NCFNG
NATIONAL CENTRE FOR FIRST NATIONS GOVERNANCE

CNGPN
CENTRE NATIONAL POUR LA GOUVERNANCE DES PREMIÈRES NATIONS

National Centre for
First Nations Governance

Crown Consultation Policies and Practices Across Canada

April 2009

NCFNG Research Directorate

The Research directorate commissions pre-eminent legal and academic research on fundamental topics relating to land, law and governance to support the inherent right of self-government and nation re-building. Likewise, a key aspect of the Research program is to support the development of the Centre's workshops such as the Inherent Rights Strategy, developing constitutions and to ensure traditional governance underlies contemporary systems. The directorate actively engages in the dissemination of the research in a manner to allow the broadest transfer of knowledge to First Nations.

About the Author

Maria Morellato, Q.C. specializes in aboriginal and treaty rights law. She is a civil litigator and negotiator and has acted as legal counsel before all levels of the court system, including the Supreme Court of Canada and the Federal Court. She has also appeared before various administrative tribunals and regulatory commissions relating to marketing boards and international trade issues.

She has negotiated agreements within the treaty context and in relation to consultation and accommodation measures with both the federal and provincial governments and she has advised on the implementation and management of settlement trusts. She has written numerous articles for various academic and professional publications on First Nations and administrative law issues, and has chaired and delivered papers at many conferences on these topics. She is the editor-in-chief of *"Aboriginal Law Since Delgamuukw"* to be published in 2009 by Canada Law Book.

Maria has been counsel on many leading aboriginal rights matters and related proceedings, including land, resource and fishing cases. She has provided advice relating to consultation and accommodation requirements regarding resource use and land development projects. She has also advised on treaty negotiations, treaty language, specific claims matters and other negotiations between the Crown and Aboriginal peoples. She has represented many First Nations on a wide variety of administrative and litigation matters.

Maria is recognized in The Canadian Legal L'Expert Directory as one of the leading lawyers in Canada. In addition, she was voted by peers as one of the leading lawyers in Canada in the 2006 inaugural edition of *The Best Lawyers in Canada,* as well as each subsequent annual edition.

Maria Morellato, Q.C.
Mandell Pinder
Barristers and Solicitors
Suite 422 – 1080 Mainland Street
Vancouver, BC V6B 2T4
Phone 604.681.4146
Fax 604.681.0959

Table of Contents

Introduction and Overview

While significant progress has been made in some jurisdictions in Canada, there continues to be a marked discrepancy between what is required of the Crown at law and how the Crown's duty to consult and accommodate is actually being exercised. This discrepancy becomes particularly apparent upon a review and analysis of the various Crown consultation and accommodation policies developed to date in Canada. It is the author's hope that the discussion which follows will facilitate productive and positive dialogue regarding how current Crown policies and practices may be changed for the better. It is intended to function as a framework for discussion rather than a comprehensive or prescriptive analysis. Much thinking needs to be done, ideally on a collaborative basis between the Crown and First Nations, concerning what tangible steps can be taken in order to implement necessary change.

Most jurisdictions in Canada, including the federal Crown, have instituted consultation and accommodation policies and guidelines in light of cases such as *Haida* and *Mikisew*.[1] What follows is an attempt to contribute to the necessary review and dialogue surrounding these policies and guidelines by addressing strengths and weakness as well as possible new approaches to the consultation and accommodation process. This analysis is undertaken with a view to connecting the suggested new approaches articulated below to both existing case law as well as the need to develop sounder, more respectful and more effective relations between First Nations and the Crown.

This paper is accompanied by a binder of materials entitled "Crown Consultation Polices and Procedures Across Canada (April 2009)" which contains, as the title suggests, the provincial and federal consultation and accommodation polices instituted and published across Canada. The binder also contains a "checklist" which identifies those topics which are, and are not, covered by these policies, as well as a synopsis of each policy. It is recommended that both the checklist and the synopses of the various consultation policies be read in conjunction with this document.

[1] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73; *Mikisew Cree First v. Canada (Minister of Canadian Heritage),* 2005, 3 SCR 388.

Apparent Strengths and Weaknesses in Provincial and Federal Policies

The Need for Available Policies in All Canadian Jurisdictions which Address Both Aboriginal Title and Other Aboriginal Rights

Those policies that have addressed both aboriginal title and rights as well as treaty rights are relatively few in Canada. These include policies issued by Canada, British Columbia, Nova Scotia and Ontario.[2] Provinces such as Alberta, Manitoba, Quebec and Saskatchewan do not address Aboriginal title within the scope of their polices, although they each address other aboriginal rights such as hunting and fishing. It is unclear whether the provinces of New Brunswick, Newfoundland or Prince Edward do or do not follow particular consultation and accommodation policies that address Aboriginal title and /or rights as their policies are not available for public review.

In this light, it is recommended that all provinces develop and distribute consultation and accommodation policies to assist in their interaction with First Nations and to transparently guide Crown decisions which influence Aboriginal rights and titles. Clearly articulated polices are, at minimum, an essential starting point for New Brunswick, Newfoundland or Prince Edward. Further, it is unclear why Aboriginal title is not addressed within the scope of those policies issued by Alberta, Manitoba and Quebec. Saskatchewan's policy states Aboriginal title, including all subsurface rights, have been extinguished by the numbered Treaties and, accordingly, Saskatchewan declines as a matter of policy to consult First Nations on Aboriginal title issues.[3] This appears to also be the rationale for the similarly limited scope of the Alberta, Manitoba and Quebec consultation and accommodation policies.

The limited scope of the policies issued by Alberta, Manitoba, Quebec and Saskatchewan (i.e., the preclusion of consultation and accommodation discussions on the issue of Aboriginal title and subsurface mineral rights) is very problematic since many First Nations within these provinces continue to assert Aboriginal title, including entitlement to subsurface mineral rights. There is at minimum an arguable case that First Nations who have signed a numbered treaty did not agree to the extinguishment of Aboriginal title and subsurface rights. Numerous First Nations, in the prairies and elsewhere, have not concluded treaties and even those that have done so may find themselves in circumstances where consultation and accommodation is required in order to honour existing treaty obligations.

As a consequence, there is a serious gap in process and principle in jurisdictions where treaties apply but where the duty to consult and accommodate is not recognized in relation to government decisions which impact Aboriginal title interests relating to lands and resources. This ellipsis creates unnecessary conflict and project uncertainty. It also compromises relationship building between governments, First Nations and industry which, notably, is an objective which appears in most consultation policies across the country. Simply put, all Crown consultation and accommodation policies, including those applicable in the prairies and elsewhere, must have a scope which is capable of addressing aboriginal title and resource concerns and interests. Otherwise, the legal obligations of the Crown set out in *Haida* and *Mikisew* can not honoured.

The Need for Policies that Address Consultation and Accommodation with Respect to Privately Held Lands

Currently, only two jurisdiction in Canada have policies which address consultation with respect to privately held lands: British Columbia and Alberta. In light of jurisprudence which provides that Aboriginal rights cannot be extinguished by the Province and can not be extinguished by Parliament except by clear and plain legislative intent and then only before the promulgation of s. 35 of the *Constitution Act, 1982*.[4]

[2] Aboriginal title is not explicitly mentioned in Ontario's policy but the policy's scope appears to address Aboriginal title by necessary implication.

[3] See page 4 of Saskatchewan's Policy; Tab 20 of accompanying binder.

[4] *R. v. Van der Peet* [1996] 2 SCR 507 at para. 28; *Delgamuukw v. BC (1997),* 153 DLR (4th) 193 at paras. 133–34.

This case law makes clear that it is legally possible for Aboriginal and treaty right to co-exist with fee simple interests.[5] While the law in this area is in its neo-natal stages, it is apparent that there are circumstances where aboriginal rights and the concomitant duty to consult and accommodate can and do survive fee simple grants of land by both the provincial and federal government. Accordingly, both provincial and federal governments would be well advised to ensure that the scope of their consultation and accommodation policies cover such situations if they wish to protect the integrity of their decisions from judicial scrutiny and intervention.

The Importance of Including Clear Policy Guidelines or Criteria for the Accommodation of Aboriginal and Treaty Rights

Prior to the decision of the Supreme Court of Canada in the *Haida* case,[6] provincial and federal policies did not address the Crown's obligation to accommodate unproved aboriginal rights or existing treaty rights. The Crown had taken the position that unproven Aboriginal rights do not trigger the duty to consult or accommodate. That position has now changed as a result of the decision of the Court in *Haida*. Federal and provincial governments now acknowledge their duty to consult to minimize the infringement of unproven Aboriginal rights.[7] However, while each of the existing policies across the country make reference to the need to minimize infringements and to the duty to accommodate generally, a number do not set out guidelines or specific approaches for what type of accommodation measures may be taken or implemented. This is particularly apparent in the cases of Alberta, Manitoba and Ontario, although it must be remembered that Newfoundland, New Brunswick and Prince Edward Island do not have publically available policies at all.

The lack of tangible specificity and clarity concerning how Aboriginal and treaty rights might be accommodated is another serious gap in process and content which is patently inconsistent with the spirit and intent of both *Haida* and *Mikisew*. *Haida* requires specific accommodation in circumstances where there is *prima facie* case of Aboriginal title and *Mikisew* requires the accommodation of treaty rights over both surrendered and unsurrendered lands; further both cases provide examples of the types of accommodation that might be employed.[8]

British Columbia's current "New Relationship" and "Recognition Legislation" initiatives (the "Initiatives') represent the most in depth and clear articulation of Crown duties and responsibilities prior to proof of Aboriginal rights. The Province envisages shared decision making regarding how Aboriginal title lands are used, as well as revenue and benefits sharing arrangements including the minimization of infringements without proof of title.[9] Along a similar vein, the governments of Canada and Nova Scotia also contemplate forms of joint decision making in their policy statements.

Notably, British Columbia has not yet updated its consultation and accommodation policy since the advent of *Haida* and *Mikisew*.[10] Nonetheless, the accommodation measures contemplated in the recent

[5] This was precisely the conclusion in the *Hupacasath First Nation v. British Columbia (Minister of Forests) et al,* 2005 BCSC 1712 where the court found that First Nation aboriginal rights where not extinguished by a fee simple land grant.

[6] *Supra*, Note 1.

[7] The following have expressly addressed the objective of minimizing impacts of Crown decisions on Aboriginal rights in their policies: Canada, Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Quebec and Saskatchewan.

[8] *Supra,* Note 1.

[9] See accompanying binder; Tab 4.

[10] The accompanying binder sets out British Columbia's New Relationship document as well as the old 2002 consultation and accommodation policy; the 2002 policy has now been publically abandoned by the Province and it is expected that the new Initiatives will yield a new policy.

Initiatives (e.g., joint decision making and revenue sharing) are not only consistent with the sort of accommodation contemplated by the Supreme Court of Canada's decision in *Haida,* but also with the principles established in *Delgamuukw* relating to the economic component of Aboriginal title and the right of First Nations to participate in decision effecting their traditional territories.[11] What is not yet clear is when and with which First Nations the Province will agree to enter into joint decision making and revenue sharing agreement; it appears these issue continue to be under review.

In *Delgamuukw,* the Supreme Court of Canada also underscored that compensation "would ordinarily be required" where Aboriginal rights are infringed.[12] In this light, it is unfortunate that only the government of Canada and four provinces have articulated polices that include compensation as a possible form of accommodation.[13] Clearly, this is another ellipsis that must be addressed. This must begin for some provinces with acknowledging that compensation in various defined forms is ordinarily required when infringement occurs. Ultimately, however, a more in depth articulation of when and what, as a matter of example and principle, compensation flows would be of assistance to First Nations and government decision makers alike.

The Need to Provide Funding for Meaningful Consultation and Accommodation

One of the greatest logistical difficulties facing Aboriginal communities today is coping with the time and expense consumed in engaging with what is referred to as the "Crown referral process." Theoretically, this process is triggered anytime the Crown is about to make a decision which may impact Aboriginal or treaty rights. The Crown sends letters to First Nations advising of a pending decision, sale, lease, permit or development on Crown land. Such referrals typically involve some degree of consultation, an assessment of the Aboriginal claim and often require accommodation attempts. As a matter of practice across jurisdiction, the degree of consultation and accommodation involved is invariably determined by Crown officials. Such referrals are received by First Nations from numerous unrelated government departments and thereby create serious difficulties for First Nations, many of whom are inundated with referral letters week after week. Most First Nations do not have the capacity, resources or staff to address these referrals. The result is what is often referred to by First Nations leaders as the "death of a thousand cuts" since their traditional lands and resources are repeatedly alienated, lost or developed without regard to their Aboriginal or treaty rights and without meaningful accommodation simply because of lack of funding and capacity on the part of First Nations to engage in the process. Fortunately, some consultation and accommodation policies have recognized the need for funding and have provided for it; these include polices issues by Canada, Alberta, British Columbia and Nova Scotia. These policies are consistent with recent case law which has underscored the importance of the Crown funding First Nations in an effort to provide for an "equal playing field."[14] Accordingly, there is a very real need for the remaining seven provinces to include the availability of funding, as a matter of policy, in order to assist meaningful consultation and accommodation.

[11] *Delgamuukw, supra,* at paras. 203, 204 and 166-169; *Haida, supra,* at paras. 47–51.

[12] *Delgamuukw, supra*, at para. 169.

[13] Compensation is referenced by British Columbia, Saskatchewan, Quebec and Nova Scotia; see accompanying binder of policies and guidelines.

[14] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation (2007),* 3 CNLR 221

Moving Consultation and Accommodation Initiatives to More Effective Levels to Engagement

The above review has focused on a comparative analysis of various policies across Canada. Clearly, some are more advanced that others. However, there are overarching considerations which, in the writer's view, could serve to substantially improve working relations between the Crown and First Nations in relation to resolution of outstanding aboriginal and treaty rights disputes. The recommendations set out below are offered as opportunities to build more effective relations between the Crown and First Nations.

The Need for Negotiated Agreements which Substantially Address the Concerns of First Nations

The case law patently illustrates that our courts have held the Crown responsible and accountable to Aboriginal peoples in a wide variety of circumstances, including those where the Crown has exercised discretionary power in the management and administration of treaty lands as well as lands and resources subject to unresolved Aboriginal title issues.[15] That accountability, grounded in the Crown's fiduciary duty and also in its duty to act honourably, requires that the Crown engage in good faith consultation with the objective of substantially addressing the concerns of First Nations and treaty peoples, as the case may be.[16] In such circumstances, the Supreme Court of Canada has warned of the unacceptability of unilateral Crown action and has reiterated the objective of reconciliation through negotiated arrangements and settlements. As described above, while a small number of consultation and accommodation policies across Canada recognize the need for joint decision making processes between First Nations and the Crown (rather than unilateral Crown decisions), these policies are in the minority. This is perhaps one of the most important changes required with regard to current consultation and accommodation processes.

The Supreme Court of Canada's emphasis on the importance of integrating Aboriginal and treaty right considerations in Crown decisions, plans and courses of action effectively requires the participation of Aboriginal and treaty peoples in Crown decisions impacting their lands.[17] A key dysfunction at certain treaty and other negotiating tables, are non-negotiable positions based on the assumption that the consultation and accommodation of Aboriginal rights in this manner has no place at the negotiation table. This position must change as it flies in the face of settled law regarding the Crown's duty to act honourably.

Allocating Land and Resources in a Manner that Recognizes and Reflects Aboriginal and Treaty Rights

In it now well established that *Delgamuukw, Sparrow* and *Badger*[18] impose positive legal obligations which necessarily involve the protection and meaningful accommodation of Aboriginal and treaty rights. What appears to be missing, however, is an accommodation process that reflects this legal reality.

In the context of basic rights such as fishing or hunting for food, *Sparrow*[19] establishes the Crown must give Aboriginal peoples first priority in the allocation of the resource over which the Aboriginal right applies. *Marshall*[20], *Gladstone*[21] and *Delgamuukw* also require the application of the principle of priority to commercial Aboriginal rights, including what the Court refers to as the "economic component" of Aboriginal title. As such, the principle of priority

[15] *Haida, supra; Mikisew, supra;* see also *Guerin v. Canada,* [1984] 2 SCR 335; *R v. Sparrow,* [1990]1 SCR 1075.

[16] *Ibid.*

[17] *Delgamuukw, supra,* at para.166; *Mikisew, supra* at para. 49.

[18] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010; *R. v. Sparrow,* [1990] 1 S.C.R. 1075; *R. v. Badger,* [1996] 1 S.C.R. 771.

[19] *R. v. Sparrow,* [1990] 1SCR1075.

[20] *R. v. Marshall,* [2005] 2SCR 220.

[21] *R. v. Gladstone,* [1996] 2 SCR 723.

applies in the Crown's allocation of land and resources in a manner which reflects and respects the Aboriginal right in question. Actually prioritizing the allocation of land and resources through the consultation and accommodation process is a principle which has not yet been implemented as a matter of policy by Crown decision makers. This is another key change which must be realized if the Crown is to act honourably and in consonance with the rulings of the Supreme Court of Canada.

More specifically, with respect to the Crown's responsibility in relation to the accommodation of Aboriginal title, the Court has suggested that its duties may be satisfied in a number of ways.[22] First, given that Aboriginal title encompasses the right to exclusively use and occupy traditional Aboriginal lands, the duty might require that the Crown accommodate the participation of Aboriginal peoples in the development of resources within their traditional territories; for example, by granting various licences and permits to Aboriginal communities. Second, as noted above, given that Aboriginal title encompasses the right to choose to what use land can be put, this aspect of title suggests that the duty of the Crown towards Aboriginal peoples may be satisfied by their involvement in decisions taken with respect to their land. As in the *Musqueam* case, such an accommodation process may require land protection measures to ensure significant parcels of Crown held land are set aside for land settlement purposes upon which Aboriginal communities may be built and sustained.[23] Third, as discussed above, because Aboriginal title has an inescapable economic component, the honour of the Crown may require that compensation be paid, again as underscored by Hall J.A. in *Musqueam,* particularly where land and resources cannot be replaced.

Simply put, the Crown is legally obliged to ensure that the consultation and accommodation processes involving the allocation and disposition of Crown held land, as well as the licensing and permitting of resource extraction and development on such land, reflect the priority of the holders of Aboriginal and treaty rights. Yet, existing policies have not recognized this aspect of the law and they must.

Interpreting Legislation and Fulfilling Treaty Promises in a Manner in Keeping with the Honour of the Crown

The duty to act honourably towards Aboriginal people also informs the manner in which Crown officials must interpret and apply legislation and treaties. The *Adams* case directs that enactments or regulations which confer a discretionary power on Crown officials should specifically set out the criteria through which such discretionary powers are to be exercised.[24] *In Van der Peet,* the Court not only reaffirmed that statutory and constitutional provisions protecting the interests of Aboriginal people must be given a general and liberal interpretation but also stated that any doubts or ambiguities with respect to the scope of those rights must be resolved in favour of Aboriginal peoples.[25] These principles are instructive not only in consultation and accommodation negotiations with crown officials who are applying and interpreting legislation but also in the context of defining the scope of the Crown's legal obligations to consult in the process of interpreting and applying treaty.

Simply put, consultation and accommodation policies must guide discretionary decision making in a manner which is in keeping with the priority held by holders of Aboriginal and treaty rights. This highlights the need for greater specificity in resource and land management plans to ensure that land and resources are managed and allocated in keeping with the interests and concerns of Aboriginal peoples during the consultation and accommodation process.

[22] *Delgamuukw, supra,* at paras. 161–169.

[23] *Musqueam Indian Band v. B.C. (Minister of Sustainable Resources), 2005 BCCA 128 (C.A.).*

[24] *R. v. Adams,* [1996] 3 SCR. 101 at paras. 52–54.

[25] *Van der Peet, supra* at paras 23–43.

In *Marshall* and *Badger* the Supreme Court underscored that: (a) treaties represent an exchange of solemn promises between the Crown and various Indian Nations such that the Crown is held to a high standard of honourable dealing; (b) it is always assumed that the Crown intends to fulfil its promises; (c) the Court will not sanction any sharp dealings; and (d) the Court will not consider itself bound by the written text of the treaty but will consider extrinsic evidence in determining the true terms of the treaty agreement.[26] The principle that the Crown's duty to act honourably requires that it must fulfil its promises, becomes particularly engaging in treaty cases where oral history suggests that promises were made by the Crown at the time of the making of treaty which are not found in the treaty's written text. For this reason and in light of the considerable weight given to oral history in *Delgamuukw,* the law requires that the Crown consult and accommodate First Nations who provide oral history evidence of treaty rights and promises that are not found in the written text of historical treaties.

In *Delgamuukw* the Court specifically stated that oral history must be placed on an equal footing with historical documents.[27] Placing oral history on an equal footing with written historical documents, requires that Crown promises at the time of treaty be kept.[28] Accordingly, during the consultation and accommodation process, the Crown must consider whether the nature and scope of the treaty rights in question are broader than that found in the written text. Further, any related concerns of the treaty peoples in question must be substantially addressed during the consultation process. This is not an approach which appears to have been adopted by the Crown in practice but it is mandated by the case law. Again, this requires that provinces such as Alberta, Manitoba, and Saskatchewan amend their policies to encompass consultation and accommodation relating to Aboriginal title where oral history supports the conclusion that Aboriginal title or another Aboriginal right was not surrendered or extinguished. Likewise, if oral history supports a unfilled treaty promise, that must also be addressed during consultation discussions.

Strategic Level Planning

Cases such as *Haida* and *Mikisew* also highlight the need for strategic level planning and the respectful management of the relationship between the Crown and Aboriginal peoples. The duty to consult and accommodate has perhaps the greatest impact when the Crown makes strategic policy decisions (e.g., relating to family and child welfare, land use or resource allocation) which are manifested through legislative or regulatory change. Examples of when consultation is necessary in this context include when the Crown implements legislation which permits the registration of mining claims by internet or when it regulates the renewal of tree farm licences.

The Court's emphasis in *Haida* on the importance of consultation at an early, strategic level of Crown decision-making is a key consideration which was also reiterated in Mikisew.[29] In Mikisew, the Court clearly adopts the principle in Halfway River which requires the Crown to "wherever possible, demonstrably integrate [Aboriginal interests] into the proposed plan of action."[30] Again, this strategic level approach is not commonplace in current Crown policies and practices and it must be made so.

As discussed above, a major logistical and fairness difficulty currently facing Aboriginal communities today relates to the "Crown referral process." The inability of First Nations to engage in the numerous

[26] *R. v. Badger,* [1996] 1 S.C.R. 771; *R. v. Marshall,* [1999] 3 S.C.R; *R. v. Marshall,* [1999] 3 S.C.R. 456; at paras 41–103.

[27] *Delgamuukw, supra,* note 9 at para. 87.

[28] *In Marshall, supra, the court found that unwritten treaty promises were part of the treaty and held the Crown to its promises.*

[29] *Haida, supra,* at paras. 76–77.

[30] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at par. 64.

consultation processes and Crown decisions within their territory every year, due to a lack of resources and funding, is a very serious threat to the protection, recognition and implementation of aboriginal and treaty rights.

Addressing land use and resource development decisions, through the strategic level consultations with First Nations and with the appropriate line ministries, is a sound and practical alternative to the "death by a thousand cuts" scenario, provided this strategic level process is respected and taken seriously by the Crown and industry, and provided First Nations are equipped with the necessary funding and capacity to meaningfully participate in it. Some First Nations are also developing their own territorial stewardship plans with the hope that these strategic plans will be harmonized with Crown land use plans.

Replacing the Referral Process with Joint Decision-Making Processes

Most consultation and accommodation process are also flawed in that, with limited exceptions, Crown policies do not engage in truly collaborative decision-making processes with First Nations.[31] Until now, a critical piece has been missing in implementing the opportunity for significant change. Although the Supreme Court of Canada in *Delgamuukw* clearly states that First Nations have communally held rights to choose how Aboriginal lands and resources may be used,[32] and although the Supreme Court of British Columbia in *Campbell* provides that Aboriginal self-government rights are constitutionally protected and have not been extinguished,[33] the federal Crown and most provinces do not recognize, endorse or operationalize the inherent Aboriginal right to self-government. Such an approach would involve Incorporating the inherent right of Aboriginal communities to make decisions relating to the use of their traditional lands and resources into the consultation process. This essential "missing piece" undermines the legitimacy of any consultation and accommodation process and renders "referrals" associated with Crown decisions affecting land and resources largely ineffective and dysfunctional.

A change in policy on the issue of Aboriginal self-government, as reflected in a commitment to shared decision-making, would constitute a very significant change in Crown policy and practice which would advance the reconciliation process. Simply put, the recognition of the right to self-government, including the right to manage land and resources which are subject to Aboriginal title, are essential if consultation and accommodation deliberations between the Crown and First Nations are to be meaningful, authentic and productive.

In light of the above, it is apparent that new land use planning and "referral" processes must be developed in collaboration with First Nations. Currently, Crown decisions relating to land use planning and referrals are not in keeping with the case law as outline above. Further; there is no shared or participatory decision-making process between First Nations and the Crown regarding land or resource use, or with respect to other Crown decisions impacting Aboriginal or treaty rights. Comprehensive or high level strategic planning with First Nations regarding land use decisions must become more commonplace.

[31] As discussed above, British Columbia is currently in the process of developing a new joint decision making approach but no policy has yet to be implemented; further it is likely that joint decision making will be circumscribed to specific situations with specific Indigenous Nations. As this work is in process at the time of writing this paper, it remains to be seen how and if the objective of joint decision-making will be realize in British Columbia.

[32] *Delgamuukw, supra,* at paras. 111, 126 and 165.

[33] *Campbell, supra,* at paras. 135, 137 and 180.

Furthermore, the current referral or consultation and accommodation process is often adversarial and imbalanced in that First Nations are inundated with referral letters which require them to justify why the land disposition, licence or development permit in question ought not be granted. Moreover, the referral process facilitates unilateral self-serving actions, since the Crown alone is regularly the final arbitrator of land and resource use decisions in circumstances where it stands to gain substantial revenue from further land alienation or resource development. As a consequence, insufficient regard has been given to how Aboriginal concerns can be addressed with a view to protecting Aboriginal rights or creating sustainable economic opportunities for First Nations. Establishing a joint decision-making process to ameliorate the current referral process is in keeping with the cases addressed above and also prevents the sort of unilateral action objected to by the Court in *Mikisew* and *Haida*.

The current *ad hoc* ministry-by-ministry referral process could be replaced, at least in part, with a government-to-government decision-making process. First Nations could, for example, be given the opportunity, on an on-going basis, to address existing provincial referrals at a single negotiating table with government authorities who would be authorized to address land and resource dispositions within the traditional territory of that First Nation ("Joint Decision-Making Committee"). At a minimum, the Joint Decision-Making Committee would address priority referrals identified by members of the Committee.

Ideally, such a referral process would be guided by a comprehensive land use plan designed in conjunction with the First Nation's input and, ideally, harmonized with the First Nation's own Territorial Stewardship Plan. It is understood that land use plans typically involve the input of a number of non-Aboriginal stakeholders. While such stakeholders clearly must be consulted, land use plans must necessarily engage a process of government-to-government negotiations with First Nations to shape and refine the land use plan according to First Nations' Aboriginal rights, interests and concerns. Such plans could then guide the deliberations of the Joint Decision-Making Committee.

This is but one example of the way in which a joint decision-making process may be reflected in Crown policies and guidelines. What must be changed, in any event, within the current referral process, is the marginalization of First Nations in relation to Crown decisions that impact upon their traditional territories and Aboriginal rights. First Nations must be given a voice in the decision-[34] making process and their substantial concerns must be addressed, as required by law.

Developing Alternative Dispute Resolution Processes

In the event agreement cannot be reached with regard to a referral or land use decision through a "government-to-government" consultation or joint decision making process, the matter could be sent to mediation and/or an independent and specialized tribunal consisting of both First Nation and Crown representatives. This is in fact what is currently being contemplated in British Columbia through the New Relationship initiatives. However, consultation and accommodation polices across Canada are remarkably silent on this point.

A mediation or dispute resolution process is consistent with the Courts' decisions in *Haida* and *Mikisew* encouraging a balancing of interests and negotiated resolutions. It is also consistent with the Court's reasons in *Platinex* directing that the parties attempt to reach agreement on the issues before them.

[34] *Platinex, supra.*

In the event mediation is not successful, a specialized tribunal comprising both Aboriginal and non-Aboriginal adjudicators would, where warranted, address the dispute. Such a tribunal could be legislatively empowered to order the accommodation of the First Nation's rights through a variety of possible measures, which could include land protection, revenue-sharing and land or resource allocations.

Ideally, a tribunal of this nature could be authorized to adjudicate land and resource-use decisions within a specified time frame, and could direct how the substantial concerns of the First Nation in question ought to be addressed. The parties would be motivated to resolve disputes on a government-to-government basis in an effort to avoid the uncertainty of a tribunal-imposed outcome.

Such an approach would address the current imbalance of power in the land use planning and referral processes currently in place. It is also in keeping with the reasons of the Supreme Court of Canada in *Haida,* where the Court reasoned that consultation may:

> ...entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. *The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.*[35]
>
> (emphasis added)

While there are various approaches and processes that can be deployed in developing consultation and accommodation policies which are in keeping with the principles outlined in this paper, the establishment of new decision-making and adjudicative processes is clearly required. Mediation and resolution through "impartial decision-makers" has been expressly contemplated by the Supreme Court of Canada, lending greater legitimacy to such institutional reform. Indeed, this objective is appear to now be actively pursued in British Columbia thought the Initiatives described above.

Interim Measures

As has become apparent from the above discussion, Crown consultation policies and practices have not yet been amended in a manner which is consistent with the principle affirmed in the *Haida* or *Mikisew* cases. In the meantime, however, land use plans are being finalized by the Crown and significant Crown decisions are being made in relation to the disposition held land and resources which are not in keeping with the principles of law discussed above. As a consequence, Aboriginal rights and title, as well as treaty rights, are not being accommodated, protected or realized as envisioned by our courts. Furthermore, traditional land and resources are being lost without any land protection measures and without any benefit sharing or revenue sharing arrangements with First Nations. It is imperative that this change soon through the incorporation of interim measure provisions and options as part of the consultation and accommodation policies.

Referrals continue to be addressed *ad hoc* on a case-by-case basis with no comprehensive overview or plan which guides the decision-making process. Again, this is extremely problematic, particularly as most First Nations do not have the funds or staff to address each referral, yet continue to face significant Crown decisions which do not accommodate their very substantial concerns regarding continued land and resource dispositions by the Crown within their traditional territories. Interim measures in relation to land and resources could ameliorate this problem in the short term.

[35] *Haida SCR, supra,* note 12 at para. 44.

Conclusion

The above analysis identifies tangible gaps and deficits in the consultation and accommodation policies in various jurisdictions across Canada. What is immediately required are concrete commitments towards a significant change in the current consultation and accommodation policies and practices of the Crown which reflect the honour of the Crown and principled stewardship of land and resources in collaboration with First Nations. These changes must be actively endorsed and taken seriously by both the federal and provincial Crown. Basic tenets relating to the respect, recognition and reconciliation of Aboriginal and treaty rights must be coupled with joint decision-making and dispute resolution processes which will yield tangible benefits to Aboriginal communities in the immediate future. Strategic level planning and decision-making between Aboriginal peoples and the Crown is necessary, as is the harmonization of such planning with the choices and priorities of First Nations communities (e.g., through the implementation of territorial stewardship plans and the allocation of land and resources through interim measures in a manner that reflects prior aboriginal rights).

There is also a decided inconsistency across jurisdictions in the manner which First Nations are treated. Indeed certain Nations, like the Treaty 6 and Treaty 8 peoples, receive different treatment with respect the same treaty rights solely due to the fact that their treaties span different provinces and therefore different consultation and accommodation policies. This too must be rectified.

Haida makes it clear that prior to land settlements or court determinations, the consultation and accommodation process is driven by the primary purpose of reconciliation through a balancing of interests. To date, there is a decided imbalance between the lands and resources allocated to First Nations and those allocated to third party interests. Genuine accommodation of Aboriginal and treaty rights can at least begin to rectify this injustice. Such accommodation can be facilitated by clearer and more fulsome accommodation policies which will likely entail the re-allocation of Crown-held land and resources through joint decision-making and negotiated agreements. Alternatively, specialized dispute resolution mechanisms can be contemplated in such policies where agreements cannot be reached between the Crown and First Nations.

Much work needs to be done to address the changes required to improve the integrity, quality and productivity of consultation and accommodation policies across various jurisdictions in Canada. The challenge is one that requires considerable work and *bona fide* effort, through collaboration and good will. Progress is being made and will continue to be made so long as collaborative efforts between the Crown and First Nations continue in relation to the development and amendment of existing consultation and accommodation policies.