THE DUTY TO CONSULT[1]
Mississauga, October 8, 2002

*. . . **The obligation to consult is a free standing enforceable legal and equitable duty** . . . [that] must take place before [an] infringement. The duty to consult and seek an accommodation does not simply arise from a Sparrow analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection.* [2]

. . . .

The special trust relationship includes the right of the treaty beneficiaries to be consulted about restrictions on their rights. [3]

. . . .

*The nature and the scope of the duty of consultation will vary with the circumstances. In occasional cases, where 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 case when the minimum acceptable standard is consultation, this consultation must be in good faith 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.* [4]

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[2] Lambert J.A. in *Haida Nation v. BC and Weyerhauser* (2002), 99 BCLR 209 at paragraph 55 (the decision is referred to as Haida 1 in this paper).

[3] *R. v. Donald Marshall Jr.*, [1999] 3 S.C.R. 533 at para. 43 (this is the decision of the SCC rejecting an application by non-Native professional fishermen for a reconsideration of the original judgment in the case - the rejection decision is colloquially known as Marshall II).

[4] *Delgamuukw v. BC*, [1997] 3 S.C.R. 1010 at 1113 and see *R.v. Sampson* (1995), 16 B.C.L.R. (3d) 226 at 251 (C.A.).

INTRODUCTION

The duty to consult with Aboriginal Peoples is a legal and constitutional duty of both the federal and provincial governments. [5] The courts have already determined that this duty is based on both the unique fiduciary relationship between Aboriginals and the Crown and section 35 of the *Constitution Act, 1982*. Aboriginal litigants continue to bring forward their unique perspectives on history and the constitutional dimensions of the relationship. Consequently the courts are beginning to understand that the relationship was in fact a partnership, and one of such fundamental importance that it enabled the building of the country. [6] This increased understanding will most likely first result in a greater legal burden being placed on the Crown regarding consultation and later should result in joint decision making that reflects the extent of the original partnership.

The concept of the duty to consult first appears in modern judgments in 1984 in *Guerin*, where the Supreme Court of Canada found that the federal Crown had violated its fiduciary duty by:

> *. . . obtaining without consultation a much less valuable lease than that was promised.* [7]

Since that decision Aboriginal Law has grown exponentially. The courts have started to examine the relationship between the Crown and Aboriginal Peoples far more closely. Consequently government action which affects Aboriginal Peoples' rights and interests is subject to court review in an increasing number of situations. The most recent case law from the British Columbia Court of Appeal not only expands the basis for the duty and increases the substantive demands on governments but places the duty on third parties when a third party has received a benefit from the Crown and knew, or ought to have

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[5] Municipal governments are "creature of statute." This means that they are essentially completely dependent on provincial statutes for the existence and authority. Powers held by municipal governments are delegated by the province. Actions or by-laws of municipalities that might infringe or impair Aboriginal or Treaty rights are therefore subject to the duty of consultation. That duty is likely shred by the other levels of government.

[6] See e.g. *Reference re the Secession of Québec*, [1998] 2 SCR 217 at 258, where the Court held:

> . . . the framers of the *Constitution Act, 1982* included in s.35 explicit protection for existing aboriginal and treaty rights, and in s.25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise"of s.35, as it was termed in *R. v. Sparrow*, [1990] 1 SCR 1075, recognized not only the ancient occupation of land, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved . . . reflects an important underlying constitutional value

[7] *Guerin v. Canada*, [1984] 2 S.C.R. 335 at 389.

known, that the government had not met its duty to consult in relation to the benefit.

Fiduciary Duty and Consultation.

...the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[8]

. . . .

The fiduciary duty of the Crown, federal or provincial, is a duty to behave towards the Indian people with utmost good faith and to put the interests of the Indian people under the protection of the Crown so that, in cases of conflicting rights, the interests of the Indian people, to whom the fiduciary duty is owed, must not be subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty. [9]

The Courts have determined that government is required to consult with Aboriginal Peoples when legislation, regulation, policy, action or a project may infringe Aboriginal or Treaty rights. The duty arises as a result of s. 35 of the *Constitution Act, 1982* and the general fiduciary relationship between the Crown and Natives. The principles from the leading cases are summarized below.

1. There is always a duty of consultation:
Delgamuukw v. B.C., [1997] 3 S.C.R. 1010; *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, [2002] B.C.J. No. 155 (B.C.C.A.); *Haida Nation v. British Columbia (Minister of Forests) and Weyerhauser*, [2002] B.C.J. No. 378 (B.C.C.A.) (*Haida I*);

2. It is not necessary to prove the existence of Aboriginal rights in court or through Treaty prior to the Crown being bound by the duty to consult:
Taku River; Haida I;[10]

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[8] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1108

[9] *Haida Nation v. BC (Minister of Forests) and Weyerhauser*, [2002] B.C.C.A. 462 at para. 62 (the decision is referred to as *Haida II* in this paper).

[10] Note however that a somewhat different result was reached in *Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Limited*, [2000] 3 C.N.L.R. 153 (Ont. C.A.). In that case the Ontario Court of Appeal found that the duty of the Crown to

3. The duty to consult does not depend on legislated rights:
Haida I;

4. The duty to consult is based on s.35 of the Constitution Act, 1982 and the fiduciary relationship between the Crown and Aboriginal Peoples:
Haida I;

5. The nature and scope of consultation varies with the circumstances of any infringement and the strength of the aboriginal claim:
Delgamuukw; Haida I & II;

6. A standard public consultation process is not enough. A regular public notice is not enough. Aboriginal Peoples are entitled to a distinct process.
Mikisew Cree v. Canada (Minister of Canadian Heritage), [2001] F.C.J. No. 1877 (QL); *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.); and, *Halfway River First Nation v. B.C.* (August 12, 1999, CA023526, CA023538 (B.C.C.A.);

7. The duty to consult is a legally and equitably enforceable duty:
Haida I & II;

8. The Crown cannot delegate its duty of consultation to third parties:
Mikisew;

9. Consultations between a third party and an Aboriginal Peoples does not relieve the Crown of its duties:
Mikisew;

10. However, third parties, such as project proponents, may have a duty to consult, depending on the circumstances:
Haida I;

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consult with First Nations is a legal requirement that helps a court to determine if the Crown is constitutionally justified in undertaking some act that has been found to infringe an existing Aboriginal or Treaty right of a First Nation. The Court said that it is only after the First Nation has established an infringement that the duty to consult becomes engaged as a factor for the court to consider when determining whether the Crown action may be legally justified.

The problem with this decision is that if the Crown does not consult prior to taking such action, and a First Nation later establishes in court that their rights were infringed, the Crown may never be able to legally justify its action since it never consulted. Governments relying on this Ontario decision as a reason not to consult may be inviting disaster.

11. Such third parties do have such a duty when the third party receives a benefit from the Crown in circumstance in which they knew, or should have known, that there was a *prima facie* breach by the Crown of its fiduciary duty including the duty to consult. Such parties became constructive trustees.
(*Haida II*).

In the words of Lambert J.A. in *Haida II*:

> *The burden of carrying out consultations or seeing that consultations are carried out never leaves the Crown. But Weyerhaeuser has an obligation to make all appropriate inquiries of the Crown to satisfy itself that the Crown's obligations of consultation are being discharged. In addition, there are some areas, such as employing Haida people in its operations, or the sharing of economic opportunities, where no consultation with the Haida people could be effective without the participation of Weyerhaeuser.*

12. A third party's failure to consult and accommodate might result in a court awarding compensatory and even aggravated or punitive damages for infringement of the Aboriginal title or rights:
Haida II;

13. Consultation must be in good faith, with the intention of substantially addressing the concerns of aboriginal people:
Delgamuukw; Taku River; Haida I, Mikisew;

14. Wherever possible the concerns of an Aboriginal Peoples must be demonstrably integrated into the proposed plan of action:
Mikisew;

15. Consultation concerns both the cultural and economic interests of Aboriginal Peoples:
Haida I;

16. The Crown must endeavour to seek workable accommodations between the interests of Aboriginal People and the resource management goals of government:
Haida I;

17. Consultation must be genuine and meaningful:
Halfway River; Mikisew; Taku River;

18. The Crown must allocate (natural) resources in a manner respectful of the priority of the Aboriginal interest as both Aboriginal title and Aboriginal rights have a general priority:
Delgamuukw; R. v. Gladstone, [1996] 2 S.C.R. 723;

19. In some cases, a decision may require the consent of a First Nation, particularly

where provinces enact hunting and fishing regulations in relation to lands to which title is proven:
Delgamuukw;

20. Consultation arises where the Crown is implementing conservation measures:
R. v. Sparrow, [1990] 1 S.C.R. 1075;

21. It is also required where any Crown measure, such as permit and application approvals, might infringe aboriginal rights or title:
Delgamuukw; Halfway River; Taku River; Haida I; Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director, [1998] 3 C.N.L.R.. 1 (B.C.S.C.);

22. The Crown must fully inform itself of the effect of a law or regulation on a First Nation, which includes getting the Nation's views concerning practices, customs or traditions giving rise to the aboriginal right or title:
R. v. Jack (1995), 16 B.C.L.R. (3d) 226 (C.A.) *Halfway*;

23. Consultation amounts to more than simply making a few telephone calls or sending a few letters or faxes; the Crown cannot say that it has consulted by referring to how many letters or phone calls it has made, as the consultation must be meaningful:
Halfway;

24. The consultation process must allow a First Nation to make a reasonable assessment of the effects of what the Crown is doing, including giving sufficient data to the First Nation:
Cheslatta;

25. Depending on the circumstances, the duty to consult may imply rules of procedural fairness and require that a party entitled to fairness is entitled to know the case it has to meet and be able to respond:
Union of Nova Scotia Indians v. Maritimes and Northeast Pipeline Management Ltd., [1999] F.C.J. No. 1546 (C.A.);

26. Consultation must be timely and is required early in the process and not simply where a decision is about to be made or only where issues of justification of infringement arise:
Halfway; Mikisew;

27. It is up to the Crown, and not to First Nations, to initiate consultation:
R. v. Sampson, [1996] 2 C.N.L.R. 184 (B.C.C.A.);

28. A request for consultation cannot be denied:
R. v. Nikal, [1996] 1 S.C.R. 1013 at 1065.

29. There is an obligation on First Nations to participate in consultation, it is a two-way street:
Cheslatta; Ryan v. Fort St. James Forest District (District Manager), [1994] B.C.J. No. 194 (B.C.C.A.);

30. The fact that a project may be time sensitive does not relieve the Crown of its duty to consult - and the duty may still arise even where a project is near completion: *Cheslatta*;

31. However, a true emergency may be one factor in terms of determining the adequacy or reasonableness of consultation and whether an infringement can be justified: *R. v. Nikal* (1996), 133 D.L.R. (4th) 658 (S.C.C.);

32. In order for consultation to be meaningful, the Crown must take the views of First Nations seriously, including the Aboriginal perspective, and it cannot simply ignore such views or make decisions which amount to rubber-stamp approval: *R. v. Noel,* [1995] 4 C.N.L.R. 78 (N.W.T.T.C.);

33. The duty to consult arises in relation to Treaties and agreements between the Crown and First Nations, as well as to Aboriginal rights and title: *R. v. Marshall,* [1999] S.C.J. No. 66 (QL) (Nov 17, 1999 - "Marshall No. 2"); *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans),* [1997] 4 C.N.L.R. 193 (F.C.T.D.);

34. Where the Crown has chosen to enter into Treaty negotiations, it must negotiate (and consult) in good faith: *Gitanyow First Nation v. Canada*, [1999] 3 C.N.L.R. 89 (B.C.S.C.).

35. Compensation is a relevant issue within the duty to consult as is economic sharing with the Aboriginal People and that sharing may take a variety of forms but consultations should include third parties such as proponents or benficiaries of government licences or permits.
Haida II.

No level of government properly complies with these wide ranging principles in its dealings with Aboriginal Peoples although some jurisdictions have made what appear to be half-hearted attempts to legislate consultation or adopt policy initiatives requiring some consultation (e.g. some fisheries allocations by the federal government and aquaculture project siting within 1 kilometre of a First Nation by B.C.).

Ministerial Discretion
In *R. v. Adams*[11] the Court has set out principles which demand all ministerial

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[11] *R. v. Adams*, [1996] 3 S.C.R. 101.

discretion be tailored to avoid infringing Aboriginal and Treaty rights.

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[12]

Despite this clear and unequivocal statement from the Court no jurisdiction in Canada has undertaken a comprehensive review of its legislation to ensure that it complies with the ruling and is constitutionally sound. The federal government and that of the province of B.C. have attempted (albeit incompletely) to meet the test in select pieces of legislation.[13] Typical of the situation are the four eastern provinces which have not undertaken any amendments to any legislation at all, throwing into question every decision by every minister that "risks infringing aboriginal rights in a substantial number of applications."

SUMMARY

In the following summary the term "Aboriginal rights" includes title and Treaty rights.

Consultation is required to avoid a breach of the fiduciary duty owed to Aboriginal peoples and avoid infringement of Aboriginal rights

It is necessary whenever infringements to Aboriginal rights might arise and where a substantial claim to Aboriginal rights exists. Consultation is to be undertaken whether or not legislation requires it. Aboriginal Peoples do not need to obtain a judicial finding that the rights exist.

Consultation must be commenced early in the planning process and must be carried out on a continuing basis.

The federal and provincial Crown and some third parties have a duty to consult with any Aboriginal peoples whose rights may be infringed

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[12] *Id.* at paragraph 54.

[13] See e.g. : Federal Acts: the new *CEAA*; The new *CEPA*; *Mackenzie Valley Resources Act;* B.C. Acts: *Environmental Assessment Act, Oil and Gas Commission Act.*

There must be a distinct process (public consultation processes are inadequate). The process must be meaningful and may require separate notice.

Consultation must be meaningful and substantially address the concerns of Aboriginal peoples. Workable accommodation of Aboriginal concerns is required.

Allocation of resources must be respectful of the Aboriginal Peoples use of the resource.

Consultation may need to address mitigation, alternatives to a project and compensation to the affected Aboriginal People.

APPENDIX I

INTER-AMERICAN COURT OF HUMAN RIGHTS

THE CASE OF THE MAYAGNA (SUMO) AWAS TINGNI COMMUNITY *V.* NICARAGUA

JUDGMENT OF AUGUST 31, 2001

PART XII
OPERATIVE PARAGRAPHS

173. Therefore,

THE COURT,

By seven votes to one,

1. finds that the State violated the right to judicial protection enshrined in article 25 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention, in accordance with what was set forth in paragraph 139 of this Judgment.

Judge Montiel Argüello dissenting.

By seven votes to one,

2. finds that the State violated the right to property protected by article 21 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention, in accordance with what was set forth in paragraph 155 of this Judgment.

Judge Montiel Argüello dissenting.

Unanimously,

3. decides that the State must adopt in its domestic law, pursuant to article 2 of the American Convention on Human Rights, the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores, pursuant to what was set forth in paragraphs 138 and 164 of this Judgment.

Unanimously,

4. decides that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Mayagna (Sumo) Awas Tingni Community and, until that delimitation, demarcation and titling has been done, it must abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Mayagna (Sumo) Awas Tingni Community live and carry out their activities, the above in accordance with what was set forth in paragraphs 153 and 164 of this Judgment.

Unanimously,

5. finds that this Judgment constitutes, in an of itself, a form of reparation for the members of the Mayagna (Sumo) Awas Tingni Community.

By seven votes to one,

6. finds that, in equity, the State must invest, as reparation for immaterial damages, in the course of 12 months, the total sum of US$ 50,000 (fifty thousand United States dollars) in works or services of collective interest for the benefit of the Mayagna (Sumo) Awas Tingni Community, by common agreement with the Community and under supervision by the Inter-American Commission of Human Rights, pursuant to what was set forth in paragraph 167 of this Judgment.

Judge Montiel Argüello dissenting.

By seven votes to one,

7. finds that, in equity, the State must pay the members of the Mayagna (Sumo) Awas Tingni Community, through the Inter-American Commission of Human Rights, the total sum of US$ 30,000 (thirty thousand United States dollars) for expenses and costs incurred by the members of that Community and their representatives, both those caused in domestic proceedings and in the international proceedings before the inter-American system of protection, pursuant to what was stated in paragraph 169 of this Judgment.

Judge Montiel Argüello dissenting.

Unanimously,

8. finds that the State must submit a report on measures taken to comply with this Judgment to the Inter-American Court of Human Rights every six months, counted from the date of notification of this Judgment.

Unanimously,

9. decides to oversee compliance with this Judgment and that this case will be concluded once the State has fully carried out the provisions set forth in this Judgment.

Judges Cançado Trindade, Pacheco-Gómez and Abreu-Burelli informed the Court of their Joint Opinion, Judges Salgado- Pesantes and García- Ramirez informed the Court of their Opinions, and Judge Montiel- Argüello informed the Court of his dissenting vote, all of which accompany this Judgment.