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Policy Brief

‘Duty to Consult’: Environmental Impacts and Métis Indigenous Knowledge

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by

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Introduction

Environmental initiatives are increasingly acknowledging the legal obligation to consult with Canada's Aboriginal peoples and are actively soliciting their input and knowledges. However, past processes have often marginalized the Métis and their perspectives on Indigenous Knowledge (IK). Even the appropriateness of that label for Métis 'ways of knowing' is just beginning to be explored.

This policy brief addresses the following: What is the basis for the Crown's duty to consult with Canada's Métis communities about environmental issues? With whom should the Crown consult in terms of Métis communities? What are the sources of Métis Indigenous Knowledge (MIK)? How could a consultation process be designed to fulfill the Crown's duty to consult while meeting the needs of Métis rights-bearing communities and clearly incorporating their knowledges?

Duty to Consult with Métis on Environmental Issues

The Crown's duty to consult arises through Section 35(1) of the *Constitution Act*, 1982, the doctrines associated with the 'honour of the Crown' and the Crown's fiduciary relationship with Canada's Aboriginal peoples.¹ The Crown has a duty to consult with all of Canada's Aboriginal peoples about any policies or projects that might affect their rights², territories

¹ "A fiduciary relationship arises when one party finds itself in a position of control vis-à-vis the legal or practical interests of another, such that through its discretion the party in control can unilaterally act to positively or negatively affect these interests of the other." Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" *UBC Law Review* 39 (2006), 144.

² The doctrine of aboriginal rights is a form of "inter-societal" law. It regulates the relations between Canadian Aboriginal and non-Aboriginal communities. It is a body of common law based on 1) the ancient relations between Aboriginal peoples and the Crown and, 2) basic principles of justice. Brian Slattery, "Making Sense of Aboriginal and Treaty

and well-being, and cannot delegate its duty to third parties such as industry or other agencies.³

Developing effective policy for implementing the duty to consult with Métis is difficult for two reasons: the vagueness regarding consultation when no *proven* rights exist on the one hand, and the uncertainty about the role of the provincial Crown in the consultation process on the other.⁴ These are both particularly salient problems for Canada's Métis. First, Métis rights and rights-bearing communities are just beginning to be acknowledged and defined through the Canadian court system. Second, who represents Métis is an ongoing negotiation within and among Métis rights-bearing communities. Third, the ambivalent positioning as either a federal or provincial responsibility vis-à-vis the *Constitution Act*, Sec. 91/24 is a continuing source of uncertainty. Finally, Métis communities who will have considerable difficulty proving Aboriginal title (e.g. land-based rights)⁵ as laid out in *Delgamuukw*⁶ would also not have the standing of 'Indians', as defined by the Indian Act. It follows, then, that the duty to consult with Canada's Métis and the nature of the guidelines for that consultation might be undermined if a pan-Aboriginal approach hides or conflates the differences amongst Canada's Aboriginal peoples. By extension, a "pan-Métis" approach to

Rights" *The Canadian Bar Review* 79 (2000), 198-199.

³ Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People" *Alberta LawReview* 41 (2003), 72.

⁴ Isaac and Knox, "The Crown's Duty to Consult", 67.

⁵ The 8 Alberta Métis settlements have the only legislated land base in Canada, see <http://www.ualberta.ca/~walld/ab2intro.html> (accessed May 6, 2009)

⁶ Teillet, *Métis Law Summary*, 2006, 60. Teillet suggests that Métis groups are unlikely to be able to meet the exclusive occupancy criteria as laid out in *Delgamuukw*. Instead, a different claim would be needed based on joint occupancy. Sufficiency of evidence would be difficult for Métis due to their mobility across a wide regional area. For existing Métis land rights case law see p. 61-64. For Métis land claims and agreements see p. 72-72.

consultation may also hide or conflate the differences amongst Canada's Métis.

Mapping Contemporary Métis Identities

With which Métis communities does the Crown consult? In other words, who is Métis for the purposes of Section 35(1) of the *Constitution Act*, 1982? In some areas, highly-developed Métis political organizations and consultation protocols already exist. However, not all Métis are represented by existing organizations, or included in current protocols. In fact, apart from some general comments made by the Supreme Court in the *Powley* decision, little has been accomplished in terms of developing newer, and perhaps more inclusive, ways of defining Métis identities and Métis rights-holders. The same could be said with regards to developing policy that includes Métis more effectively in the duty to consult about environmental issues.

So far Canadian case law has outlined three criteria that are now commonly used by most Métis political organizations to define their citizenship. However, it has been shown that these criteria –namely, self-identification, ancestral connection, and community acceptance – have been narrowly interpreted and not problematized to any great extent. There is a need to re-think and re-frame Métis identities in keeping both with current theories of identity and contemporary realities. Narrow definitions of Métis identities by scholars, politicians, and the Canadian legal system have given rise to imbalances of political power within and among Métis communities themselves.

Among the most controversial definitions of Métis rights-bearing communities is the idea of the Métis people as one nation, often referred to as “The Métis Nation”⁷. However, since official recognition in 1982, many different groups of Métis have adopted the term ‘nation’ to define themselves collectively.⁸ Furthermore, the

tendency of scholars and politicians to equate ‘political constituencies’ with ‘community’ marginalizes those Métis who have yet to develop political organizations to effectively represent them in current negotiations and consultation processes. Clearly, in defining Métis rights and exercising the duty to consult, Métis political constituencies are instrumental and perhaps even desirable for Métis people and governments alike. But, the reality of Métis political representation reveals some significant gaps and challenges. It is not unusual to have more than one Métis political organization vying for the same members, some of whom may even change their loyalties over the years.⁹ Furthermore, not all Métis people choose to affiliate themselves with, or hold a membership in, a Métis political organization.¹⁰ Moreover, not all Métis communities have the means to develop effective political organizations – although they may in the future.

Métis Indigenous Knowledge (MIK)

Environmental consultation processes have begun to recognize the importance of Indigenous Knowledge (IK).¹¹ But the term IK conflates the

representing Métis on a provincial level. Almost every province in Canada has one organization which calls itself a Métis Nation, for example, the Métis Nation of Ontario, Manitoba, Quebec, and so on. In fact, some groups in the United States have begun adopting this term too.

⁹ For more details on the socio-political development of the Ontario Métis, see Annette Chretien, “From the Other Natives to the Other Métis” *Canadian Journal of Native Studies* XXVIII, 1 (2008): 89-118.

¹⁰ This point gives rise to the issue of representativity. For example, some argue that statistics demonstrate that not all Métis in Ontario are represented by one single political organization. For more details see, “Letter to Ontario Government” <http://www.o-cap.ca/article/metis-representation-136.asp> (Accessed December 1st, 2009).

¹¹ For example, environmental assessment processes are now typically required to incorporate IK into their public participation mechanisms including the Canadian Environmental Assessment Act, Government of Canada, “Canadian Environmental Assessment Act.” June 2003. http://www.ceaa.gc.ca/013/act_e.htm (accessed August 2008). See also G. Poelzer, “Aboriginal

⁷ More often than not, most people associate “The Métis Nation” with the political body known as the Métis National Council (MNC).

⁸ Most Métis groups who use the term “Métis Nation” are actually political organizations, usually

many different permeations of Aboriginal knowledge.¹² The extent to which such understandings and interpretations of IK might represent Métis ways of knowing is an unexplored area of research. Existing challenges in identifying the sources of MIK range from methodological to ethical and even theoretical issues. Difficulties facing environmental researchers attempting to integrate IK into their work include a lack of knowledge about ethnographic methods in the field, and an understanding of how to interpret oral narratives in scientific research.¹³ Aboriginal scholars

Peoples and Environmental Policy in Canada: No Longer on the Margins" D. L. VanNijnatten and R. Boardman (eds.), *Canadian Environmental Policy: Context and Cases*, 2nd edition (Don Mills, Ontario: Oxford University Press 2002), 87-106; R. E. Johannes, "Integrating Traditional Ecological Knowledge and Management with Environmental Impact Assessment." Inglis, J.T. (ed.), *Traditional Ecological Knowledge: Concepts and Cases* (Ottawa: International Program on Traditional Ecological Knowledge and International Development Research Centre 1993); and F. Berkes, "Traditional Ecological Knowledge in Perspective." J.T. Inglis (ed.), *Traditional Ecological Knowledge: Concepts and Cases* (Ottawa: International Program on Traditional Ecological Knowledge and International Development Research Centre 2003).

¹² Some of these permeations include Traditional Ecological Knowledge (TEK), Aboriginal Traditional Knowledge (ATK), Traditional Knowledge (TK), and more recently *Inuit* Qaujimañituganquit (IQ). For more details see Nicolas Houde, "The Six Faces of Traditional Ecological Knowledge: Challenges and Opportunities for Canadian Co-Management Arrangements" *Ecology and Society* 12 (2007), 36. For more details on IQ see, Anne Kendrick and Micheline Manseau, "Representing Traditional Knowledge: Resource Management and Inuit Knowledge of Barren-Ground Caribou" *Society and Natural Resources* 21 (2008), 404-418.

¹³ Cruikshank argues that oral narratives need to be viewed beyond the existing attitudes towards TEK and underlying premises of TEK studies: "that they treat deeply different cultural perspectives as bridgeable by concepts such as 'biodiversity', 'sustainable development' or 'co-management framed within scientific discourse.'" Julie Cruikshank, "Glaciers and Climate Change: Perspectives from Oral Tradition [of Athapaskan and Tlingit elders]" *Arctic* 54 (2001), 377.

stress that we need to view IK not as 'object' but something one does, as a "way of living". McGregor asks, "If Indigenous Knowledge is something one does, rather than simply something one knows, how is it acquired? What is the process of 'coming to know'?"¹⁴

The Métis Nation British Columbia *Consultation Guidebook* provides this definition: "Métis Traditional Knowledge is that body of information, values, beliefs and practices passed on from one generation to the another by oral means or through land-based experience that pertains to the identity, culture and heritage of the Métis people and their respect for the land and its resources."¹⁵

Given the challenges discussed above, how then do we begin to integrate MIK in environmental consultations related to the duty to consult? The identity trails Chrétien originally identified in her previous research on contemporary Métis identities, combined with insights from the IK literature, can serve to underpin a deeper understanding of some key aspects of MIK and the relationships that define it.¹⁶ These include:

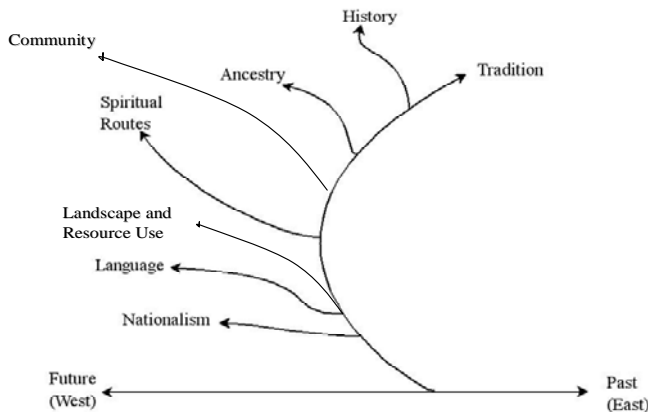
1. Tradition
2. History
3. Ancestry
4. Spiritual Roots/Routes and Values
5. Language
6. Nationalism
7. Community
8. Landscape and Resource Use

¹⁴ Deborah McGregor, "Coming Full Circle" *American Indian Quarterly* 28 (2004), 390-391.

¹⁵ Métis Nation of British Columbia, *Consultation Guidebook*, February 25, 2009, 12 <http://www.mpcbc.bc.ca/bcmanr/pdf/Final%20Consultation%20Guidelines.pdf> (Accessed December 1st, 2009).

¹⁶ For more details on identity trails, see Annette Chretien *Fresh Tracks in Dead Air: Mediating Contemporary Métis Identities Through Music and Storytelling*. Ph.D. Dissertation, York University, 2006.

Figure 1: Identity Trails



The authors wish to emphasize that these are by no means the only relationships through which Métis communities define themselves, but they can serve as a starting point. They would emphasize that different Métis people may have a different process of self-identification, or be at various stages in their sense of identity.¹⁷ If these relationships are framed as questions, they can provide a research approach and a framework for identification of rights-bearing Métis communities and their specific ways of knowing which is more in keeping with contemporary theories.

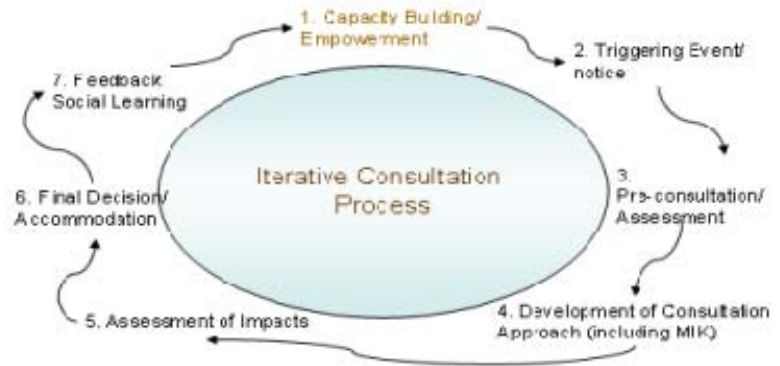
Suggested Approach to Consultation with Métis Rights-Bearing Communities

What should a consultation process look like? It requires an approach that accommodates both strategic (e.g. planning) and project-specific consultation processes, and that follows the consultation process from inception through to the completion and monitoring stage. Rather than over-taxing or disempowering Aboriginal communities, each initiative should be considered as part of an iterative process, with the ultimate goal focused on increasing the capacity (knowledge, resources, and resiliency)

¹⁷ For example, the writing of Métis histories has barely begun in areas outside of Western Canada. Given this lacunae, Métis people in other regions must rely on oral testimonies to legitimate their own experiences.

of the Aboriginal participants. Thus, the steps in a consultation process are outlined below.

Figure 1: Steps in a Consultation Process



Some Métis communities in Canada are already deeply involved in environmental consultation processes, others are not. As the process of Métis self-identification unfolds and understandings of MIK develop, how can the duty to consult be fulfilled in a manner that incorporates a broader representation from across rights-bearing communities? The authors suggest that community advisory councils (CACs) seem particularly well suited to the broader inclusion of Métis rights-bearing communities.¹⁸ These are flexible committees,

¹⁸ There are many participation mechanisms available that could allow for the inclusion of political and cultural organizations, as well as other Métis groups and knowledge holders. These include citizen's juries, citizen's panels, citizen's tribunals, consensus conferences and community advisory councils (or community liaison groups). For more details on these see Frank Fischer, *Citizens, Experts and the Environment: The Politics of Local Knowledge* (London: Duke University Press, 2000) 234-278; Kevin R. Ballard and Richard G. Kuhn, "Developing and Testing a Facility Location Model for Canadian Nuclear Fuel Waste" *Risk Analysis* 16 (1996) 824; Dave Block, "Sacramento County Campaigns for Biosolids Recycling" *BioCycle* 38 (1997) 78; N. Gibson, A. Cave, D. Doering, L. Ortiz, P. Harms, "Socio-cultural Factors Influencing Prevention and Treatment of Tuberculosis in Immigrant and Aboriginal Communities in Canada" *Social Science and Medicine* 61 (2005) 933.

either ad hoc or permanent, that gather together representatives whose interests are affected by a particular issue or initiative (either strategic or project-based). This type of committee structure has been used successfully in both environmental and health projects and has often involved Aboriginal representation.

The proposed process combined with a CAC structure could allow Métis rights-bearing communities to self-identify and organize. In the meantime, a more inclusive approach to consultation could include the following:

- Political organizations at the national, provincial, regional and local levels
- Local/Municipal governments in largely Métis communities

- Cultural associations at the national, provincial, regional and local levels
- Other Métis 'groups or collectives'
- Other local knowledge holders (e.g. elders)

With the proper institutional support, this suggested approach could also build capacity amongst Métis groups to more meaningfully participate in environmental initiatives. Under these circumstances, the Crown should be able to argue that it proceeded in an honourable manner and that it has consulted collectively with the Métis rights-bearing communities. This may reduce litigation and increase stability and sustainability for all involved.