



# THE 2017 LEGAL AND PRACTICAL GUIDE TO CONSULTATION WITH INDIGENOUS PEOPLES

Are you tapped into the issues, perspectives, and practices around today's evolving consultations?

In one in-depth day you will get current and practical advice on how to engage in effective and thoughtful consultation. You will learn about:

- Implications of the United Nations Declaration on the rights of Indigenous people, and the meaning of "free, prior and informed consent"
- Consultation Agreements: Specific tips, traps and pitfalls to watch out for
- The new Supreme Court of Canada cases addressing the intersection between administrative law and consultation
- The relationship between Consultation and Reconciliation

If you're new to the area or need a comprehensive refresher, don't miss the **Optional Primer: The Fundamentals of Consultation and Accommodation** on September 19.

Register today at:

[osgoodepd.ca/duty-to-consult](http://osgoodepd.ca/duty-to-consult)

## Program Chair

Sandra A. Gogal  
Miller Thomson LLP

## Program Details

DATE AND TIME:

September 19, 2017

9:00 a.m. – 4:00 p.m. EDT  
(Optional Primer)

September 20, 2017

9:00 a.m. – 4:30 p.m. EDT  
(Main Conference)

In Person or Webcast

LOCATION

Osgoode Professional  
Development

1 Dundas St. West, 26th Floor  
Toronto, ON

# Drawing on the expertise and experience of leading lawyers and experts, including:

## Program Chair



**Sandra A. Gogal**

Miller Thomson LLP

**Sandra Gogal** has been nationally recognized as one of the Best Lawyers in Canada and Chambers Global for Aboriginal and Environmental Law. Her practice focuses on natural resource development, primarily in the mining, hydro and oil and gas sectors. Sandra has negotiated settlements with First Nations in excess of \$100 million and has customized commercial arrangements and impact and benefit agreements between industry and aboriginal communities across North America. She has also acted for industry and governments in regulatory matters and as counsel in litigation involving aboriginal rights and constitutional obligations.

## Program Faculty

**Jason Batise**

Economic Development & Technical Services Advisor, Wabun Tribal Council

**Robert H. Brent**

Counsel, Ontario Ministry of Northern Development and Mines

**Adam Chamberlain**

Gowling WLG

**Signa A. Daum Shanks**

Assistant Professor & Director, Indigenous Outreach, Osgoode Hall Law School, York University

**Zachary Davis**

Pape Salter Teillet LLP

**Sandra A. Gogal**

Miller Thomson LLP

**Brian J. Hebert**

McKiggan Hebert Lawyers

**Larry Innes**

Olthuis, Kleer, Townshend LLP

**Nancy J. Kleer**

Olthuis Kleer Townshend LLP

**Alex Monem**

Pape Salter Teillet LLP

**Terri-Lee Oleniuk**

Osler, Hoskin & Harcourt LLP

**Justin Safayeni**

Stockwoods LLP Barristers

**S. Ronald Stevenson**

Senior General Counsel, Department of Justice

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# THE 2017 LEGAL AND PRACTICAL GUIDE TO Consultation with Indigenous Peoples

In an era where stakeholders are working to achieve certainty in an evolving regulatory framework, matters surrounding the duty to consult are hotly debated among Indigenous communities, industry and government. This in-depth and timely *Osgoode* program, designed and delivered by Canada's leading experts, will provide you with the knowledge, practical perspectives and tools you need to engage in consultation.

In addition to being a valuable learning opportunity, this conference creates the chance to meet and build relationships with others around the table. Throughout the program, there will be plenty of opportunity for questions, discussion and constructive debate. An interdisciplinary and cross-cultural faculty will discuss the key issues, including:

- How are Indigenous communities' concerns being taken into consideration regarding whether consultation is adequate?
- The impact of *Daniels* on consultation
- Are we *only* accommodating environmental impacts? Discussion of *Gitxaala Nation v. Canada*
- The new horizon – the Duty to Negotiate

## Who Should Attend?

- Lawyers practicing in the areas of Aboriginal law, natural resources, environmental and Constitutional law
- In-House Counsel, particularly those working in the energy, resource and infrastructure development sectors
- Government policy advisors, lawyers and officials – federal, provincial and municipal sectors
- Indigenous leaders, councillors and economic development advisors
- Negotiators and mediators for Indigenous communities, government and industry

Register today at:

[osgoodepd.ca/duty-to-consult](http://osgoodepd.ca/duty-to-consult)

Tuesday, September 19, 2017

## Optional Primer: The Fundamentals of Consultation and Accommodation

8:30 a.m.

Registration and Continental Breakfast

9:00 a.m.

### Introduction to Consultation: Who, What and Why

**Brian J. Hebert**, McKiggan Hebert Lawyers

**Sandra A. Gogal**, Miller Thomson LLP

- What is the purpose of consultation? Best practices for ensuring meaningful consultation
- What is the role of the Crown, the Proponent and affected Indigenous communities?
- Who is owed the duty? Who carries out the duty? How is the scope of consultation determined? Understanding the grey areas
- Is there a difference between engagement and consultation?
- What is the relationship between Industry – Indigenous Agreements and consultation?
- What is the connection between industry agreements and the regulatory approval process, including the environmental assessment process? What are the ramifications of not reaching an agreement?
- Case law, policy and other authoritative guidance
- Key principles from *Haida*, *Taku* and *Mikisew*

**10:30 a.m.**

## Refreshment Break

**10:45 a.m.**

### Mechanics of Consultation: The Relationship and Timing

**Terri-Lee Oleniuk**, Osler, Hoskin & Harcourt LLP

- Developing a consultation process: what are reasonable timelines? What's expected of each party? Creating a framework for dealing with disputes and other issues
- Use and implementation of consultation protocols
- Impact of the *Wabauskang First Nation v. Minister of Northern Development and Mines* decision
- What is the difference between "procedural" and "substantive" aspects of consultation?
- A review of the different approaches to consultation provincially and federally: Who has it right?
- How best to address consultation for projects involving overlapping jurisdictions

**12:00 p.m.**

## Networking Luncheon

**1:00 p.m.**

### Consultation Agreements: The Essentials

**Alex Monem**, Pape Salter Teillet LLP

- Is there a duty to accommodate? What does accommodation relate to?
- Is the proponent responsible for accommodating? If so, is consultation and accommodation limited to environmental impacts? What is the proponent able to accommodate?
- What type of agreement should be used, and when is it appropriate?

- Who are the parties? Should the Crown be a party? If not, does the Crown have the right to obtain or approve the agreement?
- Should the agreement be a living document?
- Various drafting issues:
  - What is the scope of the agreement: project specific or territory based?
  - Future consultation requirements and support provisions

**2:30 p.m.**

## Refreshment Break

**2:45 p.m.**

### Consultation Agreements: Specific Tips, Traps and Pitfalls to Watch Out For

**Jason Batise**, Economic Development & Technical Services Advisor, Wabun Tribal Council

**Nancy J. Kleer**, Olthuis Kleer Townshend LLP

- Drafting and negotiating Impact and Benefit Agreements or other similar Resource Development Agreements:
  - Understanding the basis for compensation
  - Review of different financial models: net cash flow, gross revenue, NSR, etc.
  - Enforceability as against successive band councils and governments
  - Addressing project support provisions
  - Addressing ongoing consultation requirements
  - Addressing changes to project scope and modifications
- Is the agreement evidence of adequate consultation?
- Does the *ESTMA* apply?
  - Are payments to Indigenous groups captured under *ESTMA*?

- What types of payments are captured?
- How do payments under IBAs relate to the purpose of the Act, which is to prevent bribery and corruption?
- The relationship between financial payments by proponents and government resource revenue sharing

**4:00 p.m.**

## Optional Primer Concludes

**Wednesday, September 20, 2017**

# Main Conference

## Current and Emerging Issues in Consultation

**8:30 a.m.**

## Registration and Continental Breakfast

**9:00 a.m.**

### Engaging in and Assessing Consultation

**Larry Innes**, Olthuis, Kleer, Townshend LLP

**Robert H. Brent**, Counsel, Ontario Ministry of Northern Development and Mines

- Review of provincial consultation guidelines: is it best approached from a legal or policy perspective?
- What is the appropriate level of procedural delegation? Are agreements a requirement of delegated duties to proponents?
- How do agreements affect the adequacy of consultation? Can parties to an agreement rely on project support provisions as an indication of adequate consultation?
- How are Indigenous communities' concerns being taken into consideration regarding whether consultation is adequate?

- Are we *only* accommodating environmental impacts? Discussion of *Gitxaala Nation v. Canada*
- What if consultation fails? What remedies are available to the parties?
- Are there ways to improve consultation? Is consultation working the way it is currently being done?

**10:45 a.m.**

### Refreshment Break

**11:00 a.m.**

### Understanding the Role of Tribunals, Municipalities and Other Administrative Bodies

**Justin Safayeni**, Stockwoods LLP Barristers

- Do municipalities have a duty to consult in relation to planning initiatives?
- How have municipalities approached Indigenous engagement?
- Update on emerging SCC case law: Exploring the role of tribunals and the intersection between administrative law and consultation
  - *The Hamlet of Clyde River et al v Petroleum Geo-Services Inc. (PGS) et al.*
  - *Chippewas of the Thames First Nation v Enbridge et al.*
  - *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*

**11:45 a.m.**

### United Nations Declaration on the Rights of Indigenous People and the Truth and Reconciliation Commission

**Signa A. Daum Shanks**, Assistant Professor & Director, Indigenous Outreach, Osgoode Hall Law School, York University

- United Nations Declaration on the Rights of Indigenous People

- How can it be used to advance consultation?
- What does it mean to implement the United Nations Declaration on the Rights of Indigenous People through section 35 of the Constitution?
  - What does “free, prior and informed consent” mean?
  - How does it apply in practice?
  - How do you know when consent is achieved?
- Truth and Reconciliation Commission
  - Understanding the relationship between the United Nations Declaration on the Rights of Indigenous People and the Truth and Reconciliation Commission
  - Effect of Article 92: Call to action for corporate Canada

**12:30 p.m.**

### Networking Luncheon

**1:30 p.m.**

### Policy Issues: The Relationship between Consultation and Reconciliation

**Adam Chamberlain**, Gowling WLG

**S. Ronald Stevenson**, Senior General Counsel, Department of Justice

- A deeper look into the direction of judicial decisions and commentary on reconciliation
- Is there a duty of reconciliation?
- What is the role of the proponent in helping to achieve reconciliation?
- Can consultation that is intended to satisfy the Crown’s Duty to Consult and Accommodate be part of the process of reconciliation?
- How can the United Nations Declaration

on the Rights of Indigenous People and the Calls to Action in the Truth and Reconciliation Commission be used to further the objective towards true reconciliation?

**3:00 p.m.**

### The Impact of *Daniels* and Emerging Issues

**Zachary Davis**, Pape Salter Teillet LLP

- The meaning of *Daniels*: Status v. Non-Status
- The basis of consultation: Rights-Bearing v. Non-Rights-Bearing
  - Consultation with Métis
  - Consultation with other non-status groups
- The new horizon - the Duty to Negotiate

**4:00 p.m.**

### Wrap-Up Session: Interactive Roundtable Q&A

**4:30 p.m.**

### Program Concludes

Here's what people have said about past Aboriginal law programs:

*“The best thing about the program was the quality and knowledge of the presenters, and how well the topics relate to the work we do in government every day.”*

Janet Leader, Executive Assistant, Office of the Assistant Deputy Minister, Provincial Highways Management, Ministry of Transportation, attended the *Osgoode Certificate in Fundamentals of Aboriginal Law*

*“The range of topics and breadth of speakers was very impressive. Furthermore the contacts I made via networking with students and faculty were invaluable.”*

Megan E. Peck, Senior Counsel, Assessment Review Board, attended the *Osgoode Certificate in Fundamentals of Aboriginal Law*

*“The past two days has been a great learning experience.”*

Bev New, Co-Minister of Métis Rights and Accommodation, Métis Nation of Alberta, attended the *2016 National Conference - The Daniels Case: Understanding The New Era of Métis Rights Law*

## Registration Details

### Fee Per Delegate

**Early Bird Price (until June 30, 2017):**

**Conference: \$505 plus HST • Conference & Primer: \$845 plus HST**

**Regular Price:**

**Conference: \$595 plus HST • Conference & Primer: \$995 plus HST**

Fees include attendance, program materials, continental breakfast, lunch and break refreshments. Group discounts are available. Visit [www.osgoodepd.ca/group-discounts](http://www.osgoodepd.ca/group-discounts) for details. Please inquire about financial assistance.

### Program Changes

We will make every effort to present the program as advertised, but it may be necessary to change the date, location, speakers or content with little or no notice. In the event of program cancellation, York University's and Osgoode Hall Law School's liability is limited to reimbursement of paid fees.

### Cancellations and Substitutions

Substitution of registrants is permitted at any time. If you are unable to find a substitute, a full refund is available if a cancellation request is received in writing 14 days prior to the program date. If a cancellation request is made with less than 14 days notice, a \$75 administration fee will apply. No other refund is available.



OsgoodePD has been approved as an Accredited Provider of Professionalism Content by the LSUC.



Eligible CPD Hours LSUC (ON):

**Conference:** 6h 30m CPD Hours (2h Professionalism; 4h 30m Substantive)

**Conference & Primer:** 12h 30m CPD Hours (3h Professionalism; 9h 30m Substantive)

OsgoodePD programs may be eligible for CPD/MCLE credits in other Canadian jurisdictions. To inquire about credit eligibility, please contact [cpd@osgoode.yorku.ca](mailto:cpd@osgoode.yorku.ca)



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