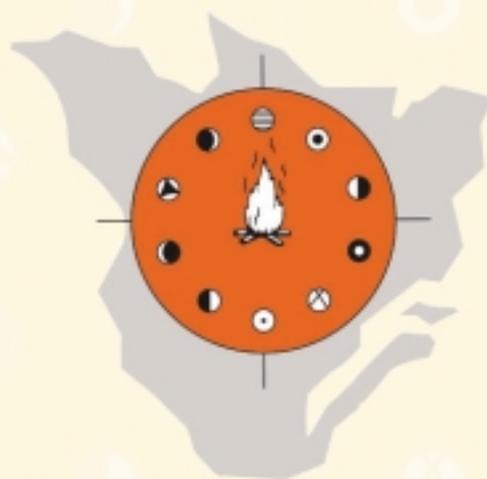


CONSULTATIONS PROTOCOL

CONSULTATIONS PROTOCOL

of First Nations
of Quebec and Labrador



Assembly of First Nations of Quebec and Labrador

Prepared by

First Nations of Quebec and Labrador Sustainable Development Institute



OCTOBER 2005

© First Nations of Quebec and Labrador Consultations Protocol

Published by: the Assembly of First Nations of Quebec and Labrador
250, Place Chef Michel-Laveau, bureau 201
Wendake (Quebec) G0A 4V0
Telephone: (418) 842-5020

Prepared by: the First Nations of Quebec and Labrador Sustainable Development Institute
Telephone: (418) 843-9999
Web site: www.iddpnql.ca

Coordination of the publication: Suzy Basile

Legal analysis: M^{re} Franklin S. Gertler and M^{re} Geeta Narang de Franklin Gertler & Associés

Design and layout: Danielle Lambert, Buzz Design et créativité

English translation and revision: Raymond Robitaille and Vivian Côté

Reproduction of this document for commercial purposes is strictly forbidden. On the other hand, reproduction for non-commercial purposes can be done with permission in writing of the Assembly of the First Nations of Quebec and Labrador.

October 2005

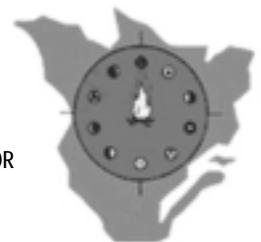
CONSULTATIONS PROTOCOL

CONSULTATIONS PROTOCOL

of First Nations
of Quebec and Labrador

OCTOBER 2005

ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR



FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE

PREPARED BY



TABLE OF CONTENTS	OVERVIEW	4
	CHAPTER 1	
	BACKGROUND	6
	1.1 The Assembly of First Nations of Quebec and Labrador	6
	1.2 The First Nations of Quebec and Labrador Sustainable Development Strategy and Institute	7
	1.3 Negative Experience with Consultations	8
	1.4 Funding and Capacity	9
	1.5 Revised Consultations Protocol	9
	CHAPTER 2	
	THE DUTY TO CONSULT AND ACCOMMODATE	
	Origins, Context and Implications	10
	2.1 The Duty: Origins	10
	2.1.1 Prior Occupation	10
	2.1.2 Section 35 Rights Limit Government Power	10
	2.2 The Duty: Its Substantive Component	11
	2.3 Consultation and Accommodation Must Be at the Strategic Planning Level to Fulfil to Duty	12
	2.4 The Duty and Existing Consultation Mechanisms	13

CHAPTER 3			
THE AFNQL CONSULTATIONS PROTOCOL	14	REFERENCES	23
PART A) Defining the Duty to Consult and Accommodate	15	CONSULTED CASES	24
Source, Nature and Context of the Duty to Consult and Accommodate	15	CONSULTED WEB SITES	25
All Levels of Government	15	APPENDICES	
Substantial Component of the Duty	15	1. Geographic locations of the First Nations of Quebec and Labrador	26
Variations in the Scope of the Duty: definite proof of the existence of rights is not required	15	2. Flowchart : AFNQL Consultation & Accommodation Process	27
The Obligation in Time	16	3. List of stages requiring letters	28
Third Parties	16	4. Model of Letter of refusal	29
Existing Mechanisms	16	5. AFNQL Resolution No.18/2005	31
PART B) Implementing the Duty to Consult and Accommodate	17		
Guiding Principles	17		
Ongoing Information Obligations	17		
First Nations' Refusal to Participate	17		
STEP 1: Beginning the Process	17		
STEP 2: Identify First Nation Interests	17		
STEP 3: Initial Response	18		
STEP 4: Federal and/or Provincial Government to Provide Information and Funding	19		
STEP 5: Identification of First Nation Interests	19		
STEP 6: Establishing a Consultation Plan and Parameters	19		
STEP 7: Consultative Activities	21		
STEP 8: Canada and /or the Province's Update of Decision-Making	22		
STEP 9: First Nation Response to the Update	22		
STEP 10: Agreement, Continued Consultation or Withdrawal	22		
STEP 11: Consultation and Accommodation Report	22		

OVERVIEW

The overriding purpose of this First Nations of Quebec and Labrador Consultations Protocol is to establish a framework to ensure the respect of the right of the First Nations of Quebec and Labrador to be consulted and accommodated before Canada, Quebec, Newfoundland and Labrador make decisions or take actions that may affect First Nations' rights.

This Protocol is designed for use in situations where Aboriginal claims or rights have not yet been fully acknowledged or recognized through treaties, negotiations, court decisions or other means. Where rights are so acknowledged, the obligations of federal and provincial governments are even more substantial in terms of process and the sharing of responsibilities and social and economic benefits with First Nations.

The Protocol provides background information on the Assembly of First Nations of Quebec and Labrador, its Sustainable Development Institute and Sustainable Development Strategy, as well as past experiences with consultations (Chapter I). A discussion regarding the origins, context and consequences of the federal and provincial governments' duty to consult and accommodate First Nations follows (Chapter II). Finally, the duty is defined (Chapter III, Part A) and an implementation model is provided (Chapter III, Part B). Thus, the Protocol sets out a step-by-step process delineating how consultation and accommodation should unfold. It is meant to be a practical tool for communities and First Nations that receive requests for consultations or demand to be consulted when they learn of proposed action that may affect First Nations.

Use of the Protocol goes beyond specific consultations on a case-by-case basis. It is also intended as a reference tool in support of representations and negotiations at the federal and provincial levels with a view to revising existing legislation and reaching agreements on the mechanisms for First Nations' involvement in decision-making, especially as regards resource allocation and development.

Therefore, beyond its application to individual government decisions, this revised Consultations Protocol may be used by the First Nations of Quebec and Labrador, individual communities and the AFNQL in engaging governments in dialogue and negotiations to modify legislation, policies, planning processes, and regimes of resource allocation and management in accord with the requirement of respect for Constitutional rights.

At the provincial and federal levels there are existing general consultations mechanisms such as environmental assessment regimes. In most cases, simply following these processes will not be sufficient to discharge federal and provincial governments of the duty to consult and accommodate.

The Supreme Court has made it clear that key questions relating to Aboriginal rights cannot be left to the unfettered discretion of bureaucrats in charge of decision-making. Rather, statutory provisions, regulations or at least a written policy will be required to guide decision-makers in their treatment of Aboriginal interests. Broad and general powers, for example to allocate and manage resources, and actions taken under such regimes may be invalid. It is not enough for federal or provincial governments to commit to exercising powers with due regard for the duty to consult and accommodate. Explicit written guidance must govern the protection of constitutional rights.

Consultations are an excellent opportunity for First Nations to exercise their jurisdiction over, and their social and economic interest in, lands and natural resources. Given the constitutional duty to consult and accommodate, First Nations should take a proactive approach. This means making federal and provincial governments aware of First Nations' interests in land and natural resources and other Aboriginal rights, as well as how they may be affected by other governments' actions and demanding a role in decision-making processes (implementation of this Protocol).

The Protocol is based on Aboriginal principles and the AFNQL Strategy for Sustainable Development. It is an expression of First Nations' contemporary understanding and exercise of self-determination, inherent jurisdiction and self-government. Further, it reflects the principles enunciated by the Supreme Court of Canada, especially in *Sparrow*, *Gladstone*, *Delgamuukw*, *Haida* and *Taku* cases regarding the provincial and federal governments' duty to consult and accommodate.

The Consultations Protocol reflects an adequate minimum standard for a valid process. It may be supplemented to reflect particular needs, rights and circumstances. Of course, it is not intended to prescribe internal First Nations process. It is meant to complement proactive First Nation governance and resource management initiatives in traditional territories. Furthermore, negotiations, agreements and treaties may provide other mechanisms for the exercise of First Nations rights.

CHAPTER 1 BACKGROUND

1.1 The Assembly of First Nations of Quebec and Labrador

The Assembly of First Nations of Quebec and Labrador (AFNQL) was created in 1985. Like the United Nations, it is a regular meeting place for the leaders of the 43 communities that make up the ten First Nations of Quebec and Labrador: the Abenaki, the Algonquin, the Atikamekw, the Cree, the Huron-Wendat, the Malecite, the Micmac, the Mohawk, the Montagnais-Innu, and the Naskapi. The AFNQL's mission is to serve its 43 members. It holds usually three meetings a year to study issues of common concern and make public its collective decisions. The Chiefs' Assembly elects a spokesperson whose title is Regional Chief of the AFNQL. Chief Ghislain Picard currently holds this position, which runs for three years.

The AFNQL is connected with other Canadian First Nations in two ways. First, each community's Chief may become a member of the Assembly of First Nations (AFN), which represents all First Nations of Canada. Secondly, the AFNQL Regional Chief is a member of the AFN Executive Committee, which examines selected issues in detail and then makes recommendations at regular and special AFN meetings.

As provided for in its formal documentation, the AFNQL deals with various issues, such as:

- attempts to modify the Canadian Constitution in order to guarantee our Aboriginal rights, including Aboriginal title and treaty rights;
- important legal cases that will have an impact on all our rights and titles;
- federal and provincial policies that interfere with our traditional customs and our way of life like, for example, the Specific and Comprehensive Claims Policies;
- government policies and laws, such as the *Indian Act*, which specifically address First Nations issues;
- funding levels and other relations with Canada, Quebec and Newfoundland and Labrador;
- Health, housing, education, environment, childcare, economic development and all social, economic and cultural issues;

- all issues affecting self-government, international relations and national relations with Canada, Quebec and Newfoundland and Labrador.

1.2 The First Nations of Quebec and Labrador Sustainable Development Strategy and Institute

The Assembly of First Nations of Quebec and Labrador Sustainable Development Strategy was adopted in the fall of 1997. It provides for the creation of the First Nations of Quebec and Labrador Sustainable Development Institute (FNQLSDI) and the elaboration of First Nations solutions to social, economic, political and environmental problems. A second version of the Strategy will be available in the fall of 2005.

Thus, the FNQLSDI has the mandate of promoting the Sustainable Development Strategy to ensure that First Nations live in communities with healthy environmental and economic conditions.

Today, development issues are key to the survival of First Nation communities and the Strategy has become an invaluable tool in facilitating discussions, negotiations and planning of this much anticipated development.

It is important that the First Nations of Quebec and Labrador share and promote the Sustainable Development Strategy to ensure that it is a genuine tool for economic, social and cultural development. This will ensure cultural survival, protection of territories and resources, as well as participation in development in accordance with Aboriginal principles.

“The Sustainable Development Strategy provides for the role of the Institute as follows:

Our sustainable development institution will help us gain political, legislative and executive powers for formulating and administering laws, policies and programs pertaining to environmental protection. It will

also enable us to set up our own environmental assessment process... A priority objective being to ensure the management of the environment... and,

...the recognition of Aboriginal rights that must go hand in hand with measures to protect local institutions that instil responsible use of resources. This recognition must also give the local communities the opportunity to get involved in decision making with regard to the use of the resources in their region.”¹

Sustainable development is a multifaceted concept. It demands that attention be paid to environmental protection and stewardship. It also has important implications in terms of democracy, local participation in governance and decision-making regarding resources and sharing in the benefits of development for disadvantaged regions and populations. Further, sustainable development requires that principles of intergenerational equity be respected in resource use.

The AFNQL Sustainable Development Strategy implies that the First Nations must have a genuine role in resource development and other decisions potentially affecting Aboriginal rights and title and treaty rights.

¹ Strategy of Sustainable Development of the First Nations of Quebec and Labrador, November 1997. Assembly of the First Nations of Quebec and Labrador, pp. 7 and 8.

1.3 Negative Experience with Consultations

Some First Nations and communities have signed territorial and economic agreements and have created partnerships with other governments and with industry. This allows them to participate in activities that affect their territories and their populations. Nonetheless, they must often deal with the general federal and provincial regimes of resource allocation and management, sometimes in modified forms. Generally, for these communities and First Nations, the rules with regard to consultation and participation in government decision-making are clearer. For others, notably those who rely on Aboriginal rights and title and historic treaties, those who are currently negotiating agreements and those who have no agreements, the consultative processes under the generally applicable laws and policies have been highly unsatisfactory.

In the last few years, the participation of several First Nations and communities, as well as of that of the AFNQL Secretariat, has been sought in various consultations concerning use and development of traditional territories, resource management, etc. However, no clear process has been established for these consultations. Objectives, processes and outcomes that stem from them remain ill-defined and the experience has had a negative impact on the communities involved.

First Nations report that the real reasons for consultations – their true purposes, goals and effects – are not always clearly communicated. This has led to people feeling ignored, manipulated and misunderstood by the governments that initiate the processes and by the interested resource developers. All too often, representatives of the federal and provincial governments requesting consultations are not aware of the rights of First Nations of Quebec and Labrador. They are not aware that they are under a constitutional obligation to consult and accommodate First Nations.

In most cases, consultations with excessively rigid timetables are imposed, as the consultation materials have been developed without the active participation of the First Nation. Thus, First Nations feel rushed by the haste of various ministries, companies and groups that seek to consult them in order to obtain their consent and conclude agreements. In other cases, those seeking to consult First Nations hide behind general legislative and policy requirements without ever addressing the essence of the constitutional duty to consult and accommodate First Nations.

Further, First Nations are unable to determine whether federal and provincial governments pay sufficient attention to their concerns, rights and interests because there are no reports produced that deal specifically with this issue. Sometimes, a consultations summary is produced and distributed to First Nations. This is not enough. Once consultations are over, First Nations are, for all practical purposes, excluded from subsequent decision-making processes and the activities that take place on their territories. Canada, provincial governments, industry and developers proceed with projects without paying heed to the concerns raised by First Nations or taking measures that could protect First Nation interests.

Overall, consultations have been inadequate. In some cases, actions have been taken that affect First Nation rights, interests and needs in the absence of any consultation and accommodation process whatsoever. Often, a First Nation's silence in response to a consultation request has been wrongly interpreted as a renunciation of its rights or as consent to the action being contemplated by the federal and provincial governments. Sometimes, despite the objections of a First Nation, governments have proceeded with projects and decisions without substantially incorporating Aboriginal concerns.

Canada, the provinces and industry's approach to consultation and accommodation has been woefully inadequate. It has violated Aboriginal rights and threatened First Nations' needs, interests and activities. Thus, establishing a First Nations protocol is essential to ensure meaningful consultation and accommodation.

1.4 Funding and Capacity

A major stumbling block to meaningful and valid consultation and accommodation with First Nations is the lack of financial and human resources needed to enable them to analyse and respond to consultations requests.

The duty to consult and accommodate carries with it the obligation to ensure adequate and sustained funding for First Nations to carry out the ongoing work of identifying and articulating their interests and to participate in decision-making processes. Federal and provincial governments are bound to act honourably in these matters. This includes the obligation to ensure that First Nations are on a fair footing with regard to information, expertise and resources.

1.5 Revised Consultations Protocol

The development of the original *First Nations of Quebec and Labrador Consultations Protocol* was requested by the AFNQL's Chiefs' Strategy Committee at a meeting held in Quebec City on January 15th, 2003. A working group set up by the First Nations of Quebec and Labrador Sustainable Development Institute and adopted by the Chiefs' Assembly on June 18th, 2003 prepared it.

First Nations communities relied a lot on the Protocol. The 2005 revisions reflect recent court decisions (especially *Haida*² and *Taku*³), developments in negotiations and evolving legislation and government policy affecting Aboriginal involvement in decision-making. The Sustainable Development Institute produced this 2005 version AFNQL Consultations Protocol, with the assistance of legal counsel.

² *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [hereinafter *Haida*].

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

CHAPTER 2 2.1 The Duty : Origins

THE DUTY TO CONSULT AND ACCOMMODATE Origins, Content and Implications

The duty of the Crown to consult and accommodate First Nations when making decisions that may affect Aboriginal rights and title and treaty rights is the result of several converging circumstances, namely:

- > prior Aboriginal occupation;
- > constitutional recognition of Aboriginal rights;
- > accelerating development pressure on natural resources and growing economic development needs of First Nations;
- > the general trend towards public participation in decision-making regarding public and private sector projects, as reflected notably in environmental impact assessment; and, of course;
- > the environmental, economic and democratic principles of sustainable development.

2.1.1 Prior Occupation

At the most fundamental level, federal and provincial governments' duty to consult and accommodate First Nations flows from the fact of prior First Nations occupation of their traditional territories as self-governing peoples relying on the natural resources of the land and maintaining a sustainable way of life and economy.

2.1.2 Section 35 Rights Limit Government Power

Section 35 of the *Constitution Act, 1982* recognizes and affirms First Nations' Aboriginal and treaty rights, including Aboriginal title. Aboriginal rights and title and treaty rights in lands and resources have, thus, gained recognition as legal rights. This constitutionally limits the exercise of the legislative jurisdiction of federal and provincial governments', as well as the Crown's territorial rights and property in natural resources. In concrete terms, section 35 has given rise to process requirements of involving First Nations in decision-making and substantive economic rights of accommodation and compensation.

Accordingly, in the 1990 case of *R v. Sparrow*⁴, the Supreme Court of Canada found that if the federal or provincial governments makes a decision that infringes First Nation' rights, it must justify that decision. To determine whether the infringement is, in fact, justified, a court will look at a number of factors including whether the affected First Nation was consulted in the decision-making process.

More recently, in November 2004, the Supreme Court of Canada rendered two pivotal decisions regarding the duty to consult: *Haida* and *Taku*. In these cases, the Supreme Court confirmed that the provincial government is required to consult with First Nations when contemplating a decision that may affect their rights, regardless of whether the right in question has been proven in a court of law, or recognized by other means such as a concluded treaty.

In June 2005, the principles of *Haida* and *Taku* were applied in the Quebec context with dramatic results. The Superior Court declared that Quebec breached its constitutional duty when the Minister of Natural Resources issued cutting permits to Forager without first consulting and accommodating the Betsiamites First Nation. The *Betsiamites* case claim Aboriginal title to the territory they call Nitassinan which includes l'Île René-Levasseur on which Kruger sought to log. Canada and Quebec have been negotiating a treaty for many years. The *Betsiamites* case has yet to be confirmed or overturned by a higher court.

In the *Haida* case, Chief Justice McLachlin summarized the Supreme Court's thinking regarding the origins, nature and scope of the duty to consult and accommodate:

"Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embed-

ded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests."

(Haida SCC, para 25)

Thus, section 35 of the *Constitution Act, 1982* and the honour of the Crown oblige federal and provincial governments to consult and accommodate First Nations when they know or should know that an action may reflect First Nations rights. Furthermore, this obligation is unequivocally engaged where a claim has been accepted for negotiation. The Court will intervene where the federal or provincial governments fail to recognize and discharge the duty to consult and accommodate.

2.2 The Duty: Its Substantive Component

A key question is the extent to which the duty owed to First Nations extends beyond the process of consultation to include a substantive duty to accommodate First Nations' rights in ways that have real significance in jurisdictional (resource governance) and economic (resource allocation) terms with respect to development in traditional territory.

The revised AFNQL Consultations Protocol reflects the view that the duty has a significant substantive component. This interpretation is based on the fact that Aboriginal rights are constitutionally protected, and thus, they must be interpreted broadly. The view also flows from reading *Haida* and *Taku* in the context of prior Supreme Court decisions, notably *Gladstone*⁵ and *Delgamuukw*⁶.

In *Haida*, the Supreme Court provided the broad outline of the basis and methodology of consultation and accommodation:

⁴ *R v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter cited as *Sparrow*]

⁵ *R. v. Gladstone*, [1996] 2 S.C.R. 723. [hereinafter cited as *Gladstone*]

⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter cited as *Delgamuukw*]

« Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations (...) »

« When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong prima facie case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. »
(*Haida SCC*, para 46-7)

In *Delgamuukw*, the claim was for Aboriginal title. Chief Justice Lamer wrote the main reasons. He defined the content of Aboriginal title in following terms:

" [...] Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves Aboriginal rights. Rather, it confers the right to use land for a variety of activities."
(*Delgamuukw*, para 111)

On the test for the justification of infringement of Aboriginal title, he wrote the following:

"The exclusive nature of Aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that Aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone*, which should apply. What is required is that the government demonstrate (at para. 62) "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of Aboriginal title in the land. [...]"

Moreover, the other aspects of Aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. [...] First, Aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. [...] This aspect of Aboriginal

title suggests that the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified, [...] The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal land.
(*Delgamuukw*, para 167 and 168)

If hunting and fishing regulations referred to in *Delgamuukw* may require First Nation consent, then the duty to consult and accommodate should require the same for actions such as authorizing forestry and mineral extraction, building hydroelectric and power facilities.

2.3 Consultation and Accommodation Must Be at the Strategic Planning Level to Fulfill Duty

In *Haida*, the Court found that the province had a duty to consult with First Nations at the strategic planning stage, in that case, at the stage of granting tree farm licenses. The duty to consult is not fulfilled if consultation occurs only at the operational level. First Nations must be involved in decision-making at the higher level where fundamental resource allocations are made. The revised AFNQL Consultations Protocol incorporates this important principle.

To take a concrete forest-sector example, beyond involvement in ground-level management and felling decisions, there must also be Aboriginal involvement through consultation and accommodation at the ministerial and high level of deciding which lands will be cut, overall sustainable yield policy, the setting of allowable cuts and the allocation of cutting rights.

The requirement of Aboriginal involvement in these higher-level decisions has serious implications. Provincial forest resource legislation, policy and allocations are vulnerable if findings in *Haida* and other cases are taken seriously. Given the developments in the duty to consult and accommodate, First Nations with Aboriginal rights and title and treaty right claims are in a good position to demand recognition of extensive resource and economic rights through negotiation or by other means. The *Betsiamites* case referred to earlier may be seen as an indication of what is possible for First Nations in Quebec and Labrador.

2.4 The Duty and Existing Consultation Mechanisms

In *Taku*, the Crown was successful in its defence that it had fulfilled its duty to consult and accommodate by following the existing provincial environmental assessment process in deciding whether to open a 160-km mine road through traditional territory. However, it is important to note that the process under British Columbia's Environmental Assessment Act was very thorough, more specifically:

- environmental assessment;
- there were specific provisions giving Aboriginal peoples an important role in environmental assessment;
- adequate consultation and accommodation was, in fact, found to have occurred in a process that extended over three and a half years;
- there was financial assistance for the Taku River Tlingit First Nation;
- additional expert studies were commissioned to explore First Nation concerns; and,
- the decision attacked was not the final stage in the approval process, so other measures to consult and accommodate could occur later on in the process.

Thus *Taku* should not be interpreted to mean that federal and provincial governments will always be able to discharge their duty to consult and accommodate by simply following existing legislative regimes. A province may put forward regimes of environmental assessment and forest management as adequate mechanisms. However, substantial amendments and modifications will be required for these regimes to satisfy the constitutional duty to consult and accommodate First Nations as reflected in this Protocol.

CHAPTER 3

THE AFNQL CONSULTATIONS PROTOCOL

The federal and provincial governments have a constitutional duty to consult and accommodate First Nations before taking actions that may affect First Nation interests. This includes: modification or adoption of legislation, policy-making, planning processes, modification or adoption of resource allocation regimes and the approval of specific projects or resource allocations.

Canada and the provinces are required to: 1) act in good faith and ensure an effective process throughout; 2) provide First Nations with information regarding the action contemplated; 3) ensure adequate funding for First Nations' participation in consultation and accommodation; 4) consult First Nations with the aim of substantially accommodating them; 5) incorporate those concerns into the decision-making process; and 6) take concrete steps to accommodate the affected Aboriginal interests made clear through the consultation process.

The following Consultations Protocol is organized in two parts: **Part A**, Defining the Duty to Consult and Accommodate, which reflects constitutional principles and recent case law regarding the duty; and, **Part B**, Implementing the Duty to Consult and Accommodate, which proposes a step-by-step process by which that duty may be fulfilled. It is meant to serve as a tool for First Nations and communities who receive requests for consultation.

Finally, a flow chart explaining the proposed consultation and accommodation process set out in Part B is produced as an appendix, along with a sample letter that consulted First Nations may use as a model.

PART A

DEFINING THE DUTY TO CONSULT AND ACCOMMODATE**Source, Nature and Context of the Duty to Consult and Accommodate**

1. **The Duty:** When contemplating any action that may affect First Nations, federal and provincial governments have a constitutional obligation to consult with First Nations and accommodate their interests. Actions that trigger the duty include: modification or adoption of statutes and regulations, policy-making, planning processes, modification or adoption of regimes of resource allocation and management, such as crude wood material (...) and (...) the approval of specific projects and allocations of resources.
2. **Status of First Nations :** Consultation and accommodation must account for First Nations' rights and jurisdiction with respect to their traditional territories, resources, economies and development. First Nations may not be treated as just another stakeholder.
3. **First Nations' Relationship with the Land:** Consultation and accommodation must respect the sacred bonds between First Nations and the land, First Nations' dependence on natural resources, as well as First Nations' rights and responsibilities that result from this special relationship.
4. **Sustainable Development:** The principles of sustainable development, particularly as set out in the First Nations' of Quebec and Labrador's Sustainable Development Strategy, must be respected throughout consultation and accommodation.

All Levels of Government

5. **Federal, Provincial and First Nations Governments:** Both the federal and provincial governments together with their agencies and Crown corporations are subject to the duty to consult and accommodate First Nations.

Substantial Component of the Duty

6. **Strategic Planning Level:** Federal and provincial governments are obliged to consult and accommodate First Nations early and at the strategic planning level, (...) not merely at the operational level.
7. **Substantial Accommodation:** Federal and provincial governments must consult with First Nations in good faith with the aim of substantially accommodating their interests.
8. **The "Zero Tolerance" Approach:** First Nations shall not adopt a so-called "zero-tolerance" approach and categorically refuse to participate in any process that contemplates actions that may affect the rights of the Aboriginal party. So doing may subsequently be interpreted as bad faith by a court of law.

Variations in the Scope of the Duty: definite proof of rights is not required

9. **Nature and Scope of Duty Vary:** The nature and scope of the duty vary: it is at its most intense and extensive, including the requirement of First Nation consent, when there is strong evidence of an Aboriginal right, title or treaty right and the potential effects of the action being contemplated are serious; the duty is less stringent when there is less convincing evidence and potential effects of the action are less serious.
10. **Definitive Evidence of Right Not Required:** The duty is triggered as soon a federal or provincial government knows or should know that First Nation interests may be affected by the action being contemplated. There is no need for the potentially affected Aboriginal right, title or treaty right to be acknowledged in a court of law, treaty, through a new agreement or by other means. However, acceptance of a claim for negotiation by Canada and/or the province necessarily means a high level of consultation and accommodation is required.

11. **No Improvised or Discretionary Consultation and Accommodation:** The duty to consult and accommodate cannot be fulfilled by improvised or discretionary measures added to the general statutory powers of the federal and provincial governments. Consultation and accommodation must be in accord with specific criteria and further to a clear process established by agreement with First Nations or in legislation that complies with this Protocol or its equivalent.
17. **Propriety of Third Party Involvement:** In some cases, the participation of third parties, especially industry and project promoters, in the consultation and accommodation processes will be appropriate and in the interest of First Nations.

The Obligation in Time

12. **Consultation Before Decision-Making:** Consultation with First Nations must occur at the beginning of the decision-making process; consultation and accommodation must occur well before any action is taken that may affect First Nations interests.
13. **A Continuous Obligation:** The duty to consult and accommodate First Nations is a continuing constitutional obligation, reflecting a permanent relationship that cannot be satisfied on a once-off basis. It must be respected throughout decision-making processes and over the life of the action or project.
14. **Follow-Up Required:** The duty requires effective follow-up to ensure that the results of consultation and accommodation are respected and implemented. This will usually include institutional arrangements, funding, and compliance monitoring.
18. **Existing Consultations Mechanisms:** Canada and/or the provinces may, in certain circumstances, use existing public consultations to fulfill their duty to consult and accommodate provided that the consultations adequately address First Nations' interests and meet legal and constitutional requirements, particularly those set out in this Protocol.

Existing Mechanisms

Third Parties

15. **Third Parties:** Project promoters and other non-governmental bodies are not constitutionally obliged to consult and accommodate First Nations. However, they may be bound by legislation or licence conditions to modify projects and use of resources to allow federal and provincial governments to give effect to their duty to consult and accommodate. They may also be liable to First Nations for negligence, breach of contract and dishonest dealings.
16. **No Delegation of Duty:** Governments cannot delegate to third parties their ultimate legal responsibility to consult and accommodate. However, Canada and the province may delegate procedural aspects of consultation in certain circumstances.

PART B

IMPLEMENTING THE DUTY TO CONSULT AND ACCOMMODATE**Guiding Principles**

19. **Good Faith:** Canada, provinces, First Nations and other participating parties must act in good faith before, during and after consultation and accommodation processes.
20. **Mutual Respect:** Consultation and accommodation must occur in an atmosphere of mutual respect.
21. **Relationship Building:** Canada, provinces, First Nations and other participating parties must show patience and open-mindedness to promote understanding and a process based on the desire to build mutually advantageous relationships.
22. **Understanding of Diversity:** Canada, provinces and other parties must seek to understand the particular cultural, social and economic situation of the First Nations with whom they are involved. .
23. **First Nations' Obligation to Identify Issues:** Before and throughout a consultation and accommodation process, First Nations shall try to identify, as precisely as possible, specific First Nations' rights that are at stake and how they may be affected by the action being contemplated.

Ongoing Information Obligations

24. **Federal and provincial governments' Information Obligations:** Before and throughout consultation and accommodation processes, federal and provincial governments must provide First Nations with all information relevant to the action being contemplated (map, data, research).

First Nations' Refusal to Participate

25. **Motivating Refusals and Withdrawals:** If a First Nation refuses to participate in a consultation and accommodation process or withdraws from a process that has begun, it must provide reasons for the refusal or withdrawal.

26. **Withdrawal/Refusal Not Equivalent to Consent:** Refusals and withdrawals do not constitute consent to the action being contemplated by a federal or provincial government.

STEPS OF THE CONSULTATION PROCESS**STEP 1: Beginning the Process**

27. **Beginning the Process and Provisional Funding :** Upon receipt of a request for consultation, a First Nation shall, as soon as possible, acknowledge receipt of the request and indicate that it will need a reasonable period of time to prepare its initial response. Alternately, if the First Nation learns that an action is being contemplated that may affect their rights, they shall initiate the process by communicating with the government bodies involved and assert their right to be consulted and accommodated.
 - 27.1. In either case, the First Nation shall provide... a copy of this Consultations Protocol (adapted and supplemented as required), and,
 - 27.2. The federal and/or provincial government shall offer and the First Nation shall require provisional funding to allow the First Nation to complete Steps 2 and 3.

STEP 2: Identify First Nation Interests

28. **Identification of First Nation Interests:** Upon receipt of a request for consultation, a First Nation should conduct an internal community scoping process to consider:
 - 28.1. the potential risks of the action being contemplated and its impact on First Nation rights, interests, territory and activities,
 - 28.2. the potential benefits of the action being contemplated,
 - 28.3. issues related to litigation, such as:
 - 28.3.1. whether there is any litigation that may be affected by the action or by participation in the consultation,
 - 28.3.2. whether litigation shall be considered in response to the action,

- 28.4. issues related to negotiations, such as:
- 28.4.1. whether there are any ongoing treaty or other negotiations that may be affected by the action,
 - 28.4.2. whether such negotiations should be considered in addition to or instead of a consultation process in response to the action,
- 28.5. issues related to jurisdiction, such as:
- 28.5.1. whether it has jurisdiction over the territory, resources or action being contemplated,
 - 28.5.2. whether exercise of First Nation' legislative authority may be appropriate in place of or in addition to the consultation process proposed,
- 28.6. business-related issues, such as:
- 28.6.1. whether there are any First Nations businesses, organizations or contractors that have an interest in the action,
 - 28.6.2. whether they should be parties to the consultation and accommodation process,
 - 28.6.3. and whether the impacts of the action can be addressed in whole or in part by means of economic benefits such as royalties, equity interest, joint ventures, contracts and employment,
- 28.7. policy-related issues, such as:
- 28.7.1. whether it would be appropriate to address larger, policy, legislative or planning issues, as well as the specific action that Canada or Quebec is contemplating.
29. **Coordination with Other First Nation Parties:** After having undertaken the exercise described above in section 28, a First Nation should:
- 29.1 forward the request for consultation to other First Nation parties, solicit their input and coordinate a response, if appropriate in the circumstances, and
 - 29.2 analyze whether the consultation and accommodation process should group together other similar actions and take place at the regional or provincial level in a consolidated process.
30. **Involvement at the Policy Level:** At this point, a First Nation may demand involvement at the policy, legislative or planning level, if it deems the action being contemplated to be part of a larger issue or to be best dealt with at that level.
- STEP 3: Initial Response**
31. **Initial Response:** After having undertaken the exercise described in section 28 and considered the matters addressed in sections 29 and 30 and without unreasonable delay in the circumstances, the First Nation shall provide its initial response to the request for consultation.
32. **First Nation Intent and Expectations:** In the initial response, the First Nation shall indicate its expectations with regard to the consultation and accommodation process, including its end purpose and the nature of the role it expects to play in the decision-making process.
33. **Preliminary Matters:** In its initial response, a First Nation shall also identify:
- 33.1 its language requirements with regard to documentation that may be provided and the need for interpretation services at meetings,
 - 33.2 any seasonal activities that will have to be considered when scheduling activities and meetings,
 - 33.3 the contact people and their coordinates at this stage in the process.
34. **Request For More Information:** A First Nation that receives a request for consultation shall request all information, including expert reports, relevant to the action being contemplated.
35. **Preliminary Assertion of Jurisdiction:** At this early stage, a First Nation may choose to identify Aboriginal rights, title or treaty rights that strengthen its rights in the process, including jurisdiction and the rights to be part of decision-making and to economic benefits.
36. **Consultation and Accommodation Without Prejudice:** In its initial response, a First Nation may specify that it is entering into discussions about consultation and accommodation without prejudice to its rights and title and treaty rights and jurisdiction and to its right to assert its rights in other forums and without

admission of the jurisdiction of the federal and provincial governments over the action being contemplated or the territory at issue.

STEP 4: Federal and/or Provincial Government to Provide Information and Funding

37. **Federal and/or Provincial Governments' Information Obligations:** Provincial and federal governments must provide potentially affected First Nations with all pertinent information, including expert reports, regarding the action it is contemplating, in a timely fashion. In some cases, federal and provincial governments may be obliged to conduct additional research and analysis of the action and provide the affected First Nation with this information or fund it to do the same.
38. **Form of Presentation:** The form in which this initial information is provided will vary with the circumstances; options include:
- 38.1 a written and electronic information package, and,
 - 38.2 information sessions – ideally one or more meetings hosted by Canada or the province during which the action being contemplated is presented to the community, documentation is distributed and the population and their representatives ask questions,
 - 38.3 in either case all materials shall be made available in the languages requested by the First Nation being consulted.
39. **Obligatory Content:** At a very minimum, the initial information provided by the federal and/or provincial governments shall include:
- 39.1 clear identification of the action being contemplated,
 - 39.2 clear identification of the territory that may be affected,
 - 39.3 the proposed timeline for the action being contemplated,
 - 39.4 all expert reports available and/or information on reports that will become available in the future.

40. **Provision of Funding:** At this stage, provision must be made by the federal and/or provincial governments to ensure adequate funding for First Nations, including costs of internal coordination, consultation and scoping, remuneration of community and other experts (...), research budgets, professional fees and consultant services to ensure genuine participation in establishing a Consultation Plan and the Parameters of Consultation.

STEP 5: Identification of First Nation Interests

41. **Identification of First Nation Interests:** At this stage, First Nations being approached shall perform the scoping exercise set out above in section 28 in a more in-depth and informed manner.

STEP 6: Establishing a Consultation Plan and Parameters

42. **Method:** Establishing the Consultation Plan and Parameters of Consultation may occur through an exchange of letters or through face to face meetings.
43. **Facilitators and Negotiation Process:** Canada, the province and First Nations may:
- 43.1 choose to engage the services of a facilitator to help establish the Consultation Plan and Parameters of Consultation,
 - 43.2 agree to explicitly adopt principled or interest-based negotiation (e.g. *Getting to Yes* by R. Fisher and W. Ury of the Harvard Negotiation Project, 1991), as opposed to ineffective adversarial negotiation or positional bargaining, To establish the Consultation Plan and Parameters of Consultation and, as appropriate, for the further stages of the consultation and accommodation process.
44. **Parameters of Consultation:** The First Nations, Canada and/or the provinces shall agree on the Parameters of Consultation, including more specifically:

- 44.1 a definition of the action being contemplated,
 - 44.2 the policy and broader implications of the action and its relationship with the policies of Canada and/or the provinces. At this point, a First Nation may decide to assert its right to be involved at a higher, strategic, level of decision-making,
 - 44.3 the relationship of the current consultations with other processes – at this point, a First Nation may decide to specify that it is engaging in the consultative process without prejudice to its rights, as asserted in other processes, such as litigation or treaty negotiations.
45. **Identifying Parties and Selecting Representatives:** The Consultation Plan must identify the First Nation, federal and/or provincial parties or bodies that will be engaging in consultation and accommodation and the corresponding contact people and their coordinates.
46. **Interlocutors of Equal Standing:** First Nation, federal and/or provincial interlocutors should be of equal standing in their respective organizational hierarchies.
47. **Participation of Third Parties:** At this stage, First Nations, Canada and/or the provinces shall determine the propriety of inviting third parties, notably representatives from industry or project-promoters, to participate in the consultation and accommodation process and provide information and funding, as needed.
48. **Means of Consultation and Accommodation:** Determining appropriate consultative activities are essential to the success of consultation and accommodation. Activities shall be chosen which allow:
- 48.1 First Nations to identify rights, title or treaty rights and other interests that may be affected by the action being contemplated,
 - 48.2 First Nations to explain how its rights, interests and activities will be affected by the action being contemplated,
 - 48.3 Canada, the provinces and third parties to provide information about the action being contemplated and identifying their interests as regards the action contemplated,
 - 48.4 the identification of possible means of addressing First Nations interests and of options for accommodation,
 - 48.5 design of means by which First Nation interests may be accommodated, including:
 - 48.5.1 abandoning the action being contemplated,
 - 48.5.2 alternatives to the contemplated action that adequately address the interests on all sides,
 - 48.5.3 minor or major changes to the action being contemplated,
 - 48.5.4 modifying a proposed project,
 - 48.5.5 providing for First Nation participation in an action or project,
 - 48.5.6 compensating the First Nation,
 - 48.5.7 providing for ongoing consultation and accommodation of the First Nation with respect to an action or project and notably follow-up, mitigation and compliance monitoring activities,
 - 48.5.8 First Nation economic benefits such as compensation, royalties, profit-sharing, equity interest, joint ventures, contracting, employment, and
 - 48.5.9 consent and agreement to a new action, modified to accommodate First Nation interests.
49. **Examples of Consultative Activities:** Possible consultative activities include:
- 49.1 meetings between decision-makers of equal standing,
 - 49.2 meetings between experts mandated by First Nations, Canada and/or the provinces,
 - 49.3 interest-based negotiations as described at article 43.2, rather than adversarial negotiations or positional bargaining,
 - 49.4 community meetings or “town-hall” type meetings at which members of First Nation communities provide input regarding the action being contemplated,
 - 49.5 focus groups, small meetings with First Nation constituencies (e.g. elders, youth, trappers, fishermen, loggers, business people), project site visits and visits to traditional territory,

- 49.6 interviews with members of First Nation constituencies,
 - 49.7 newsletters and pamphlets,
 - 49.8 surveys conducted in First Nation communities,
 - 49.9 radio show phone-ins,
 - 49.10 distribution of questionnaires in First Nation communities.
 - 49.11 solicitation of First Nations' input through electronic, web-based, forums,
50. **Consultative Activities – Practical Considerations:** In selecting and planning consultative activities, provisions shall be made regarding:
- 50.1 setting the agenda for meetings and distribution thereof in advance,
 - 50.2 determining who shall chair meetings,
 - 50.3 determining who shall attend meetings,
 - 50.4 determining who shall record and distribute minutes of meetings,
 - 50.5 determining who shall record and distribute the results of community-based activities aimed at soliciting input from First Nation communities,
 - 50.6 the propriety of engaging the services of third party facilitators for some consultative activities.
51. **Establishing Decision-Making Committees:** In some cases, the parties may choose to establish:
- 51.1 to establish working groups to address particular issues,
 - 51.2 to constitute decision-making bodies comprised of representatives from First Nations, Canada and/or the province to oversee the consultation and accommodation processes and/or to make decisions regarding the action being contemplated,
 - 51.3 to submit the results and decisions of working groups and such decision-making bodies (...) to the final approval in the formal decision-making processes of the First Nations, the province and Canada.
52. **Input From Experts:** Provisions regarding the need for expert input shall be made in the Consultations Plan.
53. **Funding:** The Consultation Plan must provide adequate funding for First Nations, including costs of internal coordination, consultation and scoping, remuneration of community and other experts (...), research budgets, professional fees and consultant services to ensure genuine participation in establishing a Consultation Plan and the Parameters of Consultation and in carrying out the process of consultation and accommodation.
54. **Calendar For Consultation Activities and the Subsequent Process:** The Consultation Plan shall include the following:
- 54.1 the dates on which the consultative activities referred to above in sections 42 and following shall occur,
 - 54.2 when Canada or the provinces shall provide its Update on its decision-making process referred to below in sections 58 and 59,
 - 54.3 when the First Nation shall provide its Response to the Update referred to below in sections 60 to 63,
 - 54.4 calendars for consultative activities shall respect the calendar for traditional First Nation activities.
55. **Range of Possible Consultation Plans:** Consultation Plans will vary from elaborate plans spanning several years to simple plans encompassing a few consultative activities, followed by an Update and First Nation Response. The scope of the Plan will depend on the nature of the action being contemplated and the importance of the First Nation interests at stake.

STEP 7: Consultative Activities

56. **Consultative Activities:** First Nations, Canada, the province and/or third parties shall engage in good faith in consultative activities as established in the Consultations Plan, always with a view to ensuring genuine consultation and substantially accommodating First Nation interests.
57. **Flexibility With Regard to Activities:** Activities and dates may be modified to accommodate changing situations or developments that may arise. All parties shall confirm any such modifications, in writing.

STEP 8: Canada and/or the Province's Update of Decision-Making

58. **Canada and/or the Province Provide An Update:** After an agreed number of consultative activities, as provided for in the Consultation Plan, Canada or the province shall provide the First Nation with a written Update of its decision-making process.
59. **Accommodation and Changes to the Action:** The Update shall include an explanation of the ways in which First Nation interests have been considered and accommodated and a new, revised, description of the action being contemplated.

STEP 9: First Nation Response to the Update

60. **First Nation Responds:** The First Nation shall respond, in writing, to Canada and/or the province's Update, within the time established in the Consultation Plan.
61. **Possible First Nation Responses:** Possible responses include:
- 61.1 consent to the action as described in the Update,
 - 61.2 partial consent to the action as described in the Update,
 - 61.3 conditional consent to the action as described in the Update,
 - 61.4 request for further consultation and accommodation,
 - 61.5 rejection of the action as described in the Update.
62. **Reasons for Response:** When criticizing the action as described in the Update or withholding consent, First Nations should provide reasons for their views based on success or failure in addressing the interests of the First Nation as regards the action now contemplated.

STEP 10: Agreement, Continued Consultations, Follow-up or Withdrawal

63. **Agreement:** At this stage, the parties may agree to an action.
64. **Continued Consultations:** Alternately, they may agree to continue the consultation and accommodation process.
65. **Withdrawal From Process:** A First Nation may choose to withdraw from the process. If it does, the First Nation shall give reasons for its withdrawal.

STEP 11: Consultation and Accommodation Report

66. **Consultation and Accommodation Report:** As provided in the Consultation Plan, a "Consultation and Accommodation Report" shall be prepared and made available by the agreed means and in the agreed languages.
67. **Consultation and Accommodation Follow-Up:** As provided in the Consultation Plan, provision shall be made for the establishment, funding and operation of mechanisms for follow-up, mitigation measures and compliance monitoring with respect to the contemplated action.

REFERENCES

- André, Nadir. *Vers une cogestion négociée des terres autochtones*, Montreal : Insight Information, Forum autochtone sur la gestion des ressources naturelle et du territoire, October 5th and 6th, 2005.
- Battiste, Marie & James (Sa'ke'j) Youngblood Henderson. *Protecting Indigenous Knowledge and Heritage*. Saskatoon: Purish Publishing Ltd., 2001. 326 pages.
- British Columbia (Government of). Provincial Policy for Consultations with First Nations. October 2002. 36 pages.
- First Nations Centre National Aboriginal Health Organization. *Ownership, Control, Access and Possession (OCAP) or Self-Determination Applied to Research*, 2002. 25 pages.
- First Nations of Quebec and Labrador Sustainable Development Institute. *First Nations of Quebec and Labrador Consultations Protocol*. Wendake, Quebec: Assembly of the First Nations of Quebec and Labrador, June 2003. 20 pages.
- Fisher, Roger, Bill Ury & Bruce Patton. *Getting to YES: Negotiating Agreement Without Giving In*. New York: Penguin, 1991.
- Forêt Modèle Crie de Waswanipi. *Accroître la participation des Cris en améliorant le processus de planification de l'aménagement forestier*, Waswanipi, 2003. 28 pages
- Gertler, Franklin S. & Narang, Geeta. *The Duty to Consult & Accommodate First Nations: Origins, Nature, Trends and Models*, Montreal, 2004 (unpublished). 44 pages.
- Isaac, Thomas & Knox, Anthony. *The Crown's Duty to Consult Aboriginal People* (2003) 41:1 *Alberta Law Review* 40. 28 pages.
- Gitxsan Treaty Office. *Gitxsan – British Columbia, Consultation Procedures – General Provisions*, British Columbia, 1991 (unpublished). 28 pages.
- Lawrence, Sonia & Macklem, Patrick. *From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult* (2000) 79 *The Canadian Bar Review* 252. 27 pages.
- Ontario (Ministry of Natural Resources). *Reaching Effective Consultation: A Guide on How to Get There!*, Ontario: Ministry of Natural Resources, 2002. 12 pages.
- Picard, Raphaël. *La Souveraineté de la Première Nation de Pessamit sur les ressources naturelles*, Montreal : Insight Information, Forum autochtone sur la gestion des ressources naturelle et du territoire, October 5th and 6th, 2005.
- New Zealand (Ministry of Justice). *A Guide for Consultation with Māori*. Wellington, New Zealand: Ministry of Justice, 1997.
- Nishnawbe Aski Nation. *Handbook on "Consultation" in Natural Resource Development*, (1st edition) July 2001. 26 pages.
- Saint-Hilaire, Maxime & Thériault. *Les arrêts Taku River et Haida Nation devant la Cour suprême : des précisions imminentes concernant la mise en œuvre du droit qu'ont les Autochtones d'être consultés* (Printemps 2003) 63 *Revue du Barreau* 163. 14 pages.
- Secrétariat de l'Assemblée des Premières Nations du Québec et du Labrador. *Stratégie de développement durable des Premières Nations du Québec et du Labrador*, November 1997. 46 pages.
- Slattery, Brian. *Making Sense of Aboriginal and Treaty Rights* (2000) 79 *The Canadian Bar Review* 196. 28 pages.
- Slattery, Brian. *Understanding Aboriginal Rights* (1987) 66 *The Canadian Bar Review* 727.
- Quebec (Ministère des Ressources naturelles). *Politique de consultation sur les orientations du Québec en matière de gestion et de mise en valeur du milieu forestier*. Charlesbourg : Ministère des Ressources naturelles, décembre 2002. 23 pages.

CONSULTED CASES

Cheslatta Carrier v. B.C., (1998) 26 C.E.L.R. (N.S.) 37 (BC SC).

La Première Nation de Betsiamites et al. c. Canada et al. 500-17-022878-048 (17 June 2005) (Sup Ct) [Permission to appeal granted *Kruger et al. c. La Première Nation de Betsiamites et al.* 500-09-015773-054 et 500-09-015771-058 (6 July 2005) (CA)].

Delgamuukw v. B.C., [1997] 3 S.C.R. 1010.

Gitanyow First Nation v. Canada, [1999] 3 C.N.L.R. 89 (BC SC).

Haida Nation v. British Columbia (Minister of Forests), [2002] 2 C.N.L.R. 121 (BC CA).

Haida Nation v. British Columbia (Minister of Forests), [2002] 4 C.N.L.R. 117 (BC CA).

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

Halfway River First Nation v. B.C. (Ministry of Forests), [1999] C.N.L.R. 1 (BC CA).

Heiltsuk Nation v. British Columbia (Minister of Sustainable Resource Management), [2003] B.C.J. No. 2169 (BC SC).

Husby Forest Products Ltd. v. British Columbia (Minister of Forests), [2004] B.C.J. No. 185 (BC SC).

Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests), [2004] B.C.J. No. 747 (BC SC).

R. v. Gladstone, [1996] 2 S.C.R. 723.

R. v. Marshall, [1999] 3 S.C.R. 533.

R. v. Sparrow, [1990] 1 S.C.R. 1075.

Saulteau First Nations v. British Columbia (Oil and Gas Commission), [2004] B.C.J. No. 1182 (BC CA).

St. Catherine's Milling and Lumber Co. v. The Queen, (18p8) 14 A.C. 46 (P.C.).

Taku River Tlinget v. British Columbia (Project Assessment Director), [2000] B.C.J. No 1301 (BC SC).

Taku River Tlinget v. British Columbia (Project Assessment Director), [2002] 2 C.N.L.R. 312 (BC CA).

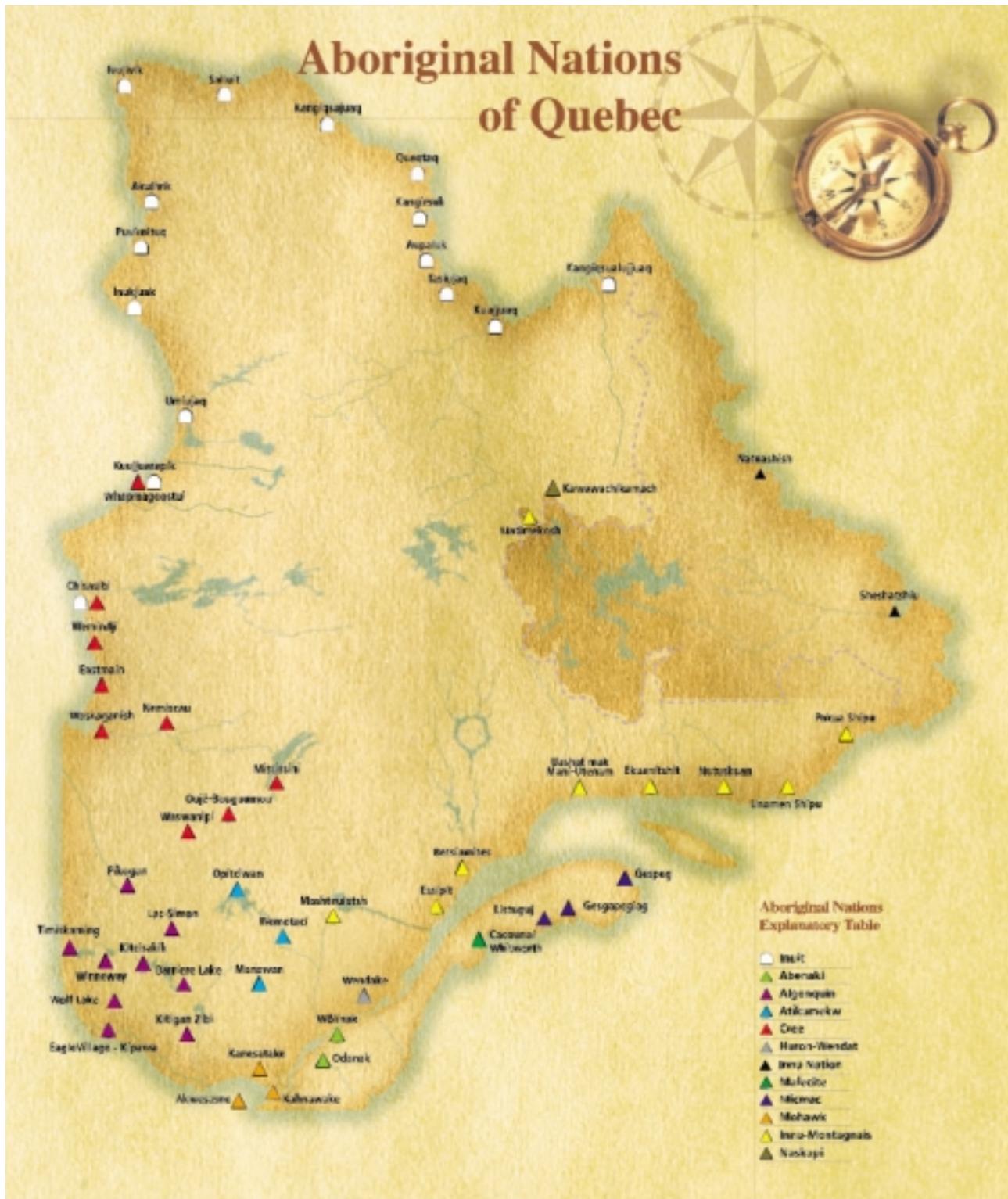
Taku River Tlinget v. British Columbia (Project Assessment Director), 2004 SCC 74; [2004] S.C.R. 550.

CONSULTED WEB SITES

<p>Environment Quality Act, R.S.Q. c. Q-2, sections 1 to 31.9</p> <p>www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/Q_2/Q2_A.htm</p>	<p>Pertinent provisions include:</p> <p>section 6.1 and following: Bureau d'audiences publique sur l'environnement established</p> <p>section 19.1 : Environmental rights</p> <p>section 22 and following: Obtaining minister's certificate of authorization</p> <p>section 31.1 and following: Environmental impact assessment and review of certain projects for which Cabinet certificates of authorization are required</p>
<p>Regulation respecting environmental impact assessment and review, c. Q-2, r.9</p> <p>www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/Q_2/Q2R9_A.htm</p>	<p>Pertinent provisions include:</p> <p>section 2: Projects subject to assessment</p> <p>section 3: Content of impact statement</p> <p>section 6 and following: Public information and consultation</p> <p>section 13: Request for a public hearing by a person, group or municipality</p>
<p>Rules of procedure relating to the conduct of public hearings, R.S.Q., c. Q-2, r. 19</p> <p>www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/Q_2/Q2R19_A.htm</p>	<p>Pertinent provisions include:</p> <p>Sections 20 and 25: Participation of "other parties" in the first part of the hearing.</p> <p>Section 27: Hearing people who have submitted briefs in the second part of the hearing.</p>

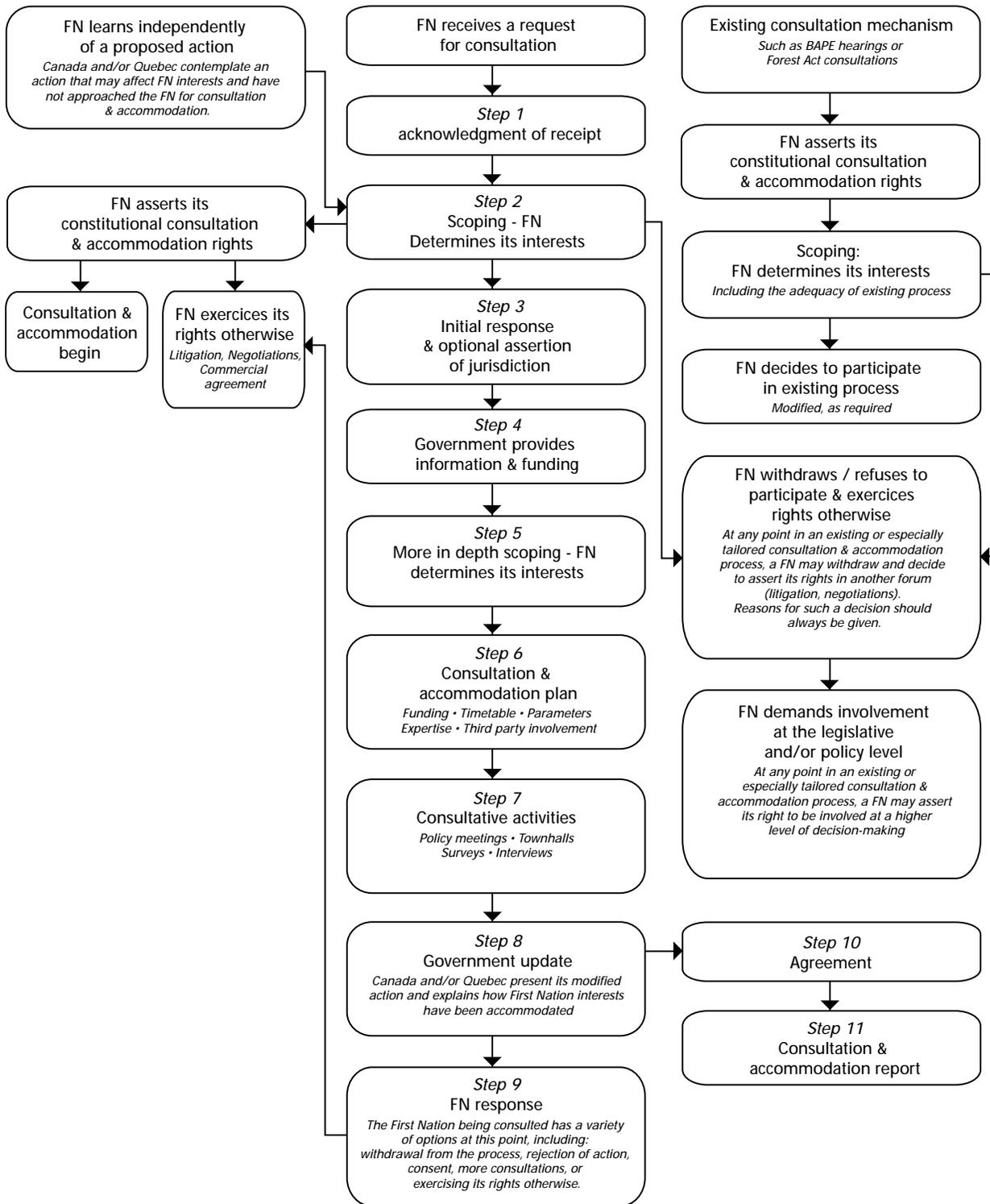
APPENDIX 1 GEOGRAPHIC LOCATIONS OF THE FIRST NATIONS OF QUEBEC AND LABRADOR

PREPARED BY: FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE



Source : Quebec Aboriginal Tourism Corporation

APPENDIX 2 FLOWCHART: AFNQL CONSULTATION & ACCOMMODATION PROCESS



APPENDIX 3 LIST OF STEPS REQUIRING LETTERS

1. **Acknowledgement of Receipt**
(Step 1, Protocol, section 27)
2. **Initial Response**
(Step 3, Protocol, sections 31 and following)
3. **Assertion of jurisdiction over decision-making** (optional)
(Protocol, section 35)
4. **Response to Canada and/or Quebec's Update on Decision Making**
(Step 9, Protocol, section 60 and following)
5. **First Nation Withdrawal or Refusal to Participate**
(Protocol, sections 25 and 65)
6. **First Nation demands involvement at a higher level of decision-making**
(Protocol, sections 6, 28.6, 30, 44.2)
7. **First Nation asserts its constitutional consultation and accommodation rights**
(upon learning that Canada and/or Quebec is contemplating an action that may affect First Nation interests and there has been no movement towards consultation and accommodation)
8. **First Nation asserts its constitutional consultation and accommodation rights**
(when faced with an existing consultation and accommodation mechanism)
9. **Request for funding**
10. **Consultation Budget**

APPENDIX 4 MODEL LETTER – REFUSAL TO PARTICIPATE IN A CONSULTATION PROCESS

See: articles 25 and 26 of the AFNQL Consultations Protocol
(October 2005)

(STANDARD ADDRESS HEADER – DATE, SUBJECT & ETC.)

This is in response to your letter of *(date)* in which you request that we engage in *(specify the consultation that was requested; if possible use the same language used the letter that was received from the provincial or federal government body)*.

We represent the interests of *(specify First Nation and/or community represented)*. We have occupied *(provide reasonably detailed information regarding territorial rights, land and resource uses that may be affected by the action or project that the government is contemplating. Also mention any claims, negotiations or court actions that aim at having these rights recognized. It is particularly important to mention any successful law suits and situations where Canada and/or Quebec have accepted to negotiate comprehensive or resource sector agreements)*.

Supreme Court of Canada decisions such as *Sparrow*, *Gladstone* and *Delgamuukw*⁷ and, more recently, *Haida* and *Taku*⁸ have confirmed that *(name of provincial or federal government body that sent the request for consultation – e.g. “the Quebec minister of natural resources”)* has a constitutional duty to consult First Nations in good faith with the aim of substantially accommodating their interests before approving projects or making decisions that may affect Aboriginal interests. Consultation and accommodation must take place at the strategic planning level, not merely at the operational level of resource management decisions. Resource legislation and policy must explicitly provide for including our interests. Protection of our rights cannot depend on the generous exercise of governmental discretion regarding development and resource allocation and use.

The legal duty to consult and accommodate carries with it numerous other obligations, including: providing information regarding actions or projects in a timely fashion, ensuring adequate funding of First Nations being consulted, listening to the concerns of First Nations and incorporating those concerns into the decision-making process. Further, the *(name of provincial or federal government body that sent the request for consultation – e.g. “the Quebec minister of natural resources”)* is not necessarily discharged of its duty by simply holding public consultations in which First Nations may participate along with other stakeholders. Consultation and accommodation should occur directly between First Nation and *(name of provincial or federal government body that sent the request for consultation – e.g. “the Quebec minister of natural resources”)* interlocutors who are of equal standing in their respective organizations. Above and beyond these procedural requirements, the duty includes a substantial economic element. *urces)* must take concrete steps accommodate Aboriginal interests. This may include modifying the original project, profit-sharing with First Nations, compensating First Nations, providing for ongoing collaboration and/or giving First Nations a continued role in decision-making.

⁷ *R.v. Sparrow*, [1990] 1 S.C.R. 1075, *R. c. Gladstone*, [1996] 2 R.C.S. 723, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

⁸ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550).

For your information and to provide you with a better understanding of our expectations regarding consultation and accommodation, we are enclosing a copy of the *Assembly of First Nations of Quebec and Labrador's Consultation Protocol* currently in force. It sets out a systematic process by which the duty to consult First Nations and accommodate our territorial and resource interests may be fulfilled.

The consultations you propose are insufficient. They do not meet the current definition of the constitutional duty to consult and accommodate First Nations. In particular, (here it is important to explain exactly what is wrong with the consultations proposed by the provincial or federal government body, e.g. there are insufficient resources available for our true and genuine participation," the timeline you propose is far too stringent and will not allow us to make informed decisions during the consultation process...", "you have not provided full information on the proposed action and its impact on our interests", "valid consultation must be at the strategic planning level, but you propose consultation only on the operational details of a project/action/proposal that you have already approved in principle").

For the reasons set out above, we have decided not to participate in (specify the consultation that was requested; if possible use the same language used the letter that was received from the provincial or federal government body). This decision is not equivalent to consent to (name the action or project that the government is contemplating). It is made without prejudice to (specify First Nation and/or community represented)'s right to assert our rights in other forums, such as treaty negotiations or the court system.

Sincerely,

Signature - Date

APPENDIX 5 AFNQL RESOLUTION NO. 18/2005



Secrétariat
de l'Assemblée des
Premières Nations
du Québec
et du Labrador

Secretariat of the
Assembly of the
First Nations
of Quebec
and Labrador

250, Place Chef Michel Laveau, bur. 201, Wendake, QC G0A 4V0
Tél. : (418) 842-5020 / 842-5274 Téléc. : (418) 842-2660

RESOLUTION NO. 18/2005

FIRST NATIONS CONSULTATIONS PROTOCOL

- WHEREAS** various stakeholders constantly call upon the First Nations of Quebec and Labrador to participate in consultations on various issues related to territories and natural resources;
- WHEREAS** at the meeting held on January 15, 2005, the Chiefs' Strategic Committee gave the First Nations of Quebec and Labrador Sustainable Development Institute the mandate of developing a consultations protocol for the First Nations of Quebec and Labrador;
- WHEREAS** the consultations protocol was developed by the FNQLSDI and submitted to the Chiefs' Table of Quebec and Labrador;
- WHEREAS** the Chiefs' Table of the AFNQL adopted, through a resolution, the *First Nations of Quebec and Labrador Consultations Protocol* on June 18, 2003;
- WHEREAS** the *First Nations of Quebec and Labrador Consultations Protocol, June 2003*, has been modified according to the demands of the First Nations represented by the AFNQL and the new decisions rendered by the Supreme Court of Canada,
- IT IS RESOLVED THAT** the modifications made to the *First Nations of Quebec and Labrador Consultations Protocol, October 2005*, be adopted;
- IT IS RESOLVED THAT** the *First Nations of Quebec and Labrador Consultations Protocol, October 2005*, be distributed in the communities and to the First Nations organizations that may use it to establish consultations agreements;
- IT IS RESOLVED THAT** the consultations protocol be revised and improved according to future experiences of implementation;

- 2 -

RESOLUTION NO. 18/2005

IT IS ALSO RESOLVED THAT the amended consultations protocol be adopted by the Chiefs of Quebec and Labrador.

PROPOSED BY: Chief Jean-Guy Whiteduck, Kitigan Zibi
SECONDED BY: Janine Tremblay, proxy, Mashteuiatsh
ADOPTED IN QUEBEC CITY ON OCTOBER 13, 2005



Ghislain Picard
Regional Chief