

CONSULTING AND ACCOMMODATING FIRST NATIONS IN CANADA: A DUTY THAT REAPS BENEFITS

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I am pleased to discuss some new developments surrounding the duty to consult as a result of recent court decisions.¹ I also will share with you the Walpole Island First Nation's experience on consultations with and accommodation of our rights and claims, and I will talk about how we deal with the interests of developers within our homelands.

When I first delivered this paper in 2002, the title did not include the word accommodation. Since 2002, however, the law in Canada has clarified the nature of accommodation as a duty that must, in many cases, accompany the duty to consult where Aboriginal claims have been made, but have not yet been proven. Most recently, the law has evolved even further to explain what the duty to consult requires where Aboriginal claims, like title, have been successfully proven.

I will begin by providing a brief overview of what the law in Canada has to say about the duty to consult with and accommodate Aboriginal peoples. I will draw from my experience as former Chief of Walpole Island First Nation, past executive director of the Walpole Island Heritage Centre, and my current position as Walpole Island's consultation manager. I will discuss why the law is headed in the right direction, though it has much further to go.

In short, my thesis is that governments and proponents of developments in Aboriginal territory need to alter their perspectives on consulting and accommodating Aboriginal peoples. Rather than thinking of the duty to consult and accommodate as a cost with no benefits, it should be viewed as a tool that can benefit all parties involved—Aboriginal peoples and proponents alike.

The duty to consult and accommodate First Nations: The law in Canada

Over the years, Canadian courts have recognized the significance of Aboriginal concerns about development that may affect our Aboriginal rights, our treaty rights, or our proven or claimed Aboriginal title. The courts have fashioned a legal duty on the part of the federal and provincial

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Crowns to consult with Aboriginal people who have proven or claimed Aboriginal or treaty rights because our land and rights are essential to our identities.

The courts are catching up to what First Nations have been saying for many years: First Nations and Canada have a special relationship. For that relationship to grow in a way which allows all of us to flourish, we need respectful processes which balance pre-existing Aboriginal rights with the needs of Canadian governments, industry, and the public for lands and resources. Although these respectful processes have been sorely lacking, the courts now recognize that an honourable relationship between the Crown and Aboriginal peoples means good faith recognition and accommodation of Aboriginal interests.

The duty to consult us is much more expansive than just checking in to gauge our concerns and treating us like mere “stakeholders”—which term connotes individuals, like members of the general public, that can affect or be affected by actions of governments and corporations. Unlike other members of the public, we have Aboriginal and treaty rights that are constitutionally protected. In this sense, we are not mere stakeholders. The duty to consult First Nations is therefore more than the opportunity to have a nice chat across the table. It is about structuring and defining how the Crown and Aboriginal peoples make decisions when development may affect Aboriginal lands, rights or interests. When properly carried out, the duty to consult and accommodate ensures that Aboriginal peoples have a meaningful role and voice when it comes to making decisions that have the potential to shape the fate of their communities, and the lives of the generations that follow. This benefits everyone—not just Aboriginal communities.

I will now move on to provide a brief overview of the law in Canada on the duty to consult and accommodate Aboriginal peoples in the context of *proven* Aboriginal title and rights.

The Crown's legal duty to consult and accommodate where Aboriginal rights or Aboriginal title are proven

There is a long string of cases from the Supreme Court of Canada that recognize that Aboriginal peoples must be consulted when Aboriginal rights (including Aboriginal title) or treaty rights, are affected. The recognition of the duty to consult First Nations in the context of proven rights started with the Supreme Court of Canada's 1990 decision in *Sparrow*.² That case established the test that the Crown must meet when it is trying to legally justify interfering with Aboriginal rights. The court said that in order for the Crown to justify interfering with proven Aboriginal rights (such as the right to hunt, trap or fish), the Crown must first consult with the Aboriginal holders of those rights. The Crown has to then take steps to minimize the negative impacts on Aboriginal rights and compensate the First Nation where those rights are infringed.

The *Sparrow* decision made it clear that proven Aboriginal rights trigger the duty to accommodate those rights, although the court did not use the word "accommodate" until later decisions. In *Sparrow*, the court indicated that the government has to engage in a particular of kind of accommodation: a "justification" process. The Crown has to provide proof that the infringements on Aboriginal rights are "justified" and that proper compensation is provided. The Court also noted that the duty to accommodate can even include the obligation to obtain Aboriginal consent, which would be provided only when an Aboriginal people's rights have been accommodated to their satisfaction.

²*R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC)

In the *Delgamuukw* case in 1997,³ the Supreme Court went one step further and considered the role of consultation where there was interference with Aboriginal title. Aboriginal title refers to the unique and constitutionally-protected Aboriginal property right to land. The *Delgamuukw* case dealt with the Gitksan and Wet'suwet'en First Nations' land rights claim to their traditional lands in British Columbia.

The *Delgamuukw* case established an important principle: where Aboriginal title or rights have been proven, the Crown must consult with Aboriginal peoples about what happens on their lands. In cases where the Aboriginal right has been proven, the consultation obligation flows from the fiduciary duty of the Crown to act in the best interests of Aboriginal peoples. The level of consultation required depends on the particular situation. The consultation obligation could range from the need to discuss the proposed infringement with the First Nation, to the requirement that the Aboriginal community fully consent to the development. The Court ruled that although the legal right to full consent would be rare, the Crown *always* has a duty to consult in good faith with the people who have proven their Aboriginal title.

For many years following *Delgamuukw*, both the Crown and the courts did not have to address what the duty to consult and accommodate would require in the context of proven Aboriginal title, because there had been no case where title had been successfully established. However, this changed in June of 2014 when the Supreme Court of Canada released the *Tsilhqot'in* decision.

In *Tsilhqot'in*,⁴ the Supreme Court confirmed Aboriginal title for the first time, granting the Tsilhqot'in Nation title over 1,750 km² of its traditional territory. This is equal to 420,000 acres, which is about the size of the Bruce Peninsula. The Court also made some important statements regarding what the Crown and proponents must do when they are consulting and accommodating

³*Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC).

⁴*Tsilhqot'in v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 (CanLII).

Aboriginal people with proven Aboriginal title rights.

Tsilhqot'in took over where *Delgamuukw* left off and expanded on the right to consent. The Court stated that after Aboriginal title to land has been established, the Crown must get the consent of the title-holding group to use or develop the land. Without it, the Crown cannot proceed, unless it justifies interfering with the Aboriginal title right. The Court clarified that this involves a high threshold - allowing third parties to harvest timber on Aboriginal title land, for instance, is a serious infringement that cannot lightly be justified. The Court also specified that justification includes fulfilling the duty to consult and accommodate. The Court goes on to say that infringements of Aboriginal title rights can *never* be justified if the infringement would substantially deprive future generations of the benefit of the land.

Importantly, the Supreme Court also confirmed that a failure to meaningfully consult and accommodate Aboriginal people *before* Aboriginal title has been proven could leave government and industry exposed to project cancellations and claims for damages, in the event that Aboriginal title is later confirmed. This sends a strong message to government and industry that there is one way to avoid this risk: always obtain the consent of Aboriginal peoples before interfering with our lands, rights and resources.

After *Tsilhqot'in*, First Nations across Canada have a much stronger hook on which to hang our long-standing frustration with governments' failure to consult with us. The *Tsilhqot'in* decision says that consent is the norm. This has not been the approach that governments and industry have taken in the past, which has forced First Nations to go to the courts to have decisions of federal and provincial governments overturned because of the failure to properly consult. If this approach does not change, there will likely be more litigation, which will not only be costly for us, but for all Canadians.

The Crown's Duty to Consult and Accommodate First Nations with Asserted Aboriginal Title and Rights

I have discussed the law in Canada in the context where Aboriginal title and rights have been proven: but what does the law have to say with respect to the duty to consult in cases where the First Nations have claimed a treaty, title or Aboriginal right, but have not yet proved it in court?

In the *Haida* and *Taku River Tlingit* cases,⁵ the Supreme Court confirmed that the duty to consult and accommodate exists even where Aboriginal rights and title are not yet proven. In *Mikisew Cree*,⁶ the Supreme Court dealt with the Crown's duty to consult and accommodate where there is a historical treaty, making it clear that the duty is still triggered and needs to be met. In these decisions, the Court confirmed the scope of the Crown's duty to consult Aboriginal peoples whose land, treaty or Aboriginal rights are affected, and laid out important principles regarding the duty to consult and accommodate Aboriginal peoples in the context of unproven rights. The Supreme Court further elaborated on these principles in 2010 in *Rio Tinto Alcan v Carrier Sekani Tribal Council*,⁷ *Beckman v Little Salmon/Carmacks First Nation*,⁸ and most recently in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*⁹ and *Clyde River v Petroleum Geo-Services Inc.*¹⁰ All of these decisions from the Supreme Court have laid out the central requirements and features of the duty to consult and accommodate, as well as provided practical guidance on how the duty ought to be met.

For example, in *Chippewas of the Thames*, the Supreme Court held that the cumulative effects of an ongoing project and its historical context inform the duty to consult. And in *Clyde River*, the Court held that the Crown must be clear about the process that it is relying on to discharge its duty to

⁵*Haida Nation v British Columbia (Minister of Forests)*[2004] 3 SCR 511, 2004 SCC 73 (CanLII); *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 SCR 550, 2004 SCC 74 (CanLII);.

⁶*Mikisew Cree First Nation v. Canada*, [2005] 3 SCR 388, 2005 SCC 69 (CanLII)

⁷*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, 2010 SCC 43 (CanLII)

⁸*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 (CanLII)

⁹*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (CanLII)

¹⁰*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (CanLII)

consult. *Clyde River* also confirmed that financial assistance, funding, extensive participation, and meaningful, understandable and accessible information sharing may be necessary to ensure that consultation about the Aboriginal right is meaningful. Accommodation may mean more than following industry guidelines or statutory minimums. In addition, the *Tsilhqot'in* case, while focusing mostly on the duty to consult in context of proven rights, also made some important developments in the context of unproven rights. Below is a summary of the principles that we can draw from a reading of all of these cases together:

- The legal source of the duty to consult and accommodate, where the Aboriginal title or right is not yet proved, is the “honour of the Crown.”¹¹
- Both the federal and the provincial Crowns have a duty to consult First Nations.
- The consultation duty is triggered when the Crown knows, or ought to know, that Aboriginal or treaty rights or Aboriginal title may exist and is considering actions which may affect those rights. For instance, the duty may be triggered at the strategic planning stage for large developments or at the policy development stage, not when a particular project comes up for review.
- Potential impacts must flow from the present decision. Where impacts on asserted Aboriginal or treaty rights or Aboriginal title have resulted from past decisions, First Nations cannot seek consultation with respect of those past decisions. However, they can instead seek damages.
- The duty to consult is always triggered where Aboriginal title or other right is claimed and is affected, but the content of the duty will vary. There is a spectrum as to what degree of

¹¹ It is not based on the fiduciary duty of the Crown because, unlike the situation where the right has already been proven, the Aboriginal interest is not specific enough to require the Crown to act as fiduciary. Where an Aboriginal right has been proven or it is a treaty right, however, the Crown may have a fiduciary duty to act in the First Nation's interest, in addition to a consultation duty.

consultation will be required, which will depend on the strength of the case and on the degree of seriousness of the impacts to the Aboriginal community. A strong case with potentially serious impacts will trigger the duty to accommodate.

- The consultation obligation is an ongoing duty that lasts for the length of time when an Aboriginal right is affected. Consultation obligations span the lifetime of a project. The duty to consult does not vanish with the conclusion of a treaty or a modern-day lands claims agreement.
- The right of Aboriginal communities to be consulted is a procedural right, meaning Aboriginal peoples have the right to a just process of consultation. It is also a substantive right, meaning the process must accommodate Aboriginal concerns about impacts on rights such as hunting and fishing.
- Aboriginal peoples are entitled to a consultation process that fully identifies how proposed development or legislative changes will affect our rights and that adequately deals with our concerns. Public notices and open houses for the general public, for instance, fall short of satisfying the legal obligations to consult us. Aboriginal peoples are entitled to a distinct process when there are no existing processes that meet that need. In addition, simply adopting industry guidelines or statutory minimums may not be sufficient to satisfy the duty to accommodate.
- The Crown should be transparent about the process that it is relying on to consult and accommodate the Aboriginal group. The Crown should also be clear about what stage it believes it is currently at in the process. The Crown should provide guidance about its proposed process, to permit the Aboriginal group to raise concerns with the proposed process in a timely manner.

- Consultation and accommodation must be responsive to, and significant and proportionate to the potential adverse effects on the Aboriginal right. Consultation and accommodation must be responsive to the Aboriginal right at issue, its source, the Aboriginal group's specific concerns, and the possible impacts on those rights, and not impacts on the environment generally. Consultation and accommodation also has to be significant to the concerns of the Aboriginal group, and proportionate to the impact on their Aboriginal rights. Concessions required by industry guidelines or statutory minimums may not be sufficient, what matters is that the Aboriginal right itself is consulted on and accommodated.
- Deep consultation requires that First Nations be able to fully participate in the process. They should be able to make submissions, and formally participate in any hearings that might take place before a decision is made about the activity being proposed that could impact their rights.
- The goal of consultation is "mutual understanding on the core issues" including the potential impact on the Aboriginal or treaty right and possible accommodations. Information has to be shared with the Aboriginal group in a meaningful, understandable, and accessible way. It is important to recognize that an Aboriginal group may have resource constraints – including time, money and people – that need to be addressed in order for information sharing to be meaningful, understandable and accessible. Simply dumping data on an Aboriginal group is not appropriate, as it will often not be accessible. Consultation requires taking all steps to ensure information is accessible – for example: translation into an Aboriginal group's language if it is required; or if the community is remote with limited internet access, proponents should make sure that the community members are either able to download the document, or that substantial copies are available in the community.

- When Aboriginal title or Aboriginal rights are proven, the Crown is required to seek the consent of the title or rights-holding group before using or developing on our traditional lands or infringing our rights. Absent this consent, development cannot proceed unless the Crown has discharged its duty to consult and accommodate, and can demonstrate that it has reached the high threshold for justifying an intrusion on Aboriginal rights.
- The requirement of consent in cases where Aboriginal title has been proven encourages governments and industry to get consent and develop agreements with First Nations, even those First Nations whose rights have not yet been proven, to avoid risk of authorizations, project cancellations and claims for damages.

The bottom line, the Supreme Court ruled, is this: *"The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake."*¹² The Supreme Court's statement reflects Walpole Island's perspective: we are looking for honourable processes that reconcile or balance the needs of the Crown and industry with the special responsibility we have to care for the lands and resources entrusted to us by the Creator for future generations.

What does adequate consultation look like where there is strong evidence that Aboriginal title or rights exist and where the potential impacts on the Aboriginal community are significant? This is more than an academic question for Walpole Island First Nation. We have a long-recognized right to our unceded territory on Walpole Island, and we never surrendered our Aboriginal title to the beds of the Great Lakes in our area. As a result, we have strong land "claims" in the eyes of the law. In fact, it is Canada that is 'claiming' to own territory that we never surrendered. We are legally asserting our rights to those parts of our traditional territories which we never surrendered, including

¹²*Haida Nation*, at para. 45

the Canadian portions of Lake St. Clair, the St. Clair River, the Detroit River, the western part of Lake Erie, the southern part of Lake Huron, various islands and parts of the mainland in southwestern Ontario, and some lands in the U.S. Even if only a small geographic area involving our claimed lands is impacted by a proposed development, we believe (and the Supreme Court agreed in the *Mikisew Cree* case) that the size of the affected area is only one issue. What is important is whether and how those lands are significant to our First Nation.

In various cases, the courts in Canada have outlined examples of what adequate consultation entails when an Aboriginal community anticipates that proposed developments could seriously impact their claims and rights.

The courts have confirmed the following elements as constituting proper consultation. We consider these to be some of the minimum consultation requirements where Walpole Island First Nation's title or Aboriginal rights would be seriously affected by a proposed development:

- Formal notice must be provided to the First Nation. Public notice alone is not sufficient. Nor is a "running list" of projects in a First Nation's territory enough. The proposed project or decision that is to be the subject of consultation must be specifically brought to the attention of the First Nation.
- Multiple meetings between the First Nation, corporation, and Crown office staff to set up and implement a consultation process which fully includes the First Nation.
- First Nation participation in the overall environmental assessment project committee and on subcommittees dealing with concerns of particular impact on the community.
- Financial assistance, including funding for technical experts, to ensure that the First Nation can participate fully in the process. It is reasonable for a First Nation to require proponents or the Crown to fund their participation, versus having to use their own limited resources to

do so.¹³

- Thorough and explicit identification of the First Nation's views, including where there are points of disagreement between the First Nation and the industry proponent, and a demonstration of full consideration of those views in decisions made by the Crown. First Nations should be given written reasons showing how their concerns were addressed. Written reasons for a decision about adequate consultation should be provided. Reasons are a "sign of respect [which] displays the requisite comity and courtesy" between the Crown and the First Nation, and also promote better decision-making.
- First Nations should receive funding to support their participation and should be able to submit their own scientific evidence, have the opportunity to present evidence, test the evidence of the proponent, make final arguments, participate as panel members, and receive appropriate accommodations.
- Mitigation strategies to address the concerns of the First Nation.
- Funding for, and First Nation approval of, the appointment of experts to conduct traditional land use, archaeological, ethnographic and heritage site studies assessing the impacts of the development.
- First Nation participation in long-term resource management strategies for the area, in the development of baseline data to track the impacts of the development, and in decisionmaking regarding the decommissioning of the project.
- Accommodation of the First Nation's rights, whereby the First Nation receives meaningful benefits from the project, such as employment or service provision or adequate compensation.
- A requirement that the First Nation would be consulted about any subsequent permitting,

¹³See *Saugeen First Nation v. Ontario (MNR)*, 2017 ONSC 3456 (CanLII).

approval, and licensing processes after the project was approved. Consultation is about more than just letting First Nations blow off steam. The Crown is required to demonstrate to First Nations that their positions have been fully considered and to provide persuasive reasons why the course of action proposed by the First Nation is impractical or unnecessary.

- The duty to consult is upstream of any statutory duty the Crown has. That means that government representatives cannot come to the table to say that they lack the authority or mandate to consult with First Nations.
- Proper consultation includes a consideration of cumulative effects and historical context, including how the current decision or activity adds to the impacts of previous developments that may have already affected Aboriginal and treaty rights, as well as how subsequent activities and the overall, ongoing project could impact rights.
- Consultations should be scheduled when the community is available and not during periods of harvesting, hunting or trapping.
- Information sharing with the First Nation is essential. For consultation to be meaningful, information sharing must be meaningful, understandable and accessible. The information must be meaningful to the First Nation's concerns and Aboriginal rights. It must also be understandable, and in some cases, might need to be translated. It should also be provided in a manner that is accessible to the community. Multiple copies should be provided, and the proponent should ensure that any information provided is accessible to the community. The proponent should make inquiries into the technological resources of the community, such as whether the internet is fast enough to be able to download a particular document.
- Proponents should answer the First Nation's questions and concerns when they arise, or as soon as possible, and in a manner that is meaningful, understandable and accessible.

- Accommodations must be responsive, significant and proportionate to the impact on the First Nation's rights. Accommodations based on industry guidelines or statutory minimums will be insufficient. The accommodations must be responsive to the Aboriginal right. They also have to be significant to the First Nation's rights. Finally, they should be proportionate to the impact on the right.
- Proponents should ask the Crown whether the Crown intends to rely on the proponent for discharging its procedural duty to consult, and the proponent should share this correspondence with the First Nation.
- Proponents should ask the Crown whether the Crown intends to rely on a regulator, such as the National Energy Board, for discharging the duty to consult, and the proponent should share this correspondence with the First Nation.
- If the Crown or company begins a project without consent prior to Aboriginal title being established, it may be required to reassess prior consultation if and when that title is confirmed. If consultation is found to be inadequate, the Crown or company may be required to cancel the project if continuation of the project would unjustifiably infringe Aboriginal title.

Do corporations have a duty to consult and accommodate Aboriginal peoples?

Companies often approach Walpole Island First Nation to inquire about our processes and expectations regarding consultation. For many years, we have worked with companies who deal with us in good faith to find the appropriate processes and types of accommodation. We strive to address our First Nation's needs while giving industry benefits, including the certainty needed to proceed with projects.

The Supreme Court addressed the question of companies' legal obligations to consult us in *Haida* and *Taku River Tlingit* cases. In the *Haida* case, the Court found that because the duty to consult in the case of unproved Aboriginal title flows from the legal doctrine of the "honour of the Crown," there is no *legal* duty on the part of third parties, such as corporations, to consult where Aboriginal rights or title could be affected.

However, the Supreme Court has also stated that the Crown could delegate some of the procedural aspects of the consultation duty to corporations. When that occurs, the corporations would in fact have the delegated duty to consult with First Nations. This happens regularly when an environmental assessment or regulatory processes include statutory obligations that industry consults First Nations. That said, the Crown cannot delegate the duty away. It is ultimately the Crown who is responsible for making sure that the duty to consult is met.

The Supreme Court has stated that corporations could be affected where the Crown fails to meet the duty to consult. A land tenure, permit, or license might be overturned in the case of a failure to adequately consult an Aboriginal community. This is exactly what the Supreme Court warned government and industry of in the *Tsilhqot'in* case, mentioned above.

In *Tsilhqot'in*, the Court stated that if the Crown or company begins a project without consent before Aboriginal title is established, the Crown or company may be required to reassess prior consultation, if and when that title is confirmed. If consultation is found to be inadequate, the Crown or company may be required to cancel the project if continuation of the project would unjustifiably infringe Aboriginal title, which would result in financial losses to the company, and put them on the line for potential claims for damages.

It is true that the duty to consult and accommodate is the Crown's duty. But, the proponent's project will be delayed if that duty is not met. In *Saugeen First Nation v. Ontario (MNR)*, a recent

Ontario case where the Court decided that the Ministry of Natural Resources and Forestry failed to meet the duty to consult and accommodate respecting a proposed limestone quarry in the First Nations' traditional territory, the company the proponent declined to take on an active role and deal directly with the First Nations to advance consultations. That, the Court says, was something the company was entitled to do. But the consequence of refusing that role was to further delay consultations, and any frustration or interest that the company has in moving the project ahead were not valid reasons to defeat the First Nations' constitutional rights.

With that mind, there is a simple and effective way for government and industry to avoid this uncertainty and risk: obtain the consent of First Nations before using and developing our lands.

Before *Tsilhqot'in*, there have been several cases where companies have proceeded to undertake projects on First Nations' traditional lands before they have adequately consulted and accommodated those First Nations. When this has happened, the courts have enforced injunctions against these companies and have required them to halt their projects, unless and until proper consultation between the company, the Crown and the First Nation took place. The failure to adequately consult in these circumstances resulted in significant financial losses to the companies involved, and in time consuming and costly litigation for all parties. All of this could have been avoided had proper consultation happened in the first place.

This shows that the failure to consult can frustrate industry's plans. It also illustrates why corporations should be integrally involved in the Crown's consultation process in order for the Crown to carry out its legally required duties.

In my experience, the Crown cannot successfully carry out their own duty without corporations becoming integrally engaged in the consultation process. The Crown cannot deal with the effects of a project and accommodate claimed Aboriginal rights in a mechanical or perfunctory

way. The devil really is in the details: the design, construction, and operation of a project, program, or policy will depend on discussing the details in order to meet the duty to consult and accommodate. In many cases, only the corporations will fully know and understand the details of the project. Moreover, the corporation proposing the project will best understand the ways in which accommodation can be achieved. In short, the Crown could well fail in its duty unless corporations are integrally engaged in the consultation process.

I would even venture to say that, in some cases, the only way the Crown will be able to meet its duty to accommodate will be to require the corporation and the First Nation to reach a bilateral agreement. I hope that the Province and Canada will see fit to agree with me without this becoming yet one more court battle on our long road to recognition of our rights. A bilateral agreement would prescribe what the corporation agrees to do in terms of mitigating any potential impacts on First Nations' rights.

The benefits to corporations of consulting and accommodating Aboriginal peoples' claims and rights

It is important to consider why corporations should *want* to consult with First Nations beyond the procedural duties that have been delegated to them. Corporations that try to disentangle themselves from the Crown's consultation process risk that the Crown will be found to be in breach of its legal duties to consult and accommodate. Yet corporations have more reasons to consult with First Nations beyond merely assessing legal risks. Consultation and accommodation are simply good business.

As the former Chief and present Consultation Manager of the Walpole Island First Nation, I have been involved in consultations with corporations and different levels of government on a wide variety of developments. The range of involvement of Walpole Island First Nation on external

projects to date have included formal hearings, community meetings, external reviews, and providing input on permit applications, establishment of on-going environmental liaison committees, and the negotiation of memoranda of understanding with project proponents. The types of external projects that our First Nation has been engaged in have included pipelines, marinas, hazardous waste landfills, dredging disposal facilities, dredging of contaminated sediments, power generation projects, highway developments, international bridges and industrial wastewater treatment operations.

We have learned that there are good reasons for industry to consult with us. In some ways, the Supreme Court decisions may not affect the evolving relationships between corporations and First Nations for one important reason: many companies have already realized that consulting with First Nations, in whose territories they plan to operate, is good business. Industry plays an important and practical role in the consultation process.

Industry Benefits of Consulting First Nations

The kinds of benefits that can be obtained by openly consulting with Aboriginal peoples and accommodating our rights and interests in relation to proposed developments are numerous. Here are ten reasons why corporations benefit when they consult with and accommodate First Nations when it comes to development in our territories:

- Consultation and accommodation create a positive relationship between the corporation and the First Nation leadership, administration and community at large. A positive working environment is, as we all know, highly valuable.
- Consultation and accommodation mean avoiding litigation. Most companies do not *want* to be one of the parties to precedent-setting litigation which goes all the way to the Supreme Court. Litigation is costly and time-consuming, and it is a path that most corporations and First Nations want to avoid.

- Consultation and accommodation help to avoid delays and manage project risk. Most corporations recognize the real and substantive interest that their companies have in the outcome of the consultation process. They want to ensure that adequate consultation and accommodation has happened so that there is a minimized risk of licenses, permits or approvals being set aside. One key component of ensuring proper consultation and accommodation is providing funding so that there is full and adequate First Nation participation in the process.
- Consultation and accommodation procedures reflect the reality that industry, not government, is often in the best position to address First Nations' concerns. Industry has the ability to involve First Nations in a project; the ability to modify the project's design, implementation, or operations to address First Nations' concerns; and the ability to provide the economic benefits to the First Nations to offset some of the impacts of development.
- Consultation and accommodation allow for the benefits of incorporating traditional ecological knowledge in:
 - baseline environmental studies (e.g., directing the location of the studies so that it properly targets valuable habitat),
 - environmental monitoring protocols (e.g., by adding parameters that should be monitored and identifying appropriate locations where the monitoring should take place),
 - development of mitigation measures (e.g., including fundamental planning-level mitigation measures like adapting the routing of pipelines, roads, and other corridor-type developments to avoid valued habitat).
- Consultation and accommodation create a partnership approach to resolving environmental

problems during a project's construction and operation. Corporations may see having to work with Aboriginal representatives on a joint environmental committee as a cost and administrative burden. However, the benefits of a second set of eyes to look at a problem and come up with ways to solve it should not be underestimated, especially considering that First Nations have unique insights into the territory that might not be found anywhere else.

- Consultation and accommodation increase the chances that qualified employees from the First Nation membership will work on the project. It is trite to say that not only does a job benefit the employee, it also benefits the employer. Training of potential Aboriginal employees may be a necessary element of achieving this because many Aboriginal people across Canada are at a substantial disadvantage when it comes to obtaining higher education and training. Employers that contribute resources for training will enjoy the long-term benefits of having employees who reside close to a development, and who have a personal interest in seeing the project operate well with limited environmental impacts.
- Consultation and accommodation help to establish clear mechanisms for informing the affected Aboriginal community about developments and potential impacts in the affected area. This, in turn, reduces both the potential for and degree of community-level frustration with a project. Unfounded rumours about environmental impacts can be dispelled when community members sit with corporate employees on joint environmental committees and advise people in the community based on having reviewed the information themselves. If community members are given adequate financial resources to participate at this level, then the Aboriginal members on a joint committee will be able to communicate with members of the community they live in about what is really happening.
- Consultation and accommodation enhance the opportunities for Aboriginal businesses to

supply goods and services to a proponent's project. This can improve community relations and meet the corporation's needs for those goods and services at the same time.

- Consultation and accommodation provide clear avenues for First Nations to communicate plans for community developments to corporations, so that the corporations and First Nations can work together to make those community developments successful. To give an example, if a First Nation were considering building a facility which required specialized equipment, or wished to build a certain type of building, the corporation and the First Nation might work out an arrangement for the purchase of a corporation's surplus equipment or infrastructure.

Examples of Terms in Agreements between WIFN and Industry

In Walpole Island First Nation's case, we have had to use a variety of methods to urge the corporations to agree to consult with us and to consult in a meaningful way. Our First Nation has adopted and distributes to proponents our Consultation and Accommodation Protocol. In this protocol, we urge corporations to voluntarily consult with us and, where appropriate, to enter into a hosting agreement with our First Nation. This type of agreement is appropriately named, as the First Nation is consenting to "host" the development on their traditional territory.

A hosting agreement can cover a variety of topics, such as:

- Recognition of Walpole Island First Nation's (WIFN) outstanding claims against the Crown, and its interest in self-government.
- Definition of an on-going role for the community in jointly implementing, managing, and monitoring the project, including the creation of a liaison committee.
- Definition of the make-up of a liaison committee, which would include representatives from the First Nation, the company, and possibly one or more consultants retained by the First Nation.

- Preparation of a schedule of meetings for the committee and other proponent/First Nation meetings.
- Agreement on the combination of environmental standards that will be used in the monitoring of the project.
- Definition of the direct advisory role that WIFN would provide in the design, implementation, and evaluation of monitoring studies.
- Description of what effective compliance monitoring, and environmental effects monitoring, would consist of for the project, as well as what forms and records would be used to document the monitoring system.
- Development of monitoring threshold levels that would trigger action and a description of appropriate notification protocols.
- Establishment of an annual schedule for the reporting and interpretation of monitoring results to the committee, the community, and other interested Aboriginal communities in the local area.
- Development of notification protocols for the First Nation for specific project construction or operation activities.
- Establishment of annual budgets and disbursement mechanisms for on-going project related activities (e.g., monitoring and database management activities), and for other environmental programs addressing broader regional objectives for which mutual benefit could be established.
- Identification of all the potential costs and benefits for the community in the project, including environmental, social, and economic impacts. This may mean identifying opportunities to develop business partnerships and defining specific First Nation employment and training

opportunities. This may also apply to opportunities for the provision of any additional services to the community that the project could potentially provide.

- Development of an Aboriginal relations policy by the project proponent if there is none in place.
- Agreement on joint positions that may be required in any regulatory processes. For example, it may be possible to jointly submit draft Environmental Compliance Approvals after effective consultation has taken place. These submissions may include such issues as contingency plans, financial assurances, monitoring programs, or emergency response planning. The submissions could also include statements on meeting federal, provincial, and other legal requirements for timely Aboriginal consultation and statements on the thoroughness of evaluating potential Aboriginal impacts.
- Payments in lieu of tax payments.
- Technical and financial support for enhancing research, monitoring, and training capacities in all areas of environmental protection within the traditional territory. This may include the sharing of information concerning environmental protection as it affects the traditional territory.
- Agreement to participate in circles that bring together governments, organizations, individuals, and private business to promote integrated local perspectives on environmental and development issues in the watersheds of our traditional territory. Taking into account Aboriginal peoples' concerns yields benefits, not only for corporations but also for the environment that we must all share and protect.

Moving Towards Free, Prior and Informed Consent

A few words should be said about the standard of free, prior and informed consent set out in

the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In *Clyde River*, the Supreme Court of Canada did not apply UNDRIP explicitly, but implicitly affirmed that many of its underlying principles are already enshrined in Canadian law – for example: freedom from force, proper resourcing, information exchange, and a demonstrated understanding of the impact of a project on a First Nation’s rights.

Although the Supreme Court of Canada has not fully and explicitly incorporated UNDRIP into its jurisprudence, the Government of Canada has recently announced that it will support the implementation of UNDRIP into domestic law. A Working Group is currently reviewing federal laws in order to harmonize them with UNDRIP.

The Government of Canada has also released a statement of principles respecting its relationship with Indigenous Peoples.¹⁴ Now, Canada acknowledges that a nation-to-nation relationship requires going beyond the current legal duty to consult and accommodate as set out in *Haida*, *Mikisew*, and *Clyde River*. This means that Indigenous people must be able to participate in decisions affecting them, and be consulted with in good faith to achieve their free, prior and informed consent. Canada has also acknowledged that consent may be required in more than just proven title lands.

Finally, Canada’s statement of principles recognizes that Indigenous peoples have a “full box” of rights. This recognizes that a First Nation’s rights are protected even where those rights have not been proved through litigation.

More so than ever, corporations can benefit by embracing the duty to consult and accommodate, and to achieve the free, prior and informed consent of First Nations. Corporations can get ahead of this change in the law by seeking consent and participation from First Nations before

¹⁴<http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

proceeding with a project. Canada's acknowledgement that First Nations have a "full box" of rights means that corporations should aim to achieve consent, even where those rights have not been proven through litigation. It is only a matter of time until these changes are incorporated into Canadian law and affirmed by the courts.

Summary

The courts have found that First Nations in Canada have to be consulted by the Crown and have to have their rights accommodated if a First Nation's Aboriginal title, whether proven in court or not, or other Aboriginal and treaty rights will be impacted by a decision to proceed with a development. Most recently the courts have found that in cases where a First Nation's title has been proven, consent is required. Absent consent, the Crown is required to meet an onerous test of justifying the interference with Aboriginal title.

The Supreme Court has also found that, although corporations are not under a legal duty to consult with First Nations, the consultation process can be delegated to them by the Crown, and corporations can have some liability where the consultation obligation has not been met. As the Supreme Court recently said in *Clyde River*:

"No one benefits – not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities – when projects are prematurely approved only to be subjected to litigation."¹⁵

Although the courts have had to steer governments and corporations in this direction, it is a direction that can yield benefits to more than just the Aboriginal peoples whose rights and title will be or may be negatively affected. Proper consultation can also yield benefits to corporations who choose to embrace consultation and accommodation as means to enhance the success of their project

¹⁵*Clyde River*, at para. 24.

and limit its negative environmental impacts while being good corporate neighbours to the community.

Consultation and accommodation are good business. Walpole Island First Nation considers consultation and accommodation as integral to the process we require of reaching a fair agreement whenever our Aboriginal rights (including Aboriginal title) or treaty rights may be affected by development. As the Courts have said, the duty to consult First Nations is about honour and reconciliation. The obligations between First Nations and the Crown go both ways. Walpole Island First Nation is committed to finding the honourable means to reconcile our special responsibility to protect the lands and resources given to us and our children and grandchildren by the Creator on the one hand; with the desire of Canadian governments, industry, and the Canadian public to use those lands and resources on the other hand. We look forward to moving together in ways which allow all of us to flourish. It is possible for everyone to reap the benefits that flow from honourable and just consultation and accommodation of First Nations' rights and interests.