

Fifteen Ways to Lose Your Consultation Partner

Authors: Bob Adkins, K.C.

published 04/10/2007

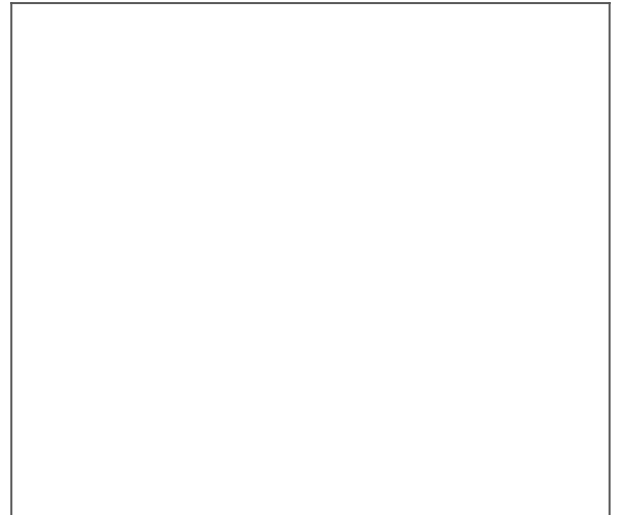
I. INTRODUCTION

Since the Supreme Court laid the foundations for a better understanding of the duties of consultation and accommodation in Haida Nation and Taku River in 2004, there has been a veritable explosion in conferences and papers on consultation duty owed by the Crown to Aboriginal peoples under Section 35 of The Constitution Act (1982). Many have offered their insights on the intricacies of the law, where the law is heading, and practical tips on how to consult successfully.

Woefully unrepresented in the discourse are views and insights on common pitfalls that can transform optimism at the consultation or negotiation table into acrimony and litigation.

Our paper seeks to fill this void. We offer our 15 ways to lose your consultation partners. We admit to adopting shamelessly the title of Paul Simon's song 50 Ways to Lose your Lover, but on the assumption that losing your consultation partner is not your desired outcome most of our paper is committed to exploring how to avoid these pitfalls.

Our paper deals with consultation as well as negotiation. The comments in our paper are based on our knowledge of the relevant cases and on our broad experience in negotiations representing Crown Corporations, public and private corporations, First Nations and



governments. Although we have closely followed cases about section 35 consultations, we have not participated as representatives of parties directly involved in such consultations. We have, however, participated in discussions between resource users and Aboriginal people and the information and understandings gathered in that context are intended to assist the Crown in meeting its s.35 Constitutional responsibilities.

Our top 15 list of pitfalls includes:

1. Demand that everyone at the consultation table have the authority to make a deal.
2. Demand the impossible.
3. Make the consultation table a private club.
4. Have a very strong constituency-supported, fixed position before going to the table.
5. Assume that every representative at the table has the continuing emotional/technical/political support of its principals and constituents and can control that support.
6. Forget the real and immediate needs of people in the area and focus solely on the larger legal, policy and political issues.
7. Assume resolution is more important than process.
8. Reject or ignore aggressive positioning and conflict at the table and do not explore what the parties are trying to express.
9. Maintain that consultation must result in agreement or else it is a failure.
10. Avoid the introduction of a mediator at all costs.
11. Assume consultation is about rights and not responsibilities.
12. Insist that all issues between the parties be resolved by the consultation.
13. Never talk to the other parties until you want something.
14. Assume that if you produce a report from a qualified expert supporting your position that it will automatically be accepted.
15. Demand immediate and full responses on all issues without any reasonable opportunity to consult with principals, or conversely take the position that time does not matter.

II. THE BASIC LEGAL PRINCIPLES

To properly understand the pitfalls, it is necessary to have an understanding of the law related to consultations. This can be found in the following key decisions. The recent key decisions are *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 ('Haida'), *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74 ('Taku') and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 ('Mikisew'). Key points from those cases can be briefly summarized as follows:

1. The duties of consultation and accommodation are owed by the Provincial and Federal Crown and not corporations.
2. The basis for the duties is the Honour of the Crown and not fiduciary duty.
3. The Crown's s.35 responsibilities are triggered once it has real or constructive knowledge of the potential existence of Aboriginal right or title and contemplates taking some action which might adversely affect these rights. The Crown will always have constructive knowledge of the existence of treaty rights.
4. The content of the s.35 consultation duties in a specific case will be a function of the strength of the Aboriginal group's asserted or treaty rights and the severity of the impact of the proposed Crown decision on the asserted or treaty rights.
5. Consultation will range from mere notice to something more substantial like the opportunity to make submissions, formal participation in the decision making process, and the right to reasons from the decision maker.
6. Consultation can lead to a need for accommodation.
7. Aboriginal people must assist the Crown in its Duty efforts by:
 - outlining its claim or asserted rights with sufficient clarity;
 - outlining the nature of the anticipated impact on the rights; and
 - acting in good faith and not taking unreasonable positions.
8. While not explicit, Aboriginal actions which frustrate the Crown's efforts to meet its s.35 consultation duties will be considered in calibrating the content of the duties or in determining if the duties were breached.

III. THE 15 WAYS TO LOSE YOUR CONSULTATION PARTNERS

1. Demand that everyone at the consultation table must have the authority to make a deal.

One effective way of derailing consultation at the earliest possible opportunity is to demand that every party at the table have the power and authority to make a deal. While this approach is commonly and usefully used in many business negotiations and litigation settlement discussions, it simply does not work in the context of consultation.

This approach to consultation misses the concept and purpose of consultation. How can either party prepare itself, or expect the other party to prepare itself, so that their respective representatives can 'make a deal' in the absence of required information about what action is proposed or how such action might impact the exercise of Aboriginal and treaty rights? This approach also ignores the basic collective nature of Aboriginal communities, with their emphasis on internal consultation and their general desire to create a consensus. It also assumes that the other parties are there to 'make a deal'.

To be effective in a consultation process, the parties should not begin with fixed positions.

The reason for consultation is recognition that there is just not sufficient common or shared knowledge for the parties to independently reach conclusions, establish fixed positions and make final decisions. The first step for the Crown is to inform the Aboriginal group about what the Crown is proposing to do or consider, which may affect their rights. This could be changing a law, authorizing a development, allocating a resource or any other action or activity that the Crown believes might impact on an Aboriginal or treaty right or on the exercise of an Aboriginal or treaty right. In undertaking the consultation the Crown should not have made irrevocable decisions on a matter that could affect Aboriginal or treaty rights.

Once informed of what is proposed, in sufficient detail that it can assess the potential effect on its rights or the ability to exercise its rights, the Aboriginal group needs to consult with its own members and in particular those constituencies that potentially would be most affected. This could be a specific group within its membership such as trappers, fishers, hunters, elders and other groups or the community and membership as a whole. It is important that these constituencies are canvassed to ensure when a response is provided it is as full a response as reasonably possible. In any consultation process it is reasonable that part of the response will likely include questions and requests for more specific information.

If you are acting for an Aboriginal group, discourage your client from taking a fixed and negative response. It is best if your client can avoid rejecting the proposed action as its first response. It is better if it can advise the Crown what it perceives the impacts will be, the seriousness of those impacts, and how the proposed action will affect that Aboriginal group's customs, practices and traditions that are core to its cultural identity. The idea is not to say no, but to say to the Crown that, in considering the action it is proposing, the Crown needs to be aware of the serious impacts this will have on the Aboriginal group's rights and its exercise of those rights.

It is appropriate and important to inquire whether or not there are other options that the Crown has considered. It is appropriate and important to ask the Crown to consider other options, if it has not done so already, or where the Crown has considered some options, to ask that the Crown consider additional options. It is also appropriate and important to ask whether the proposed action can be modified to eliminate any or all of the perceived impacts, whether any of the impacts can be mitigated, and how the Crown proposes to address the impacts of its proposed actions on the rights of the Aboriginal Group.

If you are acting for the Crown, although your client may not accept the asserted right or question the scope of the asserted right, it is still, in our view, in the interest of the Crown to hear and understand the concerns being expressed. The concerns may have arisen from a misunderstanding about what is proposed and all that is required to alleviate the concerns is correcting the misunderstanding. In other cases or situations, some minor accommodation will address the concerns. As well, there may be concerns that the Crown simply had not appreciated and now must consider.

In any event, you will want to consider and explore all of the options, modifications and mitigation alternatives. In essence, if the proposed action will cause or could potentially cause an impact on an Aboriginal or treaty right or the exercise of such rights, there is an obligation to consider how such impact can be eliminated or at least mitigated. In many cases, there will be an obligation to consider how the concerns of the Aboriginal group can be accommodated. In some circumstances, even where the Crown does not agree that there will be a particular impact, but the Aboriginal group has a bona fide and strongly held belief that such an impact will occur, considering how that potential effect can be monitored and what steps will be taken to address unanticipated effects, if the concern of the Aboriginal group turns out to be well founded, is, in our view, a prudent form of accommodation.

Ultimately the Aboriginal group will not have a veto, but the Crown must meet its consultation and accommodation obligations. Where such an impact cannot be avoided or fully mitigated, the Crown must consider and weigh the public good against the unavoidable impact and only proceed where it considers the impact justifiable in the circumstances.

This review of the steps in a typical consultation process demonstrates that demanding from the start, that each of the parties involved in the consultation have a mandate or authority to do a deal, is just not sensible.

Although 'consultation' and 'negotiation' have some different dynamics, it has been our experience that principled, interest-based negotiations normally involve the exchange and exploration of ideas that is very similar to that which occurs in a consultation. When negotiating for, or with, an Aboriginal group, in relation to anything significant, it is very unusual to have representatives at the table who have a mandate to make a deal. The governance structure of Aboriginal groups generally does not readily accommodate delegated decision making, even when members of the elected leader are at the table. In our experience, it is unusual for any final arrangement to be concluded without consultation with the community.

In fairness, it has also been our experience that individual representatives of the Crown, and even large corporations, are just as unlikely to have a mandate or authority to conclude a deal. However, within a corporate governance structure there is a clear hierarchy related to decision making authority and, provided the decision makers have been briefed as the negotiations progressed, approval can often be achieved expeditiously. Governments on the other hand have their own internal inter-departmental consultations that must be undertaken. INAC may have the key role but may nonetheless need to speak to other Federal Departments such as Parks, Fisheries and Justice. Provincial departments responsible for Aboriginal Affairs may similarly play a key role, but have to consult with other Provincial Departments such as Northern Affairs, Conservation, Highways, and the department of the Attorney General. In some instances, there are political ramifications that need to be vetted through the appropriate body. Finally, there is the formal approval process that can involve

Ministers, Treasury Board and Cabinet. Governmental hierarchy may be clearly specified, but actually processing a decision through that hierarchy can be a mystery.

2. Demand the impossible.

If during the context of your consultation you are in jeopardy of reaching agreement on a practical solution, demand the impractical or the impossible. If you are representing a First Nation, demand that the Crown representatives at the table recognize the sovereignty of your client as a pre-condition to consultation. If you are the Crown, demand that the First Nation provide an absolute release and indemnity for all possible damages that may arise from a certain action in return for modifying some element of the action. Similarly, a business might require the Aboriginal negotiators to guarantee that individual members will not oppose the project in the future.

The purpose of the consultation should be to exchange information, to investigate potential consequences of taking certain actions, to understand the rights or asserted rights of an Aboriginal group and how those rights are exercised or how they may be affected by a proposed action and ultimately, to determine if the potential impacts can be avoided or mitigated through an accommodation.

If there is a significant Crown decision to be made, then concluding a successful consultation will not be easy. If at all possible you should try to avoid complicating that process by throwing other matters and issues into the mix.

The relationship between the Crown and various Aboriginal groups is not new and it is not a blank paper. There is significant history, both bad and good and there are innumerable unresolved issues that tend to come to the table whether or not they are relevant to the particular consultation. To the extent that these extraneous issues can be avoided, it will improve the process of consultation. However, it would be naive to think that one could totally isolate a consultation from the very complex inter-relationship between the parties and the significant issues arising from their history.

It has been our experience that most Aboriginal groups and most Crown and business representatives know the lightning rod issues which can, if raised, throw any process off the rails. Sovereignty, self-government, aboriginal title that has not been ceded, unresolved specific claims, legislative authorities, human rights and institutional racism are just a few of the topics, which, raised in the wrong context, can side track the discussion and the consultation.

It is often tempting to simply stonewall such issues if they are raised; to take the position that the topic is not on the agenda, that there is no mandate to discuss or engage with the

other party at all in relation to that topic. Certainly the message has to be delivered that the issue being raised is not something that is properly at the table, but we have found the absolute refusal to even listen to such issues generally just increases the insistence on their being considered.

We are interested in the views of others who have been involved in consultations and negotiations involving Aboriginals and the Crown, but we have generally found that you are best to accommodate some degree of discussion so that you understand why the issue is being raised in the context and why the party raising the particular issue believes it is relevant. It may be that the issue can by agreement be removed to a different forum or at least that it is respected and should be dealt with on a different agenda and in a different context.

3. Make the consultation table a private club.

Consultations and negotiations involving complex matters usually take a considerable amount of time to complete. There are a number of steps in the process and almost invariably there are positions taken and posturing which delay progress and conclusion. A common result of having protracted negotiations or consultations is that the representatives at the table develop a personal relationship with each other, they develop a language which is specific and unique to the set of negotiations, they develop a shorthand way of expressing significant and complex issues and they can take on the patina of a private club where an outsider cannot apply. Although there are some benefits to developing a personal relationship and a shorthand way to deal with complex ideas, we must always be cognizant of this fact and ready and willing to bring the 'outsiders' into your private club to make them feel welcome and to make them feel that they have a role and something to contribute.

In many cases negotiations are undertaken outside of the particular Aboriginal community which is party to the negotiations. There are a number of reasons for this including travel cost, lack of facilities in a remote community necessary to accommodate negotiation or overnight stays and a desire to have some anonymity or distance from the individuals specifically involved within the community. On the other hand, in order to ensure that the Aboriginal people whose interests are being addressed do not feel isolated from the process, it is important that there is broad representation at the table, or that the consultation process or negotiations are occasionally conducted within the community.

When the table is expanded or the process is made more open to the public, the private club has to ensure that the private language and the shorthand expressions to express complex concepts are not used. The personal relationships should be set aside to ensure that the people coming to the table feel welcome, feel they are part of the process, feel that they are able to understand what is being discussed and feel that their issues are being properly

expressed at the table. The results can be disastrous if the expanded representatives or audience leave with the sense that what is happening has no meaning or importance relative to the issues they perceive as fundamental. If they believe their concerns are not being addressed or they believe that their positions are not being afforded proper consideration, they will return to their communities or to their government departments advocating against any settlement or accommodation that might be reached at the table.

We recall one negotiation when a group of elders attended. They were keenly interested in what was happening and intently followed the exchanges and discussions. We found this interesting since many of the elders had limited knowledge of the English language and most of us had no knowledge whatsoever of Cree. Therefore, the discussions were entirely in English. In the particular negotiation a negative relationship had developed at a personal level between a consultant hired by the Aboriginal community and a representative of one of the non-Aboriginal parties.

During the course of those negotiations, when a number of elders were present, these individuals were able to sufficiently irritate each other, that their voices became raised, their exchanges heated and their language offensive. Those of us who had been involved for a long period of time were not overly concerned. These outbursts had occurred in the past and we anticipated the heated positioning would subside in due course. Unfortunately, the elders did not share our experience and our knowledge of this dynamic. Although many of the elders had limited understanding of English, they had a good understanding of the dynamic they were witnessing. They did not need to understand English to understand the meaning of raised voices, agitated mannerisms and offensive language.

It was only some time later that we became aware of how significantly that exchange disturbed the elders. They left feeling that their community and their representatives were not being respected. They left feeling that they and their community were being bullied and they lost confidence in the process. The negotiations never fully recovered and, as a consequence, a number of sensitive issues which could potentially have been addressed were left unresolved.

Another situation which comes to mind involved some senior level negotiators in a very crucial and explosive situation. The group at the table included government and industry representatives, lawyers, consultants, members of Chief and Council and elders of the community. The negotiations were proceeding late into the night and some progress was being made, not on substantive matters, but on processes and approaches to address various issues. At one point, the parties caucused and the representatives of the Aboriginal community came back with an outline of what they believe reflected a reasonable process. Unfortunately from a process perspective, the First Nation advisors added to the proposed process package a substantive demand for the immediate payment of several millions of dollars.

The addition of this substantive provision elicited a confrontational reaction from some senior negotiators at the table, who were more experienced in positional as opposed to interest based negotiations. The reaction included crumpling the paper, throwing it on the table and laughing derisively. This form of posturing was not particularly surprising to the negotiators at the table, but it was not well received by the elders. As a consequence of this reaction, some strong language was exchanged and then we caucused again. When the Aboriginal community returned from the break the elders entered the room but refused to sit at the table. It was quickly apparent that no further progress would be made until the issue that had affronted the elders was addressed. Fortunately, it was possible to quiet the issue and ultimately reach some agreement on a process for moving forward.

There are cynics who would say that this was just a situation where one negotiation ploy was more successful than the other. The standing elders trumped the derisive laughter. There may be merit to that view, but that was not our perception. We saw the response as the elders being honestly offended and not a negotiation tactic, and that proved to be true. As soon as the issue was quieted, the demand for the money was dropped and an agreement on process was finalized.

The caution is to be cognizant that negotiators can develop a relationship, which is not shared by others not normally involved in, but attending, a negotiation. Negotiators need to recognize that when others are there to observe or participate in the negotiation, that the dynamic of the negotiation has to change.

It is important that each party is aware of changes in the makeup of the representatives of the other party. As the members of the 'club' change, many other changes can result. The spokesperson may change, the language may change, the relative importance of issues may change and the positioning may change so significantly that it appears a party is resiling from previous understandings. Do not overreact when that happens. Do not perceive this as a significant negative step, rather see it as an opportunity to understand the importance of the issue to others in the community and an opportunity to explore with them the resolution that had previously been reached.

4. Have a strong, constituency- supported, fixed position before going to the table.

Consultation and negotiation are two-way streets requiring flexibility and the ability to hear and understand the views, issues and concerns of other parties. Although it is very important in any negotiation that you have an understanding about your own bottom line before you start the process, a good negotiation should start by exploring issues and options. The parties should avoid being positional, at least in the early stages. If you go to the table with firm instruction not to participate in any way in any discussions about certain issues, it will

undoubtedly be a difficult, or a short, negotiation. As legal counsel, try to discourage such instructions. Even if you have no mandate to negotiate a particular issue, it is best if you can at least say that you will listen and take back what is said to your principals.

It is also important to keep in mind that each counsel/negotiator has a constituency. They are often involved in a complex process of maintaining the confidence of their own clients, while attempting to fashion remedies that address the interests of the other parties at the table.

Willingness to explore ideas, openness in discussing issues and demonstrating flexibility in considering approaches to resolution are not signs of weakness and should not be perceived as such. Our own perception, which is skewed by our experience, is that a party who is not prepared to discuss a position that he or she has taken is probably unable to justify the position or articulate the principles supporting the position. Where there is a negotiator involved, it may just show that the principal party does not trust its negotiator to properly explain, justify or support the position.

When faced with such a 'take it or leave it' posture, it is sometimes possible to explore the position by asking peripheral questions, such as: How would that be implemented? How would we document that in the overall agreement? What would happen if that requirement were breached in some way? Would damages be a remedy or would injunction or specific performance be required? If this agreement does not address that issue, will it be a continuing claim? Have you considered any alternative positions? Once you begin discussing any of the related issues it is usually possible to get a better understanding of the concern and the reasons for the position.

In one negotiation some representatives of the First Nation demanded that any agreement must recognize the sovereignty of the First Nation. Although there did not appear to be a consensus among the First Nation representatives, the representatives advocating the sovereignty position had an influential constituency and their demands could not be ignored.

Ultimately, we were able to discuss the non-negotiable item and a preamble of undisputed facts was developed. The preamble identified the First Nation's vision of itself as a nation exercising sovereignty, but did not require the Crown to acknowledge or recognize such sovereignty.

5. Assume that every representative at the table has the continuing emotional/technical/political support of its principals and constituents and can control that support.

At a negotiation or consultation table you can have any number of entities, each with its own mandate, its own interests and its own obligations. In many situations, each of those

representatives is charged with the responsibility to represent a myriad of internal interests that often conflict.

First Nations need to be cognizant of the interests of their constituent groups. The elders may be vitally interested in preserving their language and culture while the youth may be far more interested in training or jobs. Resource harvesters may be most interested in impacts on resource harvesting or gaining access to new areas to pursue harvesting activities, while other groups want better housing and infrastructure.

Similarly, Crown representatives need to be aware of potentially conflicting internal interests. For an extreme example, Parks Canada representatives could be dead set against surrendering any park land to accommodate an Aboriginal group, while INAC negotiators might be willing to give over the entire park to obtain a release and satisfaction related to a claim.

Assuming that any party has a single homogeneous interest is normally a mistake. Whether it is the party you represent or any other party at the table, it is best to be alive to all of the constituencies that might affect the positions advanced. This is well demonstrated by another example from our experience: We were involved for a number of years in a significant negotiation with a First Nation and other parties. In the negotiations it was apparent that legal counsel for the First Nation was taking a very active role in mapping out fundamental positions, particularly on matters related to self-government. What was not as clear was whether or not those positions were as strongly held by other members of the First Nation's negotiating team, including some of the First Nation members themselves.

The negotiations were difficult and the entrenched positioning by the First Nation and others on the self-government issue was making progress doubtful. Ultimately, the First Nation decided to change legal counsel and the self-government issue was dropped for the purposes of that negotiation. The negotiations proceeded quickly and a draft agreement was close to being finalized. Given the protracted negotiations, the First Nation requested an advance against the anticipated settlement funds. The Chief and Council signified their support for the agreement and the other parties to the negotiations agreed to the requested advance.

Unfortunately, some constituents of the First Nation did not consider that the agreement properly represented their interests. The elders, who continued to be in contact with the former legal counsel, were particularly uncomfortable with the draft agreement. A petition was circulated and, with the elders taking the lead, serious opposition arose. It took several months, but ultimately Chief and Council resiled from their position of support and the agreement died without ever being taken to a formal vote. More than three years of funded negotiations simply fell apart and in its place there was a sense of defeat and a battered relationship.

These situations are not uncommon and perhaps cannot be entirely avoided no matter how much consultation is undertaken to ensure community involvement and support. To some degree, the nature of governance mechanisms of the parties can contribute to or mitigate against eleventh hour reversals. It is our experience that these situations can occur with both Aboriginal and non-Aboriginal parties, when negotiators have brought an agreement to their principals seeking and expecting approval and, instead receive instructions to go back and renegotiate some significant issue.

In acting for First Nations we have been involved in situations where there was a change in Chief and Council and almost immediately a change in the approach to negotiations. We have also seen a change in Chief and Council result in a wholesale change in the negotiation team, including lawyers and consultants. Sometimes, it does not take anything as dramatic as an election to prompt a change in positions. A change in a key member of the negotiating team, the addition of a new consultant or a change in legal counsel can all lead to a change in position on fundamental points. There is no certain answer to these issues, but it is important to be alive to shifting interests and shifting power bases. Do not be surprised and try not to be frustrated when, just as you seem to be making progress, the ground shifts.

6. Forget the real and immediate needs of people in the area and focus solely on the larger legal, policy and political issues.

Too often consultations become far too focussed on the rights issues and not enough on the practical impacts on people and what can be done to address those impacts. The assertion of a right or even the existence of a recognized right is never the end of the discussion. Questions such as: What is the scope of that right? Whose right is it? Who can exercise, and who actually is exercising, the right? Are there limitations on the right? are all open for discussion and debate. Ultimately, the consultation process will rarely result in the formal recognition of an asserted but disputed right. The consultation process will not normally result in a better definition of the scope or limit on the right. It seems to us that an inordinate amount of time can be spent debating imponderables, while the real issues of potential impacts on people are relegated to the bottom of the pile.

Why become embroiled in difficult questions if there are practical ways to address the potential impacts? Certainly, there is a legal or constitutional difference if a Crown decision impacts on a pursuit or activity that is rights based, as opposed to one that is not, but if the impact is negative and can be ameliorated through reasonable accommodation why worry so much about how it is classified?

Debates about the existence or scope of a right are important, particularly when considering the need for justification. However, in many situations too much emphasis is placed on those issues and not enough on finding practical ways to deal with the impact on the real people

who are likely to be affected by the Crown decision.

7. Assume resolution is more important than process.

This is a flaw that is perhaps most frequently experienced by industry. By its very nature industry tends to be results oriented, not process oriented. The bottom line depends on a finished product or service that can be sold at reasonable prices. Although an understandable and reliable agreement may be important in negotiating or working with First Nations, the document itself is often less important than the process and the relationship that can be developed. This is particularly the case where there will be long term interactions with that First Nation.

Forestry companies, mining companies, hydro-electric companies, even oil and gas companies in some situations, carry on operations that involve a long term commitment to an area and, as consequence, involve a long term relationship with Aboriginals in that area. Reaching a quick, final legal agreement based on cash consideration paid to the local Aboriginal community may have a lot of appeal, but ultimately, unless you take the time to develop and maintain a positive relationship with that community, you will likely face continuous opposition and challenges.

Relationship building can be expensive, particularly in circumstances where the past impacts have already been felt and there is a lack of trust. However, when time, effort and money is expended upfront to:

1. understand the concerns and fears of the Aboriginal community;
2. develop an understanding of the Aboriginal community, its leadership, its needs and its aspirations;
3. identify and avoid impacts that can reasonably be avoided;
4. identify and exploit areas of mutual gain such as employment and business opportunities;
5. share openly with each other respective interests and intentions, both short and long term; and
6. develop a protocol or mechanism for ongoing, respectful and open communication;

there is a reasonably good chance of achieving a good working relationship, whether or not an agreement is reached. The product of the consultation or negotiation is the relationship.

In thinking about relationship building, consultation, and negotiation, it is important to remember that Aboriginal and treaty rights are collective in nature. It is also important to keep in mind that although Aboriginal communities have collective interests, individual members of those communities have personal interests. In developing and maintaining a relationship with an Aboriginal community you need to be cognizant of both the collective and the individual interests.

Satisfying individual interests of members of an Aboriginal group does not necessarily satisfy

the interests of the community as a whole. To have a meaningful process it is important that some form of community consultation is included. Generally the more public and transparent the process (at least within the Aboriginal community itself), the better in our view. It is important to respect the leadership of an Aboriginal community, but leadership is subject to change and unless there is general community support for an initiative, the position of the community may well change with the leadership.

It is also important to keep in mind that there is a preference for consensus. Developing a consensus requires time and effort to ensure that issues of importance to the community are brought to the table and that members of the community have had real input into the discussions, negotiations and/or consultations. If you achieve that level of informed consensus, then changes in leadership should not jeopardize the relationship.

Where there is a taking or using of reserve land by surrender or designation, there is a need for formal approval through a referendum process. Although this formal referendum process is not normally required where land issues are not involved, it is often a good idea to take any agreements, which are intended to have a lasting effect, to the members of the Aboriginal group for approval through a referendum or ratification vote. Respect for the collective view and the process of obtaining consensus or at least broad approval is often as important as the strict legal requirements for approval.

8. Reject or ignore aggressive positioning and conflict at the table and do not explore what the parties are trying to express.

People often become frustrated with meetings. A common response to the question 'What do you do for a living?' is 'Go to meetings', and that response is normally expressed with a sigh. Meeting for the sake of meeting, with no expectation of any valuable exchange, is a waste of time and should not be encouraged. Meetings should always involve some exchanges of ideas, some dialogue or, at a very minimum, an indication of positions.

However, in our view, the only 'bad meeting' is one where neither party is prepared to provide any meaningful views, ideas or insights or where neither party is prepared to listen. Either situation is equally bad and in some instances, in the reverse of the 'perfect storm' you have the 'perfect doldrums' of a meeting, where neither party is prepared to engage either actively or receptively in any meaningful way. About the best that can be said of such a meeting is that hopefully the parties will realize that nothing has been accomplished and try to make the next meeting more productive. Unfortunately, the other, and more common reaction, is to decry the waste of time and decide not to bother meeting again.

Conflict at the table need not be negative. At least one or both of the parties are trying to express their positions and even very positional meetings can be valuable as long as at least

one party is listening to what the other party is saying. In one negotiation we met on a semi-regular basis for a number of months with representatives of a First Nation who were viscerally angry about what had happened to them over a number of years. This anger erupted often, with shouting, crying and accusations of racism and cultural genocide.

One response would have been to reject such positioning out of hand, to refuse to listen to what was being said, to walk out of the process if the representatives of the First Nation were not able or willing to comport themselves more appropriately and respectfully. Such responses could be rationally justified on the basis that no progress could be made in such circumstances, that such behaviour should not be condoned and that our representatives should not be subjected to an abusive process.

In some circumstances such a response would not only be warranted but right. When such behaviour is a negotiation tactic or an effort to bully the other side to gain an advantage, then that behaviour needs to be firmly rejected. However, in this situation, it was our perception that these outbursts were not tactical or staged, but real expressions of what was felt by the people at the table.

Accordingly, we determined that we were best to listen closely, both receptively and actively, to what was being said to ensure that we understood what we were being told. This required us to avoid responding aggressively or dismissively. Instead we responded by telling the First Nation representatives in less emotive language what we had heard. Rather than reject the message, confirm that you have heard the message and that you will give it consideration.

This does not mean that you need to validate what is being said; it means that you need to hear what is being said. In most instances, in our responses, we would expand the issue to include context and positioning that we thought was relevant. This needs to be done carefully so it does not appear that you are simply rejecting what has been tabled, but doing so politely. This is much easier if you really have listened to what was said and have not just rejected it.

If you advance a response as being a full answer that should resolve the issue, then the opportunity to communicate will be significantly curtailed. That type of response will likely elicit more vitriolic responses or leave the other side feeling that they have wasted their breath.

Our approach was to repeat what had been said, but in less inflammatory language, to see if we had captured the essence of the message. We would then expand the response to provide our understanding of the issue prior to hearing their perspective, and the reasons why we had that understanding.

Over time the discussions became much less heated and positional. A number of positive

initiatives were developed and implemented. The relationship improved, although it continued to be difficult and often strained. As with all relationships they go through phases, they are not static and they are not always good. However, a working relationship where there is some degree of confidence is certainly a goal worth striving to achieve.

The very positional and aggressive situation described above brings to mind a story that some of you may have heard, that arose in the context of a multi-party facilitated negotiation. At one point the facilitator asked for suggestions and, in response, one of the parties told the facilitator to 'go jump in the lake' (although in much stronger terms not suitable for a serious paper). Rather than reacting to the personal attack, the facilitator dutifully put the suggestion up on the board for a group discussion. We are not advocating quite that degree of objectivity, but an ability to try to hear and assess the substance of the concern, rather than rising to rude and aggressive posturing, can be of significant value in finding solutions.

In our practice we have many occasions to be involved in public meetings and in private meetings with large numbers of people participating. On a lot of occasions, when the opposition is out and strongly represented, we hear our clients express dismay about the meeting, suggesting that it was a bad meeting and a waste of time. In our view those are not bad meetings, unless they occur in the presence of a regulator, a statutory decision maker, or some other person or body who could be duly or unduly influenced by hearing such strong opposition and the positions advanced.

When such meetings are part of a consultation process, whether formal or informal, they are valuable. They enable you to hear first hand the concerns and the basis for the concerns of parties that are opposed to your client's position. They enable you to assess the validity of the concerns in a way that you cannot do if the concerns are not expressed. They enable your client to modify its proposed action in an effort to address or accommodate concerns that have merit. They allow you and your client to prepare responses to those concerns that you feel are without merit.

The more difficult meetings are ones where there is no feedback. It is too easy to take silence as acquiescence or approval. Although silence may indicate approval, it can also be the consequence of: reluctance on the part of individuals to speak their minds; the lack of an identified and solidified opposition; or even a deliberate strategy not to disclose positions, or the relative strength of such positions, until the matter is before a decision making body.

One of the most interesting cases of this nature that we have come across arose in a situation where we were involved in negotiations on behalf of our client with representatives of a First Nation in relation to impacts of past development. The First Nation representatives included legal counsel, some consultants and a committee of First Nation members. The negotiations continued for approximately a year and a proposal was developed to resolve the

grievance arising out of the past impacts. The representatives of the First Nation agreed that it was a reasonable proposal and one that they were prepared to take back to their community to seek approval.

Unfortunately, although the First Nation representative or negotiating committee had undertaken some community consultation during the negotiation process, it had failed to identify some significant opposition. That opposition quickly manifested itself as soon as there was a real proposal on the table. Just as quickly the willingness on the part of the First Nation negotiators to advocate for the proposed resolution evaporated. They simply were not prepared to take on the opposition or be perceived as 'traitors' to their people.

This was a classic case where the opposition had not been particularly vocal during the negotiations, where some of the real concerns of the community were not identified and addressed, and where the community was too removed from the negotiations to appreciate the compromises reached.

It became evident quite quickly that the proposal, which had been negotiated in good faith in a funded and open process, was a non-starter. Fortunately there had been enough good will developed that we were able to arrange a further more expanded meeting to discuss what was proposed and why we believed the proposal had merit. The First Nation representation was expanded to include members of Chief and Council and some respected elders. It also included most, but not all of the past negotiating committee, none of the previous consultants, and one representative of the law firm that had been involved in the negotiations. We attended with representatives of the company involved in the negotiations.

Although both the company representatives, manager and ourselves were experienced in consultation and non-positional negotiations, we were faced with a group that had clearly decided not to engage in the process. Their legal counsel was able to provide polite responses but had no authority to indicate any position, positive or negative, about what was being tabled. It was an interesting meeting as we tried in every conceivable way to garner some reaction. The closest we got was when we produced a map and started discussing our understanding of their traditional trapping and hunting areas. A few of the representatives crowded in close to the map so they could see what was being said and a couple of them almost spoke. However, they showed resolve and discipline and remained silent.

Not a good meeting you might say. Perhaps not ideal, but remember that no meeting is really bad unless neither party is prepared to advance any ideas or neither party is prepared to listen. In this case we were certainly prepared to talk about the proposal and how it had been negotiated and what was included in the proposal and what was not included. Although the representatives of the First Nation were not prepared to engage, it subsequently became clear that they were prepared to listen and had listened. In due course the negotiations recommenced, and a new resolution which addressed all of the major concerns was

achieved. That proposal became an Agreement in Principle, which became a draft final agreement and, after ratification by a vote of the members of the First Nation, was signed and became a major impact settlement agreement.

9. Maintain that consultation must result in agreement or else it is a failure.

Consultation is not a failure simply because an agreement is not reached. Consultation is only a failure if there is no valuable exchange of information and no increased understanding of the rights being asserted, the scope of those rights or the nature and extent of the potential impacts. Reaching an agreement or consensus or even obtaining the consent of an Aboriginal group to a Crown decision is desirable, but it is not necessary in most circumstances. What is necessary is that the Crown has ensured that the Aboriginal group is well informed about the nature of the decision the Crown is contemplating making, that the Aboriginal group has had the opportunity to consider the affects of such a decision on the group, the individual members of the group and on their rights and their exercise of those rights. Consultation requires the exchange of such information and that the Crown seriously and reasonably considers the concerns of the Aboriginal group in relation to such impacts and endeavours to accommodate those concerns.

Reaching an agreement could require the Crown to recognize the legitimacy of an asserted right. Reaching an agreement could require the parties to accept a common view of the scope of the asserted right and the nature and magnitude of the potential impact on that right. Reaching such an agreement would be difficult and likely impossible. However, if the goal is not to reach agreement but to consult, it is possible to consider the asserted right and the potential impacts on that asserted right without agreement on, or formal recognition of, the asserted right. It is also possible to consult about ways to avoid or mitigate potential impacts, without actually agreeing on the nature and extent of the potential impacts. Consultation and accommodation can be achieved with each party reserving a distinctly different position in relation to fundamental questions.

This is an important fact to keep in mind when embarking on a consultation process. In most instances, we suggest it is better if the goal is not to reach an agreement, but rather to undertake a bona fide consultation in relation to the Crown decision or action and the potential impacts on the Aboriginal group and its rights.

10. Avoid the introduction of a mediator at all costs.

It is far easier to persuade yourself that your own views are right and the other parties' views are wrong than it is to persuade a third party mediator. Why create the hassle and why

create a potential complication to your conflict by introducing an independent third party? The third party's ability to point out the flaws in your argument may simply be unwelcome, and do nothing to pad the ego.

Our own research suggests that resistance to mediation can come from all fronts in these multi-party processes. Representatives of all parties fear a shift in power balance at the table. There is also a generally held apprehension that a suggestion for, or agreement to, mediation will be seen as a sign of weakness (either in terms of confidence in that party's positions or in that party's negotiator).

It is often suggested that since a mediator is not a decision maker and cannot bind the parties, that there is no upside or downside to using a mediator. We do not think that that is true. The introduction of the mediator significantly changes the dynamics of a negotiation or consultation, particularly in a bi-lateral process. In a multi-party process the dynamic of 'third party' often exists where there is a bi-lateral dispute on one issue and the other party or parties are 'disinterested' observers. The introduction of a mediator, of a disinterested third party, into a negotiation prompts the parties directly involved to explain and justify their position to try to win over the mediator. Positional negotiation normally does little to win over a mediator. Instead, each party goes to great lengths to explain the 'facts' and the merits of their respective positions, which can have the effect of changing a positional process into a factually oriented interest-based negotiation.

A mediator also can enhance of the role of moral suasion in a negotiation. No matter how positional a negotiation has become, no party wants to be perceived as acting in an unprincipled and inappropriate fashion. When a mediator is thrown into the mix, the parties are faced with an independent unbiased third party who will be making value judgments about the tactics being used, notwithstanding that he or she has no decision making role.

Our experiences with mediation and facilitation have generally been positive. In one particular situation, we were acting on behalf of a First Nation in relation to a claim against a Crown Party. The negotiations had become protracted and the negotiator on behalf of the Crown Party had changed on numerous occasions. There seemed to be little focussed interest in finding resolution. Ultimately, we were able to convince the Crown party to accept a mediator. Almost immediately representatives of the Crown party came to the meetings more prepared and ready to discuss and justify their positions than in the past. A timetable was worked out or imposed which required the parties to pay attention and focus on these issues as opposed to the myriad of other things on their plates.

With the mediator in place, the First Nation was able to articulate the history which gave rise to the grievance and the claim. As is often the case, that was a compelling story which cast the actions of the Crown in a negative light. In the end result, we were able to formulate a resolution to the claim and finalize a settlement on terms that were reasonable to our client

and certainly more favourable than the Crown representatives were prepared to consider before the introduction of mediation.

11. Assume consultation is about rights and not responsibilities, future concerns, or present goals.

In some ways this topic is similar to other issues already discussed. There is no question of Section 35 consultation obligations arises around the issue of Aboriginal and treaty rights and the honour of the Crown. It is in that context that the actual consultations should occur, but if the focus of the consultation is entirely on the issue of rights, it will likely become a long, difficult and divisive discussion with little chance of consensus.

A basic premise of the emerging law in this area is the existence of a need to reconcile the interests and aspirations of the Aboriginal people of this country with the interests and aspirations of the larger society. There is a recognition that the Aboriginals as the first citizens of this country have special rights and interests. This recognition requires that when the Crown exercises its constitutional and legislative powers in such a way that it can impact those special rights, then the Crown must act in a way that upholds the honour of the Crown. This imposes a duty on the Crown to consult with the potentially impacted Aboriginal group. It also imposes an obligation of the Aboriginal group to consult with the Crown. It is a two way process undertaken to avoid unnecessary harm or impact to the rights of the Aboriginal group. At its root, the purpose of consultation, should be mutually beneficial.

Canada is a pluralistic society that is premised on the concept of tolerance and respect for differences in culture, language, religion, tradition and history. Unfortunately, tolerance and respect has in the past not been the hallmark of our relationship with Aboriginal peoples. That fact has left a deficit and a need for reconciliation arising from the past and for ongoing reconciliation in future endeavours. The constitutional recognition and affirmation of existing Aboriginal and treaty rights was a significant step. The concepts of consultation, accommodation and the honour of the Crown are important legal tools in achieving reconciliation.

Consultation is about the future. It is about reconciliation and the development of a new, tolerant and respectful relationship and, although the duty initially rests on the Crown, once the consultation is triggered, corresponding obligation falls on the Aboriginal groups involved.

12. Insist that all issues between the parties be resolved by the consultation.

If you assume all complex issues between the parties are going to be addressed and resolved by consultation triggered by a specific proposed action of the Crown, you will be significantly disappointed. More importantly, if you set out to do that, the consultation will quite frankly never end. The relationship between the Crown and Aboriginal peoples has a long and complex history. It is ongoing and continually evolving.

In many ways it is like any other relationship. There are positives and negatives to the relationship. Seeking to resolve all the complex issues in any such process is like suggesting that a married couple, in setting out to resolve a spat or argument, should try to resolve everything between themselves and set out a course of conduct that in the future will avoid further confrontations. That is not the nature of any relationship and should never be the goal in the consultation over a specific decision or action by the Crown.

13. Never talk to the other parties until you want something.

A timber company and an Aboriginal group can pass like ships in the night. The Aboriginal group can be aware that the timber company is cutting outside of its traditional territory, but not yet in the territory. The timber company may know that the Aboriginal group exists, but does nothing because the timber operation is outside the traditional territory of the Aboriginal group. Though both parties may suspect that the timber company will want to start operations within the traditional territory at some time in the future, they decide that it is best to leave discussions until the company is ready to fell the first tree.

Invariably, the Crown has an existing and continuing relationship with Aboriginal peoples. A relationship can be good or bad and generally is a mixture of both. It can also be active or inactive but it normally includes lines of communication and basic understandings of conduct.

Unlike the Crown, private companies such as the timber company referred to above, often do not have an existing relationship with local Aboriginal people. The Aboriginal groups may know that a company exists but they may never have dealt directly with that company and have no understanding of the culture of that company. Similarly, the private company, although it understands an Aboriginal group exists in an area, may have no real concept of what that Aboriginal group does, its leadership, its governance issues, its territory, its people and its culture. That is not necessarily a problem as long as there is no area of dispute that arises between the company and the Aboriginal group. However, if the company is undertaking any major activity within an area in which the Aboriginal group is carrying on its traditional practices, the likelihood of there being a dispute is pretty high. In such circumstances, the less knowledge that the private company has about the Aboriginal group and its practices, the more likely it is that a dispute will occur.

In the past, the first introduction between a company and an Aboriginal group was related to

the occurrence of an impact, a difference of view, a dispute and an acrimonious exchange. In our view, this was extremely unfortunate and we are pleased to see that Aboriginal groups and businesses are taking more proactive steps today. Those steps should be taken long before the company starts to consider operating in the traditional territory of the Aboriginal group.

Each corporation will decide within its own internal governance how it wants to address its Aboriginal relationships. Regardless of its internal governance however, relationships between corporations and Aboriginal groups are relationships between people, between officers and employees of the corporation and members of the Aboriginal group including leaders, elders, resource harvesters and others.

We have found that there is a benefit in having an individual within the corporation charged with the responsibility for establishing and maintaining a relationship with that corporation's Aboriginal neighbours. Since such a relationship will depend on the interaction of any number of corporate people, the individual with that responsibility must also have the power and authority necessary to influence, direct and even mandate the actions of corporate employees in dealing with representatives of the neighbouring Aboriginal group.

Normally a first step is to learn as much as you can about the Aboriginal people that are about to become your neighbours. Often there are significant histories written about different Aboriginal groups that give some basic information and even some insight into their traditional territories, their practices, language and culture and past interactions and relationships with government and other people and entities entering their territory. Information can be garnered from Indian Affairs and provincial governmental departments. Normally you can find the names of the current and past leaders. Often you can find out the names of some of the elders, the businesses that are carried on within the Aboriginal group and the traditional pursuits or activities that are commonly pursued.

Nothing is more important than personal contact and the person charged with maintaining the relationship should make personal contact as soon as possible and as often as possible, particularly in the formative periods. A company is not represented by just one individual but by every single employee that interacts with an Aboriginal group. Accordingly, putting in place cross-cultural training and having policies in relation to that relationship is very important. If this effort is undertaken at the beginning, then when an issue does arise and the potential for conflict occurs, there is a basis, hopefully a positive basis, to meet with representatives of the Aboriginal group to discuss the issues and try to find resolution.

DISCLAIMER: *This article is presented for informational purposes only. The content does not constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors' and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.*

While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.