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Aboriginal Consultation and Accommodation

Updated Guidelines for Federal Officials
to Fulfill the Duty to Consult

March 2011

Canada

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Aboriginal Consultation and Accommodation

Updated Guidelines for Federal Officials
to Fulfill the Duty to Consult

EXECUTIVE SUMMARY

In the Haida and Taku River decisions in 2004, and the Mikisew Cree decision in 2005, the Supreme Court of Canada held that the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. The Court explained that the duty stems from the Honour of the Crown and the Crown's unique relationship with Aboriginal peoples.

To demonstrate Canada's commitment to address issues of Aboriginal consultation and accommodation, a federal Action Plan was announced in November 2007. The Consultation and Accommodation Unit was established within Indian and Northern Affairs Canada in early 2008 to implement the Action Plan. Some of the accomplishments of the Action Plan were the release of the February 2008 Interim Guidelines, the training provided to over 1700 federal officials across the country, the engagement with Aboriginal communities and organizations, provinces and territories and industry representatives and the development of tools to support officials in their consultation and accommodation activities.

In more recent decisions, the Court further explained that: the duty to consult is a constitutional duty; applies in the context of modern treaties; officials must look at treaty provisions first; and where treaty consultation provisions do not apply to a proposed activity, a "parallel" duty to consult exists. The Court has also clarified, that depending on their mandate, entities such as boards and tribunals may also play a role in fulfilling the duty to consult; that high level

strategic decisions may now trigger the duty to consult; and, that the duty applies to current and future activities and not historical infringements.

The Interim Guidelines have been updated with the collaboration of federal departments and agencies. This document reflects evolving case law and engagement with Aboriginal organizations and communities, provinces and territories and industry representatives. A key element of the Updated Guidelines is the Guiding Principles and Consultation Directives which provide clearer direction on the government-wide responsibility of departments and agencies to fulfill the duty to consult. The Updated Guidelines focus on the increased need for policy leadership, coordination and collaboration, federal accountability, strengthening partnerships and strategic and practical guidance, training and support. These new or enhanced elements demonstrate the progress made by the federal government to address consultation and accommodation issues.

Departments are responsible for integrating the Guiding Principles and Directives within their own day-to-day activities. The Updated Guidelines also reference the Consultation Information Service and the Aboriginal and Treaty Rights Information System and other tools developed to assist officials in determining the scope and nature of consultations.

Additional information can be found on the INAC Consultation and Accommodation Unit web site: <http://www.ainc-inac.ca/ai/arp/cnl/ca/index-eng.asp>

TABLE OF CONTENTS

PART A – OVERVIEW

I	Introduction	6
II	Common Law Duty to Consult	7
III	Government's Response	8
IV	Context across Canada	9
1.	Historical and Geographical	9
2.	Legal	9
3.	International	10
V	Updated Consultation Guidelines	11
VI	Guiding Principles and Consultation Directives	12

PART B – GETTING READY FOR CONSULTATION AND ACCOMMODATION

I	Roles and Responsibilities	18
❖	Federal Departments and Agencies	18
❖	Provinces and Territories	18
❖	Aboriginal Groups	19
❖	Third Parties	19
II	Developing a Departmental or Agency Approach to Consultation and Accommodation	21
1)	Identify Crown conduct in relation to the duty to consult	21
2)	Assess potential adverse impacts of departmental and agency activities	21
3)	Identify potential or established Aboriginal or Treaty rights and related interests	22
4)	Develop a departmental or agency approach to consultation and accommodation	22
5)	Coordinate with partners, and/or rely on other consultation processes	25
III	Organizing your Department or Agency for Consultation and Accommodation	30
1)	General considerations	30
2)	Organizational, financial and human resources considerations	30
3)	Training considerations	31
4)	Engaging Justice counsel in the consultation and accommodation process	32

PART C – STEP-BY-STEP GUIDE TO CONSULTATION AND ACCOMMODATION

Introduction	36
Phase 1: Pre-Consultation Analysis and Planning	37
Step 1: Describe and ‘map out’ the proposed Crown conduct	37
Step 2: Identify potential adverse impacts of Crown conduct	37
Step 3: Identify which Aboriginal groups are in the area of the proposed Crown conduct and ascertain their respective potential or established Aboriginal or Treaty rights and related interests	38
Step 4: Make an initial determination as to whether there is a duty to consult	40
Step 5: Assess the scope of the duty to consult and, where appropriate, accommodate	42
Step 6: Design the form and content of the consultation process	44
Step 7: Ensure that a records management and filing system is in place	51
Phase 2: Crown Consultation Process	52
Step 1: Implement the consultation process	52
Step 2: Document, catalogue and store all Crown consultation meeting records and other correspondence	53
Step 3: Develop and maintain an issues management tracking table	53
Step 4: Adjust the consultation and accommodation process, as necessary	53
Phase 3: Accommodation	54
Step 1: Gather and analyze information supporting the basis for accommodation	55
Step 2: Identify possible accommodation measures and options	55
Step 3: Select appropriate accommodation options	56
Step 4: Communicate and document selected accommodation measures	56
Phase 4: Implementation, Monitoring and Follow-Up	57
Step 1: Communicate and implement the decision(s)	57
Step 2: Monitor and follow-up	57
Step 3: Evaluate the consultation process	57
 ANNEXES	
Annex A: Definitions	62
Annex B: Legal Case Summaries	64

PART A

Overview

I INTRODUCTION

The Government of Canada consults with Canadians on matters of interest and concern to them. Consulting is an important part of good governance, sound policy development and decision-making. Through consultation, the Crown seeks to strengthen relationships and partnerships with Aboriginal peoples and thereby achieve reconciliation objectives. In addition to pursuing policy objectives, the federal government consults with Aboriginal peoples for legal reasons. Canada has statutory, contractual and common law obligations to consult with Aboriginal groups. The process leading to a decision on whether to consult includes a consideration of all of these factors and their interplay.

The Updated Guidelines provide practical advice and guidance to federal departments and agencies in determining when the duty to consult may arise and how it may

be fulfilled, as described by the Supreme Court of Canada in the *Haida*, *Taku River* and *Mikisew Cree* decisions (See Annex B Legal Case Summaries).

The Guidelines are informed by Canada's understanding of the legal parameters of the duty and provide policy-based guidance to assist officials in their efforts to effectively incorporate consultations and, where appropriate, accommodation into government activities and processes.

The Guidelines are divided into three parts: Part A – Overview; Part B – Getting Ready for Consultation and Accommodation; Part C – Step-by-Step Guide to Consultation and Accommodation. Part C includes a detailed list of questions and considerations to assist departments and agencies when managing their consultation and accommodation activities.

Good governance/ Policy Reasons

- ❖ Make informed and appropriate decisions
- ❖ Create and improve working relations with all those affected
- ❖ Address new business and policy developments

Legal Reasons

- ❖ S. 35 Common law requirements
- ❖ Statutory requirements
- ❖ Agreements/Contractual requirements

II COMMON LAW DUTY TO CONSULT

The common law duty to consult is based on judicial interpretation of the obligations of the Crown (federal, provincial and territorial governments) in relation to potential or established Aboriginal or Treaty rights of the Aboriginal peoples of Canada, recognized and affirmed in section 35 of the *Constitution Act*, 1982. The duty cannot be delegated to third parties.

Section 35 of the *Constitution Act*, 1982 provides that:

- (1) *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*
- (2) *In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.*
- (3) *For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.*
- (4) *Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.*

In the *Haida* and *Taku River* decisions in 2004, and the *Mikisew Cree* decision in 2005, the Supreme Court of Canada (SCC) held that the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. This duty has been applied to an array of Crown actions and in relation to a variety of potential or established Aboriginal or Treaty rights.

In these decisions, the SCC determined that the duty to consult stems from the Honour of the Crown and the Crown’s unique relationship with Aboriginal peoples. The Court explained that it will look at how the Crown manages its relationships with Aboriginal groups and how it conducts itself when making decisions that may adversely impact the rights recognized and affirmed by section 35. In the more recent decisions of *Rio Tinto* and *Little Salmon Carmacks* the Court has further explained that the duty to consult is a constitutional duty that invokes the Honour of the Crown and that it must be met. The context will inform what is required to meet the duty and demonstrate honourable dealings.

The duty to consult and, where appropriate, accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty by the Crown and continues beyond formal claims resolution through to the application and implementation of Treaties. The Crown’s efforts to consult and, where appropriate accommodate Aboriginal groups whose potential or established Aboriginal or Treaty rights may be adversely affected should be consistent with the overarching objectives of reconciliation.

Reconciliation has two main objectives: 1) the reconciliation between the Crown and Aboriginal peoples and; 2) the reconciliation by the Crown of Aboriginal and other societal interests. Consultation and accommodation play a key role in the fulfillment of these two objectives.

As the consultation and accommodation processes are being developed and implemented, the Crown will be guided by principles that have emerged from the case law and from government consultation practices. The Guiding Principles and Consultation Directives set out below highlight how these key principles may be applied in the planning and design of government activities (Refer to Part A, Section VI of the Updated Guidelines).

III GOVERNMENT'S RESPONSE

The courts have generally left to government the detailed exercise of implementing processes that seek to fulfill the duty to consult. An awareness of the duty and a consideration of when and how it might apply must become part of the government's daily business. A wide array of consultation practices exist and are being implemented by federal departments and agencies across the country to better fulfill the duty to consult and, where appropriate, accommodate. Examples include consultations with Aboriginal groups that occur within the context of environmental assessments and regulatory processes as well as separate consultation activities undertaken in relation to specific projects and agreed to processes set out within treaties.

Since 2004, the federal government has been engaging in dialogue with First Nations, Inuit and Métis communities and organizations as well as provinces, territories and industry representatives to address key consultation and accommodation issues. Discussions have focussed on the scope of the duty, what constitutes meaningful consultation, capacity to participate in a consultation process, Crown coordination, consultation guidelines and protocols, accommodation, and the reconciliation of the evolving duty with other legal obligations to consult such as statutory requirements and provisions in comprehensive land claim agreements and self-government agreements.

An Action Plan on consultation and accommodation was announced in November 2007 led by Indian and Northern Affairs Canada (INAC) and Justice Canada. A

Consultation and Accommodation Unit was established within INAC in early 2008 to implement Canada's Action Plan on consultation and accommodation. Interim Consultation Guidelines were released in February 2008 and related training has been provided to over 1700 federal officials across the country.

Within INAC, a Consultation Information Service and an information system on the location and nature of potential and established Aboriginal and Treaty rights has been created to provide baseline information to federal officials. As well, the Regional Consultation Coordinators within INAC will act as liaison between federal departments, provincial and territorial governments and Aboriginal organizations and communities to facilitate relationships on key consultation files and to ensure that Canada's interests are addressed.

Guiding Principles and Directives have been developed to further guide federal officials in implementing the duty and are included in the Updated Guidelines. Initiatives to better integrate Aboriginal consultation with environmental assessments and regulatory processes were also undertaken, including in relation to major natural resources and infrastructure projects.

These elements of Canada's approach to consultation and accommodation are being expanded upon and others will continue to be developed over time to enable the Crown to fulfill the duty in a more consistent, coherent, and efficient way across the federal government.

IV CONTEXT ACROSS CANADA

Consultation with First Nations, Métis and Inuit communities must be understood in the broader context of the evolving relationship between Aboriginal Peoples and the Crown.

Departmental and agency approaches to consultation should integrate, to the extent possible, the fulfilment of consultation obligations with departmental policy objectives and with other overarching government policy objectives. For example, in pursuing reconciliation objectives, Canada continues its efforts to improve its relationship with Aboriginal peoples. This includes through its historic apology in 2008 to former students of the residential school system, the subsequent establishment of the Truth and Reconciliation Commission and the recent Apology for relocation of Inuit families to the High Arctic. These important steps build on progress that has been made in negotiating Aboriginal self-government and land claims agreements; and, partnership approaches to economic development, education, health and other issues.

The development of a federal approach to consultation and accommodation is not intended to be a one-size-fits-all approach. Differences in history, geography, demographics, governance, relationships and other circumstances of Aboriginal communities and organizations in Canada are relevant when considering how to address any consultation obligations that may arise. Thus, understanding the historical, geographic and legal context relevant to Crown activities is essential. Differences in contexts can require different approaches to fulfilling the duty to consult and, where appropriate, accommodate.

1. Historical and Geographical

The application of common approaches to consultation and, where appropriate, accommodation across the country must be reconciled with the fact that potential or established Aboriginal or Treaty rights vary in both scope and content. Such rights vary depending on the historical presence of Aboriginal groups, including the historical relationship

between particular Aboriginal communities and between the Aboriginal communities and the Crown, in different areas of the country. For example, Aboriginal communities may be signatories to historic treaties, comprehensive land claim agreements, and self-government agreements or be claiming many different kinds of Aboriginal rights and overlapping territories.

Issues addressed in consultation are specific to the location and nature of the activity. Consultation procedures and approaches must be adapted to address the different kinds of rights and Crown obligations that are at issue. There is significant variability across the country.

For example, in British Columbia and Quebec, there are a few Treaties but many overlapping assertions of Aboriginal rights and title, when compared with the Peace and Friendship Treaties in the Maritimes and the historic Treaties in Ontario and in the Prairie provinces. This landscape differs from the modern Treaties in the territories, northern B.C., and in James Bay, some of which contain specific consultation provisions.

2. Legal

In addition to the common law duty to consult, there are a number of other legal reasons for the Crown to consult with Aboriginal groups, including specific requirements to consult that are set out in statutes and regulations as well as provisions in land claim agreements, self-government agreements and consultation agreements.

It is important to identify the legal source of potential consultation obligations as this will inform and guide what is required in the particular context, including the interplay between these other legal reasons to consult with Aboriginal groups and the common law duty. Departments and agencies should work with their counsel to understand what legal considerations are relevant to their activities.

3. International

On November 12, 2010 Canada issued a Statement of Support endorsing the United Nations Declaration on the Rights of Indigenous peoples (Declaration), an aspirational document, in a manner fully consistent with Canada's Constitution and laws. The Declaration describes a number of principles such as equality, partnership, good faith and mutual respect. Canada strongly supports these principles and believes that they are consistent with the Government's approach to working with Aboriginal peoples.

However, Canada has concerns with some of the principles in the Declaration and has placed on record its concerns with free, prior and informed consent when interpreted as a veto. As noted in Canada's Statement of Support, the Declaration is a non-legally binding document that does not change Canadian laws. Therefore, it does not alter the legal duty to consult. A copy of Canada's statement of support, along with other materials, can be found at: <http://www.ainc-inac.gc.ca/index-eng.asp>

V UPDATED CONSULTATION GUIDELINES

The Interim Guidelines were developed to provide direction to federal departments and agencies when assessing the common law requirements for consultation and, where appropriate, accommodation with Aboriginal groups, including how to prepare for meaningful consultations.

Since the release of the Interim Guidelines in February 2008, much has been learned about consultation and accommodation which is reflected in these Updated Guidelines. Changes to the Guidelines have been informed by developments in the case law and engagement with Aboriginal organizations and communities, provinces and territories and industry representatives. Discussions and information-sharing during training sessions held with federal officials across the country have also contributed to these changes.

This updated edition provides a more detailed step-by-step guide to consultation and accommodation. It also stresses the importance for departments and agencies to prepare, in advance, to effectively carry out their consultation and accommodation responsibilities by developing a departmental or agency wide approach instead of addressing consultation files simply on a case by case basis.

The evolution of case law and federal policy development combined with “lessons learned” and best practices from within and outside the federal government will continue to influence the content of the Guidelines, which will evolve over time. As part of this ongoing process, departments

and agencies need to continue reviewing their Aboriginal consultation and accommodation approaches to ensure that they are consistent with the Guidelines and with evolving legal and policy developments.

In many instances, departments and agencies have developed departmental or agency specific policies or guidelines to support their officials in handling consultation files. The implementation of these Guidelines is a step towards greater consistency in federal practices and approaches.

The objective of the Guidelines is to provide an approach to consultation and accommodation that:

- ❖ acknowledges and respects the Crown’s unique relationships with Aboriginal peoples;
- ❖ promotes reconciliation of Aboriginal and other societal interests;
- ❖ integrates consultation into government day-to-day activities, e.g. environmental and regulatory processes;
- ❖ reconciles the need for consistency in fulfilling the Crown’s duty to consult with the desired flexibility, responsibility and accountability of departments and agencies in determining how best to do so; and
- ❖ fosters better relations between the federal government and Aboriginal peoples, provinces, territories, industry and the public.

VI GUIDING PRINCIPLES AND CONSULTATION DIRECTIVES

As part of its on-going efforts to better address Aboriginal consultation and accommodation, the federal government approved the following *Guiding Principles* and *Consultation Directives* which will guide federal officials in their efforts to address the duty to consult and, where appropriate, accommodate.

The Government of Canada consults with First Nation, Métis and Inuit people for many reasons, including: statutory and contractual; policy and good governance; and the common law duty to consult. The Supreme Court of Canada affirmed, in a number of landmark decisions, such as *Haida* (2004), *Taku River* (2004) and *Mikisew Cree* (2005) that the Crown has a duty to consult when three elements are present:

- ❖ Contemplated Crown conduct;
- ❖ Potential adverse impact; and
- ❖ Potential or established Aboriginal or Treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*.

GUIDING PRINCIPLE NO. 1

The Government of Canada, in carrying out its activities, will respect the potential or established Aboriginal or Treaty rights of First Nation, Métis and Inuit people by consulting with Aboriginal groups whose rights and related interests may be adversely impacted by a proposed Government of Canada activity.

Consultation Directive

The Government of Canada, in its consultation with Aboriginal groups, seeks to identify potential adverse impacts of federal activities on potential or established Aboriginal or Treaty rights and related interests and find ways to avoid or minimize these adverse impacts. If there is information available or that becomes available during the planning or implementation of the proposed activity about potential adverse impacts on potential or established rights exercised by an Aboriginal group in the area of an activity, federal officials must undertake the appropriate consultations.

Government actions that may adversely impact Aboriginal and Treaty rights can include decisions with respect to a pipeline that may affect wildlife movement, supply and access; decisions with respect to pollution from construction or use that may affect flora or animal populations; change in regulation or policy that may restrict land use; federal life cycle of land management that may affect legal obligations and relationships with Aboriginal groups; or decisions with respect to use of natural resources that may limit supply and use by Aboriginal groups.

Officials from federal departments and agencies can gather information on Aboriginal and Treaty rights assertions in their proposed activity area by accessing the following resources at all stages of a consultation and accommodation process:

- ❖ Officials within your department or agency;
- ❖ The Consultation Information Service, which includes the Aboriginal and Treaty Rights Information System, at INAC – this service provides a single point of access to information on Aboriginal and Treaty rights assertions held by INAC. The information includes contact information for Aboriginal groups and their leadership, information on multipartite agreements, historic Treaties, comprehensive land claim agreements, self-government agreements, Treaty Land Entitlement agreements, comprehensive and specific claims and other assertions;

- ❖ Aboriginal groups in the area of your activity with which your department or agency has relationships;
- ❖ INAC's Consultation Information Service, Treaties and Aboriginal Government and the Department of Justice, which can assist with more detailed assessments of complex situations, overlapping claims to lands or resources, title, etc.; or,
- ❖ Other government departments and agencies, provinces, territories and industry with which your department or agency has relationships.

GUIDING PRINCIPLE NO. 2

The Government of Canada will assess how proposed federal activities may adversely impact on potential or established Aboriginal or Treaty rights, Aboriginal groups and their related interests. As part of this assessment, the Government of Canada will identify when consultation should form part of their operations and ensure that consultations are initiated early in the planning, design or decision making processes.

Consultation Directive

Departments and agencies must assess their activities, policies and programs that may adversely impact potential or established Aboriginal or Treaty rights and related interests. Based on this review, federal officials will ensure that appropriate consultation activities with Aboriginal groups are carried out. Key departments involved in Aboriginal consultation should develop a consultation approach that is responsive to the needs of the department or agency and reflects its operational realities. This approach should build from the guidance set out in the Updated Guidelines.

GUIDING PRINCIPLE NO. 3

Early consultations will assist the Government of Canada in seeking to identify and address Aboriginal concerns, avoid or minimize any adverse impacts on potential or established Aboriginal or Treaty rights as a result of a federal activity and assess and implement mechanisms that seek to address their related interests, where appropriate.

Consultation Directive

Federal officials must be able to demonstrate in decision making processes that Aboriginal concerns have been addressed or incorporated into the planning of proposed federal activities. As such, early discussions with the Aboriginal groups who may be adversely impacted by a federal activity are crucial. It is possible that there could be multiple Aboriginal groups impacted by a proposed activity, therefore they should be part of the consultation process.

GUIDING PRINCIPLE NO. 4

Consultation and accommodation will be carried out in a manner that seeks to balance Aboriginal interests with other societal interests, relationships and positive outcomes for all partners. A meaningful consultation process is one which is:

- ❖ *carried out in a timely, efficient and responsive manner;*
- ❖ *transparent and predictable;*
- ❖ *accessible, reasonable, flexible and fair;*
- ❖ *founded in the principles of good faith, respect and reciprocal responsibility;*
- ❖ *respectful of the uniqueness of First Nation, Métis and Inuit communities; and,*
- ❖ *includes accommodation (e.g. changing of timelines, project parameters), where appropriate*

Consultation Directive

The Government of Canada and its officials are required to carry out a fair and reasonable process for consultations. A meaningful consultation process is characterized by good faith and an attempt by parties to understand each other's concerns, and move to address them. Federal officials can begin a consultation process by applying the Updated Guidelines in concert with any tools, policies or guidelines developed by their department or agency. Federal officials, during a consultation process, must reasonably ensure that Aboriginal groups have an opportunity to express their interests and concerns, and that they are seriously considered and, wherever possible, clearly reflected in a proposed activity. Aboriginal groups also have a reciprocal responsibility to participate in consultation processes.

The Government of Canada will conduct consultation activities, in a timely and efficient manner, including, when appropriate, the development of a consultation plan and the provision of relevant information to Aboriginal groups, to inform and support decision-making processes. Federal officials must seek to develop processes that move beyond a project-by-project approach to consultation and move towards one that facilitates the inclusion of Aboriginal perspectives, timely decision making, integrates with and strengthens regulatory processes and promotes economic benefits for all Canadians.

GUIDING PRINCIPLE NO. 5

The Government of Canada recognizes that Aboriginal consultation is a Crown responsibility that flows from Government activities. The Government of Canada will ensure that a lead federal department or agency is identified and made accountable for any consultation processes that may be carried out for federal government activities. Should a consultation process move a department or agency beyond their mandate, mechanisms will be in place to address additional issues raised in a consultation process.

Consultation Directive

To manage Aboriginal consultation and accommodation, the Government of Canada will facilitate efficient and effective cooperation among and within federal departments and agencies via senior federal official governance structures which will assign a lead in a consultation process where the lead is not clear. When consultation and accommodation activities move a department or agency beyond their identified mandate, memorandum of understanding and other processes will be developed to coordinate other departments and agencies and processes whose function and expertise can support an effective consultation process.

GUIDING PRINCIPLE NO. 6

The Government of Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise, such as environmental assessment and regulatory approval processes in which Aboriginal consultation will be integrated, to coordinate decision making and will assess if additional consultation activities may be necessary.

Consultation Directive

A whole of government approach for Aboriginal consultation will be used in the regulatory review process for major natural resource projects. Consultation will be integrated into environmental assessment and regulatory approval processes. To assist in this approach, each major project will have a Crown consultation coordinator, who will develop and use a consultation plan to integrate the activities of all departments throughout the environmental assessment and regulatory processes. The interdepartmental committee process and interdepartmental memoranda of understanding will assist in providing clarity to these issues. The Government of Canada may rely on, where possible, existing consultation mechanisms, processes and expertise (e.g. provincial or territorial government or industry consultations) to streamline decision making and will assess if additional consultation activities may be necessary.

Federal officials must align consultation processes to existing regulatory or legislative processes, to the extent possible. Officials should, however, consider that:

- ❖ issues that arise during the consultation may be beyond the mandate of the existing process therefore additional consultation activities may need to occur;
- ❖ the existing process must allow for appropriate, meaningful consultation; and,
- ❖ consultation may be required throughout the lifecycle of an activity, thus they must ensure that any existing process is appropriate for all stages of the activity.

GUIDING PRINCIPLE NO. 7

The Government of Canada will coordinate consultation and accommodation activities with its partners (e.g. Aboriginal groups, provinces, territories and industry). While the Crown cannot delegate its obligation, the Government of Canada will, where appropriate, use consultation processes and accommodation measures carried out by its partners to assist it in meeting its commitments and responsibilities.

Consultation Directive

The Government of Canada and its officials can rely on its partners, such as Aboriginal groups, industry and provinces and territories, to carry out procedural aspects of a consultation process (e.g. information sessions or consultations with Aboriginal groups, mitigation measures and other forms of accommodation, etc.). The information collected during these processes can be used by the Government of Canada and its officials in meeting its consultation obligations.

GUIDING PRINCIPLE NO. 8

The Government of Canada will carry out its activities and related consultation processes in accordance with its commitments and processes involving Aboriginal groups. The Government of Canada will seek out opportunities to develop and maintain a meaningful dialogue with Aboriginal groups in support of building relationships with its partners.

Consultation Directive

The Government of Canada, in carrying out consultation processes, must act in accordance with its existing commitments and processes (e.g. Treaties, Treaty land entitlement agreements, settlements and consultation agreements). Federal officials need to inform themselves and be aware of Canada's policy approach and legal commitments to Aboriginal groups and how these commitments and processes may be aligned with department and agency consultation processes. Federal officials should also seek to develop positive, long-term relationships with Aboriginal groups. These positive relationships and the dialogue that results from them will assist the federal government in moving forward on future activities.



PART B

Getting Ready for Consultation and Accommodation

I ROLES & RESPONSIBILITIES

Federal Departments and Agencies

An effective consultation process requires collaboration with Aboriginal groups and coordination and cooperation within the federal government and with other jurisdictions and stakeholders, as appropriate.

The Crown as a whole must fulfill its duty to consult and, where appropriate, accommodate. In turn, each federal department or agency must support the Crown's efforts in meeting this obligation. To do so, departments and agencies must assess the consultation requirements that relate to their respective activities and develop approaches to consultation and accommodation that will allow the Crown as a whole to meet its duty. Some departments and agencies may have existing processes and/or mandates which may assist in fulfilling the duty.

Coordination between the relevant federal departments and agencies is essential to ensure that the Crown is responsive and able to relate effectively with the Aboriginal groups involved. Limitations on the mandate of any one department, agency or other federal entity will not limit what is required of the whole Crown in the circumstances (Refer to Guiding Principle and Directive # 5).

The designation of a lead department, agency or committee is recommended to oversee and track all consultation efforts and the issues raised by Aboriginal groups. The lead will follow up with relevant departments and agencies to ensure that they take appropriate action in relation to any consultation processes that may be carried out for federal government activities. The lead will also act as the federal point of contact for Aboriginal groups, industry representatives and various stakeholders.

As mentioned in Guiding Principle and Directive # 6, in seeking to ensure that its obligations towards Aboriginal groups are satisfied, Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise, such as environmental assessments

and regulatory approval processes that allow it to gather information and address issues raised by Aboriginal groups.

Agencies, boards, commissions and tribunals, including the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC) have a role to play in assisting the Crown in discharging, in whole or in part, the duty to consult. The role to be played by any given board, commission or tribunal is determined by its statutory mandate or its terms of reference. More specifically, an ability to address questions of law and an ability to remedy or address consultation related issues will inform the role of such boards, tribunals and commissions in Crown consultation processes.

Departments with responsibilities for real property management such as disposal should be aware of Aboriginal interests in federal Crown land under their management. While decisions to dispose of federal Crown land is the most common trigger for a duty to consult in real property matters, there are other aspects of land management, such as access restrictions, management of burial sites and infrastructure. Guidance on this subject can be found in the Treasury Board Secretariat's *Guide to Real Property Management: Aboriginal Context* <http://www.tbs-sct.gc.ca/rpm-gbi/doc/grpmac-ggbica/grpmac-ggbica-eng.aspx>

Provinces and Territories

The Crown's duty to consult applies to provincial and territorial governments. Some have instituted their own Crown consultation processes, policies and guidelines for projects within their jurisdictions. Departments and agencies should look at provincial, territorial and community websites for additional information on provincial, territorial, regional or community-specific consultation agreements and protocols, processes and policies. They can also contact the INAC Regional Consultation Coordinator. Inquiries can be sent to CAU-UCA@ainc-inac.gc.ca

Guiding Principle and Directive # 7 speaks to Canada coordinating its consultation and accommodation activities with those of its partners (e.g. Aboriginal groups, provinces, territories and industry). For initiatives involving federal, provincial and territorial governments, opportunities to coordinate efforts between jurisdictions should be pursued to the maximum extent possible, to increase efficiency by minimizing duplication.

Departments and agencies are encouraged to develop long-term working relationships and processes rather than work together only on an *ad hoc* or case-by-case basis. Where both federal and provincial or territorial governments are involved in an activity, their consultation efforts should be coordinated. In some instances, Canada, with their agreement, may wish to use provincial or territorial consultation processes to fulfill, in whole or in part, its consultation obligations. Federal departments and agencies will need to assess these processes to ensure that they lead to a meaningful consultation and are capable of addressing matters related to federal activities.

INAC, on behalf of Canada, will engage with provincial and territorial partners to explore the potential for developing memoranda of understanding aimed at reducing duplication, working collaboratively, sharing information and improving collaboration on Aboriginal consultation. Consultation agreements with provinces/territories and First Nation, Métis or Inuit groups may also assist in addressing consultation and accommodation issues.

In 2007, federal, provincial and territorial Deputy Ministers Responsible for Aboriginal Affairs agreed to establish an ongoing information- and priority-sharing process on Aboriginal consultation and accommodation across their respective jurisdictions. The Federal/Provincial/Territorial working group has made real progress in relation to the duty to consult. Key areas that have been explored include: capacity, the duty to consult and the Métis, traditional land use studies as a tool to inform consultation processes, developing information repositories, coordination, inter-jurisdictional challenges and approaches to dealing with municipalities.

Aboriginal Groups

In keeping with court decisions on consultation, Guiding Principle and Directive # 4 makes it clear that First Nation, Métis and Inuit groups have a reciprocal duty to participate in reasonable processes and Crown efforts to consult and accommodate them. It is in the interest of all concerned parties to develop effective processes and agreements that reflect shared interests and contribute to a consultation process that creates clarity, certainty, trust and reliability. In that respect, the Crown may reasonably expect Aboriginal groups to:

- ❖ clearly outline in a timely manner any potential adverse impacts of the Crown activity, or that of a third party, on the nature and scope of their potential or established Aboriginal or Treaty rights and related interests;
- ❖ make their concerns known to the Crown and share any other relevant information that can assist in assessing the strength of their claim or the seriousness of any impacts on their potential or established Aboriginal or Treaty rights and related interests;
- ❖ attempt to resolve any issues with any other Aboriginal groups with overlapping claims and interests;
- ❖ attempt to reach a mutually satisfactory resolution to a particular situation;
- ❖ consider that they do not have a veto over the proposed project; that consultation may not always lead to accommodation or that there may not always be agreement on what accommodation measures may be appropriate.

Third Parties

All industry sectors seek predictable timelines, clarity on the respective roles of parties, certainty and criteria to determine the adequacy of consultation and accommodation. Industry representatives indicate that earlier government consultations at the federal, provincial and territorial levels would help to establish a transparent process for the proponent, Aboriginal communities and the Crown.

The Crown could discuss with industry proponents early in the process about the possibility and extent to which it may rely on the proponent's engagement with Aboriginal groups as part of the formal consultation and accommodation process. Creating this understanding early in the planning stages of a project could help to define each party's roles and responsibilities and expectations.

Third parties, such as proponents, do not have a legal obligation to consult Aboriginal groups. The Crown may delegate to the proponent such aspects of consultation as the gathering of information about the impact of the proposed project on the potential or established Aboriginal or Treaty rights. The Crown should clearly communicate what is expected of third parties to industry proponents, Aboriginal groups and various stakeholders. The role that a third party can play in carrying out consultation and accommodation processes should be incorporated into any Crown consultation plans and efforts. The information collected during these processes, for example, can be used by the federal government and its officials in its decision-making process.

Industry's overall relationship with Aboriginal groups, including its business practices, can assist the Crown's overall consultation and accommodation efforts. Industry proponents are often in the best position to accommodate an Aboriginal group for any adverse impacts on its potential or established Aboriginal or Treaty rights, for example, by modifying the design or routing of a project. Canada will seek to benefit from the outcomes of a third-party consultation process and any accommodation measures undertaken by third parties. However, the ultimate responsibility for consultation and accommodation rests with the Crown as the Honour of the Crown cannot be delegated.

There are some formalized processes for industry involvement in Aboriginal consultation such as in the case of oil and gas development in the Treaty 8 area within B.C.'s north-east. Ontario's new mining legislation includes measures to ensure that proponents consider Aboriginal consultation.

II DEVELOPING A DEPARTMENTAL OR AGENCY APPROACH TO CONSULTATION AND ACCOMMODATION

This section outlines how departments and agencies should prepare for consultation and accommodation and, building on the Updated Guidelines, develop a departmental or agency approach that assists the Crown in fulfilling the duty while supporting other departmental and agency objectives.

Creating an approach that is consistent with the Updated Guidelines allows departments and agencies to integrate Aboriginal consultation into their activities and ensures consistency in addressing consultation and accommodation issues (refer to Guiding Principle and Directive # 8). Such an approach can support the overall objective of reconciliation highlighted by the Supreme Court of Canada in decisions such as *Haida* and *Taku River*.

1) Identify Crown conduct in relation to the duty to consult

Crown conduct refers to the Crown's own activities, such as land disposal, park creation, infrastructure development, Treaty implementation, or to Crown activities and authorizations and permits for projects to be carried out by a third party. Refer to Guiding Principle and Directive # 1 for some examples of government actions that may adversely impact potential or established Aboriginal or Treaty rights.

The duty extends to “strategic, higher level decisions” that may have an impact on potential or established Aboriginal or Treaty Rights. These could include structural or organisational changes that reduce the Crown's oversight and decision-making ability.

By becoming familiar with their departmental or agency mandate and objectives and the related activities that may adversely impact on the rights of Aboriginal groups, departments and agencies will:

- a) be able to identify which of their activities, policies and programs may give rise to the duty to consult;

- b) be able to support a department or agency to support the consultation or accommodation activities of other departments or agencies whose Crown conduct has given rise to a duty to consult. This may apply even when their own activities do not give rise to a duty to consult.

See “Part C, Phase 2 – Crown Consultation Process” for a detailed list of questions for consideration.

2) Assess potential adverse impacts of departmental and agency activities

As highlighted in Guiding Principle and Directive # 3, by assessing, in advance, what might be the adverse impacts of their activities, departments and agencies can determine how these impacts could be avoided or mitigated and what related measures may be taken by the federal, provincial and territorial governments and/or industry.

Departmental and agency officials should anticipate the types of accommodation measures that may be needed to address the kinds of adverse impacts that their activities may have on potential or established Aboriginal or Treaty rights and related interests. This will help managers and officials prepare for consultation processes, as the department or agency will define, in advance, the role it can generally play in relation to accommodation, examine the potential role of other federal departments and agencies or other governments, the role of the proponent, the steps that can be taken by each, the approvals that may need to be sought, the authorities required, etc. See “Part C, Phase 3 – Accommodation” for more information on accommodation.

3) Identify potential or established Aboriginal or Treaty rights and related interests

Managers should be familiar with the nature and location of these rights in their respective regions so that they are able to anticipate how these rights may be adversely impacted by their Crown conduct. A departmental approach must also take into account the diversity of potential or established Aboriginal or Treaty rights in each region across Canada.

Canada's Treaty relationship with groups is an important consideration in assessing how to proceed with Crown conduct in a Treaty area. Departments and agencies will also need to obtain information about relevant Treaty land entitlement agreements, comprehensive land claims agreements, self-government agreements or negotiations in a region.

An Aboriginal group may also have interests related to its potential or established Aboriginal or Treaty rights that may be adversely impacted by the proposed Crown conduct. The Crown may, for policy reasons, seek to address these related interests. As a result of a consultation process, the Crown may determine that there is no duty to accommodate, however it may still choose, for policy reasons, to address a related interest that is expressed by the Aboriginal group in the context of the activity.

For example:

- a) An Aboriginal group may have an established hunting right that could be impacted by an activity and express a related interest in declaring a certain area of their traditional territory as a wildlife conservation zone to maintain a viable population of the wildlife.
- b) The Crown is implementing measures to mitigate an adverse impact on an Aboriginal right. It can decide at the same time to address an expressed related interest from the Aboriginal group for economic development funding to take part in the project.
- c) In the context of claims negotiations, an Aboriginal group expresses a related interest for federal lands that are being considered for disposal. After assessing any requirement to consult, the Crown may also choose to engage with the group for policy reasons.

4) Develop a departmental or agency approach to consultation and accommodation

The four previous steps lay the groundwork for the development of a departmental or agency approach to consultation and accommodation that is consistent with the Updated Guidelines and appropriate for the different types of activities of a department or agency. However, given the breadth of activities carried out by most departments, a departmental approach may have to include elements that would be specific to various programs and directorates.

Principle # 4 states that officials should seek to develop consultation processes that move beyond a project-by-project approach to a comprehensive approach that will support their officials when making case-specific decisions. Developing consultation processes that can be consistently applied is more effective than consulting on a one-off basis. Some existing consultation practices may already be in place within a region or department or agency and may offer a foundation upon which to build effective consultation processes.

The overall relationship between the Crown and an Aboriginal group will influence, and be influenced, by how consultation and accommodation issues are being addressed by each department and agency. Managers must keep an eye on the "big picture" as their department's handling of a consultation file may strengthen or weaken Canada's relationship with a particular First Nation, Métis or Inuit group, thereby influencing not only their own department's or agency's future dealings with that community, but also the future dealings of other departments and agencies.

Determine whether there are any statutes or regulations that require the department or agency to consult with Aboriginal groups in relation to their activities or consider traditional knowledge (such as provisions in the *Species at Risk Act*, *Canada National Parks Act*).

Determine whether there are contractual requirements to consult in relation to departmental and agency activities such as consultation agreements or consultation provisions in comprehensive land claim agreements.

It is the responsibility of departments and agencies to develop consultation processes that respect consultation agreements or modern Treaty obligations. There may be other agreements, such as interim measures

agreements or notification agreements, that contain guidance related to how the parties should be notified about Crown activities or how the parties can work together to resolve issues.

EXAMPLES OF CONSULTATION AGREEMENTS

Mi'kmaq/Nova Scotia/Canada consultation process – A province-wide consultation process was established as part of a larger tri-partite negotiations process dealing with Aboriginal and Treaty rights issues. Although the consultation process established therein is optional, the Parties hope that the Terms of Reference for a Mi'kmaq/Nova Scotia/Canada consultation will become the preferred choice for government departments and agencies whenever the duty to consult with the Mi'kmaq in Nova Scotia arises.

Algonquins of Ontario Consultation Process Interim Measures Agreement – In 2009, Canada, Ontario and the Algonquins of Ontario reached an agreement on consultation that sets out a means for Canada and Ontario to consult the Algonquins of Ontario and the ten Algonquin communities they represent on proposed activities or projects within the claimed territory while negotiations of an Agreement-in-Principle are ongoing to resolve the Algonquin land claim in eastern Ontario. For the Algonquins of Ontario, this process is coordinated by a new Algonquin consultation office (ACO).

Consultation Protocols with the Dene Tha' First Nation – In July 2007, as part of an out-of-court settlement to resolve the Dene Tha' First Nation's concerns related to the Mackenzie Gas Project (MGP), two consultation protocols were signed between Canada and the First Nation – one for the MGP and Connecting Facilities and the other (the Federal Authorization Consultation Protocol) for other projects where federal authorizations are required.

MODERN TREATIES

Some modern Treaties include consultation provisions in relation to Crown activities and officials must consult in accordance with the consultation terms of those Treaties. Implementing Treaties is a responsibility of the Crown as a whole.

The duty to consult operates in law independently from the terms of a Treaty and can therefore apply where Crown actions have the potential to adversely impact Treaty rights provided for under a Treaty or Modern Land Claims Agreements. However consultation can be shaped and even fully addressed by the terms of an agreement for specific situations where such is made clear. Therefore, the first step for federal officials is to determine whether there are relevant consultation provisions within the Treaty itself.

Departments and agencies should contact the Indian and Northern Affairs Canada Implementation Branch, Justice Canada and, in some cases, the INAC regional offices to obtain advice and assistance in developing approaches for consulting Treaty groups.

Treaties are an important part of the process of reconciliation and provide guidance for the on-going relationship of the Crown and Aboriginal groups.

Developing effective working relationships through networks and forums with Aboriginal communities as well as with other departments and agencies in the region, with provincial and territorial counterparts and with industry will, in the long run, assist federal managers and their officials in leading consultation and accommodation efforts.

Departments and agencies with the advice of INAC may also want to consider whether consultation agreements could support consultation activities. These arrangements between the Crown and Aboriginal groups can help to define roles and responsibilities, identify points of contact, determine timelines and steps to be followed and sometime address capacity needs. They can create clarity for the parties, and allow them to strengthen their relationship while making consultation more efficient.

Consultation agreements can facilitate the coordination of consultation processes that involve multiple departments and agencies (federal, provincial and territorial) and stakeholders. The INAC Regional Consultation Coordinators will explore and negotiate consultation arrangements and

protocols with Aboriginal groups and provinces and territories to achieve coordinated and efficient processes for Crown consultations.

Officials should assess whether provisions in land claim agreements or self-government agreements require that consultation take place in relation to legally binding international instruments. Second, officials must determine whether legislation requires Canada to consult on international instruments. Officials should seek legal advice, which will support the broader departmental or agency assessments and decision-making processes.

Federal horizontal policies

Horizontal policy objectives such as those related to Gender Equity, Sustainable Development and Official Language Minority Communities need to be considered during any interaction between Canada and Aboriginal peoples. These are Treasury Board policies that should be reflected in any activities, processes, programs and policies related to consultation and accommodation.

National Aboriginal Organizations such as the Native Women's Association of Canada, Pauktuutit and the Assembly of First Nations have created Culturally-relevant Gender-Based Analysis tools to promote fairness and equity of federal programs, services and processes directed at Aboriginal women and men. In the context of the engagement process on consultation and accommodation, Native Women's Association of Canada and Pauktuutit have examined Aboriginal consultation and accommodation using the Culturally-relevant Gender-Based Analysis lense and proposed some questions to be considered when preparing for consultations with Aboriginal communities such as:

1. At what stage of a consultation process should gender issues be considered? How can a Culturally-relevant Gender-Based Analysis be used to ensure adequate consideration of gender?
2. What should be the role of the Crown, if any, in ensuring that a consultation process and any ensuing agreements between a community and industry are inclusive of gender issues? How can this be achieved?
3. What questions and issues should the proponent and an Aboriginal community routinely consider in any consultation process to ensure that the perspective of both women and men are sought in the examination of the nature and extent of impacts on the community and options for addressing them?

5) Coordinate with partners, and/or rely on other consultation processes

Federal coordination and designation of lead

More than one federal department or agency may be involved in Crown conduct that requires consultation or may have a role in consulting or accommodating potential adverse impacts. It is important that all departments and agencies work collaboratively, as the Crown, to assess roles and responsibilities, manage the consultation process together and address accommodation, where appropriate (Refer to Guiding Principle and Directive # 5). To accomplish this, departmental or agency officials must:

- ❖ ‘Map out’ all elements of the Crown conduct, including all of the potential decisions; roles and responsibilities of the federal, provincial and territorial departments and agencies, boards and tribunals that may be involved; subject areas or focus of each entity; any limitations on timelines or mandates etc.;
- ❖ Determine which departments and agencies or provincial and territorial ministries may have responsibility to consult and, where appropriate, accommodate. Designate a federal lead department to coordinate with partners;
- ❖ Identify whether there are gaps that may need to be filled to address consultation and accommodation issues.

Further to Guiding Principles and Consultation Directives # 5 and # 6 in Part A, the Canadian Environmental Assessment Agency serves as the Crown consultation coordinator for major resource projects and comprehensive studies under the *Canadian Environmental Assessment Act*. This lead role is fulfilled in cooperation with federal departments and agencies who serve as responsible authorities and federal authorities under the *Act* as well as the Major Projects Management Office.

In cases where these existing processes are not sufficient to fulfill the Crown’s duty to consult and additional consultation activities are required, the Agency, in collaboration with federal departments and agencies, should ensure that any additional consultation activities supplement but do not duplicate the environmental assessment and regulatory review processes.

The *Canadian Environmental Assessment Act* was amended in July 2010 to improve timeliness of federal environmental assessment, establish clear accountability and focus resources where they would produce the greatest benefit to the environment and the economy. For comprehensive studies under the *Act*, the Canadian Environmental Assessment Agency will exercise the powers and perform the duties and functions of a responsible authority, except for those regulated by the National Energy Board and Canadian Nuclear Safety Commission.

For projects which are subject to public review processes under the *National Energy Board Act* or the *Canadian Nuclear Safety Act*, the National Energy Board and the Canadian Nuclear Safety Commission processes are used. Supplementary Crown consultation activities may be required to address the concerns of Aboriginal communities that fall outside the mandate of the National Energy Board or the Canadian Nuclear Safety Commission processes.

Use of existing federal processes

The Courts have not required a separate process for Crown consultation where the assessment or review or regulatory, statutory or contractual process that is in place can provide a sufficient consultation process (e.g., *Taku River – B.C.’s Environmental Assessment Act* process as implemented was sufficient. By contrast, in the *Mikisew Cree* case, while the statutory requirements of the relevant Acts were all met, the involvement of the Aboriginal community in the public review process was found not to be sufficient). Where a board or tribunal is involved, legal advice as to what role it may play may be needed early on in the planning process. The Crown must be satisfied that it can or that it has, through these processes, fulfilled its duty to consult.

Consultation or accommodation issues can arise during an existing review process or assessment or during any regulatory, statutory or contractual process by a federal department or agency. Departments and agencies should consider whether any of these issues are beyond the mandate of the given process or of the responsible federal department or agency.

Consequently, additional consultation and accommodation activities may need to occur. Departments and agencies have the ultimate responsibility for identifying and filling any gaps that could prevent the Crown from fulfilling its duty. The consultation process must allow for meaningful consultation throughout the lifecycle of an activity and must be adaptable to all stages of the activity to allow federal officials to respond to any Aboriginal concerns, and if appropriate, accommodate any adverse impacts on potential or established Aboriginal or Treaty rights. (Guiding Principle and Directive # 6).

The environmental review process is generally viewed by Aboriginal groups and third parties (See Summary of Input from Aboriginal Communities and Organizations on Consultation and Accommodation) as the most effective method managed by the Crown to identify environmental effects of proposed activities and related changes. Officials should assess early in the planning stages for proposed activities whether reliance on existing processes such as environmental assessments will be sufficient to fulfill the duty. If not, the Crown's efforts may need to include additional consultation activities or further efforts to address accommodation, where appropriate.

Environmental assessment, regulatory decision making, and Aboriginal consultation

Canada takes a whole-of-government approach to Crown consultation. With respect to major resource projects (See definition below), and all projects that are assessed as Comprehensive Studies under the *Canadian Environmental Assessment Act*, this approach involves the federal Crown integrating its Aboriginal consultation activities into the environmental assessment and regulatory process to the greatest extent possible.

Note: A major resource project is defined as a large-scale resource project south of 60 that is subject to a comprehensive study, review panel, or a complex (or multi-jurisdictional) screening under the *Canadian Environmental Assessment Act*. Resource sectors typically include mineral and metal mining, oil sands development and processing, and energy generation and transmission.

This approach capitalizes on the strength of the federal environmental assessment and regulatory process to gather information about potential impacts of Crown conduct on Aboriginal and Treaty rights in a consistent and coordinated way. It enables the efficient use of departmental resources and facilitates effective communication and relationship-building with Aboriginal groups. The approach also supports ongoing Crown efforts to satisfy the duty to consult before federal decisions are made. There should be timely efforts to coordinate with provincial and territorial environmental assessment processes.

The whole-of-government approach typically begins once the Crown becomes aware of a proposed project for which Crown conduct may be contemplated (e.g. submission of a Project Description). This phase commences with an analysis of the project's potential adverse impacts in the geographic area in which Aboriginal groups could have rights. The scope of the consultation is determined by the severity of the adverse impacts and the strength of the claims and any other relevant considerations.

This analysis is intended to support the establishment of an appropriate consultation process and to inform the development of an Aboriginal consultation work plan. All Aboriginal groups identified for involvement in the environmental assessment process are contacted to inform them of the intended consultation approach. Aboriginal groups should have the opportunity to provide the Crown with information about their potential or established Aboriginal or Treaty rights and any adverse impacts of the proposed activity. As well, Aboriginal groups may be invited to participate in the Environmental Assessment project committee as a way of better integrating Aboriginal consultation into the Environmental Assessment process.

Where government is seeking to rely on an environmental assessment process for identifying, assessing and guiding consultations, it will be necessary to determine what kinds of Aboriginal concerns may be considered or addressed through that process and to what extent it can assist the Crown in discharging its duty.

Once the environmental assessment commences, the Crown should continue to consider and address the potential need to consult additionally and, where appropriate, seek to accommodate potential adverse impacts of the Crown conduct. Consultation obligations that cannot be fulfilled in the course of the environmental assessment are to be undertaken prior to any final regulatory decisions that are being issued for the project.

Prior to the completion of the environmental assessment process, the Crown determines whether or not it has, so far, honourably discharged its duty to consult. Outstanding issues are summarized and carried forward into the regulatory approvals phase, where appropriate consultation and/or accommodation may be considered by the suitable regulatory authorities.

The consultation process should then carry on to the end of the project life cycle, as the Crown has a responsibility to ensure that measures put in place to accommodate impacts to potential or established Aboriginal or Treaty rights and related interests, are implemented. Throughout the environmental assessment, an official Crown consultation record is created and maintained. The Major Projects Management Office keeps a centralized database while relevant federal departments and agencies keep the original documents of their consultations.

Beyond the duty to consult, there are other reasons for including Aboriginal groups in the environmental assessment process. These include obligations under the *Canadian Environmental Assessment Act* to consider “environmental effects,” including any change in the environment that affects the current use of lands and resources for traditional purposes by Aboriginal persons (s. 2 of the *Act*). Also, s. 16.1 of the *Act* provides the opportunity to include Aboriginal traditional knowledge in the environmental assessment. Finally, the federal government may have obligations relating to the environmental assessment under modern Treaties and self-government agreements.

Due to the complexity and size of major natural resources projects, the federal government has put in place the Major Projects Management Office to fulfill a Crown coordinating function.

Major Projects Management Office

The Major Projects Management Office (housed within Natural Resources Canada) was created in 2008 to provide a single point of entry into the federal regulatory system as well as to provide overarching management of the federal regulatory process for major resource projects in the provinces south of 60, in both operational and policy areas.

The Major Projects Management Office initiative was launched to foster a more accountable, efficient, transparent, and effective whole-of-government approach to the review of major resource projects in Canada. The Government's initiative was targeted at providing additional capacity and expertise to key federal regulatory departments and agencies to enable these organizations to deliver their environmental assessment, regulatory and Aboriginal consultation responsibilities in a timely and predictable manner.

The primary role of Major Projects Management Office is to provide overall project management, accountability and policy leadership with respect to the performance of the overall regulatory system. Working collaboratively with federal departments and agencies, the Major Projects Management Office serves as a single window into the federal regulatory process, coordinating project agreements and timelines between federal departments and agencies and tracking the progress of major resource projects through the federal regulatory review process.

The Major Projects Management Office also oversees the implementation of the whole of government approach to Crown consultation on major resource projects. The Major Projects Management Office works closely with the Canadian Environmental Assessment Agency, Indian and Northern Affairs Canada and other federal departments and agencies to ensure that the federal government fulfills its consultation responsibilities for these projects in a consistent, adequate and meaningful manner.

Regional project-specific teams of federal and, where relevant, provincial officials are established on a project-by-project basis to ensure the consistent and coordinated delivery of any Crown consultation requirements. These teams are coordinated by the Canadian Environmental

Assessment Agency or other relevant environmental assessment manager (as Crown Consultation Coordinator) throughout the environmental assessment process. Crown reliance and oversight mechanisms have been established for National Energy Board projects under the Major Projects Management Office. The Canadian Nuclear Safety Commission takes on the Crown Consultation Coordinator role when it is a Responsible Authority. Once the environmental assessment phase has been completed, a lead federal department or agency may be assigned to carry out outstanding consultation requirements in respect of their regulatory decision-making responsibilities.

Northern Projects Management Office

The Northern Projects Management Office (NPMO) was established in September 2009 within the Canadian Northern Economic Development Agency (CanNor). The mandate of the Northern Projects Management Office is to provide government-wide leadership in developing a systematic approach for federal participation in the environmental assessment and regulatory review and approvals of northern projects.

The Northern Projects Management Office is responsible for federal coordination, project management, project tracking and coordination of consultations for northern projects in the three territories. It ensures the federal government meets its obligations to consult. Its main functions are to:

- ❖ provide clear direction and assistance to proponents regarding the regulatory review and consultation process;
- ❖ coordinate the work of federal regulatory departments and agencies during the environmental assessment and permitting phases;
- ❖ create and maintain a repository of Crown consultation records for projects that fall within its mandate.

For the purposes of Crown consultation the Northern Projects Management Office proposes to act as a coordinator or facilitator for northern projects that include all projects that undergo an environmental assessment, joint or panel review. Also included are smaller scale projects

that the Northern Projects Management Office considers to be of potential economic interest or complex projects that could benefit from the coordination of the Northern Projects Management Office.

Individual departments or agencies are responsible for determining which Aboriginal groups may be impacted by a project, for carrying out strength of claim assessments, for monitoring and evaluating the robustness of third party consultations and where required for undertaking targeted Crown consultations. As well, departments or agencies are responsible for accommodating, when appropriate.

The mandate of the Northern Projects Management Office in the territories complements the mandate of the Major Projects Management Offices in the provinces south of 60. However, because of the differences and complexities of the northern regulatory environment, the Northern Projects Management Office was established as a separate entity.

The Northern Projects Management Office is headquartered in Yellowknife, Northwest Territories, with staff in each of the other two territories. These regional offices coordinate the early engagement of all federal players in resource development, work with territorial governments and boards, and coordinate federal Aboriginal consultation efforts with relevant federal departments.

Use of existing provincial and territorial processes

In developing and implementing a departmental or agency approach, managers and their officials are encouraged to learn as much as possible about provincial and territorial approaches as set out in consultation policies, guidelines and practices with the view to better coordinating federal consultation and accommodation efforts with those of its provincial and territorial partners.

In the planning phase of any Crown conduct (See Part C, Phase 1 for a full list of pre-consultation activities), federal officials must assess the Aboriginal consultation requirements related to the conduct. The federal department or agency may be able to use provincial or territorial consultation processes to assist in fulfilling, in whole or in part, its consultation obligations.

Federal departments and agencies are encouraged to learn about any concurrent provincial or territorial conduct and relevant consultation processes and discuss how these processes might assist the Crown in meeting its consultation obligations.

A departmental approach might include details of how and when a provincial or territorial consultation process may be relied on to fulfill the federal Crown's duty.

Federal officials may consider the following factors:

- ❖ Can federal issues be discussed (e.g. fish habitat, migratory birds, safe and accessible waterways)?
- ❖ Will the federal, provincial or territorial process include meaningful participation of all Aboriginal groups whose involvement is required to fulfill the federal duty?
- ❖ What is the mandate of the provincial or territorial department or agency and are there any limits to it that could have an impact on consultation activities, specifically in the case of boards or commissions?
- ❖ Will federal departments and agencies need to anticipate additional consultation activities?
- ❖ Are there any accommodation measures that have been established within the provincial or territorial process on which the federal Crown could rely?

Memoranda of understanding may be in place with certain provinces or territories to guide how federal, provincial and territorial governments can work together on Aboriginal consultation.

Reliance on industry consultations

Where departments and agencies are responsible for approving third-party activity, Crown decision makers will need to determine the role that third parties, such as industry proponents, will play in relation to consultation and accommodation.

Departments and agencies will need to inquire about the following before they decide whether or not and to what extent they can rely on third party consultation:

- ❖ To what extent have the proponents consulted Aboriginal groups? With which groups have they consulted?
- ❖ Does the Crown have access to the consultation record to date?
- ❖ Are future consultations anticipated and what are the timelines?
- ❖ Should federal officials attend the consultation sessions and if so, what would be their role?
- ❖ What procedural aspects of the consultation is the Crown delegating, if any?
- ❖ Will there be a consultation record for future consultations and will the Crown have access to that record?

The Crown is ultimately responsible for ensuring that the duty to consult and, where appropriate, accommodate is fulfilled. Therefore, it will need to evaluate whether the proponent has adequately consulted with Aboriginal groups and whether further consultations are required to be undertaken by the Crown to fulfill its consultation obligations.

III ORGANIZING YOUR DEPARTMENT OR AGENCY FOR CONSULTATION AND ACCOMMODATION

This section identifies some issues to be addressed by managers to organize their department or agency for consultation and accommodation. This includes evaluating financial, human resources and training requirements, as well as assessing the need to involve Department of Justice counsel. Step-by-step tasks to be undertaken by managers and practitioners will be described in Part C.

1) General considerations

- ❖ Ensure that officials are adequately equipped with the appropriate tools, resources and training to carry out meaningful and reasonable consultation efforts in each case. The development of a departmental or agency approach will support them in addressing case-specific issues.
- ❖ Put into place a records management system and procedure to document and file agendas, meeting notes, correspondence, actions, decisions, and ensure that procedures are used consistently by officials. Recording in a consistent format and storing in an accessible and retrievable location all relevant consultation meeting records and correspondence with Aboriginal groups is important to ensure that a complete record of the process, the concerns raised and the efforts to address such concerns are documented. Where more than one department or agency is involved, departments and agencies are encouraged to use a central or shared document storage system, wherever possible.
- ❖ Ensure officials are aware that all meetings and correspondence are “on the record” to enable the Crown to rely on such information, if necessary, in court. Information provided to government may be subject to *Access to Information Act* requests. Therefore specific measures may be required before agreeing to any confidential or off-the-record discussions or treatment of documents. Consult Department of Justice Counsel before determining how discussions or particular materials exchanged in the course of the consultation process may be treated or classified.

2) Organizational, financial and human resources considerations

Throughout the development and implementation of Crown activities and any corresponding consultation processes, officials must ensure meaningful consultation such as: timely sharing of detailed information about the activity; providing support, as required, to Aboriginal groups to achieve the objective of meaningful participation in consultation processes; providing enough time for Aboriginal groups to assess adverse impacts and present their concerns, promoting discussion with communities about impacts and ways these can be avoided or mitigated, etc.

To achieve this, departments and agencies need to have access to financial, human and technological resources that can be used for consultation and accommodation activities. They must also identify what role could be played by other partners to support the fulfillment of the duty.

Departmental or agency approaches should take into account the following:

- ❖ Assessment of departmental and agency activities that may give rise to a duty to consult;
- ❖ Assessment of any potential adverse impacts of departmental and agency activities, the severity of impact and the strength of any potential or established Aboriginal or Treaty rights to determine the scope of the duty to consult and related consultation processes;
- ❖ Frequency of consultation-related activities;
- ❖ Assessment and documentation of resource requirements for Aboriginal consultation and accommodation activities. For example, departments and agencies should consider the cost implications for the participation of Aboriginal groups, which includes determining whether their program and financial authorities can assist them in funding Aboriginal consultation-related activities;

- ❖ Records management systems to document the consultation and accommodation process;
- ❖ Human resources required to plan, research, implement and monitor reasonable and meaningful consultation processes, namely a skilled, trained and informed staff;
- ❖ Other departmental and agency policies, programs, initiatives that may complement and support the fulfillment of the duty;
- ❖ Opportunities, through protocols or Memoranda of Understanding, for collaboration, relationship building and sharing costs of consultation and accommodation with other federal departments and agencies, provincial and territorial governments and industry, and opportunities to better integrate consultation processes;
- ❖ Internal and external communications related to consultation activities;
- ❖ Approval processes and procedures;
- ❖ Evaluation of consultation and accommodation activities undertaken;
- ❖ Existing financial authorities that can support internal or external consultation and accommodation related expenditures such as capacity funding to Aboriginal groups, where appropriate. For example, the Canadian Nuclear Safety Commission and the National Energy Board have participant funding programs to support Aboriginal consultation in the review of major energy projects. The Canadian Environmental Assessment Agency can provide funding in relation to projects that are assessed by a review panel or a comprehensive study under the *Canadian Environmental Assessment Act*. The Canadian Environmental Assessment Agency participant funding program includes an Aboriginal funding envelope to provide support to Aboriginal groups to assist them with regard to Aboriginal or public consultation activities;
- ❖ Financial resources at the disposal of the departments and agencies and opportunities to seek additional resources (e.g. Treasury Board submissions). For

example, federal officials can refer to legislation and to Treasury Board Secretariat guidelines on expenditures as well as departmental or agency-specific policies, directives, guidelines and practices; and,

- ❖ Other consultation-related needs such as dispute resolution processes.

In some instances, First Nation, Métis or Inuit groups may seek financial assistance to support their participation in the consultation process. Officials should first determine if there are other means available to support Aboriginal capacity to participate in the consultation process, for example, whether other partners are able to contribute to capacity funding or other forms of assistance to Aboriginal groups.

See “Part C, Phase II – Crown Consultation Process” for more details on ways to support meaningful consultation.

3) Training considerations

Training of federal officials is critical to a consistent understanding and implementation of the duty to consult and, where appropriate, accommodate. It should:

- ❖ increase awareness and understanding of what the duty to consult, and accommodate entails;
- ❖ situate the duty to consult and accommodate in the larger context of the relationship between the Crown and Aboriginal peoples, including how the duty relates to other reasons to engage with Aboriginal groups;
- ❖ promote an understanding of the roles and responsibilities of the entities involved in the consultation process such as the Crown, Aboriginal groups and third parties;
- ❖ allow officials to understand how the duty to consult may apply in the context of their departmental or agency mandates and activities and how they can fulfill it;
- ❖ identify the specific implications of developments in case law, consultation policies and practices and the public environment for their departments and agencies and for the Crown as a whole;

- ❖ explain where officials can obtain information and practical tools that will support their consultation and accommodation activities;
- ❖ provide examples of best practices and opportunities for federal officials to share their experiences of implementing the duty to consult and accommodate;
- ❖ promote the development and efficient implementation of mechanisms for interdepartmental and intergovernmental coordination and collaboration; and,
- ❖ provide a basis for the development of common consultation approaches and practices within federal departments and agencies and across government.

Training on consultation and accommodation continues to be offered by the Consultation and Accommodation Unit of INAC in conjunction with the Department of Justice. Federal officials or their managers seeking more information on training or wishing to register for the training sessions may contact: consultation-sessions@ainc-inac.gc.ca

Various departments and agencies have also developed department and agency specific training on consultation and accommodation. For example, the Canadian Environmental Assessment Agency offers training on the integration of Aboriginal consultation into the environmental assessment process.

4) Engaging Justice counsel in the consultation and accommodation process

The Department of Justice is not responsible for conducting consultations or collecting the appropriate factual information regarding potential or established Aboriginal or Treaty rights and potential adverse impacts of an activity. However, the duty to consult is a legal obligation and raises a number of legal issues. Therefore, it is important to work closely with Justice when assessing if and how consultation may need to be incorporated into departmental or agency activities and approaches for identifying and addressing this duty.

In addition there will be situations where departments and agencies will need to engage counsel to assist in reviewing or advising on how best to do the various assessments discussed in Part C of these Guidelines. Justice provides an important advisory role to departments and agencies on the legal aspects of consultation policy choices, especially as it relates to consistency in legal advice across government and as the case law in this area continues to develop.

As departments and agencies become more familiar with the consultation requirements associated with their operations and build Aboriginal consultation and accommodation into their operations through these Guidelines as well as other policies and procedures, the need for legal advice on routine matters may decrease.

Remember:

- ❖ When identifying consultation requirements related to general departmental and agency activities or other factors that may influence consultation requirements, managers should seek their counsel's assistance. By keeping Justice informed at the outset about your approach to consultation and the nature of departmental activities, you may reduce the need for your officials to seek guidance from Justice late in the process or for every consultation process. It is also important to work with them to establish and maintain good record-keeping processes.
- ❖ Developing standard departmental and agency consultation approaches will reduce the need for advice on a case-by-case basis.
- ❖ Make sure that your officials gather all relevant information about their anticipated activities and related assessments as to how these activities may adversely impact potential or established Aboriginal or Treaty rights and related interests. Counsel will be available to review such assessments and provide advice based on the factual information provided.

- ❖ When your officials gather information and do their initial assessment of a situation, make sure they identify the legal issues and questions that may need to be answered. **Not everything is a legal question.** Your department could also benefit from prioritizing questions needing legal clarification on various files and from relevant departments and agencies working on a common consultation file, thereby streamlining requests for legal advice.
- ❖ In most instances, depending on the information gathered and the initial assessment made, departmental officials will be able to determine whether a duty is triggered and consultation is required. Identifying, in advance, which departmental activities may trigger a duty to consult will help officials more efficiently make case-specific initial assessments. As this question is a question of law, it will be assessed on a standard of correctness should this assessment be reviewed by a court.
- ❖ The information gathered by your officials from relevant sources such as others in the federal government, provincial and territorial governments, affected Aboriginal groups will allow them to 1) identify if their activities may adversely impact any potential or established Aboriginal or Treaty rights; 2) assess the severity of the potential adverse impact and the nature and/or strength of claims; 3) determine the appropriate approach and scope of consultation required; and 4) develop a reasonable approach to consultation. Counsel could assist in ensuring that a statement of a government's intentions and planned undertakings is reasonable and appropriate from a legal perspective.
- ❖ Officials will need to seek counsel's advice to answer specific legal questions such as how to address title and exclusive use claims, treaty interpretation, sufficiency of Crown responsiveness, gaps in regulatory or environmental assessment processes, linkages to litigation or negotiations files and other novel legal questions.
- ❖ Departments need to do a preliminary assessment of a claim and determine whether groups in the area have raised any concerns regarding the activity or notified the Crown that any activities in a given territory require consultation. Justice can assist in the determination of whether that Crown or third party activity requires consultation and assist in addressing new or novel claims that raise new legal or policy issues that may arise with new kinds of proposed activities or in the course of consultation processes.
- ❖ Assess whether a more detailed strength of claim analysis from Justice or other appropriate experts or other key legal analysis are warranted in the circumstances and plan accordingly (baseline information to provide to Justice, delay to obtain analysis, costs, etc.).
- ❖ Justice does not make decisions on how departments and agencies should carry out their mandates and activities. Legal advice will complement the broader departmental or agency assessments and decision-making processes which will include good governance and other policy considerations.
- ❖ Departments and agencies should keep their counsel informed of their adverse impact assessments for their various activities. As well, departments and agencies can seek Justice advice on their consultation approaches and plans, consultation records, consultation adequacy assessments and accommodation measures that are being considered.
- ❖ Where appropriate, discuss document disclosure and the creation and maintenance of a record of the consultation with your counsel.
- ❖ Where appropriate, seek counsel's advice when assessing the implementation of an activity and determining whether adjustments are required.



PART C

Step-by-step Guide to Consultation and Accommodation

INTRODUCTION

Part C provides a step-by-step, chronological guide for federal officials when fulfilling the Crown's duty to consult and, where appropriate, accommodate. The same basic steps are appropriate for consultation for good governance and other policy reasons.

Crown activities that may trigger the duty vary and therefore the consultation and accommodation approach taken may vary as well. The steps, tips and factors outlined below will apply to a wide variety of government conduct. Such conduct may involve, for example, management of federal real property (e.g. the disposal of a federal building or a change in the use of federal lands). It may also involve government approvals and authorizations for an activity proposed by a third party (e.g., issuance of licenses, permits, authorizations for the use of lands or resource extraction).

Officials can use this step-by-step guide when developing and implementing their overall departmental or agency approach to consultation and accommodation (See Part B).

Depending on the circumstances, a process for consultation and accommodation with Aboriginal groups may involve up to four phases. The following sections will discuss each phase and provide guidance on the steps to consider in each one. Where there is more than one federal department or agency or other government(s) involved, the steps should be carried out collaboratively.

The positive relationships that departments and agencies develop with Aboriginal groups over time and the resulting dialogue will assist the federal government to implement the following phases.

PHASE 1: PRE-CONSULTATION ANALYSIS AND PLANNING

The departmental or agency approach to consultation and accommodation (See Part B) will be useful in this phase. As early as possible, officials need to assemble information to assess whether the Crown has a duty to consult, the scope of that duty, and how to design a consultation process. Officials will first need to assess the potential adverse impacts of the proposed Crown conduct and then determine if there are any potential or established Aboriginal or Treaty rights in the area of the activity that may be adversely affected.

Step 1: Describe and “map out” the proposed Crown conduct

The first step involves describing the contemplated Crown conduct such as a Crown activity or an approval of a third party activity and determining which department or agency is responsible for the conduct. In their departmental or agency consultation and accommodation policy approaches or assessments, departments and agencies should have already identified activities, policies, programs or strategic, higher level decisions that may give rise to a duty to consult (See Part B).

Departments and agencies should identify other federal departments and agencies and other orders of government that may be involved in the activity, including the decisions they are responsible for making and any regulatory, statutory and other program timelines that may apply. Where multiple departments and agencies are involved, a lead department must be identified and the contact information communicated to the relevant departments and agencies and to Justice.

Some questions to consider at this step include:

- ❖ What is the nature of the proposed Crown conduct? For example a) Crown activity such as the construction of a building, the creation of a park, the disposal of Crown land; b) Crown authorization of a third party project, issuance of a permit; c) other Crown activity that enables the project to proceed such as funding; d) strategic higher level decisions such as structural or organizational changes that reduce the Crown’s oversight and decision-making ability.

- ❖ What is the purpose of the initiative?
- ❖ What are the details of the project? What is the project’s geographic scope? Identify all of its components. Is there more information that is needed to fully understand the project?
- ❖ Where the proponent is a third party, has it provided a detailed project description?
- ❖ What are the key decisions to be made and related timelines?
- ❖ Are there any maps of the project site and surrounding areas?
- ❖ What other departments and agencies and other orders of government, corporation(s), or authorities are involved? Who is responsible for authorizing the project or carrying it out?
- ❖ Have Aboriginal groups in the area raised concerns about the proposed activity or any other activities (in the past/present)?

Step 2: Identify potential adverse impacts of Crown conduct

Officials must anticipate the potential adverse impacts of the proposed activity. The nature and severity of adverse impacts depends on a variety of factors including: the scope and size of the activity, its environmental effects, and whether the impact is permanent or temporary.

Officials must determine whether the current Crown conduct in question may have an adverse impact on potential or established Aboriginal or Treaty rights. Where departments and agencies are responsible for approving third-party activity, a detailed understanding of the nature and scope of that activity will assist Crown officials to anticipate its potential adverse impacts.

Where adverse impacts are uncertain, it is important to identify those groups whose potential or established Aboriginal or Treaty rights may be impacted. Early engagement with them regarding the proposed activity will enable them to articulate any concerns they may have about the

activity. This provides officials with time to adequately assess potential adverse impacts, and identify measures to avoid or mitigate such impacts (Guiding Principle and Directive # 3).

Questions and issues for consideration include:

- ❖ What is the likely or potential impact of the activity on the land, water and resources? If there are any impacts, what changes to the current condition or use of lands, water or resources are likely to occur as a result of the activity? Are these changes significant?
- ❖ Are departmental or agency officials aware of any communication from groups which are raising concerns about the particular activity or similar activities in the area?
- ❖ Have any groups notified Canada of any concerns about the proposed activity and suggested any remedial measures that may accommodate the adverse impacts on their rights? Discussing accommodation options with the relevant decision-makers as early as possible in the consultation process will allow federal officials to discuss them appropriately with Aboriginal groups later in the process.
- ❖ Does the activity involve lands or resources that are currently the subject of treaty negotiations or are part of existing comprehensive land claim agreements or self-government agreements?
- ❖ Are the potential adverse impacts you've identified likely to be of a temporary or permanent nature?
- ❖ Have any environmental or other assessments of the proposed activity been carried out? Have any environmental or other assessments been undertaken for similar activities in the vicinity of the proposed activity? If so, what adverse impacts on rights are revealed, if any, by these assessments?
- ❖ Are there any other activities occurring in the same area? Is this activity likely to have any cumulative effects in combination with other activities in the same or surrounding area?

In the design or planning stages of contemplated Crown conduct, in the federal environmental assessment process and throughout the consultation process, managers and

officials need to identify measures that could be implemented to avoid or mitigate potential adverse impacts of the project on potential or established Aboriginal or Treaty rights and related interests.

The Courts have emphasized the need for flexibility and responsiveness; for an ability and willingness to adjust the activity in question; to provide options for addressing the interests and concerns raised in the course of consultations; and to do so in good faith. It is also important to be clear and explain the limits to what changes can be made to the proposed activity. In the end, the Crown must demonstrate that it sought to reconcile Aboriginal concerns with other societal interests and that its consultation process was carried out with a view to reconciliation.

Step 3: Identify which Aboriginal groups are in the area of the proposed Crown conduct and ascertain their respective potential or established Aboriginal or Treaty rights and related interests

To assess whether the proposed Crown conduct will have any potential adverse impacts on potential or established Aboriginal or Treaty rights in the area(s), officials must gather information about those specific rights. These may include the right to hunt, fish, trap, gather and trade and may either be established by a court or in a Treaty, or may be asserted by an Aboriginal group, for example, in litigation or for the purpose of Treaty negotiations.

Where Aboriginal rights are asserted, the Crown must make a preliminary assessment as to whether there is a credible basis for such claims and compare their assessment with the information gathered through consultation with Aboriginal groups. In the event that the proposed activity may have adverse impacts on the rights of Aboriginal groups living in the area, learn more about the potential or established Aboriginal or Treaty rights in question such as: what are their traditional practices; when and where were these practices historically carried out; are these practices still carried out today; where, by what means, and at what time of the year?

Departments and agencies are encouraged to obtain and to share, internally and with other federal departments and agencies, information about the potential and established

rights of Aboriginal groups in various regions of the country. The exchange of regional information will help officials to anticipate potential adverse impacts on rights, and plan proposed federal activity in such a way as to avoid or mitigate those impacts.

Information about potential or established Aboriginal or Treaty rights across the country will also help officials to design and tailor their consultation approach and could support broader departmental or agency priorities to establish and maintain long-term working relationships with First Nation, Métis and Inuit groups.

Keep in mind that even if only one department or agency is aware of an asserted right, the federal Crown as a whole (i.e. every department and agency) is deemed to have knowledge of it. The Crown and its officials are also deemed to know about established Aboriginal and Treaty rights.

Managers must ensure officials can obtain relevant information on potential or established Aboriginal or Treaty rights and related interests, which includes having access to the Aboriginal and Treaty Rights Information System and the Consultation Information Service at INAC.

Aboriginal and Treaty Rights Information System

The Aboriginal and Treaty Rights Information System is an electronic system that will bring together information on the location of Aboriginal communities and information pertaining to their potential or established Aboriginal or Treaty rights. It is a web-based application that leverages Geomatic Information System technology to geo-reference electronic data that is stored in existing INAC databases.

The purpose of the Aboriginal and Treaty Rights Information System is to display this information using one system and to make it available to federal officials. It will display baseline information on First Nation, Métis and Inuit communities. The Aboriginal and Treaty Rights Information System has the ability to display maps to assist federal officials to locate information on communities, claims, Treaties and litigation. The Aboriginal and Treaty Rights Information System may evolve over time to include information from other federal sources.

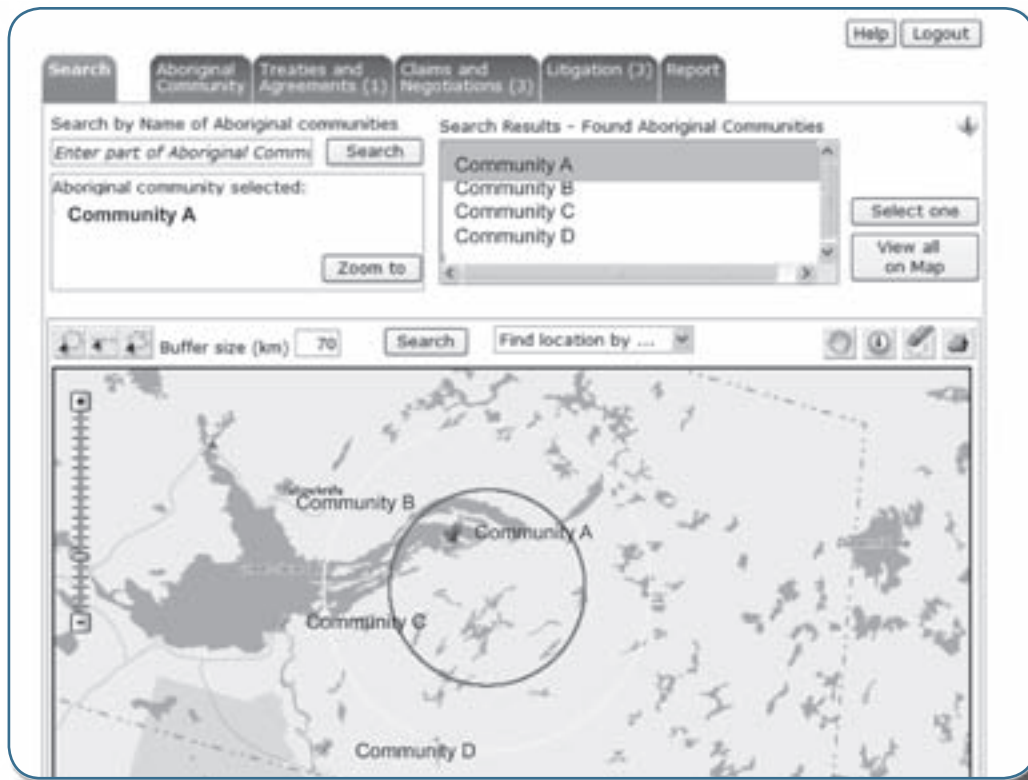
Consultation Information Service

The Consultation Information Service of INAC – which will be responsible for the Aboriginal and Treaty Rights Information System – provides a single point of access for other government departments and external stakeholders, particularly those which do not have access to the Aboriginal and Treaty Rights Information System or require additional INAC information on potential or established Aboriginal or Treaty rights in Canada.

The Consultation Information Service will provide contact information for Aboriginal groups and their leadership, information on multipartite agreements, historic and modern Treaties and their provisions, comprehensive and specific claims, litigation and other assertions. Queries regarding specific projects can be sent to: cau-uca@ainc-inac.gc.ca. Officials will first seek information through the Aboriginal and Treaty Rights Information System before sending queries for additional information to the Consultation Information Service.

Other sources of information include:

- ❖ departmental and agency records on Aboriginal claims asserted in litigation, in negotiations, or through prior consultation or other transactions with the department;
- ❖ the INAC Regional Consultation Coordinators should be contacted to assist in the coordination of consultation efforts as they may be aware of on-going or contemplated consultation processes;
- ❖ information provided by proponents to departments and agencies and specific boards and tribunals involved in the decision making process;
- ❖ traditional Use Studies, for example, those prepared in the context of Environmental Assessments and in land disposal contexts;
- ❖ colleagues who have worked with or consulted with Aboriginal groups in the area;
- ❖ the databases and records of other government departments and agencies, provinces and territories;
- ❖ the websites and information of Aboriginal groups;



- ❖ records of consultations between federal, provincial or territorial, industry and Aboriginal groups;
- ❖ court websites (federal, provincial and territorial) listing decisions, proceedings on Aboriginal and Treaty rights assertions and interpretation of potential and established rights; and,
- ❖ press coverage and public statements, in which Aboriginal groups have asserted rights, expressed concerns and proposed desired outcomes.

Federal officials must gather all relevant information. Justice can then assist with legal issues that may arise in an assessment of the strength of the claim, overlapping claims, and assertions of rights and title. Justice counsel can also advise on the appropriate consultation approach when the Crown is involved in litigation or negotiations with an Aboriginal group with whom the Crown may also need to consult.

Step 4: Make an initial determination as to whether there is a duty to consult

Next, an initial assessment of the information gathered in Steps 1, 2 and 3 must be undertaken to determine whether or not there is a common law duty to consult. This information will also lay the groundwork for determining, in Step 5, the extent of the duty and, in Step 6, an appropriate consultation process.

Three factors are required to trigger the common law duty to consult:

- (1) There is a proposed Crown conduct;
- (2) The proposed Crown conduct could potentially have an adverse impact on potential or established Aboriginal or Treaty rights; and
- (3) There are potential or established Aboriginal or Treaty rights in the area.

For a duty to consult to exist, all three factors must be present.

CROWN CONDUCT	+	POTENTIAL TO ADVERSELY IMPACT ON RIGHTS	+	EXISTENCE OF POTENTIAL OR ESTABLISHED ABORIGINAL OR TREATY RIGHTS	=	DUTY TO CONSULT
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The threshold to determine if a duty is triggered is low. The objective of the duty is to ascertain if conduct that is being contemplated by the Crown may adversely impact potential or established Aboriginal or Treaty rights before any adverse impacts are caused. To do so will require knowledge of the rights that may be affected by departmental or agency specific activities and a process for discussing any potential concerns early in the planning phases and decision making process.

Departments and agencies can seek Justice's advice when determining whether such a duty exists. For good governance and other policy reasons, your department or agency may decide to consult regardless of whether there is a duty, and this approach should be expressed to the Aboriginal groups being consulted.

(i) No Duty to Consult

The initial analysis indicates that there is no duty to consult. For example:

- ❖ There is no Crown conduct;
- ❖ No adverse impact is anticipated;
- ❖ No credible basis to support a claim;
- ❖ The claim does not include Treaty rights or activities or practices that could meet the test for Aboriginal Rights.

It is important to remember that the threshold to assert a credible claim to Aboriginal rights, informed by the need to maintain the Honour of the Crown, is not high. While the existence of a potential claim is essential, proof that the claim will succeed is not. The courts have consistently stated that the Crown must adopt a generous and purposive approach when assessing whether it has a duty to consult.

The department or agency may want to communicate its determination to the Aboriginal group. If the Aboriginal group brings forward new evidence supporting a claim or if they provide new information on potential adverse impacts, then the Crown must re-examine its determination that there is no duty to consult.

(ii) Uncertainty about the Duty to Consult

Where it is uncertain from the initial analysis whether the proposed Crown conduct is likely to have adverse impacts on potential or established Aboriginal or Treaty rights, the Crown may wish to verify the results of their initial analysis with the Aboriginal group.

Further discussions about the potential adverse impacts of the proposed Crown conduct on their potential or established Aboriginal or Treaty rights and related interests as well as the nature and basis for those rights and interests may assist the Crown when determining whether there is a duty to consult and what role, if any, consultations may play in the planning of the proposed activity.

If it is uncertain whether a duty to consult exists, officials must consider whether there are other legal reasons or policy considerations for consulting.

(iii) A Duty to Consult Exists

If the analysis indicates that the proposed Crown activity may adversely impact potential or established Aboriginal or Treaty rights, the Crown has a duty to consult and, where appropriate, accommodate.

Step 5: Assess the scope of the duty to consult and, where appropriate, accommodate

The scope of the consultation and any appropriate accommodation will be informed by the strength of the claim and the severity of adverse impacts on potential or established Aboriginal or Treaty rights. A number of factors should be considered.

Where rights have been established (e.g. in a Treaty or where a court has found an Aboriginal right), a strength of claim assessment is not usually necessary and a more extensive consultation process is generally required.

Where potential rights are claimed, the scope of consultation will need to be proportionate to the seriousness of the potential adverse impact(s) of the proposed Crown conduct and the strength of the potential Aboriginal right(s) claimed (See Figures 1 and 2 below).

Determine the level of seriousness of the potential adverse impact on the right(s), as depicted in Figure 1 below, keeping in mind that re-assessment may be required as the consultation process proceeds and new information comes to light.

Figure 1

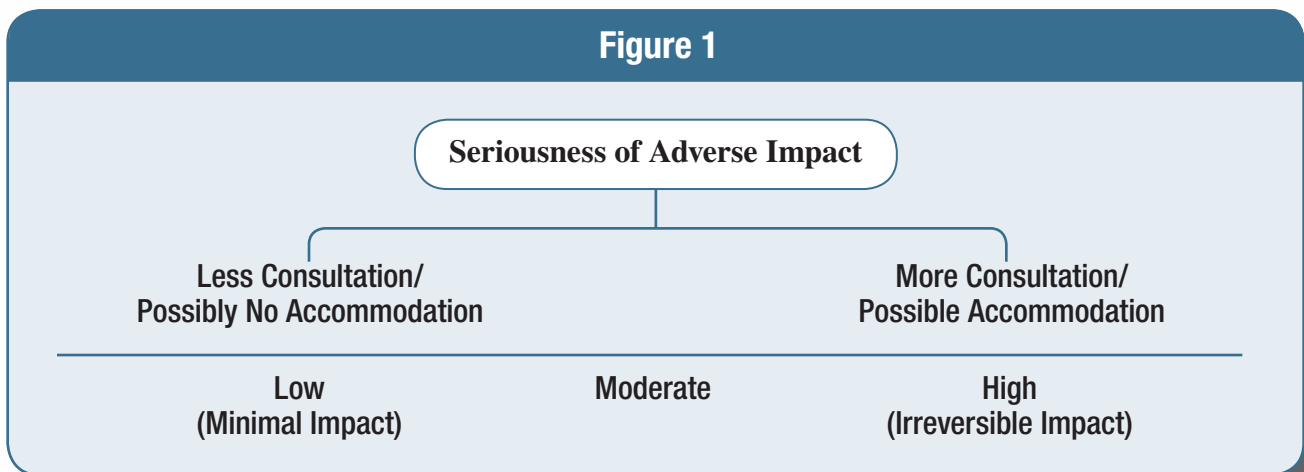
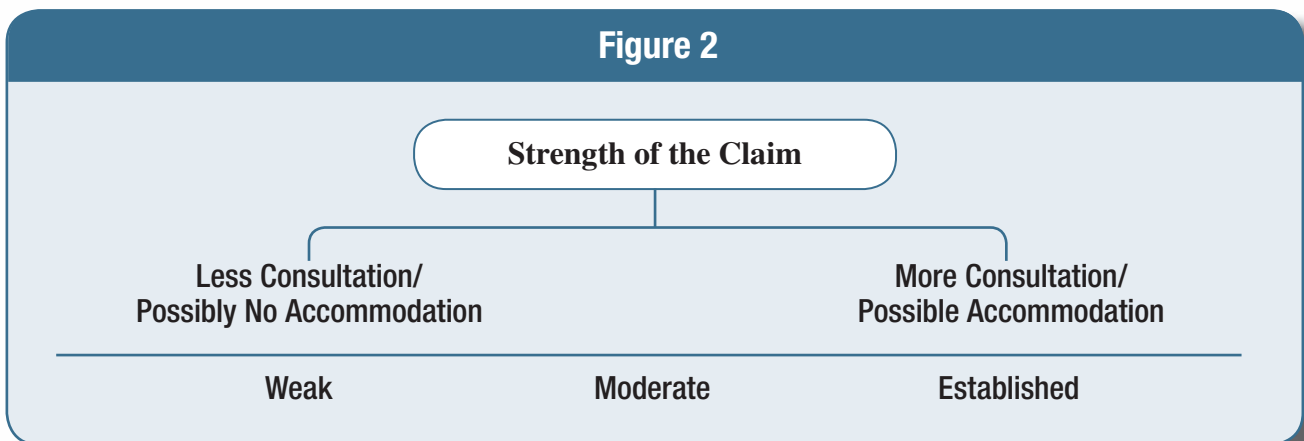


Figure 2



Based on experience, officials should be able to anticipate the potential adverse impacts of the Crown conduct in which their departments and agencies typically engage (See Part B). The nature and seriousness of potential adverse impacts of a proposed activity will become more apparent to officials as information from Aboriginal groups is gathered as part of an on-going relationship and information sharing, or during a consultation process.

Strength of claim assessment is an historical and anthropological analysis of the facts of a particular claim asserted by an Aboriginal group in the area of the proposed activity. In conducting the assessment, federal officials should gather the following information:

- ❖ What are the nature and scope of these asserted rights?
- ❖ Has the Aboriginal group(s) continually occupied the area?
- ❖ Does the group still occupy the area? If the Aboriginal group does not still occupy the area, at what period of time did they occupy it?
- ❖ What were their traditional practices historically and what are their practices today?
- ❖ Is the Aboriginal group alleging that the claimed rights were exercised prior to European contact (or for the Métis, prior to effective control)? Do they continue to exercise these rights today in a traditional or modernized form?

Justice can advise managers and their officials as to when to seek legal advice in the development of strength of claim analysis.

Documents that may alert the Crown to the existence of a claim or contain historical information in support of a claim include: protective writs and other court actions filed by Aboriginal groups; public statements made by Aboriginal groups or their letters to the Crown about their potential or established Aboriginal or Treaty rights; ethno-historical research and reports or similar research submitted by Aboriginal groups for the purposes of a

claims negotiation process; traditional knowledge and use studies prepared by Aboriginal groups for an environmental assessment process; or materials prepared by Aboriginal groups for the purposes of litigation. Confidentiality issues related to the above-noted sources of information may need to be addressed.

Other factors may influence the Crown's decision to consult with an Aboriginal group such as participation of the group in a comprehensive or specific claims negotiation process.

When the Crown is dealing with an Aboriginal group with a modern land claim treaty, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. It is important to be aware that, while consultation may be shaped by agreement of the parties in a treaty, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people – it is a doctrine that applies independently of the treaty itself.

In some cases the treaty itself will set out the elements the parties regarded as an appropriate level of consultation (where the treaty requires consultation) including proper notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter; a reasonable period of time in which the party to be consulted, and an opportunity to present such views to the party obliged to consult; and full and fair consideration by the party obliged to consult of any views presented.

Once it has been established that the Crown has a duty to consult, departments and agencies involved in the activity need to work together to assess the scope of that duty. The initial assessment of the scope of consultation may change as the consultation unfolds and more information comes to light about the potential adverse impacts of the proposed activity on the community's Aboriginal or Treaty rights.

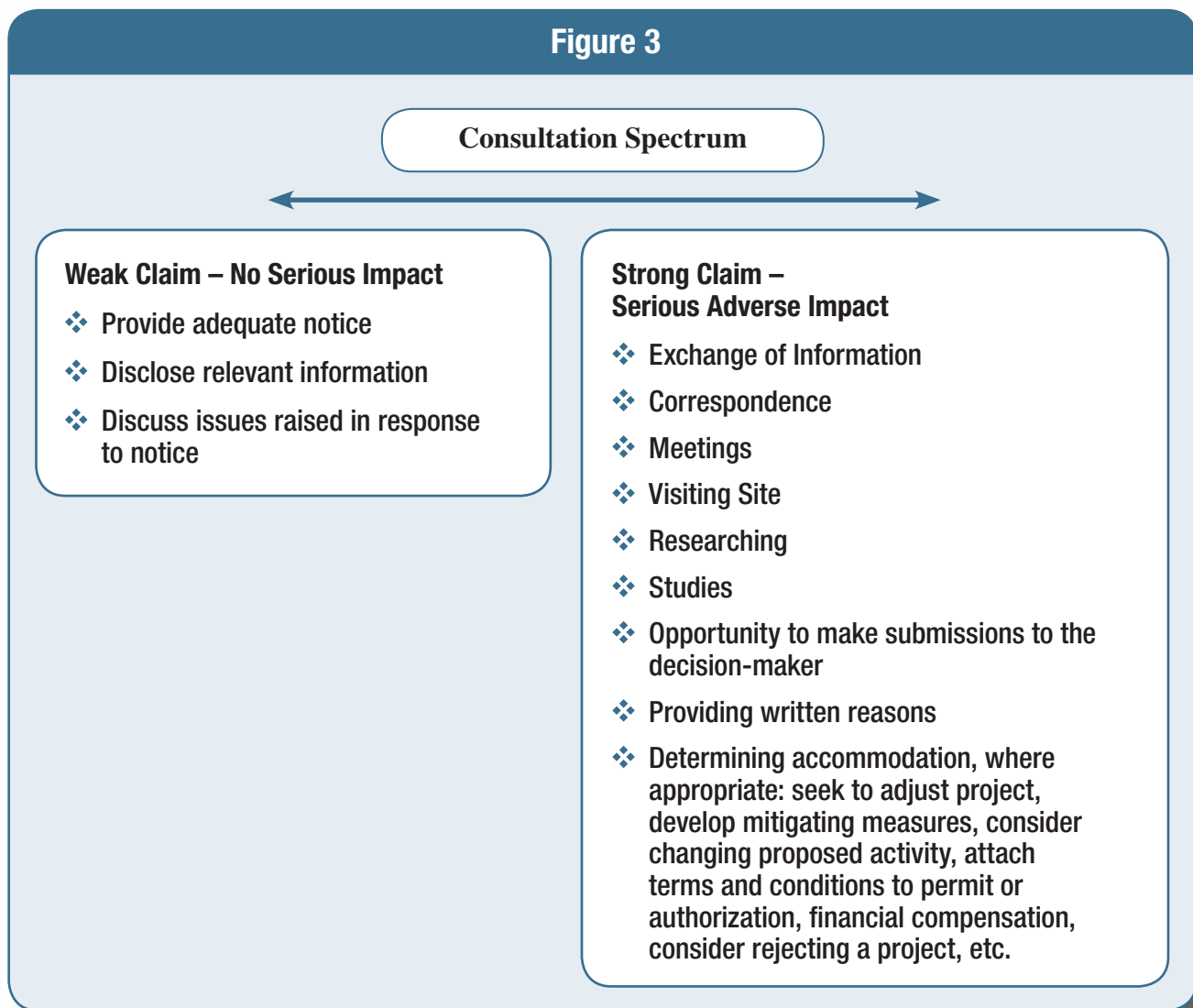
Departments and agencies must ensure that assessments of the scope of the duty are well documented. Managers can support officials to assess the scope of the duty to consult by ensuring they have access to previous assessments of similar activities in the vicinity. However, it is important to remember that Crown consultation, including strength of claim analysis, is not a rights determination process designed to establish the rights of an Aboriginal group.

The design of the consultation process should reflect the assessment and any changes made to it (See Figure 3 below).

Step 6: Design the form and content of the consultation process

The Crown's assessment of the scope of the duty to consult, and where appropriate, accommodate together with departmental and agency approaches to consultation (See Part B) will guide the development of a consultation process. As the consultation process unfolds, and new information becomes available, its form and content may also evolve to reflect resulting changes to the scope of consultation. The consultation process must therefore be flexible. When designing a consultation process, officials should become aware of existing

Figure 3



interactions, processes and dealings between the relevant Aboriginal groups and other federal departments and agencies that may support an effective consultation process.

It is important to establish goals and objectives and develop evaluation questions that will assist federal officials in determining the effectiveness of actions and decisions made at key stages of the process. Further, as officials prepare to implement their activity, they should focus the consultation process on avoiding or minimizing adverse impacts of the Crown conduct on the potential or established Aboriginal or Treaty rights and addressing any related interests, to the greatest extent possible.

Guiding Principle and Directive # 4 sums up the key elements of a meaningful consultation process and reflects what Aboriginal groups across the country have stated during the preparatory discussions (2005-06), the engagement process under Canada's Action Plan (2008-10) and in other forums on consultation and accommodation as follows:

- ❖ A Crown approach that is forthcoming, flexible and responsive;
- ❖ Inclusive processes to manage issues, decision-making and ensure accountability;
- ❖ Early consultation and policy-based discussions with communities on accommodation with the objective of avoiding or minimizing adverse impacts;
- ❖ Pro-active solicitation of Aboriginal involvement and active listening to their concerns;
- ❖ Real opportunities to inform and influence decisions before they are made;
- ❖ Assistance to support Aboriginal groups' meaningful participation in a consultation process;
- ❖ Time lines for information-sharing and responses that are appropriate and adapted to the specific circumstance;
- ❖ Serious consideration of feedback during the consultation process and prior to any decisions being final;
- ❖ Clear and direct responses on how concerns have been addressed or why they cannot be addressed;
- ❖ Better coordination, cooperation and collaboration between Crown and industry with respect to Aboriginal consultations;
- ❖ Consideration of accommodation as part of a meaningful consultation process. When looking at accommodation options, seriously consider Aboriginal perspectives, concerns and options for addressing impacts on potential or established Aboriginal or Treaty rights and related interests;
- ❖ Sustainable economic development balanced by an awareness of cumulative impacts and environmental stewardship;
- ❖ Openness to altering the original proposal and if necessary, not going forward at all with the project or decision.

Identify roles and responsibilities and opportunities for coordination

Where more than one department or agency is involved in Crown consultations for a proposed activity, officials should determine the contribution that their departments and agencies could make to the consultation and accommodation effort, having regard to their respective mandates. Effective collaboration and coordination mechanisms such as inter-departmental teams and memoranda of understanding will be essential in carrying out consultations. Coordination mechanisms should be reviewed periodically by managers to address challenges and ensure efficiency. As set out in Guiding Principle and Directive # 5, coordination includes the identification of a lead department for consultation.

Federal officials must determine:

- ❖ if other departments and agencies need to be involved, based on their mandates. If more than one federal department or agency is involved, has an inter-departmental team been assembled? For example, have the First Nation or INAC been contacted when the proposed activity is to be located on a reserve, or could possibly affect a reserve or when the lands are the subject of Treaty settlements or negotiations, Self-Government or Specific Claims?

- ❖ if other Crown entities such as federal Crown corporations and Canadian Port Authorities, and provincial or territorial governments or third parties may be involved. If so, do they have jurisdiction over the land or resources that may be affected by the federal activity in question?
- ❖ if boards and tribunals will be involved in the Aboriginal consultation process and, if so, how? What are their mandates and terms of reference?
- ❖ if the proposed Crown conduct is subject to statutory or non-statutory timelines. In the case of an activity initiated by a third party proponent, inquire about the timelines for the project;
- ❖ a lead for the Crown consultation process. The lead may change as the project shifts from the environmental assessment process to a regulatory permitting phase. When identifying a lead department or agency, consider which department or agency is: undertaking the proposed activity, such as a Crown infrastructure project or real property disposal; responsible for issuing any form of approval for the proposed activity; likely to cause more significant adverse impacts; best positioned to assume the responsibility for leading the consultations and addressing Aboriginal concerns;
- ❖ the contact information for the lead federal department or agency. Has this information been clearly communicated to all parties involved in the consultation?
- ❖ what federal programs and policies might inform or otherwise be relevant to the consultation process or to addressing the concerns of Aboriginal groups (comprehensive claims negotiations, specific claims negotiations, self-government negotiations, treaty land entitlement, additions to reserve, economic development, procurement policies, relevant Treasury Board Guidelines on transfer payments, etc.)?
- ❖ if the proposed activity is contemplated to take place on a reserve, or could have adverse impacts on a reserve. It is important to note that the Crown's obligation to consult applies in these circumstances. However, decisions about activities on reserves may also be subject to various legislation such as the *Indian Act*,

the *First Nations Land Management Act* or the *First Nations Commercial and Industrial Development Act* as well as approval processes. By-laws enacted by First Nations may also apply. Contact the First Nation directly for information on their laws, land codes and administrative procedures. You may contact the INAC Regional Lands Officer to find out which legislation applies;

- ❖ if a proposed activity that is contemplated to take place on a reserve may have potential adverse impacts on the rights or interests of other communities? If so, they may also need to be consulted;
- ❖ in relation to other Crown activities, what consultation processes within your or in another department or agency are ongoing with the same Aboriginal groups? Is it possible to coordinate your efforts with theirs to avoid consultation fatigue?
- ❖ are there any existing working forums and relationships between the Crown and Aboriginal groups (e.g. committees, Councils, round tables, consultation agreements) that can assist you when you need to undertake consultations?

Reliance on other processes to support decision-making

Officials should find out whether other processes with a consultation component have been or will be carried out by federal, provincial or territorial entities including boards, panels and tribunals or by third parties. Officials can then determine the extent to which the Crown can use information gathered in processes such as environmental assessments, other public review or regulatory processes that include Aboriginal consultation to assist them in fulfilling their duty to consult. If the processes that the Crown is seeking to rely on do not result in meaningful consultation, federal officials will need to undertake additional consultations. Please refer to Guiding Principles and Directives # 6 and # 7.

Communication and coordination throughout the consultation process is important in the early identification of issues and solutions.

Federal officials must determine:

- ❖ if there are any statutes or agreements that require Aboriginal consultation. Consultation requirements under these statutes or agreements must be fulfilled. Identify the degree to which they can assist in fulfilling the Crown's duty to consult and, where appropriate, accommodate;
- ❖ if the third party proponent or the provincial or territorial government plans to consult with potentially affected Aboriginal groups. For example, a provincial or territorial government may consult as part of an environmental assessment process or other public review process;
- ❖ if there are opportunities for the federal department or agency to participate in the third party or provincial or territorial consultation process, or to rely on the information gathered during any of those processes to assist it in fulfilling its duty to consult. Did the process that the Crown is seeking to rely on include all of the elements necessary for a meaningful consultation process? (Refer to Guiding Principle and Consultation Directive # 4);
- ❖ if the proposed activity will be subject to a federal environmental assessment process, a National Energy Board or Canadian Nuclear Safety Commission hearing or a regulatory review process. Seek to incorporate the results of those processes into your departmental or agency consultation;
- ❖ if there are limits to the extent to which the federal department or agency can rely on third party, federal, provincial or territorial processes and the information generated by these processes to meet the duty? If so, what is the nature of those limitations?
- ❖ if, in specific circumstances, it is possible to access the relevant consultation records of third parties (i.e. industry), the provincial or territorial Crown or Boards. Determine the usefulness of these consultation records in assisting the Crown to fulfill its duty to consult.

Federal and provincial or territorial collaboration

Once a lead contact has been established at the provincial or territorial level, develop an approach for collaboration. This discussion may include:

- ❖ agreement on the roles of the federal departments and provincial or territorial ministries during the consultation process (e.g. federal presence at consultation sessions, federal department or agency hosting some sessions and the province or territory hosting others, federal department or agency relying, in whole or in part, on provincial consultation report, inclusion in agreements or other arrangements of measures to address concerns related to the potential adverse impacts, etc.);
- ❖ agreement on how information is going to be shared between federal, provincial or territorial departments and agencies. There may be strategic or policy reasons why information cannot be fully shared between levels of government. Federal officials should not assume that they will be privy to all information gathered during a provincial consultation process;
- ❖ agreement on how to notify Aboriginal groups of the proposed activity. This notification can be joint with the province or territory, separate notification letters or other communication can be sent. The notification must be provided in advance of the consultation so that Aboriginal groups are aware of the process;
- ❖ agreement on timelines.

Aboriginal groups that would be consulted must be notified that Canada intends to rely, in whole or in part, on the provincial or territorial consultation process and on any accommodation measures or agreement that may be reached to fulfill its consultation obligations. Aboriginal group(s) may opt to share different information in a provincial or territorial process than in a federal one. If the provincial process does not include meaningful participation of all Aboriginal groups required to discharge the federal duty to consult, it may be necessary for a federal department or agency to expand upon the provincial process.

Taking into account the information gathered through other processes, federal officials must determine what else needs to be included in the design of the Crown consultation process. What type of information is still needed? What issues may still need to be discussed with Aboriginal groups? Taking into account any expertise required to address outstanding issues, are there other departments and agencies that need to participate in this consultation?

Determine with whom to consult

The Crown must consult directly with the Aboriginal communities with potential or established Aboriginal or Treaty rights. It is important to remember that political organizations are not necessarily the rights holders although they may be authorized to speak on behalf of the Aboriginal communities which hold the rights.

Prior to consulting with any representative organization of affected rights holders, the Crown needs to ensure that the leadership and their members agree. For example, the representative organization can provide the department or agency with a letter confirming the community's acceptance to be represented by them in relation to the activity. The role of such organizations is generally to provide informational, organizational, administrative and political support to the Aboriginal communities they represent. If it is difficult to ascertain who are the appropriate spokespersons for the rights holders, or if there appears to be differences of opinion within the groups as to who represents or speaks on behalf of the communities, seek legal advice.

Verify if there are any Aboriginal groups with overlapping claims in the area of the proposed activity. If so, you may need to invite them to participate in the consultation process.

Determine if the project is going to be carried out on, or may have effects on a reserve. If so, consult with the relevant First Nation. If the activity may have impacts off the reserve in question, for example, on the rights of any other Aboriginal groups located in the area, consultation may also need to take place with these groups.

Learn about and understand the context and current situation of the Aboriginal groups with which you will be consulting (e.g. language, geography, cultural practices,

seasonal activities, interactions with departmental and agency officials). For example:

- ❖ What are the characteristics of the community (e.g. language, history, culture, socio-economic conditions, location or remoteness)?
- ❖ What is important to community leadership and community members (e.g. interests, aspirations, consultation policies or guidelines they may have developed, etiquette as to how to approach meetings and relationship building, etc.)?
- ❖ What are their relationships with neighbouring communities?
- ❖ Have memoranda of understanding, agreements or protocols been negotiated between the Crown and the communities?
- ❖ Are they currently involved in litigation with the federal or provincial Crown?
- ❖ Are there any other considerations?

For the purpose of developing appropriate consultations, a strong knowledge of community and regional issues can assist federal officials in accurately assessing the impacts of the proposed activity on individual communities and their traditional territories and their claims.

Knowledge of the Aboriginal groups with which you will be consulting is important, as is early engagement with them regarding the proposed activity, so that they have an opportunity to outline how their potential or established Aboriginal or Treaty rights and any related interests may be adversely affected by the proposed activity.

Questions and issues for consideration include:

- ❖ Which Aboriginal communities might be affected by the activity?
- ❖ What is known about the Aboriginal communities which live in the area and assert or hold Aboriginal or Treaty rights?
- ❖ What knowledge does the Crown have about the potential or established rights of the Aboriginal groups?

- ❖ What are the current and past uses by Aboriginal groups of the land, water or other natural resources potentially affected by the proposed activity? Are there traditional use studies for this area that have been shared, in whole or part, with the Crown?
- ❖ Is there more than one Aboriginal group that is claiming rights to the same area (i.e. overlapping claims)? If so, what rights are claimed for which areas and by which Aboriginal groups? Is any Aboriginal group claiming title (e.g. exclusive occupation and rights to the land, water or other natural resources in the location and area of the activity)?
- ❖ Is the Aboriginal group in Self-Government, Treaty or Specific Claims negotiations? Inform yourself about the history, nature and status of those negotiations;
- ❖ Have the Aboriginal rights been declared by a court? Have Treaty rights been negotiated in an historic Treaty or a comprehensive land claim agreement? Has the Aboriginal group concluded a self-government agreement?
- ❖ What are the potential adverse impacts of the proposed activity on potential or established Aboriginal or Treaty rights such as hunting, fishing, trapping, gathering and trade, and on related interests? For example, will there be any impacts on wildlife or habitat, water quality or temperature, restricted access to lands or water ways, disruption of traditional techniques or timing of harvesting activities?
- ❖ What is the potential adverse impact of the proposed activity on Aboriginal archaeological sites, burial grounds, or other areas of Aboriginal interest?
- ❖ Are there any reserves in the area? Does the activity overlap or have an adverse impact on reserve lands?
- ❖ Where possible adapt the content and the process to respect the circumstances of the Aboriginal group. Identify potential challenges to the Crown consultation process in this regard.
- ❖ Many First Nation, Métis or Inuit groups have developed consultation policies, guidelines or protocols and request that the Crown adhere to them. Officials must follow the Updated Guidelines and their departmental or agency approaches. However, understanding the policies, guidelines or protocols of the Aboriginal group may become the starting point for a discussion on an effective and meaningful consultation process.
- ❖ Establish reasonable timelines for consultation activities. Meaningful consultation may require more time than anticipated; ensure that your plan is flexible.
- ❖ Design the consultation process to begin as early as possible. Take into account existing federal, provincial or territorial processes such as environmental assessments or regulatory reviews.
- ❖ Consider board and tribunal hearings that are involved in the decision-making and that the Crown may rely on to fulfill its duty. In some circumstances, the Crown could be required to demonstrate adequate consultation efforts to boards or tribunals. Early consultation enables parties to: determine whether changes to Crown conduct and other appropriate accommodation measures are needed; explore what these changes could be; and provide sufficient time to make appropriate changes (Guiding Principles and Directives # 2 and # 3).
- ❖ The duty to consult does not require the Crown and the Aboriginal communities to agree on how to resolve the issues raised during the consultation process. Nevertheless, there may be benefit in considering various means to overcome disagreements, such as dispute resolution mechanisms, to minimize conflicts, as they arise, and provide alternatives to litigation in the course of consultation or during the implementation of accommodation measures.
- ❖ In the context of established Aboriginal and Treaty rights, given the strength of those rights, federal departments and agencies must work closely with Aboriginal groups to seek ways to avoid adverse impacts on those rights. Federal officials should do the same when there is a severe adverse impact.

Design effective consultation processes

When designing a consultation process, consider the following:

- ❖ Consider involving Aboriginal groups in the design of effective consultation processes. For example, agreeing on meeting objectives, in advance, can help all parties to focus their efforts and develop effective working relations.

Anticipating requests for support

As noted earlier, in some instances, Aboriginal groups may seek support (financial or otherwise) to participate in the consultation process. As a general rule, the courts have indicated that consultation must be meaningful and that the process must be reasonable. Courts look favourably upon government providing assistance, where needed, to support Aboriginal participation in the consultation process.

Support can take many forms, including in-kind assistance that could be provided by the Crown (federal, provincial or territorial) or, in many instances, by the proponent. This could include proponent or other expert technical expertise and information; assuming the costs of translation and interpretation; document production; travel; providing Aboriginal groups with access to government technical expertise or other relevant contextual data about the resource sectors and related statutes; organizing meetings; and modifying timelines that will assist Aboriginal groups to assess the potential adverse impacts on their rights.

If financial support is requested, departments and agencies must assess whether financial support should be provided and the extent of that support. Where a department or agency seeks to transfer funds to Aboriginal groups, it must ensure it has the appropriate departmental program and financial authorities in place. Officials should identify departmental authorities or potential programs or initiatives that may assist in providing capacity to Aboriginal groups, where appropriate. Financial support may also come from the participant funding programs of the Canadian Environmental Assessment Agency, National Energy Board or Canadian Nuclear Safety Commission.

The following provides a list of capacity areas for which financial support has been provided to Aboriginal groups in the context of consultation and accommodation processes:

- ❖ information-sharing and awareness-raising;
- ❖ participation at meetings including honorarium for elders and others;

- ❖ travel costs;
- ❖ preparation of scientific, technical and legal reviews to provide advice in relation to the consultation;
- ❖ analysis and reporting related to the consultation and accommodation activities and to potential impacts on potential or established Aboriginal or Treaty rights and related interests;
- ❖ training;
- ❖ professional fees (for example, for facilitation, writing of documents, translation and interpretation);
- ❖ communications and printing;
- ❖ research and development;
- ❖ land use, traditional knowledge and use or targeted resource planning, management and implementation;
- ❖ administrative fees.

Officials must:

- ❖ monitor transfers of funding for consultation purposes and reporting, as directed by legislation and Treasury Board Secretariat policies, directives, guidelines and practices;
- ❖ seek opportunities, through protocols or memorandum of understanding with other federal departments and agencies, provincial and territorial governments and industry, to share capacity requirements for consultation. Open dialogue and transparency can enhance efficiencies and reduce costs for all involved in a consultation process;
- ❖ seek opportunities, where appropriate, to foster aggregations among Aboriginal groups (if they do not already exist) to enhance efficiencies and reduce costs through collective efforts. However, caution should be exercised not to impose aggregations as a cost and time saving measure at the risk of alienating the concerned Aboriginal groups.

Step 7: Ensure that a records management and filing system is in place

Federal departments and agencies should approach Aboriginal consultation with the awareness that they may be required to (1) access their own or other Crown records during the consultation process and (2) demonstrate the completeness and integrity of the process at a later date. To this end, federal departments and agencies that do not have a record management system for Aboriginal-Crown consultations should develop and maintain a consistent approach and format to record keeping for each step in the consultation and accommodation process.

An efficient record keeping system should ensure that the information is accessible, searchable, retrievable and reliable. It should also enable the sharing of documents between federal departments and agencies, and take into account security classification levels and privacy issues. Where multiple departments and agencies are involved in a consultation process, a centralized record keeping system is essential to maintain a complete record of consultations. For example, the Major Projects Management Office and the Canadian Environmental Assessment Agency have created a centralized Crown consultation records management system for federal departments and agencies working on Aboriginal-Crown consultations on major resource projects.

Examples of information that qualifies as a Crown record may include:

- ❖ background/technical information about the proposed project;
- ❖ any relevant information about the Aboriginal group(s) which might be affected by the proposed activity;
- ❖ a consultation plan;
- ❖ correspondence and meeting notes between federal departments and agencies and the Aboriginal group(s) in relation to the proposed activity;

- ❖ correspondence detailing each contact made with Aboriginal group(s) in relation to the proposed activity (e.g. letters, phone calls);
- ❖ letters of opinion from Aboriginal groups related to the proposed project or Crown conduct;
- ❖ an adverse impact assessment of the proposed activity;
- ❖ a strength of claim analysis on asserted Aboriginal rights;
- ❖ legal advice sought at any point during the consultation process;
- ❖ notices of consultation sessions or funding issuance (e.g. participant funding program);
- ❖ issues management tracking table.

A consultation record typically includes:

- ❖ date and time of correspondence or meeting;
- ❖ where the meeting took place and who attended;
- ❖ information shared with Aboriginal group(s) regarding the proposed activity and related consultation process;
- ❖ feedback received from Aboriginal groups;
- ❖ departmental or agency responses to the concerns and information requests made by Aboriginal group(s) related to the consultation process;
- ❖ rationale for key decisions taken in relation to the activity.

All correspondence with the Aboriginal groups (e.g. letters, e-mail messages, notes on telephone calls, notes from each meeting with the Aboriginal group) should be recorded and filed in their records management system.

It is also recommended practice for federal officials to indicate who created the record and who performed the activity recorded.

PHASE 2: CROWN CONSULTATION PROCESS

Officials will need to implement their consultation plan and corresponding process and adjust it as may be appropriate. The departmental or agency approach and the work done during the “Pre-Consultation Analysis and Planning” phase will help officials to anticipate and address issues and carry out a meaningful consultation process.

Step 1: Implement the consultation process

- ❖ Notify the Aboriginal group(s) of the proposed activity, provide a government contact for any questions or concerns, and, where appropriate, offer to meet to discuss the proposed activity and any concerns they may have about it;
- ❖ In a timely manner, provide Aboriginal groups with clear and relevant information relating to the proposed activity and any adverse impacts that may be anticipated, to enable them to provide meaningful feedback;
- ❖ To ensure that Aboriginal groups are adequately notified and able to meet timelines, federal departments and agencies should send information to them by a variety of means including registered mail, email and fax. Using registered mail ensures that recipients have an original copy on file; however, this method of correspondence can be slow. E-mails and faxes ensure timely receipt of documents. Follow-up phone calls are recommended. Timely communication facilitates an open and respectful dialogue between the Aboriginal community and the Crown;
- ❖ Confirm who is authorized to represent Aboriginal group(s) in relation to their Aboriginal or Treaty Rights and related interests;
- ❖ Identify and determine the nature of any overlapping claims that may exist in the area of the activity;
- ❖ Provide the Aboriginal group(s) with enough time to assess any adverse impacts of the proposed activity on their rights and to prepare their views on the matter. Officials should follow-up to discuss concerns, as necessary;
- ❖ Ensure that the Crown responds in a coordinated and timely fashion to communication received from Aboriginal groups. To facilitate these efforts, managers may wish to establish service standards or letter templates;
- ❖ Consider the concerns of Aboriginal groups, and respond in a meaningful way by ensuring that the Crown's responses consider and address Aboriginal representations, questions and concerns;
- ❖ Throughout the consultation process, consider ways and means to avoid or mitigate potential adverse impacts of the activity on potential or established Aboriginal or Treaty rights and related interests;
- ❖ Depending on the nature of the concerns, ensure that the third party proponent is involved in the discussion of measures to prevent or reduce any potential adverse impacts of the project. A proponent is typically in the best position to alter the project to avoid or mitigate adverse impacts (e.g., placement of docks, routing of pipelines, alignment of roads, etc.);
- ❖ Review periodically, throughout the consultation process, the extent to which environmental assessments or regulatory processes, as they are implemented, can be relied upon and how the information generated in those processes can be used to fulfill the Crown's duty in whole or in part;
- ❖ Review periodically whether the Crown has demonstrated to the board or tribunal, where appropriate, that adequate consultation has occurred;
- ❖ Ensure that throughout the consultation process, all relevant information is shared with government departments and agencies involved in the consultation. To achieve effectiveness, managers are encouraged to periodically review coordination and information sharing practices;
- ❖ Follow agreed upon dispute resolution mechanisms to resolve conflicts as they arise, and to avoid litigation related to the consultation and accommodation process.

Step 2: Document, catalogue and store all Crown consultation meeting records and other correspondence

Good practices to consider in relation to record keeping include:

- ❖ update records regularly;
- ❖ provide the same level of information detail consistently and as needed to relevant departments and agencies involved in Crown consultations;
- ❖ share information in a timely way with departments and agencies;
- ❖ ensure that the records are filed according to a set standard in a records management system that is accessible by all departments and agencies involved in the consultation process;
- ❖ ensure that all records are easily accessible and filed using an appropriate security classification; and,
- ❖ preserve corporate memory of a consultation file.

Step 3: Develop and maintain an issues management tracking table

An issues management table should be created and should include a summary of:

- ❖ Aboriginal concerns about potential adverse impacts of an activity on potential or established Aboriginal or Treaty rights, as conveyed to government decision makers;

- ❖ Crown's efforts to address concerns raised by Aboriginal groups about potential adverse impacts of the activity on potential or established Aboriginal or Treaty rights;
- ❖ any communication sent to Aboriginal groups informing them of steps taken to address their concerns;
- ❖ any outstanding issues remaining between the Crown and Aboriginal groups with information about why these issues have not been resolved and some of the challenges encountered in relation to these issues. If the intention is to address these issues at a later date, provide a rationale for the timing and a plan for implementation and follow-up.

Step 4: Adjust the consultation and accommodation process, as necessary

The consultation process should be responsive and flexible. Officials need to adjust the process as new information about the strength of claim or the severity of adverse impacts comes to light, or if a new Aboriginal group, with a credible claim, alleges that their potential or established Aboriginal or Treaty rights may be impacted by the project. If the processes being relied on by the Crown will not allow it to fulfill its consultation obligations, additional steps must be taken.

PHASE 3: ACCOMMODATION

The courts have said that consultation would be meaningless if, from the outset, it excluded any consideration of the potential need to accommodate the concerns raised by Aboriginal groups. Consultation may reveal a need to accommodate. Accommodation may take many forms.

The primary goal of accommodation is to avoid, eliminate, or minimize the adverse impacts on potential or established Aboriginal or Treaty rights, and when this is not possible, to compensate the Aboriginal community for those adverse impacts. In some circumstances, appropriate accommodation may be a decision not to proceed with the proposed activity. The Crown may be able to rely on what the industry proponent does in terms of accommodation, to fulfill, in whole or in part, the Crown's duty to consult, and where appropriate, accommodate.

The examples included below are not an exhaustive list but present a range of accommodation options. Making changes to the project design early in the planning stages of the project can help avoid or eliminate adverse impacts.

When such impacts are unavoidable or cannot be eliminated, the focus of accommodation must turn to mitigating those impacts. Sometimes this may be accomplished by making changes to the activity. The proponent is often in the best position to modify the project to avoid, eliminate or minimize the adverse impacts.

In its regulatory role, the Crown may also place terms or conditions on any permits, licences or authorizations to avoid or minimize adverse impacts. It can also enter into agreements with the proponent pursuant to which the proponent undertakes to carry out measures designed to reduce the adverse impacts.

Where it is not possible to avoid, eliminate, or substantially reduce adverse impacts, it may be appropriate to compensate the Aboriginal group for any adverse impacts on their potential or established Aboriginal or Treaty rights. Compensation could take a variety of forms including habitat replacement; providing skills, training

or employment opportunities for members of the Aboriginal group; land exchanges; impact-benefit agreements; or cash compensation.

Where accommodation is appropriate, departments and agencies should work with the Aboriginal group to identify solutions that balance the interests of the Aboriginal group with the societal interests of all Canadians. While there is no obligation on the Crown and Aboriginal group to agree on what is appropriate accommodation (i.e. Aboriginal groups do not have a veto), all parties must make reasonable efforts to find solutions that will accommodate the adverse impacts of the project on potential or established Aboriginal or Treaty rights.

Where accommodation measures proposed by the proponent or other parties are acceptable to the Aboriginal group, the federal Crown will need to determine if it is appropriate to rely on these measures in the fulfilment of its duty to consult (Guiding Principle and Directive # 7). In relying on accommodation measures proposed by a proponent or other parties, the Crown needs to be satisfied that these measures appropriately accommodate the Aboriginal group for the adverse impacts on their Aboriginal and Treaty rights.

When considering appropriate accommodation options, departments and agencies need to:

- ❖ work collaboratively to understand how the mandates of participating federal departments and agencies can be used to assist the Crown to accommodate the adverse impacts on potential or established Aboriginal or Treaty rights (Guiding Principle and Directive # 5);
- ❖ determine whether it is appropriate to involve other departments and agencies or other orders of government when any proposed accommodation measures fall outside your department's or agency's mandate. The mandates of federal departments and agencies should not limit the options for accommodation available to Aboriginal groups;
- ❖ understand and be aware of how the approval and decision-making processes within each department or agency may serve as a vehicle for accommodation; and,

- ❖ assess the extent to which the mitigation measures proposed through environmental assessment, regulatory or other consultation processes may serve as accommodation.

The following section outlines four steps for identifying appropriate accommodation measures during and following the consultation process. This section will be informed by future policy direction and practical experience in dealing with accommodation.

Step 1: Gather and analyze information supporting the basis for accommodation

The following factors are relevant when federal departments and agencies consider whether accommodation is appropriate in the circumstances. This information will be gathered during the “Pre-consultation Analysis and Planning” and the ‘Crown Consultation Process’ phases of the process (See Phases 1 and 2). Some of this information will be contained in the issues management tracking table.

- ❖ What potential or established Aboriginal or Treaty rights stand to be adversely impacted by the project?
- ❖ In the case of potential Aboriginal rights, what is the strength of the claim?
- ❖ What is the degree and severity of the adverse impacts on the potential or established Aboriginal or Treaty rights and related interests?
- ❖ the extent to which any proposed accommodation measures may reduce the adverse impacts of the proposed activity on potential or established Aboriginal or Treaty rights;
- ❖ whether the adverse impacts of the proposed activity on potential or established Aboriginal or Treaty rights can be eliminated or reduced, and if not, whether some sort of compensation may be appropriate;
- ❖ the cost to the Crown of each possible accommodation measure and the existing sources of funds (e.g. Treasury Board submissions, existing authorities, shared cost with other federal departments and agencies, other levels of government or industry);
- ❖ whether there are consultation protocols with Aboriginal groups that serve as a basis to discuss, and where appropriate, to implement accommodation measures;
- ❖ whether there are any existing or new financial authorities that are necessary to implement accommodation measures?
- ❖ whether the mandates of federal departments and agencies enable them to proceed with selected accommodation options?
- ❖ what other departments and agencies can offer in terms of accommodation, having regard to their mandates, financial authorities and legislation. For example, Human Resources and Social Development Canada – job training; Public Works Government Services Canada – sale or purchase of lands; Parks Canada – commemoration of Aboriginal sacred sites; such measures may meet the concerns and interests without requiring new resources.

Step 2: Identify possible accommodation measures and options

After determining that accommodation is appropriate in the circumstances, the next step is to assess the range of possible accommodation measures and discuss these measures with Aboriginal groups. In identifying possible accommodation measures, officials may take into account:

- ❖ options identified by Aboriginal groups or the proponents to eliminate or reduce the adverse impacts of the proposed project (e.g. changes to the design or approach to the project);

This assessment allows the Crown to identify accommodation options for discussion with rights holders. It is essential that federal departments and agencies have the appropriate internal approvals in place. It is also important that proposed accommodation measures are approved by senior management with decision-making and financial authority. Federal officials must ensure that internal approvals are obtained prior to presenting accommodation options to Aboriginal groups.

The mandates and processes of boards, tribunals or commissions and other regulatory, statutory or contractual processes that may be relied on by the Crown may not be sufficient to address certain accommodation measures or options. Therefore, the Crown may need to supplement these processes.

A clear distinction is required between accommodation of potential or established Aboriginal or Treaty Rights by avoiding or mitigating any adverse impacts on those rights and other socio-economic measures that are offered to address the Aboriginal communities' interests in relation to the activity. These latter activities are business initiatives that are linked to the project or other corporate or governmental programs that support communities. They do not always serve as accommodation measures necessary for the Crown to fulfill its duty.

Step 3: Select appropriate accommodation options

Informed by its discussions with Aboriginal groups during the consultation process, the Crown must select appropriate accommodation option(s). Generally, the most appropriate measure(s) are those which are most effective in eliminating or reducing adverse impacts on potential or established Aboriginal or Treaty rights while taking into account broader societal interests.

The duty to consult does not include an obligation on the Crown to agree with Aboriginal groups on how the concerns raised during consultations will be resolved.

Selecting accommodation measures requires cooperation amongst federal departments and agencies and effective inter-departmental mechanisms for collaboration.

Step 4: Communicate and document selected accommodation measures

It is important to document and communicate to all parties, in writing, the accommodation measures. The following factors may assist departments and agencies in communicating accommodation decisions:

- ❖ A description of the steps in the consultation process that led to the accommodation decision;
- ❖ Evidence that the selected options are supported by information provided to the Crown during the consultation process;
- ❖ Evidence that the consultation process was meaningful and reasonable and that the Crown acted in good faith;
- ❖ The reasons for selecting the chosen accommodation measure(s);
- ❖ How Aboriginal concerns and suggestions for accommodation measures were addressed or the reasons why the accommodation options suggested by Aboriginal groups were not selected;
- ❖ Roles and responsibilities of all parties involved in implementing the accommodation measures (e.g. Crown, rights holders, third parties); and,
- ❖ How to communicate the selected accommodation measures to all parties. Such communication should be coordinated if more than one federal department or agency or the provincial or territorial government is involved in the consultation process. In the issues management tracking table, the federal lead department or agency should maintain a list of the various accommodation measures proposed by all participants in the consultation process.

PHASE 4: IMPLEMENTATION, MONITORING AND FOLLOW-UP

In this Phase, departments and agencies will implement the Crown's decision and accommodation measures. This typically involves taking steps to put the accommodation measures in place and carrying out monitoring or other follow-up activities. Officials should verify whether the accommodation measures are in place and advise whether they are effective in eliminating or mitigating the adverse impacts of the activity on potential or established Aboriginal or Treaty rights and related interests.

Step 1: Communicate and implement the decision(s)

In some circumstances, departments and agencies will find it helpful to develop, in collaboration with the Aboriginal groups and other parties, if appropriate, an implementation plan that sets out the steps necessary to put the accommodation measures in place, and to guide and track the Crown's monitoring and follow-up activities. Departments and agencies can look to their departmental or agency approaches to consultation (See Part B) and the issues management tracking table for guidance in the development of an implementation plan.

Step 2: Monitor and follow-up

Departments and agencies need to coordinate their roles in carrying out monitoring or other follow-up activities. A coordinated effort will help them assess whether accommodation measures are effective in eliminating or mitigating the adverse impacts of the project.

If monitoring and follow-up activities reveal that some accommodation measures are ineffective in mitigating the adverse impacts, the Crown needs to work collaboratively with Aboriginal groups, the proponent and other parties to find appropriate accommodation measures, and monitor the effectiveness of the new measures. The Crown discharges its duty to consult, and, where appropriate, accommodate, and strengthens its working relationship with Aboriginal groups when it puts in place effective accommodation measures. (Refer to Guiding Principle and Directive # 8).

This could be facilitated by an implementation plan to guide and track the Crown's monitoring and follow-up activities. The plan may include:

- ❖ designation of a federal lead for the reporting and issues management tracking process, and for on-going communication with Aboriginal groups and proponent, as necessary. Where more than one department or agency is involved, the lead is responsible for ensuring that appropriate action is taken;
- ❖ requirements and measures that ensure that adverse impacts on rights continue to be addressed during the life cycle of the activity; and
- ❖ existing or newly developed tracking and reporting processes for each of the accommodation measures implemented, federal and regulatory activities, management and disposal of Crown land, financial requirements.

Step 3: Evaluate the consultation process

Following the implementation of the selected accommodation measures, departments and agencies should evaluate the results of their consultation and accommodation activities. A Crown consultation record, if well developed and consistently maintained, will facilitate the analysis of whether or not Aboriginal concerns about any adverse impacts on potential or established Aboriginal or Treaty rights and related interests have been adequately addressed.

Evaluating a process as it proceeds enables officials to verify the effectiveness of actions and decisions taken along the way and to correct them in a timely fashion. Therefore, undertaking an evaluation of a consultation and accommodation process at key stages will allow the Crown to ensure that it continues to act in accordance with the goals and objectives or to adjust them as new developments occur or new information becomes available. The Audit and Evaluation Unit Staff of the departments and agencies involved can assist in developing a useful evaluation process that can be shared to improve various aspects of future consultations.

When developing a process for evaluating the consultation and accommodation process, departments and agencies should take into consideration the:

- ❖ design of evaluation criteria at the outset so the goals, objectives and outcomes are clear and can be tracked over a reasonable period of time;
- ❖ advice and guidance from the Audit and Evaluation units of the departments and agencies involved on how to effectively evaluate a consultation and accommodation process; and
- ❖ potential involvement of Aboriginal groups in the development of the evaluation criteria.

Some evaluation questions to be considered:

- ❖ What Crown processes were used? What worked, what didn't?
- ❖ Were all the relevant parties properly identified and appropriately involved?
- ❖ Were roles and responsibilities in the process appropriate and understood?
- ❖ Did the consultation plan and process reflect the respective objectives and interests of the parties?
- ❖ Was the consultation process reasonable, meaningful, flexible and achievable?
- ❖ Did the consultation process reflect the nature, scope and complexity of the intended project, activity or decision?
- ❖ Were all parties clear on process objectives and outcomes?
- ❖ On what proponent activities did the Crown rely? To what extent did they assist in fulfilling the Crown's consultation obligations?
- ❖ Was the consultation process well documented in an official record and is the information generated during the process easily accessible?
- ❖ Were decisions justified and clearly communicated to the appropriate parties?
- ❖ Was legal advice sought appropriately?

The evaluation should also include information about whether or not the Crown acted in a manner consistent with the following standards, principles and relevant legal tests:

1. Has consultation been meaningful? Is the depth of consultation adequate given the circumstances? Has it been carried out in a timely and reasonable manner? Has the Crown been responsive to the concerns raised?
2. Have any concerns raised by Aboriginal groups not been addressed? Have any concerns been overlooked?
3. Is the recorded response to a concern meaningful? Is there any sense of lack of clarity or avoidance in the response? Has the Aboriginal group raised any concerns about the response?
4. Are there accommodation measures that should be implemented now? Can the consultation to date be deemed adequate, even if accommodation has not been undertaken or has been put off to a later stage of the project?
5. In the event of new information, was the scope of the consultations reassessed? Specifically, does the new information affect the strength of the claim or the significance of the adverse impact?

Evaluation questions on the procedural aspects of a consultation process to determine if the Crown has conducted a thorough and reasonable consultation process could include:

1. Has each Aboriginal group's concern been consistently considered and followed-up on?
2. Has each response been communicated to the Aboriginal group(s)?
3. Has the Crown tried to solicit Aboriginal views and concerns?
4. Has there been a good flow of information? Have all Aboriginal groups been appropriately informed through such means as information packages?
5. Have there been face-to-face meetings and, if not, were they necessary? Did groups request such meetings? If so, what was the response?

6. Is there a good correspondence record? For example, copies of correspondence, phone calls and face-to-face meetings?
7. Is there a good consultation record?
8. Was a particular board or tribunal relied on for the consultation process? Was a provincial or territorial process relied on? Was it sufficient to address the Aboriginal groups' concerns?
9. Is a third party proponent involved? Who was it and what was their role?
10. What concerns were raised and how has the third party proponent responded? What was the follow-up and monitoring process used?
11. Were the affected Aboriginal groups able to participate in the consultation and accommodation process? How were issues of capacity addressed? Was it through monetary or non monetary means or both? Were funding authorities in place? Was funding available in the department or agency to support capacity? Is a funding agreement in place? Were other departments and agencies or governments contributing to support capacity? Were final and financial reports provided in relation to transfer payments? Have transfer payments contributed to consultation objectives? Have recommendations been made for future consultations?
12. Did your department or agency lead the consultation? If so, what follow-up and monitoring processes were implemented? If not, was a lead department or agency identified?

Annexes

ANNEX A – DEFINITIONS

Aboriginal group: A community of First Nations, Inuit or Métis people that holds or may hold Aboriginal and Treaty rights under section 35 of the *Constitution Act, 1982*.

Aboriginal rights: Practices, traditions and customs integral to the distinctive culture of the Aboriginal group claiming the right that existed prior to contact with the Europeans (*Van der Peet*). In the context of Métis groups, Aboriginal rights means practices, traditions and customs integral to the distinctive culture of the Métis group that existed prior to effective European control, that is, prior to the time when Europeans effectively established political and legal control in the claimed area (*Powley*). Generally, these rights are fact and site specific.

Aboriginal title: An Aboriginal right to the exclusive use and occupation of land. It is possible that two or more Aboriginal groups may be able to establish Aboriginal title to the same land.

Activity: Any Crown or proponent undertaking, application, proposal, project, regulatory, policy or other initiative or decision that is contemplated and may have an adverse impact on potential or established Aboriginal or Treaty rights and related interests.

Capacity: It is the ability of Aboriginal groups to understand the nature of the activity the Crown or proponent is contemplating and how that activity might adversely impact their potential or established Aboriginal or Treaty rights.

Common law: In general, a body of law that develops through judicial decisions, as distinguished from legislative enactments.

Comprehensive land claim: Comprehensive claims deal with the unfinished business of treaty-making in Canada through a negotiation process. These claims arise in areas of Canada where Aboriginal land rights have not been dealt with by past treaties or through other legal means. In these areas, forward-looking modern treaties are negotiated between the Aboriginal group, Canada and the province or territory. Comprehensive land claim negotiations address concerns raised by Aboriginal peoples, governments and third parties about who has the legal right to own or use the lands and resources in areas under claim.

Constructive knowledge: *Black's Law Dictionary (Eighth Edition)* states: "Knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person". Therefore, if one part of the Crown has knowledge of potential rights, other Crown entities will be deemed to know.

Crown: Refers to all government departments, ministries (both federal, provincial and territorial) and Crown agencies.

Crown conduct: Means the exercise of the Crown's jurisdiction and authority whether the Crown may be in charge of the activity or may be approving an activity through permits and authorizations. In either context, its actions would constitute Crown conduct.

Crown knowledge: The Supreme Court of Canada stated that the duty to consult arises when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights of which the Crown has real or constructive knowledge.

Cumulative Environmental Effects: "The concept of cumulative environmental effects recognizes that the environmental effects of individual human activities can combine and interact with each other to cause aggregate effects that may be different in nature or extent from the effects of the individual activities. Cumulative environmental effects can be characterized as the effect on the environment of a proposed project when combined with those of other past, existing and imminent projects and activities, and which may occur over a certain period of time and distance" http://www.ceaa.gc.ca/9742C481-21D8-4D1F-AB14-55521160443/Addressing_Cumulative_Environmental_Effects.pdf

Duty to Consult: The duty to consult is an obligation of the government as a whole. In *Haida, Taku River* and *Mikisew Cree*, the Supreme Court of Canada held that provincial and federal governments have a legal obligation to consult when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights.

Engagement: Examples of engagement includes discussion groups and formal dialogue, sharing knowledge and seeking input on activities such as policy, legislation, program development or renewal.

Existing Aboriginal and Treaty rights: “Existing” includes potential or established Aboriginal or Treaty rights.

First Nation: A term that came into common usage in the 1970s to replace the word “Indian” which some people found offensive. Although the term First Nation is widely used, no legal definition of it exists. Among its uses, the term “First Nations peoples” refers to the Indian peoples in Canada, both Status and non-Status. Some Indian peoples have also adopted the term “First Nation” to replace the word “band” in the name of their community.

Inuit: An Aboriginal people in Northern Canada, who live in Nunavut, Northwest Territories, Northern Quebec and Northern Labrador. The word means “people” in the Inuit language, Inuktitut. The singular of Inuit is Inuk.

Métis: For purposes of section 35 rights, the term Métis refers to distinctive peoples who, in addition to their mixed First Nation, Inuit and European ancestry, developed their own customs, and recognizable group identity separate from their First Nation or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life.

Proponent: In the Updated Guidelines, proponent refers to industry, foreign governments or any other parties which initiate or propose an activity.

Reserve: As specified by the *Indian Act*, a tract of land, the legal title to which is vested in Her Majesty the Queen in Right of Canada and that has been set apart by Her Majesty for the use and benefit of a First Nation.

Traditional territory: Any designated lands and boundaries to which First Nations, Métis and Inuit communities claim or have established traditional use or occupation.

Treaty rights: Rights that are defined by the terms of a historic Treaty, rights set out in a modern land claims agreement or certain aspects of some self-government agreements. In general, Treaties (historic and modern) are characterized by the intention to create obligations, the presence of mutually binding obligations and a measure of solemnity (*Simon, Sioui*). A treaty right may be an expressed term in a Treaty, an implied term or reasonably incidental

to the expressed Treaty right. The scope of Treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by the Supreme Court of Canada (*Badger* 1996, *Sundown* 1999, *Marshall* 1999)

Where the parties disagree on the scope of obligations or what rights are provided for, a number of principles unique to Treaty interpretation apply. For example, Treaties should be liberally construed; ambiguities ought to be resolved in favour of the signatories in the context of historic Treaties; the goal of Treaty interpretation is to find the common intention and the result that best reconciles the interests of both parties at the time the Treaty was signed; the integrity and Honour of the Crown is presumed in such interpretations; the courts cannot alter the terms of the Treaty and Treaty rights cannot be interpreted in a rigid or static way as they must be updated to provide for modern exercise (*Marshall* 1999; 2005).

Trigger: Any of the three elements that are necessary for a duty to consult to exist. Specifically, a Crown conduct, a potential adverse impact and potential or established Aboriginal or Treaty rights that might be adversely affected.

With or Without Prejudice: Describes communication, either written or verbal. To designate a communication as “without prejudice” is to declare that the party does not waive its right to non-disclosure of the communication. Such communications may be referred to as being “off- the-record”. This term is often used during negotiations and litigation. Should there be a request for without prejudice or off-the-record discussion, advice from legal counsel should be sought.

In the context of consultation, if agreements or protocols are being entered into for the purposes of meeting Crown obligations to consult as per the *Haida*, *Taku River*, *Mikisew Cree* or *Sparrow* cases, it is recommended that the agreement be “with prejudice”. With prejudice means that the Crown can use this documentation in court as evidence that it has fulfilled its duty to consult obligations, and that the Aboriginal group may use the documentation in relation to its legal positions. Such communications may be referred to as being “on-the-record”.

ANNEX B – LEGAL CASE SUMMARIES

The case law outlined below relate to consultation and accommodation matters. However, federal officials should also consider judgements or cases that speak to potential or established Aboriginal or Treaty rights and title. These cases may influence or dictate government decisions on questions such as who to consult as well as the nature and extent of consultations and the requirement for accommodation.

1. Duty to Consult

Seminal Supreme Court of Canada cases

***Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73**

The Supreme Court of Canada dismissed the Province's appeal and allowed the appeal of Weyerhaeuser Company Ltd. The Court held that the Province has a duty to consult with the Haida about decisions relating to the harvest of timber from an area of the Queen Charlotte Islands over which the Haida have asserted, but have not yet proven, Aboriginal rights and title. The Court stated that good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required could not yet be ascertained. The Court found that the Province had failed to engage in any meaningful consultation. The Court also found that Weyerhaeuser did not owe the Haida any duty to consult or accommodate. The Court held that the duty to consult does not extend to third parties.

The Court stated that the Crown's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the Honour of the Crown which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. The duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title

claimed. As to the content of the duty, the Court said that, at all stages, good faith on both sides is required and sharp dealing is not permitted. The effect of good faith consultation may be to reveal a duty to accommodate.

The Court said that this process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim; nor does it impose a duty to reach an agreement. The Court also stated that, although the Crown may delegate procedural aspects of consultation to industry proponents of a particular development, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The Honour of the Crown cannot be delegated.

***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74**

The Supreme Court of Canada, applying its analysis in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] SCC 73, released concurrently with this decision, allowed the Province's appeal and held that the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of the Crown's duty to consult with the First Nation and to accommodate its concerns.

At issue was whether the Crown had a duty to consult prior to approving the re-opening of a mine and the construction of an access road to the mine through territory over which the First Nation claimed, but had not yet proven, Aboriginal rights and title. In *Haida*, the Court confirmed the existence of the Crown's duty to consult Aboriginal peoples prior to proof of rights or title claims. The Court found that the Crown's duty to consult was engaged in this case because the Province was aware of the First Nation's claims through its involvement in the Treaty negotiation process and knew that the decision to reopen the mine and to build the access road had the potential to adversely affect the substance of the rights and title claims.

The Court concluded that the Crown had fulfilled its duty to consult on the basis that the First Nation was part of the Project Committee, participating fully in the environmental review process; its views were put before

the appropriate Ministers and; the final project approval contained measures designed to address both immediate and long-term concerns of the First Nation.

The Court also stated that the Province was not under a duty to reach agreement with the First Nation and its failure to do so did not breach its duty of good faith consultations. The Court also confirmed that the Honour of the Crown cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation between the Crown and Aboriginal peoples as mandated by s. 35(1) of the *Constitution Act, 1982*.

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

The Supreme Court of Canada allowed the First Nation's appeal, quashed the Minister's decision to approve the construction of a winter road through Wood Buffalo National Park, Alberta, and returned the matter to the Minister for further consultation and consideration.

The Court held that the Crown's duty of consultation, which the Court said flows from the Honour of the Crown and its obligation to respect the existing Treaty rights of Aboriginal peoples, was breached in this case because the Minister failed to adequately consult with the First Nation in advance of the decision to build the road. The Court stated that when the Crown exercises its right under Treaty 8 to "take up" land, it is not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a Treaty right. Rather, the Court said that it must first consider the process by which the "taking up" is planned and whether it is compatible with the Honour of the Crown.

The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the Aboriginal people so as to trigger the duty to consult. In this case, the Court found that the duty to consult was triggered because the impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the First Nation's hunting and trapping rights over the lands in question.

The Court found that the Crown's duty to consult in this case lies at the lower end of the spectrum because the proposed road is fairly minor and situated on surrendered lands where the First Nation's treaty rights are expressly subject to the "taking up" limitation in Treaty 8.

With respect to the content of the duty to consult, the Court found that the Crown was required to provide notice to the First Nation and to engage it directly. This engagement should have included the provision of information about the project, addressing what the Crown knew to be First Nation's interests and what the Crown anticipated might be the potential adverse impact on those interests.

The Crown was also required to solicit and to listen carefully to the First Nation's concerns and to attempt to minimize adverse impacts on the First Nation's hunting, fishing and trapping rights. Had the consultation process gone ahead, the Court confirmed that it would not have given the First Nation a veto over the alignment of the road. The Court reiterated that consultation will not always lead to accommodation and accommodation may or may not result in an agreement.

David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy Mines and Resources et al. v. Little Salmon/Carmacks First Nation et al., 2010 SCC 53

This decision builds on the prior *Mikisew Cree* decision (2005) by setting out how the duty to consult applies to federal, provincial and territorial government conduct that may adversely impact lands and resources covered by more recent Land Claim Agreements. The Court held that the duty of consultation stems from the honour of the Crown and operates in law independently to treaties. A duty to consult can apply where Crown conduct may adversely impact treaty rights. The Little Salmon Carmacks First Nation (LSCFN) Treaty was not a "complete code" of all of the obligations that may exist as between the parties.

When assessing how the duty to consult applies to matters covered by a treaty, the first place to look is at the specific treaty terms. Treaties may shape how consultation is to be addressed.

The Court reiterated the importance of the honour of the Crown as a constitutional principle that inform all Crown dealings with Aboriginal people, including the interpretation and implementation of treaties. The Court reiterated the importance of treaties as part of the process of reconciliation and as providing guidance for the on-going relationship of the Crown and Aboriginal groups.

Treaty Interpretation Principles

Marshall: R. v. Marshall, [1999] 3 S.C.R. 456

The accused, a Mi'kmaq Indian, was charged with three offences set out in the federal fishery regulations: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. The only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760-61 that exempted him from compliance with the regulations.

The court held that extrinsic evidence of the historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms and even absent any ambiguity on the face of the treaty. Thirdly, where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones. There was more to the treaty entitlement than merely the right to bring fish and wildlife to truck-houses. While the treaties set out a restrictive covenant and do not say anything about a positive Mi'kmaq right to trade, they do not contain all the promises made and all the terms and conditions mutually agreed to.

Nowegijick: Nowegijick v. The Queen, [1983] 1 S.C.R. 29

Mr. Nowegijick is an Indian within the meaning of the *Indian Act* and a member of the Gull Bay (Ontario) Indian Band. During the 1975 taxation year Mr. Nowegijick was an employee of the Gull Bay Development Corporation, a company without share capital, having its head office and administrative offices on the Gull Bay Reserve. All the directors, members and employees of the Corporation live on the Reserve and are registered Indians.

The Federal Court of Appeal concluded that the tax imposed on Mr. Nowegijick under the *Income Tax Act* was not taxation in respect of personal property within the

meaning of s. 87 of the *Indian Act*. Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.

Ted Moses: Attorney General of Quebec v. Grand Chief Dr. Ted Moses, et al., 2010 SCC 17

The Vanadium case concerns the applicability of the *Canadian Environmental Assessment Act* ("CEAA") to a proposed mine project located in the territory contemplated by s. 22 of the James Bay and Northern Quebec Agreement ("JBNQA"). While the Vanadium case is nominally about environmental assessments, it is also relevant as the first Supreme Court decision to interpret the provisions of a modern treaty. While both sets of reasons are clear in taking the position that the JBNQA is a treaty covered by s. 35 of the *Constitution Act, 1982*, they diverge in the amount of analysis they provide as to how a modern treaty should be interpreted. It is clear that the Court sees a difference between how historic treaties and modern treaties are to be interpreted.

While it would seem to be correct to continue to posit that modern treaties are not to be interpreted in the exact same way as historic treaties, it will be interesting to see if the dissent's approach is adopted by a majority of the Court in a future decision, as that would help to clarify how the interpretation of modern treaties should differ.

The majority clearly took a contractual approach to interpreting the provisions of the JBNQA and sought to discern the common intention of the parties, but it remains to be seen whether they would take the same approach in other cases. Based on the Vanadium decision, it is clear that courts should pay careful attention to the terms of the agreement that comprises the modern treaty.

Interpretation and Application of Duty to Consult by Lower Courts

Since the seminal Supreme Court decisions noted above, lower courts across Canada have been assessing and applying the duty to consult to a variety of different kinds of Crown conduct and in relation to a number of different Aboriginal and Treaty rights. For a listing and greater details on these decisions contact your legal advisor.

2. Legal Tests for Assessing Interference with and Existence of Aboriginal and Treaty Rights

Interpretation of s. 35 (1): Test for Crown justification for infringement of s. 35(1) rights

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

Mr. Sparrow was prosecuted by the Attorney General of Canada under the federal *Fisheries Act* for fishing contrary to the terms of his Band's food fishing licence. The Supreme Court of Canada held that Mr. Sparrow enjoyed an Aboriginal right to fish for food which was protected by section 35 of the *Constitution Act, 1982*. According to the Court, the Crown must demonstrate a "clear and plain" intention to extinguish Aboriginal rights. In this case, the test had not been met by the Crown's evidence.

The Court also found that there is a fiduciary relationship between the Crown and Aboriginal peoples based on the need for the Crown to act honourably. Therefore, section 35 must be interpreted in a manner consistent with this relationship. The Court placed a high burden on the Crown to justify any infringement with the enjoyment of Aboriginal rights protected by s. 35.

See also *R. v. Badger* wherein the Court held that the justification test developed in *R. v. Sparrow* applied to Treaty rights.

Test for Aboriginal Title

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

This action involved a claim by the Gitksan and Wet'suwet'en hereditary Chiefs for Aboriginal title and an inherent right to self-government over 58,000 square kilometers of British Columbia. The Supreme Court of Canada ruled that, due to evidentiary problems with the case, a new trial is required to determine whether the plaintiffs enjoy the claimed Aboriginal title and self-government rights.

While not providing any guidance on the issue of rights of self-government, the Court made general pronouncements on the scope and content of Aboriginal title. In essence, if an Aboriginal group can establish that, at time of sovereignty, it exclusively occupied a territory to which a substantial connection has been maintained, then it has the communal right to exclusive use and occupation of such lands. The

Aboriginal group can use the lands for far ranging purposes including economic exploitation. The only limitations are that the lands can not be disposed of without surrender to the Crown nor can they be used in such a fashion that would destroy the Aboriginal group's special bond with the land.

The Court also ruled that both the federal and provincial Crown can justifiably interfere with an Aboriginal group's Aboriginal title. The Court rejected the province's counter-claim regarding provincial power to extinguish Aboriginal rights in finding that, since Confederation, only the federal Crown has such a power.

Roles of Boards and Tribunals

Rio Tinto Alcan Inc. et al v. Carrier Sekani Tribal Council, [2010] SCC 43

The Supreme Court of Canada unanimously held that the BC Utilities Commission (the Commission) had properly exercised its jurisdiction in relation to the duty to consult and had correctly determined that a duty to consult did not arise in this case.

The Supreme Court of Canada set out guidelines for determining whether a tribunal can assess the adequacy of consultation, when it can do consultation and when it cannot do either. The Court provided further guidance on what is required to engage a duty to consult and explained that it applies to current and future activities and impacts, not historical infringements.

In this case, the Commission had the authority to assess whether adequate consultation had occurred because it could decide questions of law and determine if the contract in issue was in the public interest. It also had the authority to consider any "other relevant factors" and make any order it considered advisable in the circumstances. These features of its statutory mandate authorized and required the Commission to address whether the duty to consult was triggered and if there had been adequate Crown consultation and accommodation. The Commission did not, however, have jurisdiction to engage in consultation itself.

The Court confirmed that the duty to consult is a constitutional duty.

Tests for Aboriginal Rights

***R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Gladstone*, [1996] 2 S.C.R. 723;**

***R. v. NTC Smokehouse Ltd.*, [1996] 2 S.C.R. 672**

These cases involve the question of whether section 35 of the *Constitution Act, 1982* includes, as an Aboriginal right, a right to fish commercially. In the *R. v. Van der Peet* case, the Court outlined the test for identifying Aboriginal rights protected under section 35. Essentially, an Aboriginal group must establish that, at time of contact with Europeans, the particular activity claimed as an Aboriginal right was a practice, tradition or custom that was integral to the society's distinctive culture.

Applying the above test to the facts of the cases, the Court ruled that the accused in *R. v. Gladstone* had established an Aboriginal commercial fishing right. However, the Court also indicated that, in the context of Aboriginal commercial fishing rights, there are no internal limitations to the right. As such, the *R. v. Sparrow* justification test had to be refined for Aboriginal commercial fishing rights. Other considerations, apart from conservation goals, are to be taken into account in determining whether governmental restrictions were justified.

Objectives such as the pursuit of economic and regional fairness, as well as, the historic non-native participation in the fishery are relevant objectives in the context of the justification analysis. Aboriginal rights have to be given priority but they also have to be reconciled with other rights and interests. The case was remitted for trial on the question of whether the regulation of the accused's Aboriginal commercial fishing rights could be justified.

***R. v. Powley*, [2003] SCC 43**

The accused were charged with unlawfully hunting moose and possessing game contrary to ss. 46 and 47(1) of the *Ontario Game and Fish Act*. The central issue was whether two individuals from the Sault Ste. Marie area, who self-identify as Métis, can establish Métis Aboriginal rights to hunt that are protected by s. 35 of the *Constitution Act, 1982*.

The Supreme Court of Canada held that the impugned legislation was of no force or effect with respect to the accused on the basis that, as members of the Métis community in and around Sault Ste. Marie, the accused have an Aboriginal right to hunt for food under s. 35(1). The Court concluded that the lack of recognition of any Métis right to hunt for food in the legislation infringed the Métis Aboriginal right and conservation concerns did not justify the infringement. The Court held that, to support a site-specific Aboriginal rights claim, the claimant must demonstrate membership in an identifiable Métis community with some degree of continuity and stability as established through evidence of shared customs, traditions and collective identity, as well as demographic evidence.

The Court modified the pre-contact aspect of the *R. v. Van der Peet* test to reflect the distinctive history and post-contact ethnogenesis of the Métis. The test for Métis rights should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land after a particular Métis community arose but before it came under the effective control of European laws and customs.

The Court found that the term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. While not setting down a comprehensive definition of who is a Métis for the purpose of asserting a claim under s. 35, of the *Constitution Act, 1982*, the Court cited three broad factors as indicia of Métis identity: self-identification, ancestral connection and community acceptance.