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Resource Developments on Traditional Lands: The Duty to Consult

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Executive Summary

Recent Canadian court decisions have scrutinized the way in which governments, when their actions or decisions may infringe on Aboriginal or treaty rights, consult with potentially affected Aboriginal people. Consultation is a key consideration in the justification analysis developed by the Supreme Court of Canada in the Sparrow decision to determine whether government is justified in infringing those rights. This article contrasts the type of consultation that often prevails in practice with the duty to consult emerging from the case law.

The paper begins with a “consultation story” recounting a forestry company representative’s visit to a First Nations’s band office to present the company’s forest cutting plans. The next section focuses on the emerging law on the duty to consult: the constitutional basis for the duty to consult is set out, followed by a review of some basic requirements and general principles of consultation that can be discerned from the caselaw. These include: the spirit of consultation, the parties involved, the information requirements, the goal of consultation, the kinds of decisions requiring consultation, and the provision of funding. In addition to summarizing the findings of the court, the authors offer comments and suggestions on various aspects of consultation that have not been addressed by the courts. The following section of this paper discusses some of the cultural and legal issues arising from the type of consultation described in the consultation story. Finally, the conclusion outlines some lessons and recommendations for the parties involved in a consultation process.

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Contents

1. Introduction

In a series of decisions concerning section 35(1) of the *Constitution Act, 1982,* the Supreme Court of Canada has created a test to determine whether treaty or Aboriginal rights have been infringed by government actions or decisions and, if so, whether government was justified in infringing the right in question.[1] A key consideration in the justification analysis, and one which has received much attention in the courts lately, notably in the context of natural resource developments, is whether government adequately consulted with the affected Aboriginal group.[2] Even though consultation with Aboriginal peoples may not be required by a particular statute, it may be required by section 35(1). A constitutional right prevails over inconsistent legislation because government can only legislate within the bounds set by the Constitution. It follows that failure to abide by the requirements of section 35(1) could lead a court to rule that the legislation in question is of no force or effect to the extent of the inconsistency, or that a tenure, disposition or licence issued under that legislation is of no force or effect.[3]

Exactly what must be done to fulfill the consultation requirement is unclear, as it depends on the particular facts and circumstances of each case. Rather than prescribe a standard consultation process, the courts decide on a case-by-case basis whether the consultation carried out with respect to the disputed decision or government action is adequate. However, the existing case law is helpful in that the courts have outlined some general principles and basic requirements of an "adequate" or "meaningful" consultation process.

Many decisions addressing the duty to consult consider the application of fishing or hunting regulations or policy decisions to harvesting activities carried out pursuant to fishing or hunting rights. Others involve indirect infringement of Aboriginal rights which may result from proposed resource developments (e.g., forestry, oil and gas or mining). The focus of this paper is on the emerging duty of consultation in the context of resource development on lands in which Aboriginal peoples have rights protected by section 35(1) of the *Constitution Act, 1982*. This is an initial exploration of some of the issues arising from the duty to consult from both legal and cultural perspectives.

The paper is comprised of four parts. First, the context within which consultation regarding resource developments on traditional lands often takes place is examined: we approach this analysis by telling a story based on the accumulated experience of one of the authors. Second, the emerging jurisprudence in relation to consultation

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1 The text of s. 35(1) reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

2 *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1119. See also *R.* v. *Sampson* (1995), 16 B.C.L.R. (3rd) 226 (C.A.) at 250; *R.* v. *Jack* (1995), 16 B.C.L.R. (3rd) 201 (C.A.) at 202; *R.* v. *Little* (1995), 16 B.C.L.R. (3rd) 259 (B.C.C.A.) at 279; *Klahoose First Nation* v. *British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3rd) 59 (B.C.S.C.) at 62; *R.* v. *Jones* (1993), 14 O.R. (3rd) 421 (Ont. Ct.) at 451; *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) at 423.

3 Section 52(1) of the *Constitution Act, 1982* reads: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect."

requirements is analysed. Third, some of the legal and cultural issues that arise from the story are analysed. The conclusion outlines some recommendations for designing a proper framework for consultation which will be legally and culturally acceptable to Aboriginal peoples, government and industry.

2. A Consultation Story[4]

Dave parked his brand new company 4x4 pick-up in the Old Fort First Nation administration building parking lot, slid the two three-ringed binder development plans under his arm, and strode through the mud up to the front door. With a purposeful stride, he walked up to the receptionist's desk and asked to see the Band's resources referral officer. After being told that Miles was "on the phone", he sat down in the waiting area and made a few calls on his cellular phone. Beside him on the couch sat an elder drinking tea and trying to get warm after walking three miles into town from a small cabin in the bush. Dave looked the old man directly in the eyes and asked in a loud clear voice: "do you speak English?" Not getting a reply, he looked down at the two binders and at his wristwatch. It was 11:55 a.m. At 12 noon Dave got up, told the receptionist he was going over to the local restaurant for lunch, and went out of the building. Shortly after he left, Miles walked out of his office and asked Terry if "the guy from the resource company was still waiting for a meeting?" After being told he had left for the restaurant, Miles put on his jacket to go home for lunch.

Already this morning Miles had spoken with people from six oil and gas companies, a big forestry company in the region, and some Edmonton officials from the Department of Indian Affairs and Northern Development (DIAND). Each of these meetings had involved the delivery of cirlox bound reports, binders of data and formal letters of request for various actions. Miles was still tired from the long drive home yesterday from the Geographic Information System (GIS) training sessions in Calgary. And he was not really relaxed yet from the Forestry Conference he had attended the week before in Edmonton. He had to get the expense report in to Terry this afternoon, he thought, remembering that his bank account was overdrawn. Too bad he had been turned down for a credit card! This in turn led to thoughts of the one-month conference at the Banff School of Management that was coming up in two weeks. How would he pay for his meals and accommodation?

At home Miles' wife Kendra had prepared a hot lunch of moose stew and bannock, and he sat down at the kitchen table to eat with the kids who had just arrived home from school. His mother-in-law was also over for lunch, and she asked him if he could remind the Chief about her need for new housing. For the last week she had been staying with her son because she had no wood for heat, the water pipes had frozen, and her broken windows had not been repaired. The kids were happy to see their dad who had been away so much recently, and they talked about school, hockey and the promise of a trip

4 The following composite story is fictional, though it draws upon its author's experiences over twenty years in many communities in two provinces, two territories and the Kola peninsula of Russia. Any resemblance to actual persons or events is unintentional.

in the summer to West Edmonton Mall. At 1:15 Miles began the walk back to his office, and did not notice Dave as he sped by on the road after his coke and burger lunch at the community restaurant.

Back at the Band administration building Dave was once again on the old couch, talking into his cell phone. Miles walked in, recognized him, and invited him down the hallway to his small office. Dave could not help thinking how messy it was; how filled with paper; and how unlike his own office back in town at the millsite. Miles apologized for the delay and introduced himself for the first time, simply as “Miles.” Dave grabbed his hand and gave it two strong corporate pumps. He thrust out a business card and shortly afterwards the two binder-bound documents.

“These describe our cutting plans for the next five years, and you and your team will want to review them carefully”, he said. Miles took the binders and put them on his desk, where they shared space with 12 other similar binders, full of consultant-speak, technical jargon, and GIS maps of the Old Fort tribal home lands. He did not know what to say next.

Dave asked what Miles’ team did in their resource referral process? “How soon can you complete your review?” he queried. “We’d like to get your consultation comments by this time next week . . .”

Miles looked down at his feet. He was uncomfortable with all of these direct questions. He did not know Dave at all, and he wondered how to begin to respond. He looked out the window. “Looks like it will get cold tonight”, he ventured. There was a long low ridge of cloud appearing on the western horizon, just above the tree line.

“Can you tell me how your team does its review?” Dave tried again. Miles looked up. He thought of all the conferences he had been to over the years; of all the consultants and their diagrams and flow charts; of all the binders piled up in his office. He thought about the Treaty, and its late nineteenth century language. He wondered if the headmen back then had even thought about “resource referral processes.” He also thought about next week’s Band Council meeting, where once again his annual budget would be presented for discussion. Just like last year, he had requested one more staff member, some consulting assistance to scope out an actual resource referral process, and a new focus on compensation for loss-of-livelihood in hunting and trapping claims. He wondered if any of these issues would be covered in his Banff course, and he wondered if he could even be sure that his job would continue to be funded. He had heard all the usual rumours about cut-backs, and could never be sure that it would not happen to him once again.

Dave wondered why Miles would not answer his direct question. He also wondered about why he had to ask it. After all, his company’s Forest Management Agreement (FMA) with the province was very explicit, and it said nothing whatsoever about “resource referral process reviews” at the Reserve level. They were not even cutting the Band’s timber; what business did they have querying cutting plans so far from their

community? And as for their Treaty, that was signed back in 1899, and was really about matters between the Indians and the federal government. It was all too imprecise for Dave. As a forest engineer he was used to the rational planning model, and plotting sustained yield curves based upon stand dynamics and forest ecology. This Indian political stuff was all too new to him. He wondered if he should take that upcoming Banff School of Management course on Aboriginal issues in forest management. It would probably stand him in good stead come promotion time, as Indian issues were becoming more and more important. They, more than anything else in the FMA area, could endanger the security of fibre supply, and impact on production, contracts and profits.

Miles looked at the two new binders again. “I guess I can look at these by next week.” He opened *Volume 1, Technical Information*. Once again he saw words and phrases like “boreal”, “ecosystem management”, “berm area”, “set-backs”, “riparian”, and “plantation softwood.” There were graphs with many coloured lines arching across little squares on the paper, and pages and pages of it.

Dave asked if there was anything else he could help explain before he left? Miles’ mind was now far away again. He was thinking about how hard it would be to explain all of this to his father, still a trapper, or even the Band Council. To really understand this stuff you would need an education like Dave’s, and even then Miles knew these managers relied on many consultants in places like Edmonton and Calgary to produce the binders of paper. He wondered if maybe all the binders just contained one report, repeated over and over again?

Standing up, Dave thanked Miles for “the really good meeting”, and for the promise to review the reports by next week. As he walked out of Miles’ office, he turned, and said, “If you would like to look at them, I could send you my back issues of The Forestry Chronicle so you could read up on the latest developments . . .” Miles remained silent.

Back out in the parking lot, Dave started his truck. He took out his consultation spread sheet and placed a >check mark’ in the first box of the Old Fort Band Consultation Process Stream. Next was a visit to the oil and gas producers’ office in town. “That would be more businesslike”, he mused. Beside him on the seat of the pick-up were a pair of smoke tanned and beaded moccasins, carefully wrapped in a brown paper bag. He had bought them at lunch time from an old woman in the restaurant. “Next time I come out here, I’ll wear them”, he thought to himself. “That should earn us a few points!”

Inside his office Miles leaned back in his chair and wondered if The Forestry Chronicle was one of those good hunting magazines? Right then he decided that it was time to go out and get a moose. “That’s what I’ll do next week”, he said out loud as he placed the two new binders on top of his metal bookcase next to another pile of reports, and began to walk down the hall for a coffee.

3. The Law on the Duty to Consult

3.1 Constitutional Basis for the Duty to Consult

Section 35(1) of the *Constitution Act, 1982* requires government to give Aboriginal and treaty rights priority, and to infringe upon them only to the extent necessary to achieve a compelling and substantial objective. The guiding principle in the justification analysis developed by the Supreme Court is that the means used to achieve a valid legislative objective must uphold the honour of the Crown. This means that government must act consistently with the fiduciary duty owed by the Crown to protect Aboriginal interests. Section 35(1) thus imposes upon government a constitutional requirement to accord priority to Aboriginal rights, and consultation is a factor courts consider in determining whether government has accorded the right in question the requisite priority.[5] Consultation on its own is not sufficient to justify infringements, but government will not be able to demonstrate a sincere effort to accord priority to Aboriginal rights in the absence of consultation.

In the context of decision-making regarding natural resources, government must seek to protect the prior interests of Aboriginal peoples in both the process and end result of decision-making. While government may pursue valid legislative objectives, including economic development and the reliance upon resources by non-Aboriginal users, it must at the same time endeavour to protect Aboriginal interests to the extent possible in achieving those objectives. A balance must be struck between Aboriginal and treaty rights and the ability of government to carry out its obligations to Canadians as a whole.

One indicator of priority is government's effort to infringe the right as minimally as possible, which the courts will be reluctant to find where government has not consulted with affected Aboriginal peoples. The availability of fair compensation is another consideration in the justification analysis. Government cannot determine whether compensation is appropriate in the circumstances of a case (as opposed to avoiding infringing the right in the first place), nor can it determine what adequate compensation is, unless consultation occurs with affected Aboriginal peoples.

As is the case with Aboriginal rights generally, the courts have not outlined an exhaustive set of requirements regarding the nature and extent of consultation. Whether or not the Crown's fiduciary duty, including the duty to consult, has been discharged is decided on a case-by-case basis, in light of the particular facts and circumstances of each case.[6] Relevant factors include the nature of the right at stake and the infringement of that right. The following excerpt from an English decision mirrors well the position of Canadian courts in this respect:

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5 *R.* v. *Gladstone*, [1996] 2 S.C.R. 723 at 768.
6 *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at 1113.

> The word "consultation" is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. . . . If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one.[7]

Consequently, individual court decisions cannot be generalized nor is it possible to derive from recent case law definitive answers as to the necessary components and stages of the consultation process required under section 35(1). Nevertheless, some basic requirements and general principles can be discerned from the cases.

The Supreme Court's application of a purposive analysis of section 35 has led it to conclude that the provision is aimed at achieving two goals: 1) the recognition of the prior occupation of Canada by sovereign Aboriginal peoples; and 2) the reconciliation of that prior occupation with the assertion of Crown sovereignty. In addition to the fiduciary duty and concepts of priority and minimal impairment discussed above, these purposes assist us in filling the gaps left by the courts' consideration of consultation in fact-specific situations. Our view is that consultation can only be meaningful if it is aimed at achieving reconciliation between the different cultures and world views of Aboriginal and non-Aboriginal peoples.

What follows is an outline of the following specific consultation requirements that emerge from the existing case law: the spirit of consultation; who must consult; the information requirements; the goal of consultation; the kinds of decisions requiring consultation; and the provision of funding for consultation. In addition to summarizing the findings of the courts, this section offers comments and suggestions on various aspects of consultation that have not yet been addressed by the courts.

3.2 The Spirit of Consultation

Though the courts have chosen not to prescribe the precise nature and extent of consultation processes, they are unequivocal in their findings that the fiduciary duty requires that "consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands [or other rights] are at issue."[8]

Consultation should not be viewed as a mere item to be checked off on a list of things to do before making a decision. The fiduciary duty, recognition of pre-existing Aboriginal societies, and the reconciliation of these societies with Crown sovereignty, together dictate that the consultation process should be aimed at ensuring that Aboriginal rights are protected, rather than ensuring that infringements of these rights

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7 Kings Bench decision in *Fletcher* v. *Minister of Town and Country Planning*, [1947] 2 All E.R. 496, cited in *R.* v. *Sampson*, *supra* note 2 at 250.

8 *Delgamuukw*, *supra* note 6 at 1112.

will be justified.[9] An infringement will be justified only if the government has done all it can to avoid the infringement, and consultation is one of government's tools in avoiding and minimizing infringements.

Consultation should be carried out with an open mind and not solely with the goal of convincing Aboriginal peoples that projects affecting their rights should proceed; government should be willing to consider that some projects should be denied because of their potential effects on Aboriginal and treaty rights. The assumption that all development is good must be questioned where Aboriginal interests are affected. A consultation process carried out in good faith would seek a consensus and, if compromise is required, it would not be demanded solely of the Aboriginal people whose rights are affected, but of government as well: "The decision of the Supreme Court of Canada in *Sparrow* reconciles Aboriginal rights on the one hand with legislative or regulatory responsibilities on the other. In the past, courts were faced with having to decide which prevailed. *Sparrow* creates a framework in which both can live."[10]

Related to the duty to consult in good faith are duties to consult reasonably and in a non-adversarial manner. It is government's responsibility to ensure that a proper consultation mechanism or forum is in place. In *Nikal*, the Court held that the government must make "every reasonable effort . . . to inform and consult".[11] A parallel obligation of reasonableness is also imposed on Aboriginal groups. As remarked by the court in the *Cheslatta* case, "consultation is a two-way street".[12] When government has made all reasonable efforts to create an effective forum for consultation and Aboriginal peoples refuse to take part in the process or meet with government officials, a court is unlikely to find an unjustifiable infringement of an Aboriginal right based on lack of consultation.[13] On the other hand, if discussions with First Nations consist of a single meeting between government representatives and the Aboriginal peoples in a situation demanding more extensive consultation, this will not be considered reasonable consultation.[14] In the *Kitkatla* case, where both the notification and opportunity to consult provided by government to the First Nation were considered inadequate, the court held: "There is, however, no duty on First Nations to consult with the Crown. And

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9 This seems to have been confirmed by at least one decision. In *Delgamuukw*, *supra* note 2 at 490, the Supreme Court of British Columbia held that judicial construction of a "justification process" is inappropriate, but that the fiduciary duty dictates that the "operating word must be reconciliation rather than justification".

10 *R.* v. *Bombay*, [1993] 1 C.N.L.R. 92 at 94.

11 *R.* v. *Nikal*, [1996] 1 S.C.R. 1013 at 1065.

12 *Cheslatta Carrier Nation* v. *British Columbia* (January 29, 1998), [1998] 3 C.N.L.R. 1 (B.C.S.C.) at 21; *Chief Cliff Calliou and the Kelly Lake Cree Nation and Ministry of Energy and Mines, Ministry of Forests and Amoco Canada Petroleum Company Ltd. ("Amoco") — Chief Stewart Cameron and the Saulteau First Nation and Ministry of Energy and Mines, Ministry of Forests and Amoco* (October 23, 1998) Vancouver Registry No. A982279 (B.C.S.C.) at para. 164-165.

13 *Ryan* v. *Shultz* (January 24, 1994), Smithers Registry No. 7855 (B.C.S.C.) at para. 23: "I accept that the Gitksan are entitled to be consulted in respect of such activities. [. . .] However, consultation did not work here because the Gitksan did not want it to work. The process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met."

14 *R.* v. *Noël*, [1995] 4 C.N.L.R. 75 (N.W.T. Terr. Ct.) at 87; *Treaty 8 Tribal Association* v. *British Columbia (Minister of Forests)*, [1994] B.C.E.A. No. 11, Appeal No. 92/27 (British Columbia Environmental Appeal Board) at 27 and 29.

there is no correlative right in the Crown to compel consultation. But there is a duty on the Crown to provide an opportunity for consultation to First Nations; and a correlative right on First Nations to be extended the opportunity to consult."[15]

3.3 Who Must Consult?

3.3.1 Government

It is government, not resource industries exercising rights to extract or develop resources on traditional Aboriginal lands, that has an obligation to consult with potentially affected Aboriginal peoples. The Constitution limits the actions of government, not industry, and the fiduciary duty is the Crown's and not a proponent's;[16] a corporation cannot be expected to fulfill these obligations of the Crown. Corporations cannot be expected to act in the interests of Aboriginal peoples when they have a strong interest in a project which is in conflict with Aboriginal needs or interests. The courts thus scrutinize the way in which *government* representatives have consulted with First Nations.

In addition, the onus to initiate consultation is clearly on government, not on potentially affected Aboriginal groups.[17] That the government must initiate consultation is also inferred from the information obligations which are imposed on the Crown.

In practice, however, government increasingly delegates resource management decisions to resource industries, and expects the private sector to undertake consultations with local Aboriginal groups.[18] Government can impose obligations on resource companies to meet with and consult with First Nations as conditions of obtaining licences or permits. First Nations whose lands are subject to resource development may find it to their advantage to enter into discussions directly with resource users to seek accommodation of their respective uses. Further, in the context of project proposals, industry's involvement will often be necessary in ascertaining potential effects on Aboriginal people, because only industry will have complete information on planned projects. Industry can also provide valuable information on what is or is not feasible with respect to resource development. In the recent *Kelly*

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15 *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, [1998] B.C.J. No. 2440, Victoria Registry No. 98 2223 [982223] (B.C.S.C.) at para. 45.

16 See *Union of Nova Scotia Indians* v. *Canada (Minister of Fisheries and Oceans)*, [1997] 1 F.C. 325 (T.D.) at 342.

17 *Nikal*, *supra* note 11 at 1065; *Sampson*, *supra* note 2 at 252; *Jack*, *supra* note 2 at 222, where the duty to inform and become informed is clearly placed on the Crown, implying that it would be the Crown which must initiate consultation; *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, *supra* note 15 at para. 46.

18 See, for example, Province of British Columbia, Ministry of Employment and Investment, Information Letter EMD97-01: "The Ministry of Employment and Investment requires industry to consult with First Nations about their aboriginal and treaty rights and to communicate fully with the Ministry about the consultation process undertaken and the results achieved, thus ensuring that the legal obligations of the Crown have been met"; see also Ministry of Energy, Mines and Petroleum Resources, British Columbia Oil and Gas Handbook (Interim) (November 1995) section 3.5.

Lake/Saulteau decision, Mr. Justice Taylor held that "the process of consultation cannot be viewed in a vacuum and must take into account the general process by which government deals with First Nations people, including any discussions between resource developers such as Amoco and First Nations people."[19]

However, the fact that private companies fulfill certain consultation obligations does not turn them into fiduciaries.[20] Further, the extent to which, and conditions under which, government may delegate this duty to resource industries at certain stages in the decision-making process (e.g., at the project development stage) remain unclear. In the absence of parallel or prior government consultations with Aboriginal peoples, and in the absence of clear substantive and procedural guidelines by responsible government agencies, industry-initiated processes will not suffice to discharge the Crown's duty to consult.[21] Current case law supports the view that consultation carried out by a company in the absence of any consultation by government is not sufficient. In the *Halfway* decision, which dealt with the issuance of a timber cutting permit, the court examined in detail the extent of consultation that took place and found that meetings held between the forest company and the Aboriginal group in the absence of government representatives "cannot be considered consultation for the purpose of determining whether Lawson [the government representative] met his fiduciary obligations".[22] In a recent order issued in favour of the Blueberry River Indian Band, the British Columbia Supreme Court took a similar view of the duty to consult. Even though consultations had occurred between company officials and the First Nation, the company had to surrender its exploration permit and timber license and the Court ordered that consultation must take place between the Crown, the First Nation, and the company.[23] Ultimately, government will be held responsible for ensuring that consultation is adequate and that any infringement is justified.[24]

Consultation as described above occurs most often in relation to resource management decisions involving a proponent and a proposed land use project. As suggested in Section 3.6 of this article, however, our view is that consultation should also take place in the context of broader land use planning decisions, before resource

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19 *Kelly Lake/Saulteau*, *supra* note 12 at para. 154.

20 In the *Kelly Lake/Saulteau* decision, Justice Taylor found that the duty placed upon the Crown to fulfil its honour through the consultative process was "a specific duty imposed upon the Crown with respect to First Nations as opposed to any other interested parties", *supra* note 12 at para. 224.

21 This is acknowledged in a document prepared for British Columbia's Ministry of Energy, Mines and Petroleum Resources, "Guidelines for Avoiding the Infringement of Aboriginal Rights: A Handbook" (March 1995) at 13: "Although third parties can undertake consultations under the direction of the Ministry, the authority to make policy and direct the scope of related consultations with First Nations shall not be delegated."

22 *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.) at 72. This case has been heard on appeal and the appeal decision is pending. See, however, *Kelly Lake/Saulteau*, *supra* note 12.

23 *Blueberry River Indian Band* v. *British Columbia (Ministry of Employment and Investment)* (November 28, 1997) Vancouver Registry No. A973030 (B.C.S.C.).

24 This does not mean that only government will suffer the consequences of an unjustifiable infringement with Aboriginal or treaty rights. Permits and licences issued to industry by government can be revoked on grounds of inadequate consultation.

rights are allocated and project developments proposed. At this stage in the decision-making process there is no project proponent and thus consultation should be between government and Aboriginal peoples.

3.3.2 What Level of Government?

Both federal and provincial governments must consult whenever a decision which they are making has potential to interfere with the exercise of Aboriginal or treaty rights. The federal and provincial Crowns owe the same obligation to consult with Aboriginal people when making decisions that may affect Aboriginal or treaty rights.[25] All representatives of the Crown must act consistently with the Crown's fiduciary duty and must endeavour to avoid infringing Aboriginal or treaty rights, since all levels of natural resource decisions are unconstitutional if they unjustifiably interfere with Aboriginal or treaty rights.

Where the existence and nature of rights is a subject of consultation, government representatives should include someone with authority to make decisions on such issues that will bind other government officials.[26] In this way, the same Aboriginal group will not be forced to consult with multiple levels of governments or departments, with the possibility of different determinations regarding the existence and nature of its rights. A broad interdepartmental consultation process to identify existing rights and their exercise should precede consultation in the context of specific proposals and allocations. This point is discussed further in Section 3.4 on The Information Requirements, and Section 3.6 on What Kinds of Decisions Require Consultation.

3.3.3 Who Within the Aboriginal Community?

With respect to this question, it is difficult to be prescriptive, but we note that the courts have determined aboriginal and treaty rights to be collective rights. Therefore, government, or project proponents when a government duty is delegated to them, should not be consulting solely with individuals who are affected in their particular exercise of those collective rights, but also with community representatives. Consultation must occur with those whom government can reasonably assume are in a position to represent the needs of the group and make decisions on behalf of that group.[27]

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25 *R.* v. *Badger*, [1996] 1 S.C.R. 771 at 820.

26 In the *Kelly Lake/Saulteau* case, the court held, however, that "there is no requirement under the Act or the duty imposed on the Crown to inform those interested who will make the decision", and "likewise there is no requirement that the decision-maker be the one who consults personally", *supra* note 12 at para. 205.

27 In British Columbia's Ministry of Energy, Mines and Petroleum Resources, Guidelines for Avoiding the Infringement of Aboriginal Rights: A Handbook (March 1995) at 5, the following is suggested:

it will be important to know the political and administrative organization of the First Nations community you are dealing with. In some communities, the Chief and the band council may be the decision-making body to whom information should be presented and comments solicited. .

3.4 The Information Requirements

A consultation process should provide both government and potentially affected Aboriginal peoples with sufficient information to ensure that unnecessary or unjustified interferences with the exercise of treaty or Aboriginal rights are avoided. Inadequate information, notably in relation to wildlife, has been held to prevent the parties from assessing how a proposed decision or project might adversely affect Aboriginal rights.[28]

Governments must fully inform Aboriginal peoples regarding conservation measures and resource use decisions that affect the exercise of their rights, including the potential effects of an infringing measure on their resource use and on other users.[29] In *Sparrow*, where regulation of the fishery resource interfered with the exercise of rights to fish for food and for ceremonial purposes, the Court held that Aboriginal rights holders had to be informed regarding "the determination of an appropriate scheme" for regulating the fishery.[30] Government has been held to have an obligation to inform Aboriginal peoples regarding the steps taken in arriving at a decision affecting their rights and the reasons for any measures which interfere with the exercise of Aboriginal rights.[31]

The consultation requirement includes not only a duty to inform, but also a duty to become informed.[32] The courts have found that decision-makers must become as familiar as possible with the resource uses and practices of the Aboriginal group in question. Aboriginal input is indispensable to a determination of potential infringement of Aboriginal rights.[33] As stated by Dorgan J. in the *Halfway* case, "How can one reach any reasonable conclusion as to the impact on Halfway's rights without obtaining information from Halfway on their uses of the area in question?"[34] Indeed, in most circumstances, resource managers will lack the legal and factual knowledge to determine what Aboriginal rights exist in an area and how these rights may be affected. Moreover, any determination of these questions absent comprehensive consultation is disrespectful and accordingly inconsistent with the fiduciary responsibilities of the Crown which guide the section 35(1) justification tests.

. . In others, the band may be a member of a tribal council which deals with such matters on their behalf. In still others, where a traditional or hereditary system of government is followed, the elders must be consulted.

28 *Cheslatta*, *supra* note 12 at 21: "The First Nations affected by the proposed Project are entitled to data sufficient to make a reasonable assessment of the Project's impact on their people and territories, and the exercise of their rights in those territories."

29 *Delgamuukw*, *supra* note 2 at 423; *Jack*, *supra* note 2 at 222-223; *Sampson*, *supra* note 2 at 252.

30 *R.* v. *Sparrow*, *supra* note 2 at 1119.

31 *Sampson*, *supra* note 2 at 252; *Little*, *supra* note 2 at 279.

32 *Halfway*, *supra* note 22 at 70-71; *Kitkatla*, *supra* note 15 at 7.

33 *Treaty 8 Tribal Association*, *supra* note 14 at para. 31: "The Panel also notes that . . . there had not been enough input from the Bands to establish whether the herbicide application would cause an unreasonable adverse effect, and further, that there was perhaps not enough evidence of an ecological nature to establish whether the herbicide application would result in an unreasonable adverse effect."

34 *Halfway*, *supra* note 22 at 58.

Arguably, the consultation process could be made more efficient if the nature and extent of Aboriginal or treaty rights and land and resource uses were determined before resources were allocated and projects developed.[35] Traditional land use and occupancy studies and harvest studies could provide the information base upon which consultation in the context of rights allocation and project development could take place.[36]

Government should also obtain the views of affected Aboriginal groups as to any conservation measures being considered and alternative methods of achieving a legislative objective.[37] The courts increasingly acknowledge the existence of Aboriginal laws, customs and practices[38] and their value in informing the conservation and management of natural resources.[39]

Finally, the concept of reasonableness is invoked in determining whether the government's efforts in collecting information are sufficient:

> In the consultation process, First Nations demands for information must not be unreasonable. One can always insist on another study, or on more money for further research, even where such steps yield diminishing returns. Where further studies would defy generally accepted professional, scientific and commercial practices and standards, it is not reasonable to insist upon them.[40]

In this statement, the court emphasizes the need to place reasonable limits on the *amount* of information to be collected. The last sentence should not be interpreted as implying that traditional land use studies and harvest studies – which are not based on dominant society's approach to science and resource management, but rather on traditional knowledge and use, including management, of resources – can be dismissed as unconventional science.

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35 In Ministry of Aboriginal Affairs, Province of British Columbia, Crown Land Activities and Aboriginal Rights Policy Framework (January 1997) at section 7.2, it is noted that "The Province is currently faced with a lack of information on Aboriginal rights and few central mechanisms exist for compiling and making this type of information available in a shared basis. In the absence of a coordinated central database or inventory for obtaining information on specific First Nation's rights and interests . . . steps are recommended for establishing the existence of Aboriginal rights." What follows is a procedure for determining what rights exist in the context of a specific decision or activity. In practice, the existence and nature of rights are not subject to negotiation during consultation. See British Columbia, Consultation Guidelines, September 1998, which instructs that "staff must not explicitly or implicitly confirm the existence of aboriginal title when consulting with First Nations" (C. Operational Guidelines).

36 A traditional land use and occupation study typically takes the form of maps and stories indicating patterns of land use and species harvested, and a harvest study indicates the species harvested in the annual round of seasonal procurement of bush economy communities.

37 *Jack*, *supra* note 2 at 222; *Noël*, *supra* note 14 at 95.

38 *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at 545-546.

39 See *Sparrow*, *supra* note 2 at 1119.

40 *Cheslatta*, *supra* note 12 at 21. See also *Kelly Lake/Saulteau*, *supra* note 12 at para. 221, where in the court's view, the First Nation's request for further study was a delay tactic.

3.5 The Goal of Consultation

It is in this aspect of consultation that the decisions have been most imprecise. Practically speaking, consultation is carried out in order to achieve certainty in resource use decisions. If carried out improperly, however, consultation will not achieve this goal and the decision in question can be overturned as an infringement of section 35(1). An important question concerning the form of consultation processes contemplated under section 35(1) is whether or not and to what degree Aboriginal peoples have final authority over the decision to be made.

3.5.1 The Level of Authority Transfer

The general guideline provided by the Supreme Court is that government should consult with the aim of "substantially addressing the concerns of the aboriginal peoples whose lands [or rights] are at issue."[41] However, depending on both the nature of the right which may be infringed and the seriousness of the potential infringement, this requirement may translate into anything from a mere duty to "discuss" to obtaining "full consent".[42] Where along the scale between "discussion" and "consent" a particular consultation process falls should be determined by asking what level of consultation is required to achieve minimal infringement of rights. To date, the vast majority of decisions on consultation have dealt with Aboriginal rights. The rights at issue may be Aboriginal rights (including Aboriginal title) and/or treaty rights as defined by a specific treaty. In the context of title lands, where government seeks to impose hunting or trapping regulations, consent is required.[43] In the few instances where an infringement of treaty rights was at issue,[44] the courts have applied *Sparrow's* justification test and have not imposed a different standard of consultation.[45] However, some authors have suggested that as treaties are solemn agreements entered into by the Crown and Aboriginal peoples, and as the Aboriginal group has already contributed to reconciliation by surrendering its title for the rights defined in the agreement, the justification test for infringement of treaty rights should be more onerous than for Aboriginal rights.[46]

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41 *Delgamuukw*, *supra* note 6 at 1113, emphasis added.

42 This scale of consultation is similar to Arnstein's ladder of public participation, which has been adopted in the co-management literature. See F. Berkes, "Co-Management: Bridging the Two Solitudes" (1994) 22:2-3 *Northern Perspectives* at 18.

43 *Delgamuukw*, *supra* note 6. Aboriginal peoples have the right to exclusive occupation of their title lands as well as the right to make decisions regarding the use of title lands.

44 See for instance *Halfway River, Noël*, *Little*, *Blueberry River*, *Treaty 8 Tribal Association* and *Kelly Lake/Saulteau*.

45 In *R.* v. *Badger*, [1996] 1 S.C.R. 771 at 820, the Supreme Court held that the *Sparrow* test applies equally to infringement of Aboriginal and treaty rights.

46 Catherine Bell, "*R.* v. *Badger*: One Step Forward and Two Steps Back?" (1997) 8:2 *Constitutional Forum* 21 at 25: ". . . when the breach of a treaty right is at stake, the process of consultation requires stricter scrutiny. The standard of making reasonable attempts to inform and consult is not enough. Rather, it may be more appropriate to acquire consent to termination unless such consent is unreasonably withheld."; see also Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997) 36 *Alta. L. Rev.* 149 at 166, 168.

Consequently, infringements of treaty rights should more often require consent, rather than mere discussion or informing on the part of government.

While courts are reluctant to require the consent or agreement of the Aboriginal people in the context of harvesting rights,[47] they have found that "such is much to be desired"[48] and, in most cases, the government must engage in something "significantly deeper than mere consultation."[49] The British Columbia Court of Appeal has stated that there may be circumstances in which a vote must be taken by affected Aboriginal people, but it did not elaborate on those circumstances.[50]

In the *Noël* case, the court held that any alternative methods of achieving the legislative objective offered by the Aboriginal people concerned must be seriously *considered* by the decision maker.[51] This suggests that alternative methods offered by the Aboriginal people concerned should be adopted if possible; the alternative method, if viable, would allow the legislative objective to be achieved with as little infringement as possible. Where consent is possible without jeopardizing the legislative objective, it should be difficult for government to justify an interference that the Aboriginal rights holders do not agree to.

3.5.2 Negotiation

The reconciliation of Aboriginal and non-Aboriginal interests is best achieved through negotiation. In *Ardoch Algonquin First Nation* v. *Ontario*[52] the Ontario Court of Appeal, overturning an order of Justice Cosgrove of the Ontario Court (General Division), concluded that the duty on government to respect Aboriginal hunting and fishing rights in section 35(1) does not impose "an affirmative obligation upon Ontario to negotiate with the Aboriginal peoples of this province to determine and identify the extent of their Aboriginal rights."[53] Courts will not order negotiation, but rather see their jurisdiction as limited to "declaring the legal status of the respective rights claimed."[54] While a court

47 *Jack*, *supra* note 2 at 223; *Sampson*, *supra* note 2 at 252.
48 *Delgamuukw*, *supra* note 2 at 488.
49 *Delgamuukw*, *supra* note 6 at 1113.
50 *Jack*, *supra* note 2 at 223.
51 *Noël*, *supra* note 14 at 95.The Federal Court recently scrutinized the meaning of the term "considered" under Article 15.4.1 of the Nunavut Land Claim Agreement and concluded that "consultation and consideration must mean more than simply hearing. It must include listening as well." see *Nunavut Tungavik Inc.* v. *Minister of Fisheries and Oceans*, Federal Court of Canada, July 14, 1997, T-872-97 at 22. Specifically, the Court found that consideration under the agreement implies that "there must be *full, careful and conscientious consideration* of any advice or recommendations made by the Nunavut Wildlife Management Board (NWMB) respecting decisions which affected marine areas, and in this context, *allowance must be made for* the advice or recommendations" (emphasis in the original).
52 *Ardoch Algonquin First Nation* v. *Ontario* (1997), 148 D.L.R. (4th) 96 (Ont. C.A.) (also known as *Perry*).
53 *Ibid.* at 116. As we noted above, however, it is this kind of negotiation carried out by the province as a whole with Aboriginal peoples that would lead to an identification of Aboriginal rights and interests which would allow decisions and consultation to be carried out more efficiently when a specific decision or project is being considered.
54 *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) (B.C.C.A.) per Wallace J.A. at 601.

may then declare a law an unjustifiable infringement of rights, thereby rendering the law unenforceable in circumstances where such infringement occurs, the Ontario Court of Appeal held that this does not mean there is an affirmative obligation to negotiate "for the purpose of reaching agreement" with respect to an amended law.[55]

Nonetheless, the Supreme Court has repeatedly invited, though not ordered, government and Aboriginal people to negotiate. In *Sparrow* the justices wrote: "Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place."[56] In *Delgamuukw*, the Court referred to this statement, and concluded that "the Crown is under a moral, if not a legal duty, to enter into and conduct those negotiations in good faith".[57] Thus, while section 35(1) may not *require* negotiated agreements regarding rights in most circumstances, it is apparent that where feasible, the best way to determine the extent of rights and responsibilities is to seek agreement on them. Negotiation to implement section 35(1) is the strategy most likely to achieve certainty in land and resource decisions.

3.6 What Kinds of Decisions Require Consultation?

Consultation may be required at various stages in government decision-making, from the development of legislation and regulations to the allocation of resource rights to project approvals and the issuance of specific permits. Where Aboriginal interests might be affected, section 35(1) requires consultation respecting individual resource allocations such as the granting of licences and in decisions such as how much of a resource is to be harvested and how the resource is to be allocated between uses and users.

Generally, natural resource decision-making can be divided into pre-allocation, allocation and post-allocation. Consultation is usually carried out during the allocation of resources, when an interest is granted to a third party or project proponent. To what extent, if any, is consultation necessary in the context of general land use decisions such as designating areas of land for development or resource harvesting *before* interests are granted or resources are actually allocated? While the courts have not considered broader land use planning decisions, the case law does suggest that consultation is necessary in pre-allocation decisions where the priority of Aboriginal resource users is potentially affected by the decision.

Any decision affecting the balance between Aboriginal and treaty rights and non-Aboriginal interests in natural resources arguably triggers a consultation requirement. In *Gladstone*, the Court found that the setting of the total catch of the herring fishery at 20% was justified notwithstanding the "scanty" evidence with respect to consultation.[58] There was "some evidence to suggest that the government was cognizant of the views

55 *Perry*, *supra* note 52 at 124-125.
56 *Sparrow*, *supra* note 2 at 1105.
57 *Delgamuukw*, *supra* note 6 at 1123.
58 *Gladstone*, *supra* note 5 at 779.

of Aboriginal groups with regards to the herring fishery."[59] Knowledge of the Aboriginal viewpoint with respect to this aspect of the regulatory scheme was sufficient because the decision in question concerned the proportion of the total stock of the resource to be harvested and therefore had as its only purpose conservation. It did not affect "the priority of Aboriginal versus non-Aboriginal users" of the resource.[60] This suggests that where a government decision has implications for the priority of Aboriginal users over others, a higher level of consultation and a closer scrutiny of the decision is necessary. For example, setting harvesting limits for some resources will affect the balance between Aboriginal and non-Aboriginal interests, particularly where the harvesting of one resource, for example trees, by non-Aboriginal people, affects the harvest of another resource, for example wildlife, pursuant to Aboriginal and treaty rights.

Consultation in the pre-allocation stages of decision making may also be desirable from a practical perspective. There may be less need for consultation at later stages in resource decision-making if Aboriginal concerns are adequately addressed earlier, and consultation at later stages may be facilitated by earlier consultation. Furthermore, as the aim of consultation should be to avoid infringement of Aboriginal and treaty rights, ongoing consultation during various stages of resource management will often be necessary in order to protect rights.

Though *Ardoch Algonquin First Nation* held that the government does not have to negotiate in drafting legislation, in general the courts seem to agree that consultation should precede the enactment of legislation or regulations directly affecting Aboriginal or treaty rights. In *Sparrow* the Court held: "The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries."[61] This suggests that the consultation is to occur early in the development of that scheme.

Whether section 35(1) also includes an obligation to consult regarding the drafting of legislation which does not directly regulate Aboriginal or treaty rights, but potentially affects the exercise of these rights, is an open question. Consultation in the drafting of legislation which potentially infringes rights in a substantial number of applications could render such legislation less vulnerable to a section 35 challenge.[62] Modern land claim agreements include consultation in drafting legislation or regulations affecting Aboriginal interests and rights.[63] Where consultation occurs in the drafting of legislation it should be undertaken during the earliest stages of the drafting process, where Aboriginal input can have an effect on the outcome.[64] The Supreme Court has instructed legislators that

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59 *Ibid.*
60 *Ibid.*
61 *Sparrow*, *supra* note 2 at 1119.
62 See *R.* v. *Adams*, [1996] 3 S.C.R. 101.
63 See, for example, the *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (Ottawa: Minister of Indian Affairs and Northern Development and Tungavik, 1993) Art. 2.6.1.
64 Patrick Macklem suggests that "the requirement of consultation [in *Sparrow*] could result in a constitutional requirement of an equal partnership between governments and First Nations in the

a statute or regulation granting a discretionary power which may interfere with the exercise of Aboriginal rights "must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights".[65] Logically, those criteria would include a requirement to consult with potentially affected Aboriginal peoples.

3.7 The Provision of Funding for Consultation

It has been suggested that the Crown is under a positive obligation to provide funding to Aboriginal groups in order to enable them to participate effectively and meaningfully in consultation initiatives, and that "the receipt of such funds is a right that is necessarily ancillary to the >obligation . . . not to infringe' that has been imposed on the Crown".[66] This is especially the case when the group consulted does not have the necessary financial resources to collect and analyse information as to their uses of the lands affected and the potential impacts of proposed activities on these lands. To date, the only court decision ordering a provincial government to provide reasonable funding to an Aboriginal group to engage in negotiations was overturned on appeal.[67] In another case the court rejected an argument that the fiduciary duty of the Crown included a duty to provide direct funding to the Aboriginal group, stating: "I am not satisfied on the authorities that the fiduciary duty of the Crown may be so clearly defined."[68] The Supreme Court of Canada has yet to consider the question of funding in the context of consultation under section 35.

There is an obvious inconsistency between the consultation story outlined in Section 2 of this paper and the principles and requirements emerging from the case law on consultation discussed above. We turn now to a discussion of cultural and legal issues arising from the type of consultation described in Section 2.

4. Learning from the Consultation Story

The consultation exercise described in Section 2 raises two kinds of issues. The first set of issues concerns something that is apparent from the interaction between Miles and Dave and is usually not addressed by the courts, namely, the cross-cultural

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drafting of laws which affect s. 35(1) rights . . .": "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 *McGill L.J.* 382 at 449.

65 *R.* v. *Adams*, [1996] 3 S.C.R. 101 at 132; *R.* v. *Côté*, [1996] 3 S.C.R. 139 at 186-187.

66 Michael J. MacDonald, *Aboriginal and Treaty Rights in the Natural Resource Sector: Consultation, Negotiation and Justification Duties of the Crown Towards Aboriginal Groups*, presentation to the Native Investment and Trade Association Conference on Aboriginal Law (September 26-27, 1996) at 19.

67 *Perry* v. *Ontario*, [1996] 2 C.N.L.R. 167, overturned by the Court of Appeal, *supra* note 52 at 125: ". . . by mandating open ended funding of the Aboriginal groups during these negotiations, the court below placed a budgetary burden on the province that would only frustrate any attempt by the parties to negotiate their differences at their own initiative".

68 *Halfway*, *supra* note 22 at 74.

complexities of consultation. The second set of issues results from asking whether what occurred in that meeting measures up to the legal requirements emerging from the case law. As will be seen below, there are several inconsistencies between the process described above and what the courts have indicated is required under section 35(1) of the Constitution.

4.1 Cultural Issues

Culture for the purposes of this paper is defined as the total set of rules and norms of behaviour, including thought, speech, and action, whose practice guarantees sanctioned inclusion in a functioning society. The concept of culture is carried in the mind as beliefs and values from which flow behaviour, and relations with others. The Inuit word *isuma* gives us further guidance in understanding the concept of cultural responsibility: *isuma* is "a kind of intelligence that includes knowledge of one's responsibilities towards society".[69] Therefore knowledge of generalized "bush economy" practices,[70] or years of work-related northern travel are not sufficient grounds alone for developing *isuma*. In two of the world's last great hunting and gathering cultures, the Dene and Inuit of the Canadian North, the primary socialization of children in the rules and norms of social responsibility takes until adolescence, and requires further refinement through a lifetime. *Isuma* has to be constantly nurtured.

It is rare that case law addresses cultural issues, and by relating the above composite story we seek the opportunity to discuss the cross-cultural complexities of consultation. In the cultural nuances of direct or indirect gaze, loud use of English, silence masking lack of consent, direct questions and circular responses, differing concepts of time, and the alternate blending and separation of work and play, we develop an understanding of the inherent complexities of consultation. The worlds of Miles and Dave do occasionally overlap, but they are in many respects located in parallel universes. In Miles' community the household unit still has strong links to the bush economy, and its combination of production activities (hunting, fishing, gathering and trapping) with extended family consumption. Dave's world features the separation of household consumption and industrial-based production.

Miles' family still retains a first language other than English, whose structure contains the essential wisdom necessary to live in the bush. It is rich in the concept of *isuma*, and focuses on promoting sharing, a reliance upon informal learning, and generalist skills. Dave's use of English focuses on desired action, is more verb than noun-centred, and conveys technocratic ideas. The phrase "resource referral process" echoes this approach, and manages to enshroud consultation in a fog of corporate language. While Dave has much vocabulary that is specific to the workplace, Miles' first language is adept for general usage anywhere on the land. In the consultation story

69 John R. Saul, *Reflections of a Siamese Twin: Canada at the End of the Twentieth Century* (1997) at 112-113.

70 M. Robinson and E. Ghostkeeper, "Native and Local Economics: A Consideration of Economic Evolution and the Next Economy" (1987) 40(2) *Arctic* 138.

loud, clear English, accompanied by a direct gaze is rebuffed by the elder's silence. The silence does not indicate either a lack of comprehension or evasiveness; it telegraphs a lack of appreciation for what is interpreted as overly forward, impolite behaviour. Had Dave been better informed regarding the community's culture, he would have spoken softly, averted his gaze to show respect, and not been so pushy in an introduction. As well, Dave should guard against interpreting Miles' silence as consent. Consent will be verbally acknowledged if it is given; silence conveys a lack of agreement.

When Dave presses Miles for speedy answers and gets instead elliptical responses and circular speech about the weather, he is being treated to a different style of decision making. In the bush economy a planning discussion includes humour, substantive content, generalized commentary on weather and past experience, and circles about all topics until the group decides that enough has been said. At this point everyone knows their role in the upcoming task, and they will perform as promised. There is no need to reiterate what has been promised or to write up minutes of the meeting.

In Miles' community people speak practically about shared activities. They still prefer partnership in the hunt and on the trapline. There is also an instinctive distrust in narrow specialization. The ideal cultural citizen can perform a wide range of tasks with quiet competence, and the focus is on self-reliance and self-sufficiency as a household philosophy. Children and elders are the exception to this rule; the rest share their bounty with them as a matter of nurture and respect.

In Dave's world the specialist is king. He highly values his professional forestry designation, and now aspires to a masters in business administration. Dave is fearful of trespassing on others' professional turf, and very accustomed to buying consultant help to complete tasks. He is used to compartmentalization of knowledge, and expects that if his company needs specific answers, an expert can be found to supply them.

In Miles' world if an answer does not exist in past experience, caution is exercised along with inductive reasoning in the pursuit of a solution. Rather than deducing the next steps, small clues are sought from the domain of common sense, practicality, and creativity to guide process and arrive at conclusions. This inductive path often takes time, and the community understands that it must if it is to be successful.

Miles grew up in a culture where people were given a place in nature by the Creator. The bush citizen is carefully trained to respect the linkage of all things to the land, and to accept the duties of stewardship and conservation. Within these responsibilities it is the cultural norm to integrate work and leisure. In fact, prior to the creation of industrial economy employment and the devolution of government administrative responsibilities to First Nations, many Aboriginal people associated the word *work* only with paid tasks they performed for outsiders, like helping with the harvest or splitting fence posts for farmers.

Dave knows the value of his time, and sells eight hours per day, five days per week to the company. He hopes to maintain this relationship for as long as possible; he calls

it his *career*. When he is not at work Dave aspires to play. He loves to fish and golf, and spends a great deal of money travelling with his family to good vacation spots, far from the place of work. He especially likes to camp in national parks, and to get back to nature for three weeks each summer. While his job involves securing the fibre supply for the company, he does not especially enjoy camping in the region where he works. It reminds him too much of work. Miles' homelands are Dave's work place.

When Miles and Dave meet in the context of the "resource referral process", much distance separates their cultural world views. Given the complexities and nature of the problems outlined in their dialogue, all of which is further biased by its unilingual reliance on English, a balanced and sensitive approach to cross-cultural discourse is essential. While the duty to consult establishes a special relationship between government and First Nations, the cultural conduct of the process can determine its utility and effectiveness. A duty carried out in ignorance of the nuances of cross-cultural communication may be a failed duty. As a consequence, those charged with the duty of consultation in government should pay close attention to regional ethnographies, applied anthropology publications, traditional land-use and occupancy studies, harvest surveys, modes of communication, and participatory action research methodologies in preparation for their work. In addition, functional fluency in the appropriate Aboriginal language(s) would be a decided asset. Collectively these preparatory measures can help to ensure that cross-cultural communication occurs, and the duty to consult is successfully carried out.

4.2 Legal Issues

Before we consider the legal issues, it is necessary to bring up two points. First, Miles and Dave are not likely consciously engaging in a section 35(1) consultation process. Indeed, the story reveals that neither Miles nor Dave understands why they are interacting. However, should logging proceed, and should Miles' community then seek an injunction to halt logging or a judicial determination that government unjustifiably infringed Aboriginal or treaty rights by permitting the logging or failed to adequately consult before issuing a cutting permit, government will likely argue that contact between Miles and Dave served to fulfil government's obligations to consult. Second, the end of the above story is not likely the end of contact between the First Nation and industry and/or government. Admittedly the entire consultation process, and the end result, must be examined before a conclusion can be made regarding the adequacy of consultation or the justifiability of any infringements. Nonetheless, the above story does highlight some significant problems with consultation as it often occurs.[71] We base our analysis on the assumption that while consultation is likely to continue, the way in which it has occurred between Miles and Dave is not likely to change significantly. Further, some of the issues raised cannot be solved by further consultation.

71 It is acknowledged that there are examples of more extensive efforts on the part of resource industries to consult with Aboriginal communities.

4.1.1 Government Involvement

The most obvious question arising from the story is where is government? Not only are government representatives not involved, they have provided no guidance to industry or the First Nation regarding their respective rights and obligations. Government delegates its obligations to consult to industry because it considers that the developer should mitigate the effects of its activities on Aboriginal peoples. While admittedly there should be some industry involvement in consultation, especially in the context of specific developments, industry's efforts do not relieve government from its obligations. As noted in subsection 3.3 above, section 35(1) imposes fiduciary obligations on government not industry. For government to ensure that resource allocations do not infringe Aboriginal or treaty rights, it must at least provide guidance and rules to industry. In the story presented above, government has not provided any background information to the parties as to their respective rights and land and resource uses, and has taken no action to ensure that the consultation is carried out properly. Dave does not know what government's obligations are, or even that he or his company are there to fulfil constitutional and fiduciary obligations. Neither party knows what role the Aboriginal community is constitutionally entitled to play in resource developments.

Not only do the parties lack guidelines or principles upon which to base discussions, they are likely not aware of the legal standards against which consultation is measured. There is no common understanding of the community's rights, or of the reason why Miles and Dave are talking to each other. Miles really does not know what his authority is, or indeed if he has any. He knows about the sacred Treaty, but is unsure of the protection it affords the Band in dealing with companies 100 years after it was signed. For his part, Dave is unsure why he has to meet with the Band. He knows his company has an FMA, and that it gives a 25-year right of harvest subject to certain environmental and technical terms and conditions being complied with. For Dave the "resource referral process" is now an institutionalized practice. Nowadays security of fibre supply is becoming more and more politicized, and the last thing the company needs is a roadblock or a consumers' product boycott. Dave has not travelled to Miles' community to ensure that his company minimizes interference with the community's rights.

Because the government and/or company and the Band have no co-management agreement, and the province gives primacy to the FMA, there is no legal context other than treaty rights for consultation to occur. And until treaty rights are recognized and given effect to by government, they only exist in an abstract way for guidance. In sum, there can be no certainty in a process that lacks government involvement, and it is unlikely that infringements can be justified based on this type of consultation.

4.1.2 The Stage in Resource Development

A second obvious issue arising from the story is that, assuming this meeting is the first between the company and the community, it is taking place *after* government has allocated timber harvesting rights to the company. To a large degree the future activities

of the company on the land are a foregone conclusion and there is limited room for Aboriginal interests to be taken into account; Dave is presenting Miles with a five year cutting plan. At this stage, Aboriginal rights are only likely to influence the company's activities to the extent that interferences can be mitigated with minimal changes to the company's plans, or by compensation. The Aboriginal group is disempowered and is placed in an uneven bargaining position, because a "no-go" option, or any significant changes to cutting plans and cutting volumes, are not on the table.

4.1.3 The Information Base

If the story ends here, there is clearly not enough information upon which to base a conclusion regarding the effects that the proposed logging may have on the exercise of Aboriginal or treaty rights. Government has apparently made no effort to obtain that information or to ensure that the Aboriginal community is able to develop an informed position on the proposed logging. The industry representative has come to the Band with information on the company's plans, not with a view to collect information from the Band on its use of forest lands or its views on mitigation measures.

4.1.4 The Community's Role

While neither party seems to understand whether or not and the extent to which the community has authority over the proposed cutting, it is clear that they cannot simply disallow it. Further, the manner in which Dave has consulted with Miles places their interaction at the bottom of the scale referred to in *Delgamuukw*, and arguably below that, as it is a stretch to describe their interaction as "discussing". Dave is merely informing Miles about decisions which have already been made, the lowest level of the co-management ladder.[72] Miles is probably unaware of any higher order of authority transfer, but instinctively desires the input of shared community wisdom to the process. Dave does not see any reason for the Band to have any authority over his company's cutting plans.

5. Conclusion

The purpose of this paper is not to suggest a specific consultation process to government, Aboriginal communities, or industry. Rather, we draw upon the above discussion in order to outline some lessons and recommendations for the parties. The current situation results in uncertainty for all three parties. While courts do not prescribe a consultation process, they do police it and may quash permits or grant injunctions where they conclude that consultation has been inadequate. It is therefore in the interests of all parties to devise a method of ensuring that resource development does not unjustifiably interfere with section 35(1) rights. The parties must be satisfied that

72 See *supra* note 42.

they have achieved closure on all the issues. Government must take responsibility for instituting guidelines, including an institutional forum for higher levels of consultation. Obviously some method of determining the nature of the required consultation must be developed as well.

The above observations lead us to conclude that there are three immediate needs. The first is the collection of traditional ecological knowledge as a basis for consultation. Traditional land use and occupancy studies (TLUOS) as well as harvest studies may be used to such ends.[73] Government should fund these studies as it is ultimately government's responsibility under the constitution to ensure collection of the information. Nonetheless, it is reasonable to suggest that government could raise the revenue from the private sector by requiring industry to contribute to a fund as a prerequisite for applying for and maintaining interests in Crown land. From the perspective of resource companies, this will save them money in the long run because they will not have to undertake as extensive studies in the context of specific projects. Second, companies will not waste money carrying out other studies (for example, environmental and economic studies) for projects which may be rejected based on information contained in TLUOS and harvest studies. Those studies are likely to reveal particularly sensitive or important areas which cannot be subject to any more resource development, as well as areas where activities must be avoided during particular times, for example calving areas.

Another immediate need is the development of consultation guidelines which ideally would be found in legislation or regulations so that all government decision makers and, where appropriate, industry, are bound by the process. Guidelines must set out clear ground rules and roles for all parties. They must identify situations triggering consultation requirements and set up a screening process to identify at least in a preliminary way the extent and nature of consultation required. In turn, whether, when, and what process is triggered must be determined according to the nature of the right affected and the proposed activity, as well as the state of the land. Guidelines should also make clear the ultimate goal of the process: to minimize infringements. Further, if government is to delegate the responsibility to consult to industry, then guidelines should provide a way to ensure that industry is fully informed with respect to the rights involved, land uses, and the need to minimize infringements. Guidelines should impose clear requirements upon industry and indicate the extent to which Aboriginal views on ways to minimize infringements must be implemented.[74] The cumulative effects of individual projects or actions that may appear to be minor interferences with the exercise of Aboriginal or treaty rights can add up to a major infringement. The community perspective in that respect will be very important. Situations in which Aboriginal peoples may prefer a "no-go" option need to be identified. More generally, the goals of consultation, and their link to the result, must be set out.

73 These will need to be regularly updated.

74 Since it is likely that this can only be decided on a case by case basis, it would be most appropriate for government and Aboriginal communities to set the rules.

A third critical need is to integrate the information gathered in TLUOS and harvest studies with each other and with planning processes. A priority must be for government and Aboriginal peoples to identify particularly important, sensitive, vulnerable or damaged areas, and to comprehensively incorporate this information in setting harvesting levels and determining where and when particular land use activities or developments may or may not occur. This obviously necessitates some agreement on what rights Aboriginal peoples have.

In the context of specific proposals, when resource harvesting or development proposals are overlain on TLUOS data, the beginning of collaborative resource use planning occurs. The highest level of consultation will feature the creation of a co-management agreement. Such an agreement should be negotiated early in the consultation process, as it will prescribe how the parties will integrate local-level and state-level systems of decision-making. In all of the comprehensive land claims north of 60□, co-management committees feature balanced representation of federal/territorial government officials and First Nations. In some cases it may make practical common sense for provincial governments and First Nations to jointly invite industry to sit on co-management committees with strategic objectives that can only be met in this manner.

In general terms, co-management agreements should specify who participates, what the goals of the parties to the process are, how issues are presented for discussion and decisions are taken, how conflicts are to be resolved and how compliance is monitored and achieved. If co-management committee decisions are to be advisory to a Minister of the Crown only, this fact must be very clearly understood by all parties.

In specific terms, co-management agreements and any other form of consultation should focus on sharing and combining First Nations' wisdom and western science on matters of joint stewardship. Co-management committee decisions also convey shared responsibility for their implementation. Implicit in this sharing is local capacity to carry out certain defined tasks, adequate budgets for the work, and the continued development of bush economy wisdom for future application. Examples of joint stewardship responsibilities in the provincial mid-North could include sustaining moose populations, monitoring water quality, protecting fish habitat, ensuring a sustainable yield of pulp fibre, and enabling the continuance of the trapping lifestyle in the bush economy.

In general, consultation duties should last for the duration of the resource development cycle, up to and including project abandonment and environmental rehabilitation. Once the preparation for consultation is complete and the work begins, it makes good sense for government to maintain the same team over the entire project (or planning) cycle. The same applies to the First Nations representatives. The dynamic of consultation is often dependent on personalities, and the relationships that develop over time. When these relationships are positive, they should be supported and enhanced. Government's intentions must include substantively addressing the concerns presented, and attempting to do so utilizing consensus building rather than adversarial, winner take all approaches. Inherent in consensus-based alternative dispute resolution methods is

the notion of compromise on all sides on behalf of the environmental and economic common good. And inherent in building and enhancing the common good is the greater good of achieving wisdom – a noble goal for all parties to the consultation process.

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