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Tsawwassen Treaty: Right of the Band Government to Be Consulted

When “Consult” is used in the Tsawwassen Treaty it does not have the ordinary everyday meaning of “consult.” In the Treaty “Consult means more than merely “asking somebody’s *opinion*.” Its meaning and use in the context of a constitutionally protected Tsawwassen Treaty borders on “asking somebody’s *permission*” or in some instances nearer to “asking somebody to participate in the decision or decision-making.”

Chapter 1 of the Treaty sets out the following definition for “*Consult*”:

“**Consult**” means provision to a party of:

- a. notice of a matter to be decided;
- b. sufficient information in respect of the matter to permit the party to prepare its views on the matter;
- c. a reasonable period of time to permit the party to prepare its views on the matter;
- d. an opportunity for the party to present its views on the matter; and
- e. a full and fair consideration of any views on the matter so presented by the party.”

The requirement to *Consult*, engage in *Consultation*, or in an activity related to consultation or akin to consultation is contained in the following sections of the Treaty:

- **International Treaty and International Legal Obligations:**

“After the Effective Date before consenting to be bound by a new International Treaty that would give rise to a new International Legal Obligation that may adversely affect a right of Tsawwassen First Nation under this Agreement, Canada will Consult with Tsawwassen First Nation in respect of the International Treaty, either separately or through a forum that Canada determines is appropriate.” (Chapter2 - Clause 30)

- **International Tribunal:**

“Canada will Consult with Tsawwassen First Nation in respect of a development of positions taken by Canada before an International Tribunal where a Tsawwassen Law or other exercise of power by Tsawwassen First Nation has given rise to an issue concerning the performance of an International Legal Obligation of Canada. Canada’s position before the International Tribunal will take into account the commitment of the Parties to the integrity of this Agreement.” (Chapter2 - Clause 33)

- **Deltaport Way Corridor:**

“British Columbia or Canada, as applicable, will *Consult* with Tsawwassen First Nation before authorizing new works within the Deltaport Way Corridor.” (Chapter 4 – Clause 57)

- **Provincial Initiatives and Land Use Processes:**

“British Columbia will invite Tsawwassen First Nation to participate in any provincial land use planning process affecting *Tsawwassen Territory* on the following bases: Tsawwassen First Nation will be consulted and may participate in the same capacity as a Local Government, a First Nation or a member of the public, as the case may be; and

- a. British Columbia will provide Tsawwassen First Nation with the decision resulting from any such process and the reasons for that decision.” (Chapter 6 - Clause 16)

- **Crown Corridors – Regulation of Traffic and Transportation:**

“On the request of Tsawwassen First Nation, British Columbia will Consult with Tsawwassen First Nation in respect of the regulation of traffic and transportation on a Crown Corridor that is adjacent to Tsawwassen Lands.” (Chapter 7 – Clause 12)

- **Crown Corridors – Development of Corridor Adjacent to Tsawwassen Lands:**

“British Columbia will *Consult* with Tsawwassen First Nation in respect of the development of any new Crown Corridor adjacent to Tsawwassen Lands.” (Chapter 7- Clause 14)

- **Crown Corridor – Public Utility:**

“The Public Utility [B.C. Hydro and others] will *Consult* with Tsawwassen First Nation at least 60 days before the effective date of the proposed permit or authorization, in respect of measures to be taken by the Public Utility or any compensation payable to Tsawwassen First Nation, in relation to the installation of the new Utility Transmission Works.” (Chapter 7 – Clause 20)

“Where no agreement is reached between the Public Utility and the Tsawwassen First Nation under clause 20 within the time specified, the Public Utility will, at the request of Tsawwassen First Nation, agree with Tsawwassen First Nation to submit the issue of compensation to arbitration under the *Commercial Arbitration Act*.” (Chapter 7 – Clause 21)

- **Public Fisheries Management Advisory Process:**

“Where Canada or British Columbia proposes to establish a public fisheries management advisory process for an area of the Fraser River watershed that includes any part of the Tsawwassen Fishing Area or Tsawwassen Intertidal Bivalve Fishing Area, Canada or British Columbia will Consult with Tsawwassen First Nation in developing that public fisheries management process and, if appropriate, will provide for participation by Tsawwassen First Nation on the *same basis as other First Nations*.” (Chapter 9 – Clause 89)

- **Marine Protected Areas:**

“Canada will *Consult* with Tsawwassen First Nation when Canada proposes to establish, terminate, or change the boundaries of a Marine Protected Area that is wholly or partially *within Tsawwassen Territory*.” (Chapter 9 – Clause 99)

“Where Tsawwassen First Nation makes a written recommendation under clause 100 to establish, terminate or change the boundaries of a Marine Protected Area that is wholly or partially *within Tsawwassen Territory*, *Canada will review the recommendation and provide a written response.*” (Chapter 9 – Clause 101)

- **New Emerging Commercial Fisheries:**

“Where the Minister proposes to establish a new emerging commercial fishery within Pacific Fishery Management Areas 14, 15, 16, 17, 18, 19, 20, 28 or 29, the *Minister will advise* Tsawwassen First Nation of the proposal to establish the fishery and *will Consult* with Tsawwassen First Nation on a process for participants to enter the fishery and for how the fishery should be allocated among participants.” (Chapter 9 - Clause 106)

- **Migratory Birds – Designating a Migratory Bird Population to Address a Conservation Risk:**

“After *Consulting* with Tsawwassen First Nation, the Minister may designate a Migratory Bird population as a Designated Migratory Population if the Minister determines that, in order to address a conservation risk to that population, a Total Allowable Migratory Bird Harvest of that Migratory Bird population is necessary.” (Chapter 11 – Clause 31)

- **International Negotiations on Migratory Birds:**

“*Canada will Consult* with Tsawwassen First Nation on the development of Canada’s positions in respect of international discussions or negotiations that may adversely affect the Tsawwassen Right to Harvest Migratory Birds [in Tsawwassen Territory].” (Chapter 11 – Clause 36)

- **Harvesting Renewable Resources [plants, birds including migratory birds, land mammals and traditional foods] in National Parks or National Marine Conservation Areas:**

“*Canada will Consult* with Tsawwassen First Nation in respect of any proposed new legislation or regulation, or amendment thereto, for harvesting of Renewable Resources in any National Park or National Marine Conservation Area that is wholly or partly within *Tsawwassen Territory* to the extent that the new legislation or regulation, or amendment thereto, may reasonably be expected to affect the Tsawwassen Right to Harvest Renewable Resources.” (Chapter 12 – Clause 29)

“After *Consultation* with Tsawwassen First Nation, the Minister may close to harvesting an area in a National Park or National Marine Conservation Area, for as long as necessary, for purposes of park or marine conservation area management including ecosystem research, protection of representative ecosystems and protection of species or habitats.” (Chapter 12 – Clause 30)

- **Conservation Measures in National Park or National Marine Conservation Areas**

“*Canada will Consult* with Tsawwassen First Nation in respect of:

- a. the need for additional conservation measures within the relevant National Park or National Marine Conservation Area in *Tsawwassen Territory* during the term of a Renewable Resource Harvesting Document; and
- b. the development and implementation of such additional conservation measures where the Minister decides that the measures are necessary.” (Chapter 12 – Clause 31)

“After the *Consultation* referred to in clause 31, the Minister may amend a Renewable Resource Harvesting Document to the extent required to bring into effect the conservation measures referred to in clause 31.” (Chapter 12 – Clause 32)

- **Establishment of National Parks or National Marine Conservation Areas**

“Canada will *Consult* with Tsawwassen First Nation before establishing or changing the boundaries of any National Park or National Marine Conservation Area that is wholly or partly *within Tsawwassen Territory*.” (Chapter 12 – Clause 33)

- **Cooperation in Planning and Management of National Parks and National Marine Conservation Areas**

“In respect of a National Park or National Marine Conservation Area that is wholly or partly within *Tsawwassen Territory*, Canada will Consult with Tsawwassen First Nation on:

- a. the role of Tsawwassen First Nation in interim planning and management planning;
- b. the role of Tsawwassen First Nation in the research and protection of Cultural Heritage Sites of significance to Tsawwassen First Nation;
- c. the role of Tsawwassen First Nation in the identification, protection, interpretation and presentation of Tsawwassen Artifacts and heritage where applicable, including the use of the Hun’qum’i’num language in *signage* and the *interpretation*; and
- d. identification of the interests of Tsawwassen Members in *economic, employment* or training *opportunities* in or associated with any *National Park or National Marine Area*. (12-34)

“At the request of Tsawwassen First Nation, Canada and Tsawwassen First Nation will negotiate and attempt to reach agreement on arrangements for Tsawwassen First Nation to provide *advice* on matters affecting Tsawwassen First Nation in any National Park or National Marine Conservation Area that is wholly or partly within *Tsawwassen Territory*.” (Chapter 12 – Clause 35)

- **Planning and Cooperation in Management of Provincial Parks, Protected Areas or Wildlife management Areas – Establishment of New**

“British Columbia will Consult with Tsawwassen First Nation in respect of:

- a. the establishment of new Provincial Parks, Protected Areas or Wildlife Management Areas;
- b. the Disposition of or modification of boundaries of existing Provincial Parks, Protected Areas or Wildlife Management Areas; and
- c. changes in the use or designation of existing Provincial Parks, Protected Areas or Wildlife Management Areas;

that may affect the Tsawwassen Right to Gather Plants, the Tsawwassen Right to Harvest Wildlife or the Tsawwassen Right to Harvest Migratory Birds.” (Chapter 13 – Clause 34)

- **Planning and Cooperation in Management of Provincial Parks, Protected Areas or Wildlife Management Areas – Closure to Tsawwassen Hunting**

“British Columbia will Consult with Tsawwassen First Nation on the closure of opportunities for the exercise of the Tsawwassen Right to Harvest Wildlife in Provincial Parks and Protected Areas within the Tsawwassen Wildlife Area.” (Chapter 13 – Clause 35)

- **Federal Environmental Assessment**

“If a proposed Federal Project may reasonably be expected to adversely affect Tsawwassen Lands or Tsawwassen First Nation rights [in Tsawwassen Territory] set out in this Agreement:

- a. Canada will ensure that Tsawwassen First Nation is provided with timely *notice* of the Environmental Assessment and information describing the Federal Project in *sufficient detail* to permit Tsawwassen First Nation to determine whether it is interested in *participating* in the Environment Assessment;
- b. If Tsawwassen First Nation confirms that it is interested in participating in the Environmental Assessment of the Federal Project, Canada will provide Tsawwassen First Nation with an opportunity to comment on the Environmental Assessment conducted under the *Canadian Environmental Assessment Act*, including
 - i. the scope of the Federal Project;
 - ii. the environmental effects of the Federal Project;
 - iii. any mitigation measures to be implemented; and
 - iv. any follow-up programs to be implemented;
- c. During the course of the Environmental Assessment conducted under the *Canadian Environmental Assessment Act*, Canada will give full and fair consideration to any comments provided by Tsawwassen First Nation under sub-clause 4.b, and will respond to the comments, before taking any decision to which those comments pertain; and
- d. Canada will provide to Tsawwassen First Nation access to information in Canada’s possession related to the Environmental Assessment of the Federal Project, in accordance with the public registry provisions in the *Canadian Environmental Assessment Act*.” (Chapter 15 – Clause 4)

“If a proposed Federal Project that is referred to a panel under the Canadian Environmental Assessment Act may reasonably be expected to adversely affect Tsawwassen Lands or Tsawwassen First Nation rights [in the Tsawwassen Territory] set out in this Agreement, Canada will provide Tsawwassen First Nation with:

- a. the opportunity to propose to the Minister a list of names that the Minister may consider for appointment to the panel, unless the panel is a decision-making body such as the National Energy Board, or Tsawwassen First Nation is a proponent of the Federal Project; and
- b. formal standing before that panel.” (Chapter 15 – Clause 6)

● **Provincial Environmental Assessment**

“If a proposed Provincial Project is located within the area of land that as at the Effective Date comprises the *Greater Vancouver Regional District*, or is otherwise located within *Tsawwassen Territory*, and may reasonably be expected to adversely affect Tsawwassen Lands, residents or Tsawwassen Lands or Tsawwassen First Nation rights [in Tsawwassen Territory] set out in this Agreement, British Columbia will ensure that Tsawwassen First Nation:

- a. receives timely notice of, and relevant available information on, the Provincial Project and the potential adverse environmental effects;
- b. is *Consulted* regarding the environmental effects of the Provincial Project; and
- c. receives an opportunity to *participate* in any Environmental Assessment of that Provincial Project. (Chapter 15 - Clause 7)

● **Block Federal or Provincial Project:**

“Despite any decision made by Canada or British Columbia in respect of a Federal Project or a Provincial Project, no Federal Project or Provincial Project may proceed on Tsawwassen Lands without the consent of Tsawwassen First Nation.” (Chapter 15 – Clause 9)

- **Changes to Structure of Regional Government**

“British Columbia will Consult with Tsawwassen First Nation on any changes to the structure of regional government that directly and significantly affect Tsawwassen First Nation.” (Chapter 17 – Clause 6)

- **B.C. Settlement Legislation and Ratification**

“British Columbia will Consult with Tsawwassen First Nation in respect of the development of the Provincial Settlement Legislation.” (Chapter 24 – Clause 12)

- **Federal Settlement Legislation**

“Canada will Consult with Tsawwassen First Nation in respect of the development of the Federal Settlement Legislation.” (Chapter 24 – Clause 14)

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