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

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March 2010

Acknowledgements

This publication is part of the Aboriginal Policy Research Series, which focuses on public policy issues affecting Métis, non-status Indians, and other Aboriginal peoples residing off-reserve. The series is produced in a partnership between the Institute On Governance (IOG) and the Office of the Federal Interlocutor for Métis and Non-Status Indians (OFI).

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Abstract

This paper analyzes the implications of recent duty to consult case law that has implications for Métis and Non-Status Indian communities and for governments' interactions with them. At a general level, the duty to consult doctrine has been acknowledged as opening new opportunities for Aboriginal communities. However, the doctrine has developed in the specific context of consultations with recognized First Nations, with unanswered questions in the context of Métis and Non-Status Indian communities. Part I of the paper situates and briefly explains some recent cases that open the possibility of consultation through representative agent bodies, and these cases have major implications for off-reserve communities. Part II identifies the distinguishing factors that emerge between agents that have been recognized and those that have not. Part III analyzes how opportunities for Métis and Non-Status communities to be involved in consultation can be enhanced and points to the shared interests between governments and Aboriginal communities in furthering this reality through various identified policy steps.

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Introduction

The Supreme Court of Canada's (SCC) elaboration of the "duty to consult" in its 2004 judgment in the *Haida Nation* case,¹ along with further elaboration in the *Taku River Tlingit First Nation* case² and *Mikisew Cree First Nation* case,³ has opened enormous new possibilities for relationships between governments and Aboriginal communities.⁴ 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.⁵ The development of the duty to consult doctrine also makes it much more likely that governments, industry stakeholders, and Aboriginal communities will begin to come to terms with significant issues that have thus far not been subjected to full discussion, such as the sharing of resource revenues.⁶

The duty to consult doctrine, like many others in the jurisprudence under s. 35 of the *Constitution Act, 1982*,⁷ 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.⁸ Although there are very significant differences between the situations of Métis

¹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.

² *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550.

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

⁴ The literature on the post-2004 duty to consult remains limited. The one book-length work on the topic, surveying some of the key lower court case law since 2004 as well as relevant policies, is Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009). With the exception of some significant case comments, the most significant articles or chapters to discuss the duty would include: Jeffrey Harris, "Emerging Issues: Natural Resources and the Duty to Consult and Accommodate: An Examination of the Content," in *Proceedings of the National Aboriginal Law CLE Conference* (Ottawa: Canadian Bar Association, Mar. 2005); Tom Isaac, Tony Knox and Sarah Bird, "The Crown's Duty to Consult and Accommodate Aboriginal Peoples: The Supreme Court of Canada Decision in *Haida*" (2005) 63 *The Advocate* 61; Megan Brady & Ben Millard, "*Haida Nation v. British Columbia*: What Obligations do Developers Owe to First Nations?" in Dwight Dorey & Joseph Magnet, eds., *Legal Aspects of Aboriginal Business Development* (Toronto: LexisNexis Canada, 2005) 367; Ronald Murphy, Richard Devlin & Tamara Lorincz, "Aquaculture Law and Policy in Canada and the Duty to Consult with Aboriginal Peoples," in David L. VanderZwaag & Gloria Chao (eds.), *Aquaculture Law and Policy: Towards Principled Access and Operations* (New York: Routledge, 2006), p. 293; Heather L. Treacy, Tara L. Campbell & Jamie D. Dickson, "The Current State of the Law on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development" (2007) 44 *Alta. L. Rev.* 571; Christopher G. Devlin, "Deep Consultation at a Higher Level: *Wii'litswx v. British Columbia (Minister of Forests)*" (2009) 67 *The Advocate* 25; Maria Morellato, "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights," National Centre for First Nations Governance Research Paper (Feb. 2009); James (Sa'k'ej) Youngblood Henderson, "Dialogical Governance: A Method of Constitutional Governance" (2009) 72 *Sask. L. Rev.* 29.

⁵ Henderson, *ibid.* would envision this new dialogue in a particularly robust form, but whether or not it goes as far as he suggests, it does encompass an interaction with a range of government decision-makers beyond that occurring previously. The courts have indicated preferences for negotiation for some time. For one article citing a number of examples and discussing this phenomenon, see Dwight G. Newman, "Negotiated Rights Enforcement" (2006) 69 *Sask. L. Rev.* 119.

⁶ This conversation has been raised in very substantial ways in the duty to consult context: see Newman, *The Duty to Consult*, *supra* note 4 at 61-62, 77.

⁷ Being Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11.

⁸ 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-



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 that make the idea of a duty to consult significantly more straightforward in that context.⁹ 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-holding community.¹⁰ However, if that rights-holding community does not have, at the same level and giving representation specifically of that rights-holding community, 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 mechanisms by which there will be consultation with Aboriginal communities other than recognized First Nations remain significantly under-defined. If continued, this under-definition may have very serious ramifications for communities of Aboriginal peoples that may, as a result, miss the potential opportunities afforded by this new doctrine.¹¹ This paper seeks ultimately to

bearing communities on the basis of regional communities: see *e.g. Powley, ibid.*; *R. v. Belhumeur*, 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. In some cases, status has been lost through the complex application of legal rules that have not corresponded with individuals' identities. In others, particular Aboriginal communities may never have been brought into treaty or *Indian Act* structures, and descendants may now live as Non-Status Indian communities. In yet others, revisions of band registers mistakenly removed individuals or communities (see Joseph E. Magnet, Andrew K. Lokan & Eric M. Adams, "'Arbitrary, Anachronistic and Harsh': Constitutional Jurisdiction in Relation to Non-Status Indians and Métis", in Dwight Dorey & Joseph Magnet, eds., *Legal Aspects of Aboriginal Business Development* (Toronto: LexisNexis Canada, 2005) 167 at 179-81). Of course, many off-reserve Aboriginal communities will actually contain individuals with a mixture of statuses. One question that will arise in such contexts is whether the community is rights-bearing. The National Association of Friendship Centres has attempted to open the question of whether mixed urban Aboriginal communities might be distinct rights-bearing communities for some purposes (see National Association of Friendship Centres, "The Government's Duty to Consult Urban Aboriginal People" (March 2009)) but this question has been little discussed to this stage and does not fit easily with the existing s. 35 rights test in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, even as modified in *R v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686.

⁹ Two caveats apply to this statement. First, there are contexts in which Métis governance structures have attained greater recognition, particularly in a limited statutory recognition of the Métis Nation of Saskatchewan in Saskatchewan legislation and in Alberta's General Settlements Council system structuring Alberta Métis communities. The latter has been held in Alberta effectively to have more significance than the Supreme Court of Canada's decision in *Powley*, *supra* note 8, in defining membership in rights-bearing Métis communities in Alberta: see *R. v. Lizotte*, 2009 ABPC 287. Second, there may be more complex questions concerning representation of rights-bearing First Nation communities in some contexts. One example is present in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700. For discussion, see Dwight Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v. British Columbia*" (2008) 41 U.B.C. L.Rev. 249. Other complications may exist in contexts where there are conflicts between traditional leadership structures and *Indian Act* structures, with communities divided on which leadership structure best represents the community. However, these latter questions raise issues not within the scope of this paper.

¹⁰ Cf. Newman, *The Duty to Consult*, *supra* note 4 at 37.

¹¹ Saying this much is not to deny that there are challenges also associated with participating in consultation, notably the resource and capacity challenges when facing a larger number of consultation requests or particularly complex consultation requests. However, it nonetheless opens opportunities, whether in potentially facilitating changes to various policies subjected to consultation or in opening dialogues about topics like resource revenue sharing.

analyze what forms of governance structures and/or corporate organizations the key jurisprudence to date suggests could be recognized by the courts as entitled to pursue consultation on behalf of Métis or Non-Status Indian communities. More specifically, it seeks to analyze the policy implications of the early judicial guidance that has arisen on one related issue. That issue, based on the guidance offered through two particularly important court judgments, relates to what forms of governance institutions and/or corporate organizations the courts will recognize as entitled to pursue consultation on behalf of an Aboriginal community, particularly in the context of Métis or Non-Status Indians. In *Native Council of Nova Scotia v. Canada (Attorney General)*, the Federal Court rejected the applicant organization as a consultation partner,¹² with the Federal Court of Appeal upholding the judgment but declaring this specific issue one that did not need to be resolved.¹³ 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,¹⁴ with the SCC denying leave to appeal from this judgment.¹⁵

This latter case (at least the lower court phase¹⁶ affirmed by the Court of Appeal's judgment) has already been applied in at least one administrative tribunal's decision-making, with the Alberta Energy and Utilities Board in *Re Imperial Oil Resources Ventures Ltd.*¹⁷ considering the appropriateness of consultation with Métis locals and with other groups and individuals seeking recognition as consultation partners.¹⁸ Although this latter decision does not have precedential value in the same manner as a court judgment, it is nonetheless illustrative of the developing approaches and important to analyze in turn.

Part I of the paper briefly contextualizes the issue addressed by these cases within the law of the duty to consult and goes on to describe briefly each of these cases. Part II dissects the distinguishing factors that these cases have identified that have led the courts to recognize some governance institutions and corporate organizations as consultation partners and to reject others. Part III situates these factors in broader perspectives, considering the policy implications of the identification of these factors for steps that need to be taken by governments and by Aboriginal communities to ensure opportunities for Métis communities and Non-Status communities to participate fully in consultations.

However, all of this argument is premised on an underlying proposition that there are circumstances in which governments have a duty to consult with each of Métis and Non-Status

¹² *Native Council of Nova Scotia v. Canada (Attorney General)*, 2007 FC 45, [2007] 2 C.N.L.R. 233 [NCNS Fed. Ct. Decision].

¹³ *Native Council of Nova Scotia v. Canada (Attorney General)*, 2008 FCA 113, [2008] 3 C.N.L.R. 286 [NCNS Fed. C.A. Decision].

¹⁴ *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75, 288 D.L.R. (4th) 641 [LMN C.A. Decision].

¹⁵ S.C.C. File No. 32468 (29 May 2008).

¹⁶ *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2006 NLTD 119, [2006] 4 C.N.L.R. 94 [LMN TD Decision].

¹⁷ *Re Imperial Oil Resources Ventures Ltd.*, [2007] A.E.U.B.D. No. 13.

¹⁸ I discuss the details further in Part II, below.

Indian communities.¹⁹ Before proceeding with the analysis of the court decisions, it is important to explain that presupposition slightly further.²⁰

The Duty to Consult with Métis and Non-status Indian Communities

At the outset, it is worth distinguishing briefly between the contexts of Métis as opposed to Non-Status Indian communities with respect to the duty to consult. 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.²¹ Métis communities are specifically enumerated in s. 35 as amongst the Aboriginal peoples of Canada, and it has thus seemed to flow in a reasonably straightforward manner from the duty to consult jurisprudence - even when the case law had mentioned only First Nations - that a duty to consult would also arise in the context of an Aboriginal or treaty right held by a Métis rights-bearing community.²² Although Métis rights remain under-defined, and although there have been some judicial indications that the honour of the Crown principle underlying the duty to consult may not have the same implications in the Métis context as in the First Nations context,²³ there have nonetheless also been judicial decisions that imply the possibility of a duty to consult a Métis community in appropriate circumstances.²⁴

“Non-Status Indians” are obviously not explicitly enumerated in s. 35, but there is nonetheless strong reason to think that Non-Status Indians could at least potentially hold s. 35 rights. First, s. 35 says only that the Aboriginal peoples of Canada “includes” Indian, Inuit, and Métis peoples, thus leaving room for other non-enumerated Aboriginal peoples. Second, the term “Indian” within s. 35 also need not be read according to the *Indian Act* definition of “Indian”; indeed, to read it that way would be to say that the federal government, in making various amendments to the *Indian Act* definition over time, has in fact been making unauthorized constitutional amendments.²⁵ Moreover, the SCC also appears to have implicitly accepted that Non-Status Indian communities (or “non-band First Nations”) are s. 35 Aboriginal communities.²⁶ Although the identification of a community as a s. 35 Aboriginal community does not automatically mean that it actually bears specific s. 35 Aboriginal or treaty rights, this

¹⁹ Cf. *ibid.* at 39.

²⁰ One particular concern it will evoke for some is the prospect of further overlapping claims and conflicts between Métis communities, Non-Status Indian communities, and legally recognized First Nations. Thus, in some contexts, First Nations have sought to intervene in proceedings concerning Métis rights to try to ensure that their interests are not compromised by determinations concerning Métis rights: see e.g. *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2008 MBCA 131 (rejecting the intervention effort of Treaty 1 First Nations).

²¹ This is the triggering or engagement step within the duty to consult analysis (see Newman, *supra* note 4, at 24ff.). The scope or depth of the duty in particular circumstances is subject to a further analysis from the case law.

²² See especially Thomas Isaac, *Métis Rights* (Saskatoon: University of Saskatchewan Native Law Centre, 2008) at 41-48.

²³ See particularly *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2007 MBQB 293, 223 Man.R. (2d) 42, [2008] 2 C.N.L.R. 52 at paras. 640-46.

²⁴ See e.g. *R. v. Kelley*, 2007 ABQB 41, [2007] 5 W.W.R. 177 (indirectly implying the possibility of a duty to consult concerning Métis harvesting rights); *Kane v. Lac Pelletier (Rural Municipality No. 107)*, 2009 SKQB 348, [2009] 4 C.N.L.R. 108 (rejecting the duty to consult claim brought by a Métis elder but averting to the possibility of such a claim by a Métis rights-bearing community); *R. v. Badger*, 2009 SKPC 91, 340 Sask. R. 243, [2009] 4 C.N.L.R. 252 (citing approvingly the use of consultation funding by First Nations and Métis communities).

²⁵ On both arguments, cf. Magnet, Lokan & Adams, *supra* note 8, at 175-77.

²⁶ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

identification at least makes the holding of Aboriginal or treaty rights possible in circumstances that meet the requisite legal standards.

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 real possibility. Accordingly, it follows that both Métis and Non-Status Indian communities 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 (something that will lead to somewhat differing conclusions for the different communities in the last part of this paper), this paper nonetheless considers them together as communities that have thus far not received the same standing within discussions about the duty to consult for partly shared reasons concerning lack of recognized governance and representative structures.

Current federal government policy on the duty to consult, it bears noting, indirectly recognizes the possibility of rights held by Métis communities and does not preclude the possibility of rights held by Non-Status Indian communities. The main body of the *Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult and Accommodate*, after an early reference to the s. 35 rights of Indian, Inuit, and Métis peoples of Canada,²⁷ then chooses to refer only to the possibility that a project could “have implications for Métis and Non-status Indian interests,”²⁸ rather than rights. Some provincial policies have not yet found room for consultation with Métis communities,²⁹ whereas others have found definitive room for consultation with Métis communities and, indeed, are in continuing dialogue with Métis communities’ own development of duty to consult policies.³⁰

I. The Duty to Consult and the Case Law on Consultation Partners

The duty to consult doctrine, in simple terms, requires that governments consult Aboriginal communities whose Aboriginal or treaty rights might be affected by a particular government decision even prior to final judicial proof of the right or final determination of the right through a formal negotiated agreement.³¹ This is a constitutional requirement arising from s. 35 of the *Constitution Act, 1982* and an associated precept requiring that the Crown act in a manner consistent with the honour of the Crown.³² The degree of consultation required varies, based on specified factors related to the degree of likelihood of interference with an Aboriginal or treaty

²⁷ Canada, *Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult and Accommodate* (February 2008) at 5.

²⁸ *Ibid.* at 20 (underlining added).

²⁹ This is the case, for instance, with the main final Alberta policy: *Alberta’s First Nations Consultation Guidelines on Land Management and Resource Development* (November 14, 2007).

³⁰ This is the case, for instance, with even the interim Saskatchewan policies: Saskatchewan, *Draft First Nation and Métis Consultation Policy Framework* (December 2008).

³¹ For a fuller explanation, see generally Newman, *The Duty to Consult*, *supra* note 4.

³² *Haida Nation*, *supra* note 1 discusses the honour of the Crown at various places throughout the judgment. For one recent work trying to say something more general on the honour of the Crown, which has largely replaced the former concept of fiduciary duties to Aboriginal peoples, see generally J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Toronto: LexisNexis, 2008).

right and the significance of the impact of the government decision.³³ Furthermore, the degree of consultation required ranges from notice of the prospective government decision through to deeper consultation frameworks, through to, in appropriate instances, more thorough-going accommodation of the affected Aboriginal interests.³⁴

In simple terms, the consultation is to be with the community or communities whose rights are potentially affected. The courts have been clear that, given that Aboriginal and treaty rights are held by communities rather than by individuals, the duty to consult is a duty owed to communities and not to individuals.³⁵ Yet, even saying this much actually unveils an even more complicated set of questions. At what level of community are the rights considered to be held so as to give rise to consultation with that community? This question has been discussed little enough in respect of Aboriginal rights in First Nations contexts, with some discussion in the British Columbia Supreme Court's trial decision in the *Tsilhqot'in Nation* case being the one noteworthy attempt to grapple with it,³⁶ with this case ironically having drawn on the brief paragraphs in *Powley* that had sought to define how locally a Métis community was to be considered to be defined.³⁷ In the specific context of consultation, however, there is limited clarity, with questions of the level at which consultation is to take place having given rise to disputes between different First Nations' organizations. For instance, in some provinces, there have been live questions of whether consultation is to take place with individual First Nations, with a provincial federation, or even with a national-level organization such as the Assembly of First Nations.³⁸

The question is yet more complex in the context of Métis communities and Non-Status Indian communities whose representative structures may not have received as much definition, or at least definition recognized within the Canadian legal system. Questions of with whom consultations are to take place for rights that apply to Métis communities and Non-Status Indian communities remain extremely complex, despite some possible guidance from judicial decisions that some have taken to imply consultation with regional, provincial, or national Métis organizations over consultation with Métis locals.³⁹ That guidance, however, remains

³³ This spectrum is discussed in *Haida Nation*, *supra* note 1. See also Newman, *The Duty to Consult*, *supra* note 4 at 43-57.

³⁴ *Ibid.*

³⁵ *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203 at para. 38; Newman, *The Duty to Consult*, *supra* note 4 at 37.

³⁶ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at paras. 458-59, 470. For a co-authored case comment discussing this part of the case, see Dwight G. Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law" (2008) 41 U.B.C. L. Rev. 249.

³⁷ *Powley*, *supra* note 8. See also the reasoning of the Manitoba Provincial Court in *Goodon*, *supra* note 8, on the specification of a Métis rights-bearing community, with other cases having arisen in Saskatchewan and Manitoba as well.

³⁸ For some discussion of such disputes, see *e.g.* Newman, *The Duty to Consult*, *supra* note 4 at 71.

³⁹ Some attention has begun to be paid to these issues, with some recent presentations by Jason Madden being one particular instance, particularly Jason Madden, "Métis Consultation and Accommodation: Answering the 'Who' Question" (Presentation to the Métis Nation of Ontario & Law Society of Upper Canada Symposium on Métis Consultation and Accommodation, 27 March 2009, Toronto), text available at http://www.metisnation.org/PDF_new/Symposium_Consult_Accom_09.pdf Discussing a number of judicial decisions on the scope of Métis rights-bearing communities, Madden reasons in several ways towards a conclusion that consultation generally must take place with larger Métis organizations rather than at a more local level: "More simply put, the Métis collective that holds the right and that needs to be consulted will not be limited to one

inconsistent with significant existing practice, with many government and corporate stakeholders having taken the view that consultations would occur with Métis locals,⁴⁰ a surprising view when it is gradually appearing that Métis Aboriginal rights have regional Métis communities as the rights-holders.⁴¹ In any event, the question of whether consultation with Métis communities is to take place at local, regional, provincial, and/or national levels remains significantly under-defined.

The questions on consultation partners in the context of Métis communities and Non-Status Indian communities are precisely what are at the fore in the two leading recent cases that this paper will discuss. These cases are chosen, it bears noting, because they are cases on point on the duty to consult outside the First Nations context. Although there is an emerging body of case law on point with the issue of the scope of Métis rights-bearing communities, largely from decisions on harvesting rights and largely on the prairies,⁴² this case law has not directly addressed the combination of issues that arise in respect of the duty to consult, which involve both the scope of the rights-bearing community and the representation of that rights-bearing community. The two leading cases I will discuss 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. The *Native Council of Nova Scotia* case and the *Labrador Métis Nation* case, in my submission, have a crucial importance for future consultation with Aboriginal Canadians who do not have membership in First Nations with *Indian Act* status,⁴³ obviously with contextual differences for Métis communities and Non-Status communities but nonetheless with a relevance to both. It is useful at this stage to describe these cases briefly before turning in the next section to identify the very specific distinguishing factors that they identify.

In *Native Council of Nova Scotia*,⁴⁴ the Native Council of Nova Scotia (NCNS) sought to challenge a federal government decision to limit in two areas of Nova Scotia the lobster catch permitted by an Aboriginal Communal Food, Social and Ceremonial Fishing Licence, arguing that there had not been sufficient consultation on the change. The Native Council of Nova Scotia

extended Métis family, a few Métis who live in close proximity of the project, one settlement or town or one Métis Community Council or Métis Local” (*ibid.* at 26-27, stating further at 27 that the Métis collective needing consultation is “the potentially affected Métis community in its entirety”). With no disrespect to the merits of his analysis, however, one must note that he is General Counsel for the Métis National Council and thus represents a position within a potentially disputed issue which has been very controversial as between different levels of First Nations’ representative organizations. Very careful analysis is needed and even to the extent that judicial decisions might support some elements of this analysis, they are unlikely to remove controversy.

⁴⁰ Newman, *The Duty to Consult*, *supra* note 4 at 39-40. But see also *ibid.* at 72 (discussing moves in several provinces by provincial Métis organizations to develop consultation policies requiring regional consultation).

⁴¹ See note 8, above, and accompanying text.

⁴² *Ibid.*

⁴³ Madden questions how relevant the *Labrador Métis Nation* case is to Métis consultation because there were ongoing uncertainties over whether the rights claimed there were Métis rights or Inuit rights: Madden, *supra* note 39 at 7n15. I will seek to show in the argument below that it is relevant. The Congress of Aboriginal Peoples, in its newsletter, has already recognized the tremendous significance of the case for consultation with communities represented by it and its affiliate bodies: “*Newfoundland & Labrador v. Labrador Métis Nation*: Ground-breaking case for CAP” (Spring 2009) *The Forgotten People* [Congress of Aboriginal Peoples Newsletter] at 10-11, available online at www.abo-peoples.org/media/people.pdf

⁴⁴ *NCNS Fed. Ct. Decision*, *supra* note 12.

had a voluntary membership base, with around three thousand off-reserve members from Mi'kmaq, Inuit, Métis, and potentially other Aboriginal communities.⁴⁵ Through past agreements, it also held an Aboriginal communal fishing licence under which it effectively regulated the fishing rights of specific Aboriginal persons.⁴⁶ Although there was some evidence on the record arguing for a Mi'kmaq Aboriginal right to fish, the January 2007 Federal Court trial decision in the case concluded that there was insufficient evidence of an Aboriginal fishing right meeting the requirements of s. 35 of the *Constitution Act, 1982* to support the case being considered under a constitutional duty to consult analysis.⁴⁷ In addition, Layden-Stevenson J. went on to question the ability of the NCNS to engage in consultation when its membership did not even potentially all hold the claimed Mi'kmaq right to fish given that some were not Mi'kmaq.⁴⁸ The result, she concluded, was that “[t]hus, NCNS is alleging a duty to consult and accommodate for individuals who, on the basis of the record, do not possess the Mi'kmaq right to fish.”⁴⁹ The combined result was that there would be no recognition of the constitutional duty to consult in the circumstances.

In a March 2008 judgment, the Federal Court of Appeal upheld the conclusion against the NCNS claims, specifically doing so on the basis of the conclusion that there was insufficient evidence presented to put to the Crown a clear Mi'kmaq right to fish and specifically choosing not to comment on “whether the Council should have been regarded as the agent of its Mi'kmaq members in the consultative process.”⁵⁰ Although the Federal Court of Appeal declined to decide on this latter point, it also did not specifically reject the lower court’s reasoning, effectively leaving Layden-Stevenson J.’s comments as important *obiter* on the question.

In the meantime, however, in between the trial court and appellate court decisions in *Nova Scotia Native Council*, the Newfoundland and Labrador Court of Appeal weighed in on related issues in its monumental December 2007 judgment in *Labrador Métis Nation*.⁵¹ Here, a Court of Appeal confronted squarely a situation in which Aboriginal persons in southern Labrador had claims to Aboriginal rights that could be affected by highway construction and “[t]he Crown base[d] its appeal primarily on the grounds that the respondents failed to produce sufficient evidence of a continuing aboriginal community and that neither the Labrador Métis Nation (‘LMN’) nor Carter Russell should have standing to pursue the claim.”⁵² In this case, the membership of the organization was somewhat different: “The LMN says that approximately 6,000 individuals in 24 communities in southern and central Labrador have authorized it as their agent to pursue an aboriginal rights claim and enforce their rights to consultation with government until the claim is resolved. Nine of its members (2 of which are honorary) have Micmac, Innu or Cree ancestry, but the remainder are of mixed Inuit and European descent.”⁵³

⁴⁵ *Ibid.* at para. 8.

⁴⁶ *Ibid.* at paras. 9-13.

⁴⁷ *Ibid.* at para. 43.

⁴⁸ *Ibid.* at paras. 43-44

⁴⁹ *Ibid.* at para. 44.

⁵⁰ *NCNS Fed. C.A. Decision*, supra note 13 at para. 5.

⁵¹ *LMN C.A. Decision*, supra note 14.

⁵² *Ibid.* at para. 1.

⁵³ *Ibid.* at para. 4.

In this case, the Court of Appeal specifically adopted the position, over a Crown argument against, that a corporate agent may be authorized to represent the Aboriginal communities to whom a duty to consult would otherwise be owing.⁵⁴ (The Court specifically distinguishes this agency from any claim of transfer of the rights.) The fact that the preamble to the LMN's articles of association referred to its intent to represent members in consultations, the Court held, was sufficient to mean that members would be deemed to be authorizing it to do so.⁵⁵ It is, as the LMN has shown, thus possible for Aboriginal communities otherwise entitled to consultation to authorize an agent to act on their behalf.

Although an administrative tribunal's decision is not of the same precedential value as a court decision, it is nonetheless worth noting the decision of the Alberta Energy and Utilities Board in *Re Imperial Oil Resources Ventures Ltd.*⁵⁶ and its application of the *Labrador Métis Nation* case to questions on the appropriateness of consultation with groups and individuals seeking recognition as consultation partners. The Board did not have to adjudicate on the consultation status of the Wood Buffalo Métis Locals Association, which had instead struck a negotiated agreement with Imperial Oil and withdrawn its claim before the panel.⁵⁷ However, in its decision, the Alberta Energy and Utilities Board first concludes that the unrecognized Wood Buffalo First Nation—not recognized under the *Indian Act* and thus potentially consisting of Non-Status Indians but which had a membership that included many individuals who were status members of a different and recognized First Nation—did not have a claim to consultation.⁵⁸ The desire of those individuals who had joined this unrecognized First Nation to be recognized as a distinct Aboriginal community did not lead the panel to be ready to recognize it for consultation purposes.⁵⁹ Where there is a recognized Aboriginal community, this will be by default the community with which consultation occurs.⁶⁰ The Wood Buffalo First Nations Elders Society, which similarly had a membership largely already members of a recognized First Nation, would not, according to the panel now basing itself directly on the reasoning from the lower court phase of the *Labrador Métis Nation* case,⁶¹ be recognized as having Aboriginal or treaty rights giving rise to consultation. In addition, if it claimed to act as an agent for the Wood Buffalo First Nation, that did not change matters,⁶² presumably because the Wood Buffalo First Nation had no claim to consultation. This administrative board decision goes on to illustrate further some of the ways in which the principles are being applied.

II. Distinguishing Factors for Consultation Partners

It is possible to take this developing case law and to seek to characterize more specifically the distinguishing factors between the NCNS, not recognized for consultation purposes, and the LMN, which was recognized for consultation purposes. Doing so can thereby illuminate better what will make it possible for a Métis community or Non-Status Indian community to access

⁵⁴ *Ibid.* at para. 46.

⁵⁵ *Ibid.* at para. 47.

⁵⁶ *Supra* note 17.

⁵⁷ *Ibid.* at para. 37.

⁵⁸ *Ibid.* at para. 61.

⁵⁹ *Ibid.* at paras. 61-62

⁶⁰ *Ibid.* at para. 62

⁶¹ *Ibid.* at para. 63, citing *LMN TD Decision*, *supra* note 16.

⁶² *Supra* note 17 at para. 63.

fully the opportunities afforded by the duty to consult. It is, of course, worth remembering at the outset that these cases arise in relation to a specific issue of possible representation by an agent of underlying Aboriginal rights-bearing communities that would be, in principle, entitled to consultation as communities. In instances where the underlying communities have clear organizational structures, it may well be that governments can consult them directly, and this may be a preferred option by the communities. However, these cases make clear that there are additional possibilities that enable Métis communities and Non-Status Indian communities to become participants within the duty to consult even prior to fuller establishment and recognition of governance structures. They also allow communities effectively to define different modalities of consultation where governance structures developed for some other purposes do not entirely correspond to the most effective structures for consultation.

Indeed, the first distinguishing factor reiterates the community orientation of consultation in that it may have been to the advantage of the LMN as compared to the NCNS that the LMN's membership base had support from communities whereas the NCNS membership base was composed of individuals. The likelihood that an agent claiming to be able to carry out consultation activities on behalf of certain Aboriginal communities will be recognized will almost certainly increase to the degree that whatever other organizations do exist have indicated their support for its role in consultation.

Second, the cases differ, as well, in an element related to possible conflicting interests within the NCNS that did not arise in the same way within the LMN. Within the NCNS, only some of the membership had a claim to the rights at issue because the NCNS had membership of First Nations, Métis, and Inuit origins. The LMN's membership was Métis and/or Inuit, but the uncertainty was because of historical circumstances generally shared across the different Labrador communities. There will be challenges to the recognition of a representative body's role in consultation where different branches of its membership have a different relation to a particular kind of right or where the organization is subject to competing interests. In Part III, I will turn to some possible routes around this challenge that allow for the broader-based organization to operate while avoiding this problem.

Third, at a simple level, the LMN's constituting instruments made very clear that it would carry out consultation on behalf of its member communities, whereas we have no such information concerning the NCNS's constituting instruments. This is no doubt because the NCNS had existed in much the same form since the 1990s. But this distinguishing factor nonetheless points to the importance of consultation issues being explicitly discussed within a potential representative body, and of members being made aware in some explicit way of the intended role of the body in consultation.

III. Policy Implications

Several underlying considerations define a policy question and frame policy options as to how governments and Aboriginal communities should work to see consultation occur with Métis communities and with Non-Status Indian communities. First, the legal rules concerning the duty to consult in general, of course, frame the question and options. Particularly important is the principle that the entity fundamentally entitled to consultation is the rights-bearing community.

Second, there is an underlying imperative upon governments to ensure that such consultation can occur because governments must act in the common good of all citizens, including both the good of Aboriginal communities and the good of non-Aboriginal communities who will benefit from reconciliation with Aboriginal communities. If Métis and Non-Status Indians are to have the opportunities implicit in the new doctrine of the duty to consult, it is vital that governments and Aboriginal communities both be ready to work to ensure that Métis communities and Non-Status Indian communities have representation through organizations that will be recognized. Otherwise, consultation is effectively rendered impossible in various scenarios, with the implication that the value of the duty to consult is undermined. At the same time governments are themselves left in the precarious situation of being under a duty to consult but having nobody with whom they may legally consult. Of course, if someone were able to mount a court challenge, there would then potentially be the consultation requirements the courts might impose in the circumstances, with these being relatively unpredictable in advance.

Third, this imperative to try to ensure consultation can occur applies to both federal and provincial governments, regardless of anyone's view on the distinct and controversial question of which level of government has responsibility in relation to Métis communities and in relation to Non-Status Indian communities.⁶³ Both are subject to all of the same above considerations. Therefore, these underlying considerations mandate the need applying to both federal and provincial governments to help ensure that appropriate consultation modalities develop.

The payoff from this paper's case law analysis is that the distinguishing factors in Part II define how to identify some representative organizations as potentially gaining legal recognition as consultation partners and others not gaining such recognition. As will be apparent in some of the comments on each option, they thereby act as significant legal opportunities, parameters, and constraints that assist in choosing between these policy options. Where there are not already recognized governance structures that correspond in level and scope to the rights-bearing community, then it may become possible to recognize representative entities. But they will be recognized only when several conditions apply: when they have adequate support as consultation entities as demonstrated by the relevant rights-holding communities; when there is not conflict arising from mixed membership; and when it is clear to all members that these entities are to carry out consultation.

Despite the challenges that still exist in this context, policy options in the context of Métis communities have some more straightforward elements than in the context of Non-Status Indian communities. Two relevant phenomena are important. First, a developing case law, while not having spoken directly to the duty to consult, has moved toward some clarity that the relevant rights-bearing communities will often be regional communities. However, this remains fact-sensitive to particular circumstances and particular rights at issue. Second, Métis organizations are actively involved in attempting to enunciate and develop duty to consult policies.⁶⁴ One could even foresee a possibility that matters could just work themselves out, with those policies developing in a manner fitting with the developing case law and evolving government policy.⁶⁵

⁶³ This is subject to wide discussion. For just one example, see Magnet, Lokan & Adams, *supra* note 8.

⁶⁴ For some examples, see Newman, *supra* note 4 at 72.

⁶⁵ For discussion of such possibilities more generally and their significance in terms of norm formation, see *ibid.* at 78-80.

However, the legal parameters identified within this paper do speak to several more specific needs within evolving processes, and governments have an important role here.

Métis Governance Structures

One attractive option for governments is to recognize Métis governance structures more forthrightly than they have done, which could enable consultation with established consultation structures. This option is subject to further considerations beyond the scope of this paper and has both advantages and disadvantages for governments.⁶⁶ Another option, not contradicting the first but also not requiring a full and immediate commitment to it, is for governments to specifically signal a readiness to recognize Métis duty to consult policies. However, the case law analysis here also reveals that it may be prudent to have a precondition to any such recognition. This precondition would require that such policies should match consultation structures to the level of rights-bearing communities as identified by the developing case law, should be free of any conflict among mixed membership (which I will discuss further below), and should have full clarity between the consultation structure and members. Obviously, the development of their consultation policies properly belongs to Métis communities themselves, but governments can certainly offer capacity-building assistance, including financially.⁶⁷ The important legal parameters present may give support to utilizing that option.

The development of Métis governance structures has been through very complex historical mechanisms,⁶⁸ and the differing capacities at local, regional, and provincial levels in different contexts may make for the possibility of more effective consultation modalities in these different contexts. Métis communities themselves need to consider carefully the possibility of specifically choosing to make use of the case law on consultation through agency structures and to consider developing their consultation policies in a way that meets the requirements of the case law. Naturally, much of the effort thus far in the development of Métis consultation policies has taken place at the provincial level.⁶⁹ However, for these policies to have the force that they could, it will be important to ensure that different levels of Métis governance structures are legally committed and signed on in the necessary sense. If locals also adopt even brief consultation policies that specify a consistency with the provincial-level policies, Métis communities can themselves work towards defining on what kinds of issues there will be consultation at the local, regional, and provincial levels.⁷⁰

Non-Status Indian Governance Structures

The situation of Non-Status Indian communities is more complex. Some of the choices on policy options may depend on significant further research and analysis that needs to be undertaken on

⁶⁶ For general history on Métis governance structures, see Jason Madden, “The Métis Nation’s Self-Government Agenda: Issues and Options for the Future” in Frederica Wilson & Melanie Mellet, eds., *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin, 2008).

⁶⁷ Some have, of course, been doing so already. On such funding in more general terms, see Newman, *The Duty to Consult*, *supra* note 4 at 38, 73.

⁶⁸ See Madden, “The Métis Nation’s Self-Government Agenda: Issues and Options for the Future”, *supra* note 66.

⁶⁹ Newman, *The Duty to Consult*, *supra* note 4 at 71-72 discusses some of the emerging Métis-adopted consultation frameworks.

⁷⁰ Again, this can achieve greater efficiencies through appropriate jurisdictional allocations.

the scope of Aboriginal rights that may be held by Non-Status Indian communities. However, three policy options on consultation seem to emerge. First, there may be some efficiencies in consultation developing with reasonably broad-based organizations. To a degree, there is already a broad-based national organization representing the interests of many Non-Status Indian communities in the form of the Congress of Aboriginal Peoples (CAP).⁷¹ However, the case law analysis suggests a difficulty in consultation taking place with a broad-based organization, whether CAP at the national level or even one of its affiliate organizations, if that broad-based organization combines individuals from Aboriginal communities with different kinds of rights claims and different interests. In such situations, the danger becomes that the broad-based organization cannot be recognized as an appropriate consultation partner on the issues that expose certain differing interests as between different communities within the organization.⁷² One possibility that might address this dimension would be through having meaningfully distinct consultation branches within broad-based organizations. Having such branches may challenge the organization's ability to always speak with one voice, but it will arguably enable it actually to be recognized for consultation purposes and to seek what coordination can be achieved as between these branches without taking away from their ability to represent potentially slightly differing interests. This proposal is of course a challenging proposition subject to further considerations beyond the scope of this paper but is one option that governments might consider supporting.

A second option would foresee support for the recognition of and development of more localized governance structures for Non-Status Indian communities. These options, it bears noting, are not mutually exclusive, and there may be particular factual circumstances where this option has more potential than others. The challenge on this option may be whether such structures conform to the level of consultation partner required for fulfillment of the duty to consult. To be clear, seeking to match governance structures, in some manner, to the duty to consult does have a natural element in so far as it matches them to the level at which rights are held. That said, the legal parameters also permit the joining together of more localized units into consultation structures as needed, so long as mechanisms are developed to deal with differing relations to the rights at issue. However, it may or may not have the other efficiencies and other characteristics sought of governance structures, including by their own members, so there does need to be a very specific analysis of the possibilities on particular circumstances. Governments might seek to facilitate this option in circumstances where it is otherwise appropriate but, again, might develop some conditionalities on the governance structures actually matching the rights-bearing communities.

A third option is arguably present in situations where the structures foreseen by the first two options have not developed. If governments identify rights held by Non-Status Indian communities in a context where consultation structures do not exist, there would be the possibility of attempting to engage in a more direct public consultation endeavour, envisioning more direct governmental communication with those within the scope of the rights-bearing community, obviously most suitably developed in some manner coordinating with relevant communities' views on the modalities of such consultation. However, depending on the

⁷¹ For a general discussion on the emergence of different national representative organizations, see Joe Sawchuk, *The Dynamics of Native Politics: The Alberta Métis Experience* (Saskatoon: Purich, 1998).

⁷² See Part II, above.

particular matter at issue, and its complexity and sensitivity, a direct public consultation in fulfillment of the duty to consult might have advantages or disadvantages arising from the substantive matters at issue. It would also be relatively complex to organize on an *ad hoc* basis so as to be a process that would effectively have to itself meet the legal parameters identified earlier.

The second option may have potential in some local circumstances, but the first option, of governments working with those organizations that are established and these organizations developing duty to consult policies, has some significant advantages. It also involves some meaningful risks in terms of compliance with the legal parameters. Such risks might call for the conditioning of governmental interaction with these organizations' duty to consult policies on those meeting the relevant legal parameters, particularly through the development of consultation modalities that separate the interests of relevant rights-bearing communities when required. Given their interests in consultation occurring in fulfillment of the duty to consult, governments have good policy reasons (in addition to potential legal requirements) to offer capacity-building support here as well.

Conclusion

This paper has sought to establish that it is important for governments to see the development of effective consultation mechanisms with Métis and Non-Status Indian communities. At the same time, obviously these mechanisms must be those defined by Métis and Non-Status Indian citizens and not dictated by governments. Governments can support the development of Aboriginal representative bodies and Aboriginal duty to consult policies in a number of ways. Obviously, in some circumstances, it may be appropriate to provide funding to support the necessary capacity.⁷³ But as important may be the moral and symbolic support of actually seeking to respect Aboriginal duty to consult policies, subject to a non-excessive set of conditionalities, which fosters the incentives for different Aboriginal communities to continue to develop them. There will, of course, be circumstances where a particular duty to consult policy contains elements with which governments cannot agree given their own interests. But in the absence of such problems, it is both a gesture of good faith and an important policy initiative for governments to show their readiness to work with Aboriginal communities as they move forward with their definitions of how consultations are to take place.⁷⁴

At a more general level, there is also a clear need for ongoing objectively-oriented research that examines continuing legal and policy developments related to consultation with Métis and Non-Status Indian communities, is engaged with ongoing developments in governance, and that examines carefully the track record of different approaches to consultation. The duty to consult has a limited academic literature. The academic literature on consultation with Métis communities is limited, and literature on consultation with Non-Status Indian communities (or even on their rights more generally) scant to non-existent. This kind of recommendation will, of course, be challenged by some as implying ongoing expenditure on 'mere research' rather than solving problems or even as directing resources in a manner that serves the interests of

⁷³ On such funding in more general terms, see Newman, *The Duty to Consult*, *supra* note 4 at 38, 73.

⁷⁴ Governments have shown some tentativeness around this point previously: see *ibid.* at 73.

researchers over those of Aboriginal communities.⁷⁵ Such concerns can be a reminder that we need to focus on practical challenges and not be lost forever in abstraction. However, to simply assume that the issues and challenges can be satisfactorily addressed without this kind of ongoing research comes close to presuming that effective policy is whatever works as a sound-bite or that there is one magic formula for policy-making. Such an assumption is simply not in keeping with the reality of complex, multidimensional, multiparty problems that deserve careful analysis. This paper has tried to offer some analysis but remains caught in the realities of a very underdeveloped area on which it cannot address every consideration in a short piece. The capacity and initiative of entities like the Office of the Federal Interlocutor for Métis and Non-Status Indians, to continue commissioning important research, is vital to achieving effective policy.

The conclusions in this paper endeavour to capture some relevant implications of case law to date on consultation outside the First Nations framework in which the doctrine of the duty to consult was developed. There will remain the possibility that the law will continue to develop differently. Thus, policy measures adopted in response to its current evolution are, naturally, vulnerable to the later development of the law in an unexpected direction. This, I would argue, is not a reason to avoid pursuing them. The courts are trying to develop the duty to consult in a manner that works.⁷⁶ The essence of the whole doctrine is an endeavour to see Aboriginal and treaty rights discourses move forward through the interactions of governments, Aboriginal communities, and (in appropriate circumstances) industry stakeholders, without the constant involvement of the courts. If governments and Métis and Non-Status Indian communities move forward in ways that work, the risk that courts will try to interfere is arguably actually lessened. On the other hand, refusal to move forward practically and proactively spells the certainty of ongoing confusion and significant future risks. Thus, there would seem to be 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. This process could begin as outlined in this paper, by pursuing some of the policy steps which would allow for Métis communities and Non-Status Indian communities to be represented in consultations. Both good policy and honour demand no less.

⁷⁵ Such claims are particularly strident in such works as the heterodox book of Frances Widdowson & Albert Howard, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Kingston: McGill-Queen's University Press, 2008).

⁷⁶ See generally Newman, *The Duty to Consult*, *supra* note 4, *passim*.

Bibliography

Secondary Sources

Brady, Megan Brady & Millard, Ben (2005). “*Haida Nation v. British Columbia: What Obligations do Developers Owe to First Nations?*” in Dwight Dorey & Joseph Magnet, eds., *Legal Aspects of Aboriginal Business Development* (Toronto: LexisNexis Canada) 367.

Devlin, Christopher G. (2009), “Deep Consultation at a Higher Level: *Wii’litswx v. British Columbia (Minister of Forests)*” 67 *The Advocate* 25.

Harris, Jeffrey (2005). “Emerging Issues: Natural Resources and the Duty to Consult and Accommodate: An Examination of the Content,” in *Proceedings of the National Aboriginal Law CLE Conference* (Ottawa: Canadian Bar Association, Mar. 2005);

Henderson, James (Sa’k’ej) Youngblood (2009). “Dialogical Governance: A Method of Constitutional Governance” (2009) 72 *Sask. L. Rev.* 29.

Isaac, Thomas (2008). *Métis Rights* (Saskatoon: University of Saskatchewan Native Law Centre).

Isaac, Tom, Knox, Tony & Bird, Sarah (2005). “The Crown’s Duty to Consult and Accommodate Aboriginal Peoples: The Supreme Court of Canada Decision in *Haida*” (2005) 63 *The Advocate* 61

Madden, Jason (2008). “The Métis Nation’s Self-Government Agenda: Issues and Options for the Future” in Frederica Wilson & Melanie Mellet, eds., *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin).

Madden, Jason (2009). “Métis Consultation and Accommodation: Answering the ‘Who’ Question” (Presentation to the Métis Nation of Ontario & Law Society of Upper Canada Symposium on Métis Consultation and Accommodation, 27 March 2009, Toronto), text available at http://www.metisnation.org/PDF_new/Symposium_Consult_Accom_09.pdf

Magnet, Joseph E., Lokan, Andrew K. & Adams, Eric M. (2005). “‘Arbitrary, Anachronistic and Harsh’: Constitutional Jurisdiction in Relation to Non-Status Indians and Métis”, in Dwight Dorey & Joseph Magnet, eds., *Legal Aspects of Aboriginal Business Development* (Toronto: LexisNexis Canada) 167.

McCabe, J. Timothy S. (2008). *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Toronto: LexisNexis).

Morellato, Maria (2009). “The Crown’s Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights,” National Centre for First Nations Governance Research Paper (Feb. 2009).

Murphy, Ronalda, Devlin, Richard & Lorincz, Tamara (2006). “Aquaculture Law and Policy in Canada and the Duty to Consult with Aboriginal Peoples,” in David L. VanderZwaag & Gloria Chao (eds.), *Aquaculture Law and Policy: Towards Principled Access and Operations* (New York: Routledge), 293.

National Association of Friendship Centres (2009). “The Government’s Duty to Consult Urban Aboriginal People” (March 2009).

“*Newfoundland & Labrador v. Labrador Métis Nation*: Ground-breaking case for CAP” (Spring 2009) *The Forgotten People* [Congress of Aboriginal Peoples Newsletter] 10, available online at www.abo-peoples.org/media/people.pdf

Newman, Dwight G. (2006). “Negotiated Rights Enforcement” (2006) 69 Sask. L. Rev. 119.

Newman, Dwight G. (2009). *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich).

Newman, Dwight G. & Schweitzer, Danielle (2008). “Between Reconciliation and the Rule(s) of Law” (2008) 41 U.B.C. L. Rev. 249.

Treacy, Heather L., Campbell, Tara L. & Dickson, Jamie D. (2007). “The Current State of the Law on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development” (2007) 44 Alta. L. Rev. 571;

Government Documents

Alberta, *Alberta’s First Nations Consultation Guidelines on Land Management and Resource Development* (November 14, 2007).

Canada, *Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult and Accommodate* (February 2008).

Saskatchewan, *Draft First Nation and Métis Consultation Policy Framework* (December 2008).

Case Law

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511.

Kane v. Lac Pelletier (Rural Municipality No. 107), 2009 SKQB 348, [2009] 4 C.N.L.R. 108.

Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works), 2006 NLTD 119, [2006] 4 C.N.L.R. 94.

Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works), 2007 NLCA 75, 288 D.L.R. (4th) 641.

Lovelace v. Ontario, [2000] 1 S.C.R. 950.

Manitoba Métis Federation Inc. v. Canada (Attorney General), 2008 MBCA 131.

Manitoba Metis Federation Inc. v. Canada (Attorney General), 2007 MBQB 293, 223 Man.R. (2d) 42, [2008] 2 C.N.L.R. 52.

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

Native Council of Nova Scotia v. Canada (Attorney General), 2007 FC 45, [2007] 2 C.N.L.R. 233.

Native Council of Nova Scotia v. Canada (Attorney General), 2008 FCA 113, [2008] 3 C.N.L.R. 286.

R. v. Belhumeur, 2007 SKPC 114, 301 Sask. R. 292.

R. v. Goodon, 2008 MBPC 59, 234 Man. R. (2d) 278.

R. v. Kelley, 2007 ABQB 41, [2007] 5 W.W.R. 177.

R. v. Badger, 2009 SKPC 91, 340 Sask. R. 243, [2009] 4 C.N.L.R. 252.

R. v. Lefthand, 2007 ABCA 206, 77 Alta. L.R. (4th) 203.

R. v. Lizotte, 2009 ABPC 287.

R. v. Powley, 2003 SCC 43, [2003] 2 S.C.R. 207.

R. v. Sappier, 2006 SCC 54, [2006] 2 S.C.R. 686.

R. v. Van der Peet, [1996] 2 S.C.R. 507.

Re Imperial Oil Resources Ventures Ltd., [2007] A.E.U.B.D. No. 13.

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

Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700.