

Duty to Consult and the Aboriginal Reconciliation Process in New Brunswick



**Aboriginal Affairs Secretariat
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Historical Context (400 Years) Aboriginal and Treaty Rights in New Brunswick

Jacques Cartier: New France in New Brunswick 1534



in Quebec 1535



European / Aboriginal Point of Contact

Samuel de Champlain 1604

- St. Croix Island settlement
- 1604: New Brunswick becomes part of the French colony of Acadia.



1700's: A century of war

- 1713: Treaty of Utrecht – Flips Nova Scotia (Acadia) to the British.
- (New Brunswick), PEI, Cape Breton stay with the French.
- British need to secure Nova Scotia.
- Need France's Aboriginal Allies to flip.

Britain & Aboriginal peoples in the Maritimes signed the Peace and Friendship Treaties:

No surrender of land - First Nations claim rights (i.e. hunting, fishing, gathering, trapping, ceremonial) & title to their ancestral lands (i.e., traditional territory).



Orange – Peace & Friendship 1725-1779

Mauve – Upper Canada Land Surrender 1784-1862

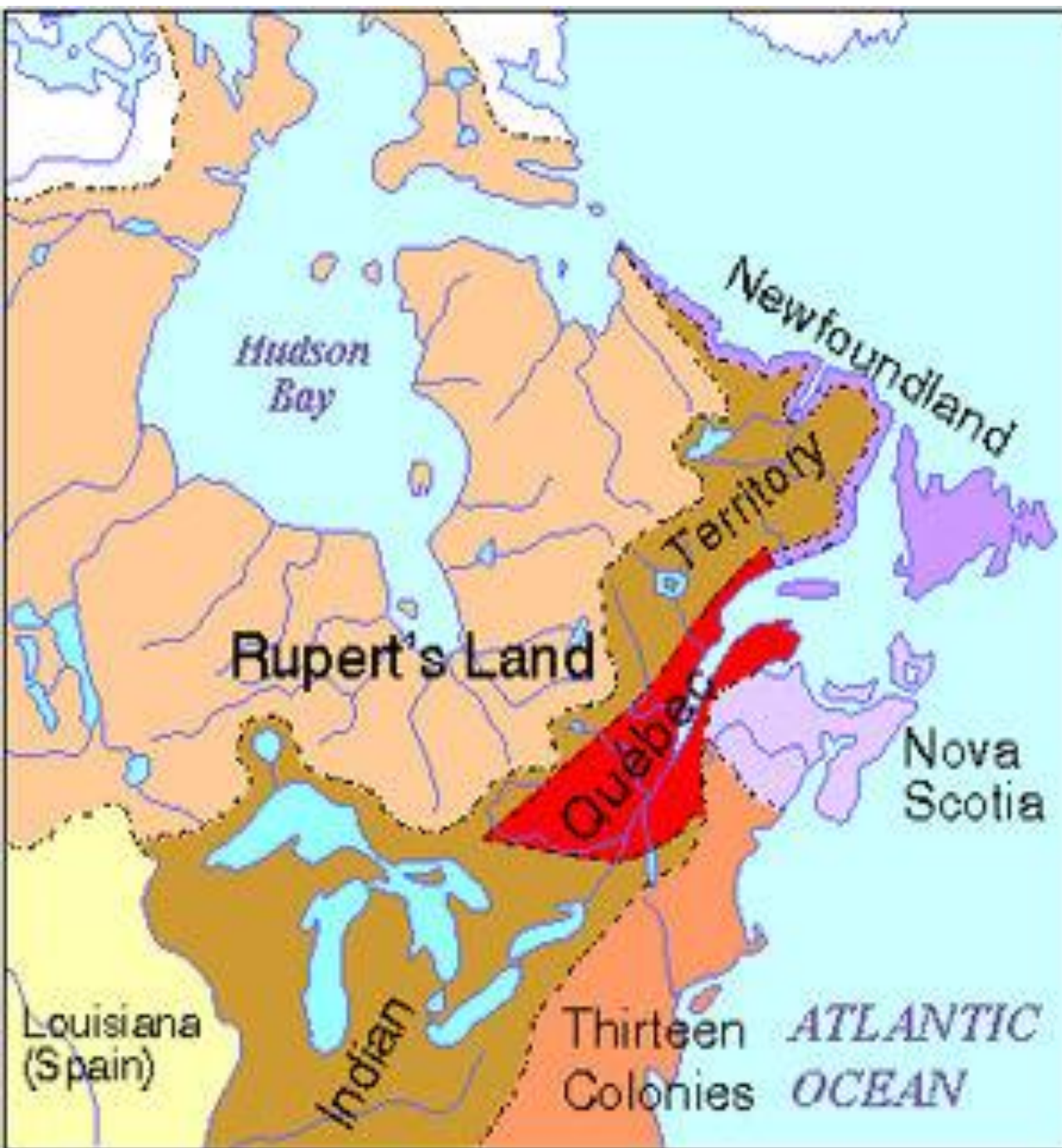
Yellow – Robinson 1850

Blue – Douglas 1850-54

Green – Numbered 1871-1921 (11)

Red – Williams 1923

1763 Treaty of Paris, Royal Proclamation



- British conquer New France.
- “Indian Magna Carta”
 - Source of reconciliation process and 1982 Constitution
- Treaty-making in Canada
- Early cases:
 - *Calder v. BC* [1973] SCC

Source of the Duty to Consult

Constitution Act, 1982 - Part I



CANADIAN CHARTER OF RIGHTS AND FREEDOMS



Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Everyone has the following fundamental freedoms: (1) freedom of conscience and religion; (2) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (3) freedom of peaceful assembly; and (4) freedom of association.

Democratic Rights

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. (2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if each continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly as the case may be. (3) There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

Every citizen of Canada has the right to enter, remain in and leave Canada. (1) Every citizen of Canada has the right to move to and take up residence in any province, and (2) to pursue the gaining of a livelihood in any province. (3) The rights specified in subsection (2) are subject to (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and (b) any laws providing for reasonable mobility requirements as a qualification for the receipt of publicly provided social services. (4) Subsections (2) and (3) do not preclude any law or practice that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. (1) Everyone has the right to be secure against unreasonable search or seizure. (2) Everyone has the right not to be arbitrarily detained or imprisoned. (3) Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful. (4) Any person charged with an offence has the right (a) to be informed without unreasonable delay of the specific offence; (b) to be tried within a reasonable time; (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (e) not to be denied reasonable bail without just cause; (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is

imprisonment for five years or a more severe punishment; (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; (h) finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lower punishment. (5) Everyone has the right not to be subjected to any cruel and unusual treatment or punishment. (6) A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to increase that witness's or any other person's evidence, except in a prosecution for perjury or for the giving of contradictory evidence. (7) A party to a witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French. (4) Everyone has the right to use English or French in any debate and other proceedings of Parliament. (5) Everyone has the right to use English or French in any debate and other proceedings of the legislature of the province of New Brunswick. (6) The records, reports and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. (7) The records, reports and journals of the

legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. (8) (1) Neither English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. (2) (1) Neither English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. (2) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (a) there is a significant demand for communications with and services from that office in such language; or (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French. (3) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French. (4) Nothing in section 20 is to be interpreted or construed to deprive any right, privilege or obligation with respect to the English and French languages or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada. (5) Nothing in section 20 is to be interpreted or construed to deprive any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

(1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province. (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language. (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies whenever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

(1) The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 3, 1763, and (b) any rights or freedoms that now exist by way of land claims agreements or that may be so acquired. (2) The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada. (3) This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. (4) Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. (5) Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissenting schools. (6) A reference in this Charter to a province or to the legislature or government of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be. (7) Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

(1) The Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. (2) Notwithstanding subsection (1), section 31 shall not have effect until three years after this section comes into force. (3) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 30 of this Charter. (4) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (5) A declaration made under subsection (3) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (6) Parliament or a legislature of a province may re-enact a declaration made under subsection (3). (7) Subsections (3) and (4) apply in respect of a re-enactment made under subsection (6).

Citation

This Part may be cited as the Canadian Charter of Rights and Freedoms.

"We must now establish its basic principles, its basic values and beliefs which hold us together as Canadians in that legend we regard together that is a way of life and a spirit of what which made us proud of this country that has given us such freedom and such opportunity."

P. Trudeau



Pre-1982 Aboriginal Rights

- Aboriginal rights existed before the *Constitution Act, 1982*
- British common law adopted by Canada
- Recognized original inhabitants and their rights to the land they occupied

Constitution Act, 1982 - Part II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

- S. 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- Aboriginal rights: practices, traditions & customs practiced prior to European contact: hunting, trapping, fishing, gathering, ceremonial.

Section 35 rights

- S.35 rights may be **established** by a treaty or in a court decision
- OR
- **Potential** rights that are claimed or asserted in formal negotiations, letters, previous or current consultation processes with the Crown or through litigation (applications, claims, writs filed in court).

New Brunswick Rights

- 1980's & 90's: Court decisions defined aboriginal logging and fishing rights
- Led to PNB forestry 5% of AAC , DFO fisheries agreements

Comprehensive Claims

Comprehensive Claim Process NB

- 1996: UNBI, MAWIW, NBAPC – land claim for all lands in NB.
- 2000: Accepted for negotiation by federal gov.
- 2003: 1st Tripartite meeting Moncton.
- 2011: Signed Umbrella Agreement : Fed. Prov, FNs with Assembly as representative
- Framework Agreement: ready to support treaty implementation process – 25 years+

Duty to Consult: NB Policy Released Dec 2011

Duty to Consult – When?

- Crown has a duty to consult (DTC) with First Nations when contemplating an action or decision that may impact or infringe an asserted or proven Aboriginal or treaty right.



Roles in Consultation Process

- ***Crown:*** Leads consultation, responsible for process and outcome.
- ***First Nation:*** Responsible to participate, any delay or refusal does not stop process.
- ***Proponent:*** May share in consultation efforts, can make positive contribution to information-sharing & accommodation.

Phases of Consultation Process

- Phase 1: Pre-consultation Analysis and Planning
- Phase 2: Consultation engagement
- Phase 3: Accommodation
- Phase 4: Decision and Implementation

Phase 1: Pre-consultation Analysis and Planning

- Review available FN information
 - Existing reports, studies, previous consultations or information already received from the FN
- Review information about the project
 - Application, reports, studies, maps – crown lands
- Potential for impact / infringement of asserted and established rights

Consultation Levels

Notification

- Potential for infringement of a treaty right or proven Aboriginal right is minor
- Aboriginal claim is weak or limited
- Activity - Notify FN of the proposed decision, disclose information, and be prepared to discuss issues raised by the FN.

Normal

- Reasonable probability of an infringement of a treaty right or proven Aboriginal right
- Likely impact on a reasonable claim
- Activity - Notify FN of the proposed decision & consultation level, disclose information, offer to meet, be prepared to make changes, intend to substantially address concerns, and to consider reconciliation between the interests of the FN and Crown.

Deep

- Potential infringement of a treaty right or proven Aboriginal right is high
- Strong aboriginal rights claim (including title) and potential for negative impacts
- As above for Normal and may involve: the opportunity for FN to make submissions for consideration by Crown; FN participation in the decision-making process; written reasons to show how FN concerns were considered and influenced the decision.

Changing the Consultation Level

- If new information comes to light during FN consultation, the consultation level may need to be changed.

Phase 2: Crown Consultation

- Contact FN & provide all relevant information about the project,
- Advise FN of initial assessment of consultation level,
- Meet to learn FN views about potential project impacts on their rights.

Phase 2: Crown Consultation

- Factors to consider as to the seriousness of the potential adverse effect:
 - Geographic size of project area
 - Degree of bio-physical changes to land
 - Whether resource is renewable or finite
 - Level of FN use of area & importance
 - Duration of project and its effects
 - Other activities affecting FN use of the area
 - Special characteristics of the area
 - Etc.

Phase 3: Accommodation

- Based on *Haida*, accommodation seeks compromise to attempt to harmonize government and FN competing interests – need balance.
- Avoid, minimize, mitigate, address impacts to FN rights based on consultation,
- Identify and propose accommodation options to FNs for consideration / input,
- Seek to reach agreement on adequacy of accommodation.

Phase 3: Accommodation

- Crown needs to consider:
 - Significance of the impact to the FN rights
 - Extent to which proposed accommodation measures addressed the impact
 - Whether additional accommodation options are available to be discussed with FN
 - Whether there are any residual impacts to FN rights

Phase 4: Decision & Implementation

- Decision-maker makes decision based on administrative law principles:
 - Fairness
 - Adequacy of record
 - Within authority of decision-maker
 - Transparent – reasoning set out clearly

Asserted Aboriginal Rights

- Crown does not determine that rights exist – only the courts can do so.
- Need to consider claims to Aboriginal rights / title in consultation process



THANK YOU!!