

01. The Duty to Consult & Accommodate

IN 2004-2005, A KEY LEGAL DOCTRINE regarding Aboriginal and Treaty rights was established by the Supreme Court of Canada in three important decisions (*Haida Nation v British Columbia*, 2004 SCC 73; *Taku River Tlingit First Nation v British Columbia*, 2004 SCC 74; *Mikisew Cree First Nation v Canada*, 2005 SCC 69). The “Duty to Consult” requires federal, provincial, and territorial governments to consult First Nations when they contemplate taking action that may adversely affect their established or asserted Aboriginal or Treaty rights.

The Duty to Consult has a number of characteristics:

- **CONSULTATION:** The level of consultation required by government exists on a spectrum based on the strength and nature of a First Nation’s Aboriginal or Treaty rights being impacted and the significance of the potential impact on those rights.
- **ACCOMMODATION:** If a First Nation’s Aboriginal or Treaty rights will be harmed by a government decision (to permit a development, for example), there must be accommodation measures of some kind to prevent, mitigate, or off-set the harm.
- **NO "VETO":** The Duty to Consult does not provide a First Nation with a veto over contemplated government actions. If a government and a First Nation cannot agree on accommodation measures there is still an ability for the government to proceed with plans if their efforts to consult and accommodate have been “reasonable”.

Challenges

- The law is continuously evolving meaning there is often a lack of clarity on the Duty to Consult and the standard that it requires from one circumstance to another. Moreover, across the country there are many unique consultation policies and practices. This is further complicated by recent developments establishing that “arms-length” government entities can discharge aspects of the Duty to Consult.
- The Duty to Consult has also enabled a “death by a thousand cuts” for First Nations. As they try to deal with hundreds of referrals for consultation, critical financial and human resources are consumed.
- Finally, the Duty to Consult has failed to respect First Nation jurisdiction by promoting engagement processes that treat communities as mere stakeholders rather than legitimate decision-makers holding constitutionally protected rights.

02. Free, Prior and Informed Consent

THE 2007 DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP) contains several clauses ensuring Indigenous people's right to free, prior, and informed consent (FPIC). Article 19 asserts that: "States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

At the highest level, FPIC is defined in the following ways:

- **FREE:** Consent given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations, or timelines that are externally imposed.
- **INFORMED:** The nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.
- **PRIOR:** Consent is sought sufficiently in advance of any authorization or commencement of activities.
- **CONSENT:** Collective decision made by the rights holders and reached through the customary decision-making processes of the communities.

Challenges

- Canada's commitment to implementing UNDRIP is increasingly interpreted through domestic legal and constitutional frameworks, which means that Canada does not recognize FPIC in spirit and incorrectly views it as an extension of the Duty to Consult, rather than a fundamental component of Indigenous self-determination.
- Like Duty to Consult, FPIC as expressed in UNDRIP has limits. The exercise of rights should not threaten "territorial integrity or political unity of sovereign states (Article 46). Settler states such as Australia and Canada have pointed to FPIC as such a threat.
- Because of the nature of Declarations as non-binding, and an international system that privileges states, international institutions like the United Nations can only encourage states to implement UNDRIP: their power is limited. There is little to prevent Canada from accepting FPIC in principle, but interpreting it narrowly in practice.

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03. Community Conceptions of Consent

MORE RECENT INDIGENOUS CONCEPTUALIZATIONS of consent can be seen in the practice of Indigenous jurisdiction, whether engaging with proponents or re-occupying the land. The generalized version of consent, which emerges from Indigenous jurisdiction has four distinct elements that build on the existing notion of FPIC:

- **RESTORATIVE:** Promotes the active and intentional centering of Indigenous models of governance and law and moving away from Western frameworks and definitions. This does not necessarily exclude band councils or tribal councils but promotes the revitalization of authentic governance practices and institutions.
- **EPISTEMIC:** Accepts Indigenous knowledge frameworks and languages for understanding relationships to the land. This may include Indigenous science, land management customs, obligations to the land and waters, or recognizing the land as having agency. This knowledge can be embedded in Indigenous law and governance.
- **RECIPROCAL:** Ensures that Indigenous people are not merely being asked to grant consent, but are determining the terms of consent. This is an active and enduring condition whereby consent may be revoked or the terms changed depending on the ability of outsiders to abide by the terms in good faith. This is less a process of governments obtaining consent, but an active maintenance of Indigenous authority.
- **LEGITIMATE:** While community politics can be fraught, decisions about granting or withholding consent generally require representatives perceived as legitimate by the community, and with a stake in the decision (whether band council, hereditary council, youth, elders, all genders, and urban populations) to participate or be accommodated. A decision should not be made until the legitimate authorities consent.

Challenges

Much of this version of consent depends on Indigenous cultural and political resurgence. Factors preventing that process include:

- division between and within nations, which is exploited by state governments;
- decisions made by “official” leadership that excludes others;
- time and resource capacity to build community visions of consent,
- lack of enforcement powers for communities who withhold consent.

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