, the Supreme Court of Canada has refused to define comprehensively who a Métis person may be, preferring instead to verify that a person is a member of an identifiable Métis community, a group with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.[36] This is done in three steps:

(i) The person must self-identify as a member of a Métis community;
(ii) The person must demonstrate an ancestral connection to a historic Métis community; and
(iii) The person must demonstrate that he or she is accepted by the modern Métis community whose continuity with the historic community provides the legal foundation for the right being claimed.[37]

Only those members with a demonstrable ancestral connection to a historic Métis community can claim section 35 Aboriginal rights.[38]

The test for Métis practices that receive protection as Aboriginal rights under section 35 focuses on identifying those practices, customs and traditions that are integral to the Métis' distinctive existence or relationship with the land during the period after the particular Métis community arose and before it came under the effective control of European laws and customs.[39] In other words, the court will look to find what practices and customs existed prior to the imposition of European laws on the Métis. This is known as the "pre-control" test.

The rest of the test is the same as that for Indian or Inuit people asserting Aboriginal rights.[40] The court will then determine whether the practice is integral to the distinctive practices of the Aboriginal group in question, whether there is sufficient evidence of continuity between that historic practice and the contemporary right being asserted, whether the asserted right has been extinguished, whether the right has been infringed and if so, whether the infringement is justifiable.[41]

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[34] *R. v. Powley*, [2003], 4 C.N.L.R. 321 (S.C.C.) ("*Powley*") at par. 10
[35] *Powley*, at par. 11.
[36] *Powley*, at par. 12 and 30
[37] *Powley* at par. 31 to 33
[38] *Powley*, at par 34
[39] *Powley*, at par. 37
[40] *Powley*, at par. 15
[41] *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.), at par. 44, 46, 55 to 67

## 2. Consultation with the Métis

The law with respect to Crown consultation regarding potential but unproven Aboriginal rights was definitively established in the Supreme Court of Canada's *Haida* decision.

### (a) Consultation Principles Generally

The point in time at which the duty to consult arises is 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."[42] In other words, First Nations with as yet unproven Aboriginal interests must outline their claims to make a *prima facie* case for the Aboriginal right being asserted. The Supreme Court of Canada in *Haida* suggested the concept of a spectrum to determine the scope of the duty to consult.

> In general terms, the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.[43]

Thus, to determine the extent of the consultation requires a consideration of two things: 1) the strength of the First Nation's claim; and 2) the seriousness of the infringement on the right or title. If the claim to the right or title is weak or the potential for infringement is minor, then mere notice may suffice. However, if there is a strong *prima facie* case for the claim, the right and its potential infringement is significant to the First Nation and the risk of non-compensable damage is high, then deeper consultation will be required.[44]

The Supreme Court held that where there is a strong *prima facie* right and the consultation process suggests the government's proposed decision may adversely affect that right, "addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of the infringement, pending final resolution of the underlying claim."[45] Accommodation means "seeking compromise in an attempt to harmonise conflicting interests and move further down the path of reconciliation."[46] Accommodation does *not* mean a duty to agree.[47]

### (b) Application of Principles to the Métis

To date, the courts have not yet found there to be a historic Métis community in British Columbia.[48] This is not to say that there are no such communities but rather to observe that the necessary evidence has yet to be proved in a court of law. It also must be noted

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[42] *Haida*, at para. 35.
[43] *Haida,* at para. 39.
[44] *Haida,* at para. 44.
[45] *Haida*, para. 47
[46] *Haida*, para. 49
[47] *Haida*, para. 49
[48] See, for example, *R. v. Willison*, [2006] 4 C.N.L.R. 253 (B.C.S.C.)

that there have not yet been any Métis consultation cases decided by the courts in British Columbia.

Nevertheless, the guidance of the Supreme Court of Canada in *Haida* makes it clear that Aboriginal peoples who assert rights protected by section 35 are entitled to be consulted by the Crown and, where appropriate, to have their rights accommodated. Such principles should apply equally to Métis people. In *Haida*, the court left open to the government the ability "to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts."[49]

Interestingly, what seems to be a rather self-evident application of *Haida* to the Métis is not without controversy. There is some judicial debate as to whether the doctrine of the honour of the Crown even applies to the Métis people.[50] Perhaps more oddly, where the Alberta government had attempted to address Métis harvesting rights through a regulatory scheme (the 2004 *Interim Métis Harvesting Agreement*), the court struck down the scheme as being beyond the powers conferred by the statute in question.[51] To date, the British Columbia government has not attempted to regulate or legislate in this regard.

Where does that leave us? We know there are groups of people living as Métis communities in north-eastern British Columbia. Under the *Powley* test, they may be entitled to assert rights protected by section 35 of the *Constitution Act, 1982.* Accordingly, the honour of the Crown would require that the government consult with these people prior to making decisions or authorizing activities which potentially may infringe these potential yet unproven rights. And that consultation presumably will follow the *ad hoc*, common law principles established in *Haida* given the absence of provincial regulation in this regard. [52]

## Part C Aboriginal Rights within Treaty 8 Territory?

As described above, most of the Treaty 8 First Nations have entered, or are negotiating, resource management agreements which expressly define specific processes through which the province will consult. But one cannot rely on them as definitive statements of how consultation will be conducted in northeastern British Columbia, for several reasons:

1. The Halfway River, Saulteau and McLeod Lake First Nations are not signatories to either EBA, nor are they yet signatories to any of the resource management agreements envisioned in the EBAs.

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[49] *Haida*, at par. 51

[50] *Manitoba Métis Federation Inc. v. Canada (Attorney General)* [2007] M.J. No. 448 (M.Q.B.), at par. 636-643. But see in contrast *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, [2006] 4 C.N.L.R. 94 (N.L.T.D.) at par. 107-133, appeal dismissed 2007 NLCA 75, leave to appeal dismissed [2008] S.C.C.A. No. 134

[51] *R. v. Kelley*, [2007] 2 C.N.L.R. 332 (A.Q.B.) at 69, 71,

[52] *Labrador Métis Nation* at par. 121

2. Even it they were, all those agreements (including the EBAs) are with the province only - Canada is not a party. For any large projects that might trigger the federal government's obligation to consult, none of the processes set out in these agreements would apply.

3. The agreements only cover half of the Treaty 8 territory (at least the territory as recognized by the signatories to the Treaty i.e. Canada and the First Nations). This means that there is no agreement between the province and the Treaty 8 First Nations over how consultation should be conducted, if at all, respecting proposed activities within the Rocky Mountain Trench.

4. And even if there was such agreement, there are other First Nations within the Trench who are not parties to Treaty No. 8 (e.g. Kwadacha, Tsay Keh Dene, etc.). Crown consultation respecting their concerns does not fall under the scope of the EBAs or the resource management agreements.

The question thus arises as to how consultation will or should occur respecting proposed activities that fall within the Trench.

## 1. The Treaty 8 First Nations

As we have seen, the Treaty 8 First Nations now may be divided into two groups for the purposes of consultations east of the Rocky Mountains - the five who have entered an EBA with the province, and three who have not. That said, many also have agreed to specific consultation processes for oil & gas in the CPAs, some of which extend geographically into the Rocky Mountain Trench.

All of these agreements are based, to one degree or another, on the existence of Treaty rights pursuant to Treaty No. 8. Are there residual Aboriginal rights that these nations can exercise as well?

The text of Treaty No. 8 would appear to answer that question negatively, as follows:

> … the said Indians DO HEREBY CEDE, RELEASE, SURRENDER and YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say: -
>
> [*omitted here is the metes and bounds description from Treaty No. 8*]
>
> AND ALSO the said Indians rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

The two "cede and surrender" clauses of the Treaty appear to extinguish the Aboriginal rights and titles of the signatory First Nations not only to the lands within the metes and bounds description, but also to lands outside the Treaty boundary.

Appearances can be deceiving. The Treaty 8 First Nations have consistently maintained that Treaty No. 8 was only a "peace and friendship" agreement, not unlike those made between the British military leaders and the Mi'kmaq First Nations in Atlantic Canada in the 1700 and 1800's.[53] In the only case to date in which these specific clauses of Treaty No. 8 have been considered, the court concluded that there is significant "doubt as to whether the full aboriginal title had been extinguished, certainly in the minds of the Indians".[54]

Absent a clear judicial determination on this question, the Crown, the First Nations and proponents are left with the possibility that, notwithstanding Treaty No. 8, the Treaty 8 First Nations may continue to hold not only Aboriginal rights, but also Aboriginal title, to some or all of the areas within and outside the Treaty's boundaries.

### 2. The Other First Nations in Treaty 8 Territory

And what of the other First Nations who claim traditional territories within the boundaries of Treaty No. 8, some of whom have reserves in the Treaty territory?[55]

Not unlike with the Métis people in the area, the simple answer is that consultation with the non-Treaty First Nations must follow the common law principles set out in *Haida* to the extent that those First Nations have potential but unproven Aboriginal rights and title to the territories they claim. This means that even if a proponent has adhered to the formal consultation processes outlined in the EBAs or the sector-specific resource management agreements, it may still need to engage in an *ad hoc*, *Haida*-like process with non-Treaty First Nations with overlapping claims to Treaty 8 territory.

## Conclusion

Imagine a proponent wondering what consultation may be required with a First Nation in north-eastern British Columbia for a particular project who has some delegated authority from the provincial Crown to assist with the consultations. As described in this paper, there are a plethora of potential processes which may apply. The proponent would be wise to keep in mind the following questions:

1. Is the First Nation a Treaty 8 signatory, a non-Treaty 8 band, or a Métis community?

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[53] *R. v. Marshall*, [1999] 3 S.C.R. 456 at par. 4 & 96

[54] *Re Paulette and Registrar of Land Titles (No. 2)* (1973), 42 D.L.R. (3d) 8 (NWT SC) at 35

[55] The governments of British Columbia and Canada are parties to a number of ongoing treaty negotiations with First Nations groups that claim rights within areas in overlap with Treaty 8 Territory. They are Lheidli T'enneh Band, Yekooche Nation, Kaska Dena Council, Carrier Sekani Tribal Council, Tsay Keh Dene Band, Acho Dene Koe First Nation, Teslin Tlingit Council and the Gitxsan Hereditary Chiefs.

2. If the First Nation is a Treaty 8 signatory, then query:

   (a) Is the First Nation a signatory to the Treaty 8 EBA or the Blueberry EBA?

      (i) If yes, then determine whether the proposed project falls under a sector-specific consultation process within a resource management agreement or the default consultation process within the EBA.

      (ii) If not, then determine whether:

         - the proposed project falls within the Claimed Traditional Territories as defined in the McLeod Lake Adhesion Agreement;

         - the proposed project falls under the consultation process outlined in the Oil & Gas CPAs;

         - failing any applicable bilateral agreements, the degree to which consultation and accommodation is owed pursuant to *Mikisew* and *Dene Tha'*.

   (b) If the PMT SRMP is ratified, does the proposed activity occur on lands subject to the PMT SRMP? If so, then the SRMP may also provide direction in terms of how Treaty values are to be incorporated in resource management decisions within the SRMP.

   (c) Is the proposed activity to occur east of the Rocky Mountains or within the Rocky Mountain Trench?

      (i) If to the east, then follow the process under 2(a) above;

      (ii) If to the west, then determine the degree to which consultation and accommodation may be owed pursuant to *Haida*;

      (iii) If the affected First Nation is McLeod Lake, then determine whether the proposed activity will occur within the Claimed Traditional Territories:

         - if so, then determine the degree to which consultation and accommodation is owed pursuant to *Mikisew* and *Dene Tha'*;

         - if not, then determine the degree to which consultation and accommodation may be owed pursuant to *Haida.*

3. If the First Nation is not a Treaty 8 band or is a Métis community, then determine the degree to which consultation and accommodation may be owed pursuant to *Haida.*