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# Policy Brief

## ***The Duty to Consult Doctrine and Representative Structures for Consultation with Métis Communities and Non-Status Indian Communities***

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*by*

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## Introduction

The modern “duty to consult” doctrine that has developed in Canadian law in the past five years<sup>1</sup> has arisen from cases involving First Nations. First Nations have legally entrenched and recognized representative structures. Thus, in these contexts, governments have generally been able to apply the duty to consult doctrine without ambiguity about with whom consultation must take place. In contrast, Métis communities and Non-Status Indian communities, although having important differences between them, do not have legally entrenched governance structures. As a result, these communities may have an important commonality in potentially having rights to consultation in some contexts, but without clarity concerning whom consultation would take place.

This brief draws on a longer paper providing a legal analysis of two leading cases, outside the First Nations context, on *consultation with a representative organization or entity*. These cases enable further contemplation of possibilities and options for fulfillment of the duty to consult with Métis communities and Non-Status Indian communities when required. An analysis of these cases provides distinguishing factors between different possible representative structures that could provide guidance on the legal parameters applying as governments establish policy options for promoting the fulfillment of

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<sup>1</sup> The associated full paper cites more of the literature on the duty to consult. The one academic book in the area is Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009). However, there remains significant room for further literature in this important area.

the duty to consult doctrine with Métis communities and with Non-Status Indian communities.

## Background

The Supreme Court of Canada’s (SCC) elaboration of the “duty to consult” in its 2004 judgment in the *Haida Nation* case,<sup>2</sup> along with further elaboration in the *Taku River Tlingit First Nation* case<sup>3</sup> and *Mikisew Cree First Nation* case,<sup>4</sup> has opened enormous new possibilities for relationships between governments and Aboriginal communities. The doctrine advances a more widespread and far-reaching dialogue and interaction between governments and Aboriginal communities, rather than the more limited set of formal negotiations around specific issues that were encouraged in prior case law.

The duty to consult doctrine, like many others in the jurisprudence under s. 35 of the *Constitution Act, 1982*,<sup>5</sup> was developed in a context of litigation with legally recognized First Nations rather than with Métis communities or with so-called “Non-Status Indian” communities.<sup>6</sup> Although there are very

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<sup>2</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.

<sup>3</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550.

<sup>4</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388.

<sup>5</sup> Being Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11.

<sup>6</sup> Métis communities are communities that are part of a culture that formed post-contact among individuals of mixed Aboriginal-European ancestry, with the Supreme Court of Canada having provided more precise legal definitions in *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207. The jurisprudence has tended to define the scope of Métis rights-bearing communities on the basis

significant differences between the situations of Métis and Non-Status communities, both lack the legally entrenched and recognized governance structures that Status Indians (those registered under the *Indian Act* structures) have through their First Nations. Such recognized governance structures fit more readily with the duty to consult doctrine and allow for more straightforward legal and other determinations.

Fundamentally, the duty to consult is owed by government to rights-holding communities that hold the specific Aboriginal or treaty rights engaging the duty to consult; in other words, the entity with which consultation must occur is presumptively the relevant rights-bearing community. However, if that rights-bearing community does not have, a legally recognized governance structure, as will often be the case with Métis and Non-Status Indian communities, then it is necessary to consider whether some other entity can be accepted for consultation purposes.

### **The Duty to Consult with Métis and Non-Status Indian Communities**

This policy brief is based on the premise that there are circumstances in which governments have a duty to consult with Métis and/or Non-Status Indian communities. It is important to explain

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of regional communities: *Powley, ibid*; *R. v. Bellhumeur*, 2007 SKPC 114, 301 Sask. R. 292; *R. v. Goodon*, 2008 MBPC 59, 234 Man. R. (2d) 278. So-called Non-Status Indian communities are composed of Aboriginal individuals who are of Indian or First Nations ancestry and would so identify but do not have *Indian Act* status. Of course, many off-reserve Aboriginal communities will actually contain individuals with a mixture of statuses.

that presupposition slightly further. A duty to consult an Aboriginal community arises based on a government's actual or constructive knowledge of a claimed or potential Aboriginal or treaty right that might be affected by a specific government action or decision.<sup>7</sup> Métis communities are specifically enumerated in s. 35 as amongst the Aboriginal peoples of Canada. It has thus seemed to flow in a reasonably straightforward manner from the duty to consult jurisprudence that a duty to consult would also arise in the context of an Aboriginal or treaty right held by a Métis rights-bearing community,<sup>8</sup> subject to some further considerations discussed in the longer paper.

“Non-Status Indians” are obviously not explicitly enumerated in s. 35, but, as discussed in the paper, there is nonetheless strong reason to think that Non-Status Indians could at least potentially hold s. 35 rights. Although there has not been a definitive judicial recognition of a Non-Status Indian right or the duty to consult a Non-Status Indian community, such a right or such a duty must be considered a live possibility.

Accordingly, it follows that both Métis and Non-Status Indian communities

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<sup>7</sup> This is the triggering or engagement step within the duty to consult analysis (see Newman, *supra* note 1, at 24ff.). The scope or depth of the duty in particular circumstances is subject to a further analysis from the case law. Note that “constructive knowledge” in this triggering test refers to a situation where the government may not actually know of a right but legally ought to have.

<sup>8</sup> See especially Thomas Isaac, *Métis Rights* (Saskatoon: University of Saskatchewan Native Law Centre, 2008) at 41-48.

could reasonably be beneficiaries of the duty to consult in circumstances where their Aboriginal or treaty rights are potentially affected. Without denying the different situations and circumstances of Métis and Non-Status Indian communities, this policy brief nonetheless considers them together as communities that have thus far not received equal treatment where the duty to consult doctrine has been discussed or implemented, and particularly as a result of their lack of recognized governance and representative structures.

### **Legal Analysis of Cases Bearing on Consultation with a Representative Body**

Two leading cases bear on consultation with a representative body in place of an already recognized representative of a rights-bearing community with a recognized governance structure. In *Native Council of Nova Scotia v. Canada (Attorney General)*, the Federal Court rejected the applicant organization as a consultation partner,<sup>9</sup> with the Federal Court of Appeal upholding the judgment but declaring this specific issue one that did not need to be resolved.<sup>10</sup> In *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, the Newfoundland and Labrador Court of Appeal accepted the Labrador Métis Nation as an appropriate consultation partner despite some complications around this issue.<sup>11</sup>

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<sup>9</sup> *Native Council of Nova Scotia v. Canada (Attorney General)*, 2007 FC 45, [2007] 2 C.N.L.R. 233 [NCNS Fed. Ct. Decision].

<sup>10</sup> *Native Council of Nova Scotia v. Canada (Attorney General)*, 2008 FCA 113, [2008] 3 C.N.L.R. 286 [NCNS Fed. C.A. Decision].

<sup>11</sup> *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and*

Although there is an emerging body of case law on point with the issue of the scope of Métis rights-bearing communities, this case law has not directly addressed the combination of issues that arise in respect of the duty to consult. The issues in question involve both the extent of the membership of the rights-bearing community and the representation of that rights-bearing community. The two cases discussed offer a route to much greater clarity on otherwise highly contestable issues, particularly insofar as they provide the possibility for Métis communities and Non-Status communities to themselves work towards clarifying the uncertainties that would otherwise exist.

Given their differing outcomes and the reasons expressed in relation to those outcomes, these two cases reveal some important distinguishing factors concerning when it is permissible for a representative body to act for consultation purposes on behalf of the relevant rights-bearing communities and, thus, when it is permissible for governments to consult with such a representative body.

These distinguishing factors, summarized here, have several important implications. First, representative entities can be recognized where recognized governance structures matching to the level of entity that is the rights-holding community do not already exist. But second, they will be recognized only subject to the following conditions: having adequate support as consultation entities from the relevant

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*Works*), 2007 NLCA 75, 288 D.L.R. (4th) 641 [LMN C.A. Decision], leave to appeal to S.C.C. denied: S.C.C. File No. 32468 (29 May 2008).

rights-holding communities; not having conflicts arising from mixed membership; and having clarity on the part of members that these entities are to carry out consultation. The payoff, therefore, from case law analysis is that these distinguishing factors help to define how to identify certain representative organizations as potentially gaining legal recognition as consultation partners and others not gaining such recognition. The factors thereby act as significant legal opportunities, parameters, and constraints that provide some relevant guidance on the policy options on facilitating duty to consult structures.

### **Resulting Options Analysis and Recommendations**

This brief contends that there is an onus on governments to ensure that consultation can occur with rights-bearing Métis communities and rights-bearing Non-Status Indian communities. This onus derives both from government's duty to act in the public interest and from the specific legal risks arising from any failure to carry out adequate fulfillment of the duty to consult. This applies to both federal and provincial governments, regardless of any debates outside this context on whether federal or provincial governments have primary responsibility in relation to Métis and Non-Status Indian policy.

An associated paper, as referenced earlier, carries out a longer analysis of some of the policy options. Its key point is that the legal parameters from above must be respected in the development of consultation structures and arrangements. Governments may appropriately use them as

conditionalities on their readiness to recognize duty to consult policies that may be developed by Métis organizations and Non-Status Indian communities.

In the Métis context, duty to consult considerations may provide an impetus for the greater recognition by governments of Métis governance structures. Independently of that option, which is subject to further considerations, governments should signal a specific willingness to recognize Métis duty to consult policies, which are currently being formed. This recognition might be conditioned on these policies meeting the legal parameters identified. Governments should also provide capacity-building support as needed.

For their part, Non-Status Indian communities must seek to develop efficient consultation mechanisms with reasonably broad-based organizations. In so doing it must be recognized that further work is required to meet some of the requirements flowing from the legal parameters, developing internal mechanisms that can provide consultation modalities separating the interests of different rights-bearers as required.

A second option, not necessarily mutually exclusive with the first, involves seeking to further support recognition and development of more localized governance structures for Non-Status Indian communities. However, this option is subject to considerations beyond the scope of this paper in terms of the overall efficiency of such structures. In addition, different circumstances arising from situations in Non-Status communities in different

locales across the country would have to be taken into consideration.

Governments, however, may seek to facilitate this option in circumstances where it is otherwise appropriate. But, within this option, they will need to develop conditionalities on the structures matching the rights-bearing communities in a manner fitting with the legal parameters from the case law.

A third option is relevant particularly where rights held by Non-Status Indian communities are identified as potentially at issue but consultation mechanisms of the sort from the first two options are not available. This option envisions a more direct public consultation endeavour. However, this would be subject to considerations related to the substantive matters at issue and would be relatively complex to organize in a manner meeting all of the legal requirements and parameters. This third option is probably disadvantageous but remains a possible option if required.

Apart from these policy recommendations and options, it bears noting that the area of study remains very much underdeveloped. There has been far too little attention to the unique needs of Métis communities and of Non-Status Indian communities. It is important that there continue to be the commissioning of research on what are actually complex, multidimensional, multiparty issues that deserve ongoing analysis.

In any event, there is a clear policy case for governments and Métis and Non-Status Indian communities to seek to work out ways in which the duty to consult can work. A good start would be to pursue some of the policy steps

outlined in this paper for Métis communities and Non-Status Indian communities to be able to be represented in consultations. Both good policy and honourable relations with Aboriginal communities demand no less.