

# Consultation and Accommodation in the Interim Period

- “The duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”

– *Haida Nation v. BC* at para 33



# The Duty to Consult and Accommodate

- Scope of the duty will vary according to the strength of the nation's case and the seriousness of potential impacts
- At a minimum includes good faith consultation with the intent of substantially addressing the concerns of the First Nation
- Deep consultation, aimed at finding a satisfactory interim solution, may be required, including formal participation in the decision-making process by the First Nation



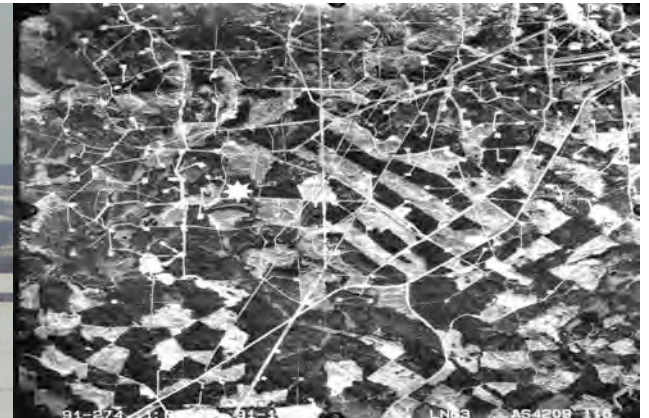
# The Duty to Consult and Accommodate

- First step in consultation is to discuss the process itself
- The Crown must engage directly with the First Nation, not just as an afterthought to standard public participation
- There is a duty to consult with respect to higher level “strategic” planning and policy decisions about the use of resources, not just project-specific or operational ones
- The Crown’s duty is not just to provide a reasonable process, but also substantive accommodation of impacted Aboriginal Title and Rights
- Varying or withholding approvals or even legislative/policy amendments may be required
- The honour of the Crown may not be delegated to third parties

# Treaty context

- Decisions to alienate treaty lands or that may otherwise negatively impact on treaty rights to fish, trap or hunt require consultation and accommodation
- Crown will already have notice of the rights impacted, but otherwise the legal principles about consultation from *Haida* apply

– *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69





# Implications

- Failure to work with First Nations to design the process for review and decision-making on projects may result in legal challenges and delay (e.g., *Dene Tha'*, *CSTC* cases)
- Resource tenures or approvals granted without honourable consultation and accommodation are vulnerable to legal challenge and may be set aside or suspended by the courts (e.g., *Klahoose* case)





