

Making Modern Treaties Work – LCAC  
Breakout 1E – Consultation: Guidelines, Expectations and Case Studies

**Moderator: Janna Promislow, Associate Professor, Thompson Rivers University, Faculty of Law**

**PANNELIST 1: Tom Isaac, Senior Counsel, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC).**

- Tom began the presentation by providing an outline of Crown consultations with modern treaty partners and a brief summary of common law duty to consult.
- The sources of Crown consultation obligation derive from the common law duty to consult, modern treaties and other agreements and protocols between governments, statutory obligations, policy and good governance.
- The nature of consultation duties is context specific; duties in relation to consultations are specific to the source of obligation (common law duty to consult obligations are determined by case law, consultation obligations from modern treaties are determined by the treaty itself interpreted in a manner consistent with the honour of the Crown).
- Good governance does not carry specific duties but are governed by principle of the honour of the Crown.
- The evolution of the concept of common law's duty to consult has resulted from Section 35 (existing Aboriginal and treaty rights), Sparrow, Delgamuukw, Haida/Taku, Rio Tinto, Little Salmon (modern agreement includes consultation provisions, the duty to consult continues to apply in relation to aspects not covered by the agreement), Tsilhqot'in, Chippewas/Clyde River, Mikisew (duty to consult cannot apply to legislative action).
- The hallmark of the duty to consult, as a Crown duty, is it applies to federal, territorial and provincial governments but not private entities, such as project proponents.
- The fundamental purpose is to advance reconciliation, it applies where the rights that may be impacted are established (by a treaty or court decision) or asserted but not yet established.
- The scope and content of the duty varies with the strength of the claim to the asserted right of the importance to the individual community of the established right, and the seriousness of the potential adverse impacts.
- In all cases, what is required is reasonable, good faith efforts to provide meaningful consultation.
- What has triggered common law duty to consult is contemplated Crown conduct, Section 35 rights, and the connection with potential adverse impacts on the rights.
- Crown conduct is a broad concept, high-level planning decisions, specific decision making in respect to statutory or resource allocation decisions. It is cast broadly and can include planning, decision making and the course of conduct.
- The duty to consult arises when the Crown is contemplating a decision or a course of action that may have a negative effect on Section 35 rights, established or asserted.
- Fulfilling the duty to consult, the content varies with the circumstances, but generally includes early notification, opportunities for Indigenous groups to become involved, provision of relevant, sufficient, timely information about proposed projects and sufficient time for Indigenous groups to participate in consultations, giving meaningful

and timely responses to questions and concerns raised during consultation, making genuine efforts to understand concerns and address them, ensuring the record of reasons provided demonstrate that the concerns of Indigenous people were considered.

- The Crown has the duty to consult and where appropriate, a duty to accommodate Indigenous interests as well.
  - o Accommodation can take place in various ways, including seeking compromise in an attempt to harmonize conflicting interest and to move parties further down the path towards reconciliation and the need to uphold the honour of the Crown, making good faith efforts to understand the concerns of Indigenous peoples and attempting to address them, taking steps to prevent irreparable harm or to minimize adverse impacts.
  - o Consultations will reveal any duties to accommodate.
- The seminal case with respect to consultation obligations arising in respect of modern treaties is the 2010 Supreme Court of Canada (SCC) decision in Little Salmon Carmacks First Nations vs. Yukon, which challenged the approach of a land disposition decision by the Yukon government on the grounds that the decision was made without proper consultation with the First Nation.
  - o The modern treaty at issue was the final agreement by Little Salmon/Carmacks, which has many provisions expressly setting out a right to consultation in specific areas as well as definition of the term “consultation”.
  - o While the Yukon government argued the modern treaty clearly indicated that parties turned their mind to the issue of consultation which expressly set out **all** situations to which there was an obligation to carry out consultations, Little Salmon/Carmack First Nation argued that the common law duty to consult applies to any Crown action that has the potential to adversely impact Section 35 rights, including their rights under their treaty.
  - o The SCC ruled that although consultation is expressly required by the terms of the modern treaty, it does mean that consultation is not required in other situations where the modern treaty is silent on consultation obligations as the honour of the Crown is a constitutional imperative that must be maintained in the interpretation of modern treaties.
  - o If the Modern Treaty is silent on duty to consult in a specific situation the honour of the Crown may still require that consultation is required in that situation.
- There is no common law constitutional **right** to be consulted, however the duty to consult is an adjunct to upholding the honour of the Crown.
- There is some case law to suggest that if the Crown does fulfill a duty to consult set out in a modern treaty, the Crown would be in breach of the treaty.
- Furthermore, the common law duty to consult does not arise in the context of the development or enactment of primary legislation (statutes).
- In contrast, modern treaties include a right to be consulted on the development of both primary (statutes) and subordinate (regulation) measures.

## **PANNELIST 2: Georgina Lloyd Senior Director, CIRNAC**

- Georgina acknowledged that consultation is an area heavily shaped by law; it's very detailed, a lot of depth and different ways of interpreting the law and balancing it with a

policy lens. It is important to have tools, training and coaching for federal officials to uphold their obligations in a meaningful way.

- Common and case law has provided guideposts; however, consultation is about rebuilding relationships and serves as an opportunity for Canada to rebuild those relationships and not just because of legal obligations.
- The duty to consult is a framing for how to do jobs, take those steps and outline how we interact with partners.
- There are a lot of best practices out there, however the best practices for government does not translate to best practice for Indigenous communities. With early engagement, there are no surprises, an integration of Traditional Knowledge and opportunity to protect that knowledge by providing for the provisions of capacity building as a standard set by the courts. It provides a clear role and transparency in decision making.
- Georgina notes there is a lot of dialogue required to ensure no one is left out of the table but it must be balanced with not getting lost in the navigation.
- Consultation protocols are negotiated with Indigenous partners and provides a tool for partners to establish parameters.
- There are resource centres that can help identify who needs to be consulted in order to bring the right people to the table and Indigenous groups share technical resources across regions.
- As consultation activities are increasing, one of the things for Canada is a need for coordination. It is important for the government to work across federal departments to have one conversation.
- Georgina concluded the presentation by noting that when the government can figure out how to do this well (not within the courts), they will be serving the relationship with Indigenous Nations much better.

**PANNELIST 3: Julie Mugford, Senior Director, Modern Treaty Implementation Office, CIRNAC**

- The Assessment of Modern Treaty Implications (AMTI) is based in the Cabinet Directive on the Federal Approach to Modern Treaty Implementation. One intent of the AMTI requires a broadening of the understanding of federal public servants regarding modern treaties.
- The Cabinet Directive requires all departments and agencies to conduct an assessment as part of the Cabinet proposal. The need for engagement could be reflected in the development of policies or programs, but it is often a question of timing or sequencing.
- Heard it said that the AMTI is shrouded in secrecy – which is true as it is a Cabinet-protected confidential document. However, it has also yielded increased awareness across the federal public service (what modern treaties are, what they contain, why they exist). It does not stop at the officials' level as part of the Memorandum to Cabinet forces the Cabinet to be taken into consideration. It increases ministerial awareness of treaty implications in decision making.
- It is not designed to be an engagement tool.
- Analysis is currently underway to determine how successful modern treaty implementation has been.

#### **PANNELIST 4: Frank Dragon, Ka:yu:'k't'h' / Che:k'tles7et'h' First Nations**

- Frank began the presentation by recognizing that the failure to honorably consult with First Nations can be viewed as disrespectful to the connection to the land and treaties, and Canada's record in this regard needs to change.
- In order for both Canada and First Nations to obtain benefits, we must honour the spirit and intent of treaties. We must ensure the living nature and core elements of the treaty are upheld; as long as the grass grows and the sun shines.
- Frank notes that the process has passed on critical teachings and management systems for lands. The key to interpreting the treaties cannot be replicated by the Crown, and Canada's consultation does not meet protocols in a reasonably negotiable approach. It is important to ensure treaties and way of life are protected.
- The treaties need to work for the people. Rights cannot be defined narrowly; treaty rights and development must be balanced. The provincial governments must address the reality that we share the same lands, there are overlapping issues, but consultation can lead to mutual success.
- The respect for treaties goes beyond the matter of principle. To maintain and protect our way of life, to ensure we have capacity and opportunity to enhance and maintain strong language, culture and connection to the land, to ensure the security and protection of constitutional rights, meaningful opportunities to exercise those rights, the involvement in decision-making processes, planning management and potential impacts to treaty settlement lands.
- There is an equal opportunity to share in wealth; we require training measures relevant to the people, general measures including revenue sharing, enable First Nations to maintain political self-sufficiency and distinction, ensuring adequate consultation takes into consideration environmental, social, economic, and education impacts.
- It's important to note that consultation requirements may be different amongst Indigenous communities. They are also based on the impacts of the proposed development, severity, duration and the proximity to the First Nation.
- Consultation is an ongoing process and always required; it is a two-way street with obligations on both sides and the duty consult includes a broad range of Crown actions.
- The Crown has a duty to assess strength of claims rights, the First Nations input must be seriously considered, and accommodation may also be necessary.
- Consultation and accommodation are primarily about treaty rights and must include full consideration. The Crown intentions to fulfill promises must be sensitive to cultural and linguistic differences.

#### Questions:

1. Can you please speak about Free, Prior & Informed Consent (FPIC) ties into the duty to consult now or how it will tie in?

#### **Response:**

- The concept of FPIC has not been considered by courts.
- The question of how that concept would play into consultation and the duty to consult, whether it changes the various concepts, there hasn't been any case law on it.
- From a legal perspective, right now, it is wait and see.

- FPIC is a policy perspective; the origins derive from a principle, not a free-standing right.
  - One of the most telling elements of interpretation of FPIC is a balancing of interests.
  - Intent is that no one party has unilateral control over another party; therefore, you are guaranteed a process but not guaranteed the right to agree.
2. What tools is CIRNAC working on to help other departments to help with duty to consult?

**Response:**

- The duty to consult triggers training and ongoing coaching, catered to each department (Terms & Conditions, mandate, authorities) to help build a good consultation plan. There are also senior consultation advisors on the ground building relationships.
  - There is a provision for dispute resolution within the Umbrella Final Agreement, however no one has taken that route. The appeal of the land use plan was complete and I'm not sure if the appeal land use plan case has just recently been handed down, and as part of Yukon land use planning council, we are starting the process to revive that plan.
  - I want to know if, in the future, another challenge is going to be brought to the court rather than take the issue through the dispute resolution process, so I just want to hear your views in that regard and what could we as the implementing body do to try to keep that from happening?
    - Aware of decision, but unfortunately have no concrete answer
3. Consultation may be shaped by agreement of parties – Can you share your thoughts on what you expect a court may look to when determining whether there's been agreement?

**Response:**

- Terms of the treaty
- In addition to text of the treaty, back and forth process, does it align with the honour of the Crown?
- The parties, it can't be the intention to deny the honour of the Crown