

The Key Principles of the Duty to Consult in Canadian Law



A.
The Government must consult when it considers a project or action that could affect Mi'kmaq rights or title. The law (*Simon v The Queen*) recognizes that the Treaty of 1752 in Sipekne'katik **did not** extinguish Mi'kmaq title. The Sipekne'katik People are in a unique legal position.

Consultation, and in some cases accommodation, is a constitutional right, the Crown's duty, and:

- Is grounded in the *Honour of the Crown*;
- Is part of *reconciliation*;
- Is *reciprocal*: both sides must be committed to the process of consultation;
- must be *meaningful*;
- is held by the community's rights holders.

The scope of the government's duty to consult and accommodate depends on the seriousness of impacts on rights. It is assessed case by case and ranges from:



B.
Rights holders are community members, and are the ones who will determine how the community is consulted and how projects and actions will be considered by the community. Rights holders must also commit to a meaningful process conducted in good faith.

C.
Industry may consult directly with the community, but the government is responsible for making sure consultation is adequate in the circumstances. It is the Government's duty.

THE ISSUE OF CONSENT

The United Nations Declaration on the Rights of Indigenous Peoples is not yet law in Canada.

There is no veto right.

The Crown has no duty to reach an agreement: the commitment is to a meaningful process conducted in good faith with the proper rights holders.

Nova Scotia Consultation Policy

The Office of Aboriginal Affairs coordinates and oversees all consultation processes in the province of Nova Scotia.

The Province has a five-step policy for consulting with the Mi'kmaq People in Nova Scotia. Sipekne'katik is not bound by this policy.

Most other bands in Nova Scotia are participating in the Kwilmu'kw Maq-klusuaqn (KMK) / "Made In Nova Scotia" process and have agreed to a consultation protocol with the province and federal government.

Sipekne'katik is outside of the KMK process. It is developing its own Consultation Protocol on how it will engage and consult its People.

The People themselves will decide how the Sipekne'katik Band Council will consult with Governments and Industry.

Developing the Sipekne'katik Consultation Protocol

Sipekne'katik People share Illnu Legal Traditions & Governance Principles in knowledge sharing sessions

We share knowledge and listen very carefully



We study the information received and draft core principles as we understand them

Sipekne'katik People: Consulted on Principles

We propose and revise consultation principles based on community input and feedback.



We study community feedback, edit the principles and draft a consultation protocol

Sipekne'katik Consultation Protocol and Process

We propose and revise the consultation protocol based on community input and feedback.



We revise band policies and provide ongoing support to train and advise consultation officers

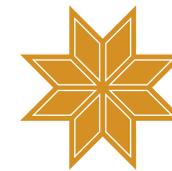
Implementing the Protocol



The People will drive the Consultation Protocol, which in turn will drive the activities of the Consultation Office.

We will conduct a capacity-needs assessment to make sure the Consultation Office has the necessary expertise.

Many communities across the country have developed their own consultation protocols. No two are exactly the same.



Sipekne'katik Relations:

CONSULTATION PROCESS

Sipekne'katik and the Duty to Consult:

Committing to a meaningful process, conducted in good faith, engaging the proper rights holders.

The controlling question in all situations is what is required to maintain the Honour of the Crown and to effect reconciliation between the Crown and Aboriginal People with respect to interests at stake?

Supreme Court of Canada
in *Haida Nation v British Columbia*

