What is the nature of the duty to consult?

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It has been established by the Supreme Court of Canada in *Delgamuukw* that the Crown has a duty to consult with First Nations. The Court has recently ruled that existing treaties, new and old, do not absolve the Crown of this duty. But recent cases have only begun to deal with the nature of consultation.

There are several key questions that have not been decided in Canadian law. What are the duties of the Crown in the consultation process? Are there varying levels of consultation?

On November 4, 2008 in the case of *Hupacasath First Nation v. British Columbia* the B.C. Supreme Court distinguished "deep consultation" from "lower levels of consultation." In allowing a petition by the First Nation for the appointment of a mediator to address the levels of consultation and accommodation required in the disposition of licences on privately held lands which are the subject of an Aboriginal title claim, the Court discussed the balancing required to determine if the duty to be consulted and accommodated has been met.

The Court raised the distinction between the content of the consultation and the process of the consultation. In order to evaluate whether the Province had fully accommodated the Hupacasath concerns, the Court reviewed the substance of the Crown proposals and the Hupacasath concerns on an item by item basis. To do so the Court considered whether the Crown consultation was required to be go beyond its obligations, Provincial policies, and legislation.

The Court stated:

"I find that there was little in the Crown's offer specifically relating to the HFN concerns regarding their possible future exercise of aboriginal rights . . .

and:

". . . one sees a number of occasions when HFN representatives suggested possible accommodations . . . beyond financial compensation . . . or legislative change . . . to preserve it as a sacred site. The record shows that the Crown declined to engage with respect to those suggestions, instead agreeing only to review the ways in which current legislation applies . . .

The extent of the consultation that is required will vary depending upon the strength of the First Nation's claim, and depending upon the extent of the potential infringement of First Nations rights. Deeper consultation may be required to find a satisfactory interim solution to First Nations concerns where a) a strong *prima facie* case for the claim is established, b) the right and potential infringement is of high significance to the Aboriginal peoples, or c) the risk of non-compensable damage is high.

The purpose of accommodation is reconciliation, such that it requires good faith efforts to understand each other's concerns and move to address them, compromise and attempt to resolve conflicting interests. So what are the reasonable concessions that the Crown must make in order to be seen as bargaining in good faith, and to be seen as willing to accommodate, even if it is hard bargaining?

Justice Smith found that based on the Supreme Court of Canada's ruling in *Mikisew*, even a "lower level of consultation" requires the Crown to "solicit and listen carefully" to a First Nation's concerns and "attempt to minimize adverse impacts" on their rights, prior to a proposed development.

Elsewhere in the same decision Justice Smith characterizes this kind of "low level" consultation in these words:

> It does require informed discussion between the Crown and the [First Nation] in which the [First Nation] have the opportunity to put forward their views and in which the Crown considers their position in good faith and where possible integrates them into its plan of action.

Could the Crown find a way to assist the First Nation in retaining access to at least the most important of their sacred sites? Was it possible for the Crown to provide improved access to resources on the Crown lands in replacement of the former access to such resources on the Removed Lands? Could wildlife corridors be created so that the animals hunted by the First Nation would still be available on the Crown lands? Consultation required the Crown to agree to a process that would be capable of addressing concerns raised by the First Nation, even if no agreement was reached.

While this definition of consultation is somewhat open-ended and leaves the question about what "moderate" or "deeper consultation" might look like, the general idea is that the Crown engages in a process that attempts to reconcile their own interests with those of the First Nation, where feasible. The Crown must be involved in a process that focuses on the possible impacts of a decision on the First Nation. If other public review processes are engaged, but do not address impacts on the First Nation, the duty to consult is not met. If a decision of the Crown has already been made, and a duty to consult is owed but not acted upon, then accommodation of the First Nations concerns is required.