Government of Canada
Gouvernement du Canada

Aboriginal Consultation and Accommodation

Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult

February 2008

Canada

Aboriginal Consultation and Accommodation

Interim Guidelines
for Federal Officials
to Fulfill the Legal Duty to Consult

Table of Contents

Part A – Introduction

I Introduction 5

II Purpose 7

III Context 7
- Historical 7
- Legal 8
- Geographic 8

IV Guiding Principles 9
- Legal Principles 9
- Principles from Practice 10

Part B – Information for Managers

I Roles and Responsibilities 15
- Federal Departments/Agencies (the Crown) 15
- Aboriginal Groups 17
- Provinces and Territories 17
- Third Parties 18

II Getting Organized For Crown Consultation Processes 18
- Organizing your Department/Agency for consultation 19
- Financial and human resources considerations 21
- Training considerations 22
- Engaging DOJ counsel in the consultation process 23
- Conducting consultations – checklist of fundamentals 24

Annex A: Definitions 25

Annex B: Legal Case Summaries 29

Part C – Information for Practitioners

The Crown Consultation Process 37

Phase 1: Pre-Consultation Analysis and Planning 38

– Step 1: Describe and map out intended project/activity 39

– Step 2: Conduct background research on Aboriginal groups in the area and their rights and identify potential adverse impacts of the proposed project/activity 40

– Step 3: Undertake initial assessment and analysis, including strength of claim assessment 42

– Step 4: Determine potential severity of adverse impacts of proposed project/activity on established or potential section 35 rights 44

– Step 5: If a legal duty appears to exist, establish its content (initial form and content of consultation process) 46

Phase 2: Crown Consultation 48

– Implement the consultation process 48

Phase 3: Accommodation 51

– Step 1: Collect background information supporting the basis for accommodation 53

– Step 2: Review and determine accommodation option(s) 54

– Step 3: Determine the selected accommodation options(s) 55

– Step 4: Document and communicate the decision(s) 55

Phase 4: Implementation, Monitoring and Follow-Up 56

– Step 1: Implement the decision 56

– Step 2: Monitoring 57

– Step 3: Follow-up 57

End notes 58

Part A

Aboriginal Consultation and Accommodation

Interim Guidelines to Fulfill the Legal Duty to Consult

An Introduction

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. In addition to good governance objectives, the federal government consults with Aboriginal people 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 focus of the Interim Guidelines however is not on the broader context but on when, who and how to consult pursuant to the common law duty to consult most recently described by the Supreme Court of Canada in *Haida*[1], *Taku River*[2] and *Mikisew Cree*[3].

The common law duty to consult is based on judicial interpretation of the obligations of the Crown in the context of existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, recognized and affirmed in section 35 of the ***Constitution Act, 1982***[4] [5]. In the *Haida* and *Taku River* decisions, the Supreme Court of Canada (SCC) held that the Crown has a legal duty to consult and, if appropriate, accommodate, when the Crown contemplates conduct that might adversely impact section 35 rights (established or potential). This duty has been applied to an array of Crown actions and in relation to a variety of potential or established Aboriginal and treaty rights. For the purposes of these Guidelines, the legal duty to consult refers to the common law duty; statutory or contractual obligations to consult will be referenced as such.

In these decisions, the SCC also determined that the legal duty to consult stems from the Crown's unique relationship with Aboriginal peoples and must be discharged in a manner that upholds the honour of the Crown and promotes reconciliation of Aboriginal and non-Aboriginal interests. The SCC is looking at how the Crown manages its relationships with Aboriginal groups and how it conducts itself when faced with constitutionally protected Aboriginal and treaty rights. Crown decisions can be subject to review by a court prior to the final definition of an established right or the resolution of an outstanding claim. The scope and content of consultation will be proportionate to the strength of the potential right and the seriousness of the potential adverse effect of the contemplated activity. Consultation may reveal a need to accommodate.

Other than this broad general framework, the courts have thus far left the detailed exercise of implementing processes designed to fulfill the legal duty, to government. An awareness of the duty and a consideration of when and how it

might apply and how it corresponds with existing departmental or agency consultation policies must become part of the government's daily business including such activities as operational decisions, policy development, negotiations and legislative processes. These Interim Guidelines seek to provide guidance in determining how and when the legal duty to consult is triggered and need to be considered by government officials in the course of their work. They reflect the federal government's understanding of the legal parameters of the duty.

In the coming months, work will be undertaken to develop a federal policy on consultation and accommodation that will address outstanding legal and policy matters including the scope of the duty, who is the Crown, the nature and scope of accommodation, capacity of government and Aboriginal groups to engage in consultation, and the reconciliation of the evolving legal duty with statutory and other legally based obligations to consult (e.g. comprehensive land claim agreements). It is expected that such a policy, to be informed by engagement with First Nations, Inuit and Métis groups, will enable the legal duty to be fulfilled in a more consistent, coherent, and efficient way across the federal government.

The evolution of consultation case law combined with the "lessons learned" and best practices from within and outside the federal government, will mean that these Interim Guidelines will change over time. In addition, the development of federal policy on consultation and accommodation is anticipated to have a significant influence on the content of these Guidelines. As part of this ongoing process, departments and agencies need to review their current approaches to consultation with Aboriginal groups to ensure that they are consistent with these Guidelines and with the developing consultation policy framework. It is the responsibility of each federal department/agency that is engaged in the contemplated Crown conduct to ensure that adequate consultation and accommodation measures where appropriate, are undertaken for each decision or action it takes, or is part of, which may give rise to a duty to consult.

This document comprises three parts: Part A – Introduction to Interim Guidelines on Aboriginal Consultation and Accommodation; Part B – Interim Guidelines for Managers; and Part C – Interim Guidelines for Practitioners. Part C includes guiding principles for consultation and a step-by-step guide that federal departments and agencies can use to determine if there is a legal obligation to consult, how it may be fulfilled and detailed lists of the kinds of factors that will assist them in managing their consultation efforts.

II Purpose

The purpose of this document is to provide practical advice and direction to federal departments and agencies regarding the legal requirement for the Crown to consult with Aboriginal groups and, where appropriate, accommodate their interests. The Interim Guidelines aim to provide steps and pointers for federal departments and agencies when assessing whether consultation with Aboriginal groups is needed on a legal basis and, if so, how to get organized for consultations and what is needed to ensure that meaningful consultation is carried out. Implementation of these Guidelines is a step towards reconciling the need for consistency in federal practices and approaches with the law, by providing common information and tools, and draws upon existing information within the federal system.

All federal departments and agencies are required to comply with the legal duty to consult and possibly accommodate. In addition, a wide array of consultation practices is currently being used across the country (including the existence of many project-specific consultation arrangements). Leaving the decisions on how best to carry out consultation responsibilities solely within the purview of individual federal departments and agencies would likely lead to inconsistent results and potentially increase Canada's legal risk. However, a highly prescriptive set of guidelines would amount to "reinventing the wheel" in many cases where existing consultation processes may be adequate and preferred by the Aboriginal groups involved. Thus, the objective of these Guidelines is to provide an approach to consultation that reconciles the need for consistency in exercising the Crown's legal duty to consult with the desired flexibility, responsibility and accountability of departments and agencies in determining how best to do so.

III Context

The context within which the requirement to consult Aboriginal groups and, where appropriate, accommodate their interests, may be divided into three distinct but related components: historical, legal and geographic.

1. Historical

Consultation with First Nations, Inuit and Métis representatives is a reality across Canada that predates the Supreme Court of Canada decisions. While

these consultation practices differ by project type or by government department/agency, many were developed jointly with Aboriginal representatives and applied in a manner satisfactory to the parties involved. Further, existing public consultation processes may be enough to satisfy the requirement to consult in many situations. In certain cases, these Interim Guidelines will complement or supplement existing consultation processes that exist in different areas of the country. Industry may also establish consultation processes. All existing processes should be assessed to determine what further steps if any the Crown must take to fulfill its legal duty to consult in particular circumstances. An illustrative example is the legislated federal environmental assessment process that has public consultation mechanisms and specific information requirements which may vary from the requirements for the legal duty to consult and will need to be reconciled by federal officials for a proposed project/activity that might have potential adverse effects on section 35 rights. Departments and agencies will need to review their on-going practices in light of the Interim Guidelines set out in this document and make appropriate adjustments or changes.

2. Legal

The legal duty to consult developed in the Supreme Court of Canada decisions of *Haida, Taku River* and *Mikisew Cree* forms the basis of these Interim Guidelines. There are a number of other legal reasons and sources for the Crown obligation to consult with Aboriginal groups, including: statutory and regulatory provisions, comprehensive land claim agreements, treaties, contractual arrangements, and more specific common law requirements that may be triggered in a particular context. It is important to identify the legal source of potential consultation obligations as this will inform and may guide what is required in the particular context. Department of Justice legal counsel can assist in this regard.

3. Geographic

The application of common approaches to consultation and, where appropriate, accommodation across the country, must be reconciled with the fact that established and potential Aboriginal and treaty rights vary in both scope and content. Such rights vary depending on the particular treaty, the kinds of activities, resources or claims that exist, and the area of the country where the project/activity is proposed to take place. As well, modern land claim

agreements often contain their own consultation provisions, which were agreed upon by all parties. Consultation procedures and approaches must therefore be sensitive to these differences and provide for appropriate adaptations to address the different kinds of rights and obligations on the Crown that are at issue in different geographical areas in the country.[6]

For reference purposes, the Natural Resources Canada web-site offers a map of Canada that illustrates the geographic locations of Treaties and comprehensive land claims including settlement areas, traditional territories and those areas under negotiation (this 2004 version is in the process of being updated and will be available soon). http://cccm.nrcan.gc.ca/english/comprehensive_claims_e.asp

IV Guiding Principles

When developing and implementing processes for consultation and accommodation, the Crown will be guided by a series of principles that have emerged both from the case law and consultation practice by government over the years.

Legal Principles

The following legal principles apply in all contexts in which consultation obligations may arise. They outline the basis for this obligation and the objectives that the Court has sought to promote through this common law duty.

Honour of the Crown – The honour of the Crown is at stake in all dealings between the Crown and Aboriginal peoples. The duty to consult and accommodate, where appropriate, stems from the Crown's unique relationship with Aboriginal peoples and must be discharged in a manner that promotes reconciliation of Aboriginal and non-Aboriginal rights and interests.

Reconciliation – 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. Crown efforts to consult with, and accommodate the interests of Aboriginal groups whose rights may be adversely affected, should be consistent with the overarching objective of reconciliation with Aboriginal groups.

Reasonableness – Crown efforts to reconcile and balance other societal interests and established or potential Aboriginal and treaty rights must be reasonable. Consultation processes need to reflect reasonable and genuine efforts by all parties.

Meaningful Consultation – The duty to consult requires a genuine effort to address legitimate concerns and interests that relate to the impacts of contemplated Crown conduct on section 35 rights. To be meaningful, there must be a genuine willingness and ability to adjust the contemplated conduct, if such is appropriate.

Good Faith – Consultation must be guided by genuine efforts. Such efforts require the disclosure of relevant factors and information, no predetermined outcome, no oblique motive, and the absence of any appearance of any sharp dealing.

Responsiveness – Consultation is intended to respond to Aboriginal rights and interests, to minimize the potential adverse affects of a given activity, and to substantively address the concerns raised. To do so, it is necessary that the Crown be prepared to respond, have some degree of flexibility in relation to the planning and implementation of the proposed activity, and consider potential accommodation measures that may be appropriate in a given context.

Principles from Practice

Mutual Respect – Consultation must be based on mutual respect for all participants, taking into account different interests, perspectives, cultures, understandings and concerns.[7]

Accessibility and Inclusiveness – It is important to ensure the participation of Aboriginal groups who have an interest in or who may be affected by the decision. For consultation based on a legal duty to consult, participation would have to include specific Aboriginal groups whose established or potential rights could be negatively affected. Appropriate measures should be taken to ensure access of Aboriginal groups to the process, taking into account community capacities, geographic location and/or their linguistic, socio-economic background or physical capabilities.

Openness and Transparency – Consultation needs to be a procedurally fair and clear process. Consultation should be carried out with consideration of:

- early engagement;
- the provision of clear, accurate and relevant information;
- informing participants on how their concerns were considered in the decision-making process and reasons why their views were not reflected; and,
- documenting results of the process.

Efficiency – The consultation process ought to be designed to make the most efficient use of existing and proposed processes and resources while maximizing the contribution of all participants.

Timeliness – Consultation is most effective if initiated as early as possible before decisions are made. Clear and reasonable timelines should be established for input and comments and these timelines need to be communicated clearly.

Part B

Aboriginal Consultation and Accommodation

Interim Guidelines
to Fulfill the Legal Duty to Consult

Information for Managers

I Roles & Responsibilities

Federal Departments and Agencies (the Crown)

Where it has been determined that there is a legal duty to consult, as a result of an assessment that the proposed Crown conduct has the potential to affect a credible claim to Aboriginal or treaty rights (see Part C), effective consultation requires collaboration with Aboriginal groups and coordination and cooperation within the federal government.

The federal government as a whole is responsible to ensure that any and all consultation and, where appropriate, accommodation obligations are fulfilled. Limitations on any one department, agency or other federal entity will not limit what is required of the Crown in the circumstances. Hereinafter, the term department/agency will be used to denote any and all federal entities involved in the Crown conduct/activity and consultation process. As a result, it is important for all federal departments/agencies involved in an activity that gives rise to the legal duty to consult, to work together and to coordinate their efforts to discharge their respective mandates in a manner that assists to fulfill any Crown consultation duties. It is the responsibility of each federal department/agency that is engaged in the activity to ensure that adequate consultation and measures to accommodate, where appropriate, are undertaken for each decision or action they take that may give rise to a duty to consult.

There may also be instances where other federal departments/agencies need to be involved in the process to ensure that the Crown is adequately responsive and able to deal meaningfully with the Aboriginal groups involved. Coordination and support within the federal government are essential to ensuring that the Crown is able to fulfill its consultation obligations.

The following elements are appropriate for honourable Crown conduct in the context of consultation with Aboriginal groups (whether on the basis of good governance or a legal duty) and if they are followed, will help to ensure that the Crown will have acted honourably:

- Clearly "map out" the proposed Crown activity, or approval process for a third party activity, noting all potential federal departments/agencies that may be involved, the decisions or types of conduct each may be mandated to make or do, and the nature of the activity or decision;

- Clearly identify who has the authority to consult on behalf of Canada in the particular context – which department/agency has the mandate and ability to sign any agreements or protocols reached on behalf of Canada. (i.e. what level of authority is necessary, what mandates are required or currently in place and what is the potential process for seeking approvals?). Where it is not clear which department/agency has the authority, it is important that all involved conduct their work collaboratively and the designation of a "lead" department/agency is strongly encouraged;

- Where a third party or non-government entity may be involved, determine how information, timelines and project decisions are to be exchanged with and communicated to government and whether it anticipates carrying out consultations with Aboriginal groups;

- Inform itself of the established or potential Aboriginal and treaty rights that may be adversely impacted by the proposed conduct;

- Ensure that an assessment of the strength of claim has been done and documented;

- Ensure that relevant information regarding the government or third party activity is provided to appropriate Aboriginal groups in a timely manner, including the appropriate contact within government to respond to and any particular timelines that may be at issue;

- Engage the Aboriginal groups regarding the proposed activity so that they have an opportunity to outline their established or potential Aboriginal and treaty rights and to articulate concerns regarding potential adverse impacts on their rights or interests;

- Ensure there is a reasonable process for engaging Aboriginal groups (may be within or in addition to public processes or established regulatory processes) and keep records of all communications;

- Ensure that all communications received from Aboriginal groups are responded to in a coordinated and timely fashion;

- Ensure 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 discussing how discussions or particular materials exchanged in the course of the consultation process may be treated or classified;

- Ensure that any consultations carried out by third parties or Crown agents that the Crown intends to rely on are also available to the Crown;

- Consider, assess, and respond to the representations of the Aboriginal groups;

- Consider opportunities for mitigating all potentially adverse impacts on the Aboriginal groups and their respective section 35 rights, and seek ways to minimize such impacts; and,

- Be responsive to participants on what decisions have been made, how their concerns and representations were considered or why they were not considered in the decision making process.

Aboriginal Groups

The Crown may reasonably expect Aboriginal groups to:

- Clearly outline in a timely manner the nature and scope of the Aboriginal or treaty rights they claim and the potential adverse impacts that the Crown activity, or that of a third party, will have on such rights;

- Make the concerns of the affected Aboriginal groups known to the Crown;

- Not frustrate reasonable good faith attempts to consult by the Crown or take unreasonable positions that thwart government from making decisions (*source*: paragraph 42 of SCC decision *Haida Nation* v. *British Columbia*); and,

- Attempt to reach a mutually satisfactory resolution to a particular situation.

Provinces and Territories

The Supreme Court of Canada decisions on *Haida*, *Taku River* and *Mikisew Cree* apply to provincial and territorial governments. Provincial and territorial governments have, to varying degrees, instituted their own Crown consultation processes for projects within their jurisdictions. For initiatives involving both

federal and provincial governments, opportunities to coordinate efforts with provinces and territories should be pursued to the maximum extent possible, to increase efficiency by minimizing duplication and conflict.

Third Parties

Third parties, such as industry proponents, do not have a legal obligation to consult Aboriginal groups whose rights may be adversely impacted by their activities. The Crown alone is legally responsible for any consequences that flow from its actions and interactions with third parties that may adversely affect Aboriginal and treaty rights. However, there are normal due diligence and like business practices that are carried out by industry in the course of their interactions, relations and dealings with Aboriginal groups. Such practices may assist the overall consultation efforts.

The Courts have also suggested that the Crown can delegate procedural aspects of consultation to third parties, as in the case of proponents' roles within environmental assessments or through the placement of conditions on licenses or authorizations to carry out certain activities. In addition, case law suggests that the Crown can benefit from the outcomes of a third party consultation process and any accommodation measures provided by third parties. The role of such third party activities within the consultation processes should be incorporated into any Crown consultation plans and efforts.

In the case of legally based consultation, the final responsibility for consultation and accommodation rests with the Crown as the honour of the Crown cannot be delegated.

II Getting Organized for Crown Consultation Processes

This section outlines how managers in federal departments and agencies should prepare for consultations including examining financial, human resources and training requirements and the need to involve Department of Justice counsel. It complements Part C which provides a step-by-step guide for practitioners who will be developing and implementing Crown consultation processes on the ground. Both Parts B and C serve as interim measures to assist in consistency and efficiency until federal policy on consultation and accommodation is developed.

Organizing your Department/Agency for consultation

Within its mandate, each federal department/agency is responsible for meeting the legal obligation to consult with Aboriginal groups. Some federal departments/agencies may have already established processes as a matter of good governance. These should be reviewed in order to ensure that they meet the standards necessary to fulfill the common law duty to consult.

In Nova Scotia, there is a province-wide consultation process developed as part of a larger tri-partite negotiations process dealing with Aboriginal and treaty rights issues. The Terms of Reference for a Mi'kmaq/Nova Scotia/Canada consultation process are now being implemented on a trial basis by the Parties for approximately one year. This "test-drive" will enable the Parties to decide whether to amend the Terms of Reference in advance of final approval. Although the consultation process established therein is optional, the Parties hope that it will become the preferred choice for government departments and agencies whenever the duty to consult with the Mi'kmaq in Nova Scotia arises.

The following list identifies some of the tasks to be undertaken in preparation for consultation:

- Review options for consultation approaches based on types of activities the department/ agency typically engages in or has the potential to engage in and existing consultation processes that may already be in place within regions or by type of project;

- Identify opportunities and constraints facing the department/agency in conducting consultations such as financial and human resources available;

- Review current mandates and authorities of departments /agencies in relation to considering specific consultation agreements or protocols with Aboriginal groups and scope for any potential accommodation measures;

- Ensure that potential accommodation measures that are proposed are reviewed by and approved by senior management of the department/agency;

- Clarify potential roles and responsibilities of department/agency staff and management and put into place a records management procedure;

- Identify person/body with decision-making authority or authorities;

- Determine if there are other departments/agencies of government with potential consultation obligations with the same Aboriginal groups and establish any appropriate coordination mechanisms;

- Identify other interested departments/agencies that should be kept informed of your department/agency's consultation;

- Review the current department/agency relationships with Aboriginal people, groups and organizations and explore opportunities to build on and enhance these relationships in anticipation of consultation (e.g. see text box above on Nova Scotia consultation process);

- Consider how to best consult and communicate with Aboriginal groups, taking into account potential barriers to communication such as language and culture;

- Review options with department/agency's legal counsel to ensure departmental or agency procedures and processes are compliant with the legal duty to consult;

- Determine if Canada is in active litigation with the Aboriginal group(s) involved and, if so, DOJ counsel will assist in ensuring that the consultation approach taken does not prejudice Canada's legal positions or arguments; and,

- For a proposed project/activity that might have implications for Métis and Non-status Indian interests, the Office of the Federal Interlocutor for Métis and Non-status Indians (OFI) serves as a resource centre for information relating to Métis and Non-status Indian interests, and is available for specific information exchanges as follows:
  - To assist in bringing more consistency to consultation processes across the federal government with Métis or Non-status Indian groups, it is recommended that OFI be informed by departments/agencies of any decisions to consult with these Aboriginal groups; and,
  - OFI can provide advice on communications with Métis and Non-status Indian groups, if the department/agency decides that a consultation is warranted.

Financial and human resources considerations

Financial and human resources need to be reviewed to determine how the consultation initiatives will be supported. For example, federal departments/agencies need to consider:

- Frequency of consultation related activities taking place both internally and with the Aboriginal groups and other third parties;
- Potential extent of legal duty and proposed consultation process to be undertaken;
- Departmental costs/expenditures related to proposed consultation process;
- Departmental authority or potential programs or initiatives available for providing funds to Aboriginal groups, where appropriate;
- Opportunities for collaboration and sharing costs of consultation with other federal departments/agencies, provincial/territorial governments and industry;
- Opportunities to foster aggregations among Aboriginal groups (if they do not already exist) to enhance efficiencies and reduce costs; and,
- Specific internal operating requirements such as,
  - capacity requirements,
  - planning and research,
  - evaluation,
  - records management,
  - communications,
  - training, and,
  - other support.

When calculating the financial and human resource requirements for consultation, federal departments/agencies should also consider the cost implications for the participation of Aboriginal groups. As a general rule, the courts have indicated that consultation must be meaningful and that the process must be reasonable. Such Aboriginal participation improves outcomes in decision-making and the courts have already looked favourably upon the government providing assistance to Aboriginal groups for their participation in the consultation process.

For example, this might include support for:

- information sharing/awareness-raising,
- participation at meetings,
- travel and accommodation,
- preparation of reports,
- training,
- communications,
- research and development, and,
- land use, traditional use or targeted resource planning.

During this planning phase, refer to Treasury Board Secretariat guidelines on expenditures as well as department/agency-specific policies, practices and guides.

Training considerations

Training is critical to a consistent understanding of the duty to consult and its implementation. Training will:

- Increase awareness and understanding of what the legal duty to consult entails;
- Promote an understanding of the roles and responsibilities of everyone in the consultation process;
- Identify the specific implications for the department/agency;
- Inform staff of any specific expectations;
- Provide an opportunity to share experience and information on practical approaches and tools; and,
- Provide a basis for the development of common approaches, analyses and practices.

Note that the Department of Justice legal counsel is willing to participate in and contribute to these consultation training sessions.

Engaging Department of Justice (DOJ) counsel in the consultation process

While DOJ is not responsible for conducting consultations, it is important to engage your DOJ counsel throughout the course of a consultation process to ensure that legal obligations to consult are recognized where they may arise and are in play and that consultation processes put in place will fulfill legal obligations. DOJ provides an important supportive role to departments /agencies on the legal aspects of consultation policy choices and approaches, especially as it relates to consistency across the federal government. In particular DOJ counsel should be involved in the following specific aspects of consultation:

- In the context of a planned government activity, legal counsel can assist in determining whether the government has a legal duty to consult, when it may be engaged and the scope or extent of that obligation. Legal counsel may also be consulted in those situations where it has already been determined for policy, relationship, or other reasons that a federal department/agency needs to consult with Aboriginal groups (this would enable an assessment to be done to ensure that a legal duty is not implied where it does not exist).

- Once a federal department/agency has determined the basic facts, advise your legal counsel on the consultation approach to help determine its reasonableness with respect to fulfilling the legal duty to consult.

- As the consultation is underway, legal counsel may be called upon to:
  - ensure that the proposed approach to the consultation – including statements of government intentions and planned undertakings – are reasonable and appropriate from a legal perspective;
  - provide a strength of claim assessment to assist in determining the degree/scope of consultation and potential accommodation that may be required;
  - discuss document disclosure and the creation of a record of the consultation process; and,
  - in the concluding stages of the consultation, discuss what documentation the department/agency should retain for the official record, including any formal decisions or commitments that may be appropriate from any or all of the parties that were involved in the process.

After the consultation has been concluded and a project has been or is being actively implemented, the effective implementation of the accommodation plan, if any, will require the federal department's/agency's review from time to time, and may require adjustment if circumstances change.

Conducting consultation – checklist of 'fundamentals'

- Ensure adherence to the guiding principles (see Part A)
- Confirm that prescriptive, or required process decision points are followed to achieve results
- Ensure that proper documentation of the process is retained
- Incorporate measures to assess progress and to evaluate the success of the process, where appropriate (i.e. lessons learned).

Annex A

Definitions

Aboriginal group: A community of Indian, Inuit or Métis people that holds or may hold Aboriginal or 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, i.e. 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.

Capacity: The ability of an individual to understand the nature and effects of their acts. In this context, it is the ability of Aboriginal groups to understand the nature of the activity/project the Crown is contemplating and how that might impact on what they may hold as rights.

Common law: In general, a body of law that develops through judicial decisions, as distinguished from legislative enactments, relating to the government and security of persons and property.

Comprehensive land claim: A comprehensive land claim is based on the assertion of continuing Aboriginal rights and claims to land that have not been dealt with by treaty or other means. Comprehensive land claim negotiations address concerns raised by Aboriginal people, 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 the Crown is contemplating an activity, the Crown must inquire as to whether there are

any established or potential Aboriginal or treaty rights that may be adversely affected by this activity.

Crown: Refers to all government departments, ministries (both federal and provincial) and Crown agencies and includes all government employees that are doing the work of the government. The duty to consult is an administrative act and it is an obligation of the government as a whole. In *Haida* and *Taku River*, 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 affect established or potential Aboriginal or treaty rights.

Crown conduct: Means any activity, project or undertaking by the federal government in the exercise of its jurisdiction/authority. The federal government may be in charge of the project or it may be approving a project through permits and authorizations. In either context, its actions would constitute Crown conduct.

Crown knowledge: The Supreme Court of Canada stated that the legal duty to consult arises when the Crown contemplates conduct that might adversely affect existing or potential section 35 rights of which the Crown has "real or constructive knowledge" (see definition above). Therefore, an assessment of whether the Crown has such knowledge is part of the first step in assessing whether the legal duty to consult is triggered in a particular case. If the Crown has no such knowledge, there is no legal duty to consult.

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.

Meaningful consultation: Consultation depends on the circumstances, but it must always be meaningful. At a minimum, consultation requires providing affected Aboriginal groups with timely notice of intended Crown conduct along with objective information to assist in the understanding of the proposed conduct and its associated impact on established or potential Aboriginal and treaty rights. Where the strength of the claim is strong, or the right is established, and the potential adverse impact is strong, consultations may

entail: the opportunity to make submissions; formal participation in the decision-making process; provision of written reasons to show that the Aboriginal concerns were considered; and to reveal the impact the Aboriginal group had on the decision. The *Mikisew Cree* case has confirmed that the Crown cannot satisfy its legal duty to consult by making unilateral decisions to address what it perceives to be Aboriginal concerns in the absence of consultation.

Métis: For purposes of section 35 rights, the term Métis refers to distinctive peoples who, in addition to their mixed Indian/Inuit and European ancestry, developed their own customs, and recognizable group identity separate from their Indian 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.

Section 35 rights: Existing Aboriginal rights, including Aboriginal title and treaty rights (section 35 of the ***Constitution Act, 1982***).

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).

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 *Haïda*, *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

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 legal 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.

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 Gitskan and Wet'suwet'en hereditary Chiefs for Aboriginal title and an inherent right to self-government over 22,000 square miles 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 counterclaim regarding provincial power to extinguish Aboriginal rights in finding that, since Confederation, only the federal Crown has such a power.

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.

Part C

Aboriginal Consultation and Accommodation

Interim Guidelines
to Fulfill the Legal Duty to Consult

Information for practitioners

Information for Practitioners

Part C contains recommended steps for Crown consultation that may apply when the federal government decides to implement a consultation process pursuant to the legal duty to consult. Specifically, the courts have held that when the Crown (federal, provincial or territorial) contemplates conduct that may adversely affect established or potential Aboriginal and treaty rights for which it has real or constructive knowledge, it has a legal duty to consult with the rights holders.

The kinds of Crown activities that may attract the legal duty to consult vary. The steps, tips and relevant factors outlined below are provided with a variety of kinds of government conduct in mind. Such conduct may involve a government initiative by a federal department/agency (i.e. management and disposal of Crown lands, a construction project, change in use of lands, etc.) or it may involve government approvals/authorizations for an activity proposed by a third party (issuance of licenses, permits, authorizations for the use of lands or resources). The approach to consultation developed for each context will necessarily vary. This same basic approach may also be appropriate for consultation on a policy or good governance basis.

The Crown Consultation Process

Introduction

Depending on the circumstances, a consultation process with Aboriginal groups may involve up to four phases:

(a) Pre-consultation analysis and planning

(b) Consultation process

(c) Accommodation

(d) Implementation, monitoring and follow-up

The following sections will discuss each phase of the consultation process and provide guidance on the steps to consider in each phase. Where there is more than one federal department/agency or other government(s) involved, the steps should be done collaboratively for greater efficiency.

Phase 1: Pre-Consultation Analysis and Planning

1. Describe and "map out" the intended project or activity
2. Conduct background research on Aboriginal groups in the area and their rights, established and potential; and identify potential adverse impacts of the proposed project/activity
3. Undertake initial assessment and analysis, including strength of claim assessment
4. Determine potential severity of the adverse impacts of proposed project/activity on potential or established s. 35 rights
5. If a legal duty appears to exist, establish content of duty (initial form and content of a consultation process)

Phase 2: Crown Consultation

1. Implement the consultation process

Phase 3: Accommodation

1. Collect background information supporting the basis for accommodation
2. Review and determine accommodation option(s)
3. Determine the selected accommodation option(s)
4. Document and communicate the decision(s)

Phase 4: Implementation, Monitoring and Follow-Up

1. Implement the decision(s)
2. Monitor
3. Follow-up

Phase 1: Pre-Consultation Analysis and Planning

In order to determine whether there is a legal duty to consult, the scope and content of that duty, and how to design the consultation process, the department/agency needs to assemble facts and information as early as possible to enable an initial assessment and analysis to be done of the established or potential section 35 rights and the potential adverse impacts of the proposed project/activity. This includes information on:

- proposed project/activity;

- general and specific information on the Aboriginal groups that reside in the area;
- current and past uses of the area;
- indicators of established or potential Aboriginal and treaty rights;
- indicators of pre-1982 extinguishment of rights or no continuity of use;
- any interests or concerns that may relate to the proposed project/activity; and,
- any information relating to potential adverse impacts on established or potential Aboriginal and treaty rights as a result of the various implementation options.

After assembling these facts, work with DOJ counsel to undertake an initial assessment of the established or potential section 35 rights and the potential adverse impacts that the proposed project/activity may have on those rights to determine if there is a legal obligation to consult. If it is determined that there is a legal duty to consult, DOJ can assist in the determination of the scope (degree) of the duty. Specific aspects of this approach are described in detail below.

Step 1: Describe intended project/activity

The first step involves describing the project/activity contemplated and determining who within the Crown is responsible for carrying it out or its authorization. It may assist to actually "map out" the federal departments/agencies that may be involved, what decisions they are responsible for and any timelines that apply.

Questions for consideration include:

✓ What is the nature of the proposed project/activity?

✓ What is the purpose of the project/activity?

✓ What is entailed in developing the project/activity?

✓ Which department, agency, Crown Corporation, Authority, Board, Review Panel or other federal body is responsible for carrying out the particular project/activity or its authorization?

✓ Is there more than one federal body involved?

✓ Are there corporations/ provincial or territorial governments/ third parties that might also be involved?

✓ Are there any specific statutes, regulations, agreements or protocols that refer to the matter of Aboriginal consultation?

✓ What is the mandate or scope of authority of those involved in the project/activity or its authorization and are there others that ought to be involved?

✓ What type of decision(s) must be made in relation to the project/activity?

✓ What is the location or geographic application of the project/activity?

✓ What is the potential impact of the project/activity on the land or natural resources (where applicable)? Have any assessments of such been made to date?

✓ Have any options/alternatives within the proposed project/activity been identified?

Step 2: Conduct background research on Aboriginal groups in the area and assess what established or potential section 35 rights may exist and identify potential adverse impacts

Federal departments/agencies must gather sufficient information to make a preliminary assessment of what potential or established section 35 rights are in question (i.e. hunting, fishing, self-government rights, cultural rights etc.), whether there is a credible basis for such claims and whether there are potential adverse impacts that the project/activity may have on such rights. This will allow them, in consultation with DOJ, to make an initial assessment (see step 3) of whether there is a legal duty to consult.

Some questions to consider when preparing and gathering this information are:

(1) ***Identify specific information on Aboriginal groups and any established or potential Aboriginal and treaty rights that may be affected by the proposed project/activity***

✓ What Aboriginal communities could be affected by the proposed project/activity?

✓ What real or "constructive" knowledge is there of potential or established rights and which communities assert or hold such rights?

✓ Potential sources of information:

1) Internal government data bases of sources[8] (i.e. historic or modern treaties; correspondence to government officials; specific claims files; comprehensive land claims processes; British Columbia Treaty Commission; claims being addressed in litigation; Métis and Non-status Indian interests – Office of the Federal Inerlocutor; knowledge held by officials in other departments/

agencies involved in the enforcement of regulation of land and resource uses – Fisheries and Oceans Canada, Parks Canada, Environment Canada, Natural Resources Canada, National Defence, etc.).

2) Public information – claims made in any court, information on publicly accessible web sites, public statements, etc.

✓ What are the bases of those established or potential rights?

✓ Are the rights premised on historic or modern treaty rights or Aboriginal rights and/or title?

✓ Is there more than one Aboriginal group claiming rights (i.e. overlapping claims)? If so, what rights are claimed for which areas?

✓ What known "other" consultation processes involving Aboriginal groups are already in place to deal with the proposed project/activity (i.e. environmental, regulatory, public forums, etc.)?

✓ Have Aboriginal groups in the area raised concerns about this proposed project/activity or similar activities (past or present)?

✓ Are there any traditional territories affected by the proposed project/activity?

✓ Are there any burial grounds, traditional territories or reserves in the area where rights are claimed?

✓ Is there any factual basis for potential extinguishment arguments (treaties, legislation, and incompatible usage by the Crown etc.)?

As mentioned in Part A, for maps or further sources of information on Treaties and comprehensive land claims, go to **http://cccm.nrcan.gc.ca/english/comprehensive_claims_e.asp** which are also available at the Canada Map Office, Natural Resources Canada.

The INAC website (**http://www.aboriginalcanada.gc.ca/acp/community/site.nsf/index_en.html**) also contains a database of all Aboriginal communities within Canada, including their up to date contact information.

(2) ***Identify potential adverse impacts on established or potential Aboriginal and treaty rights for each of the implementation options.***

✓ What are the potential adverse impacts of the proposed project/activity on the established or potential Aboriginal and treaty rights (i.e. hunting, fishing, trapping, and gathering)?

✓ Due to the proximity of the proposed project/activity, what is the potential adverse impact on areas to which an Aboriginal group claims Aboriginal or treaty rights or an interest under a comprehensive claim, specific claim or the British Columbia Treaty Commission process?

(NOTE: For a proposed project/activity located on-reserve, or affecting a reserve, the Crown obligation extends beyond the duty to consult and it is recommended that legal counsel be consulted.)

✓ What is the potential adverse impact of the proposed project/activity with respect to archaeological sites, Aboriginal burial grounds, or other areas of Aboriginal interest where there is a credible claim to a section 35 right?

✓ Is there concern regarding the cumulative effects of this project or activity in combination with others in the same or surrounding area?

✓ Do one or more Aboriginal groups appear to have maintained long-term occupancy of an area or continual use of a rights-based nature that may be potentially affected by the proposed project/activity?

✓ Is the project/activity in a rural or urban setting and is the use changing or altering the current status quo of the land use?

Step 3: Undertake initial assessment and analysis, including strength of claim assessment.

Next, an initial assessment and analysis of the research collected in Steps 1 and 2 need to be undertaken. This step will help to determine whether or not there is a legal duty to consult.

The initial legal assessment requires consideration of the following three factors:

(1) If there is a proposed Crown project/activity;

(2) If there are established or potential section 35 rights held by Aboriginal groups in the area (strength of claim assessment); and,

(3) If the proposed Crown project/activity or implementation options could result in potential adverse impacts on those section 35 rights.

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

ACTIVITY / PROJECT	+	ESTABLISHED OR POTENTIAL SECTION 35 RIGHT	+	POTENTIAL ADVERSE IMPACT ON RIGHT	=	LEGAL OBLIGATION TO CONSULT

DOJ's advice should be sought in carrying out this initial assessment. Once this assessment is complete, federal departments/agencies should be in a position to make an initial determination on which of the following three options regarding the legal duty to consult applies (**Note** – for reasons of good governance, your department/agency may decide to consult regardless of whether there is a legal duty, and this should be expressed to those Aboriginal groups being consulted).

(i) No Legal Duty to Consult

If initial legal analysis indicates that there is no credible evidence to support a potential section 35 right (i.e. does not meet the test for Aboriginal rights; the claim has no linkage to established or potential Aboriginal or treaty rights; the facts illustrate that rights were extinguished prior to 1982; or there is no continuity of use), then there is no legal duty to consult.

If analysis indicates the proposed project/activity would be implemented in a way that will not adversely affect established or potential Aboriginal and treaty rights or if there will be no potential adverse impacts from the project/activity on such rights, then it could be determined by the Crown that there is no legal duty to consult. If the evidence in support of the claims or the nature of the proposed activity changes, then the position regarding the legal duty to consult should be revisited. It should be noted however, that the department/agency may still wish to carry out a consultation process for the proposed project/activity for good governance or policy purposes.

> The federal Minister of Indian and Northern Affairs launched a consultation process in partnership with the Native Women's Association of Canada and the Assembly of First Nations in 2006 to develop options for a legislative solution to matrimonial real property issues on reserves. These consultations were conducted to complement good governance and contribute to sound legislative and policy development, even though initial assessment did not lead to a conclusion that there was a legal duty.

(ii) Uncertainty about the Legal Duty

Should uncertainty remain on whether a legal duty to consult exists, the legal risks and other relevant policy considerations need to be considered. From a legal perspective, precaution may be warranted as there is a low threshold for credibility of the claim and degree of impacts to trigger the legal duty to consult and the Courts have suggested that difficulties associated with proof and definition of claims be addressed through the degree of consultation, not denying a legal duty to consult.

To resolve such uncertainty it may be helpful to look to the knowledge and experience of other federal departments/agencies and other governments

involved with similar activities and locations. It may also be appropriate to approach the Aboriginal groups to clarify the basis of their claim or the basis of their representation of a particular group.

Using the additional information, a determination could be made as to whether or not there is a legal duty to consult (this determination would be based on whether or not activities will affect established or potential Aboriginal and treaty rights and if there will or will not be potential adverse impacts from the activity).

(iii) A Legal Duty Exists

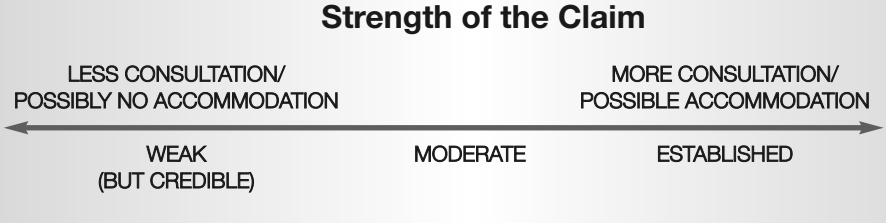
If analysis indicates the proposed activities may adversely affect established or potential Aboriginal and treaty rights, there will be a legal duty to consult. As noted above, it will be necessary to ascertain who is going to engage in the consultations, who has the authority to speak on behalf of Canada and potentially sign agreements or protocols used, if required, and assess what if any mandate requirements may be necessary.

Step 4: Determine potential severity of adverse impacts on established or potential section 35 rights

Typically the scope/extent of the duty will be proportionate to an assessment of the strength of the claim and the seriousness of the potential adverse impact of the proposed activity on the established or potential right. If there is a legal duty to consult, DOJ can assist in assessing the strength of the claim (see Figure 1). Information held by other departments/agencies may also be useful in this determination.

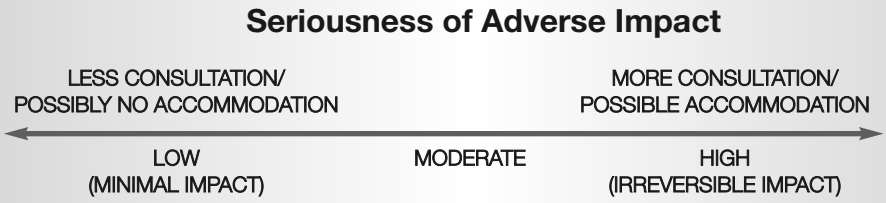
It is important to note that Crown consultation is not intended to be the means to prove potential rights. Experience has demonstrated that it takes years to describe and confirm Aboriginal rights. The implementation of the proposed activities are generally on much shorter time frames (sometimes legislated), therefore, it is important to work with initial assessments of those rights and potential adverse impacts.

Figure 1



Determine the level of seriousness of the potential adverse impact on the right(s), as depicted in Figure 2 below, keeping in mind that re-assessment may be required as the consultation process proceeds and new information comes to light.

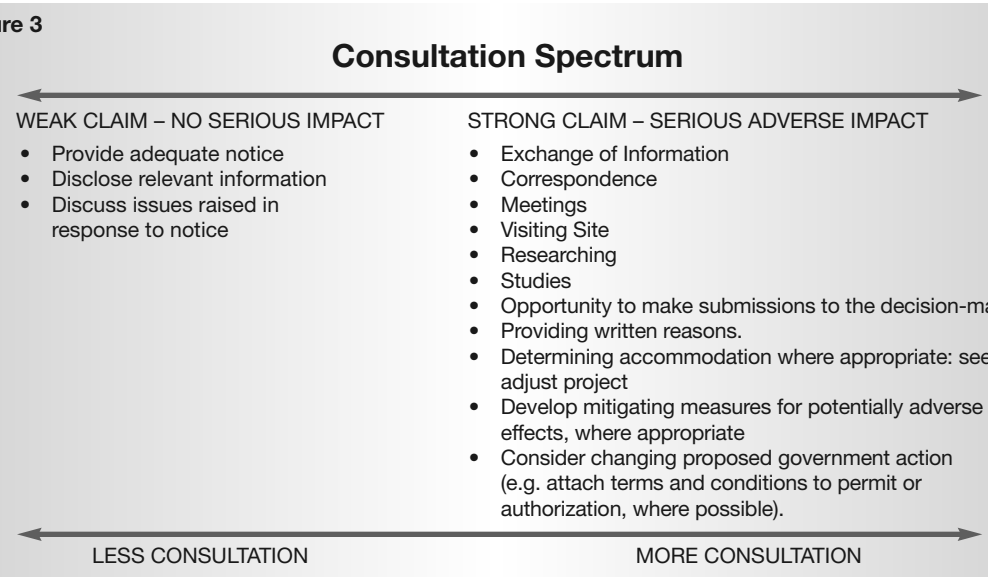
Figure 2



After an analysis of the strength of claim and the above analysis of impacts, the appropriate response on the extent of the consultation may be determined. It will vary as illustrated by examples in Figure 3.

Federal departments and agencies may wish to consider the Treasury Board of Canada Secretariat (TBS) Risk Scorecard Toolkit as a model for risk assessment. The following link provides information on the Toolkit:
http://www.tbs-sct.gc.ca/ia-vi/policies-politiques/rbaf-cvar/guide12_e.asp

Figure 3



Although each department/agency involved in the project/activity has responsibility for conducting its own initial assessment and analysis of the existence of the legal duty to consult and the scope/extent of the consultation process required that would fall within each department/agency's mandate, it is essential that communication, cooperation and coordination among all federal entities involved, occur to the greatest extent possible.

Step 5: If a legal duty exists, establish its content (initial form and content of consultation process)

It may not be possible to determine the exact form and content of the consultation from the outset due to insufficient information. As the consultation process is underway, its appropriate form and content may change to more accurately reflect the strength and nature of the claim and seriousness of the potential adverse effect on the right(s).

In determining the form and content of the Crown consultation process, the following elements are important:

✓ Establish goals and objectives for the consultation process.

✓ Determine (if not yet done) if there are other departments/agencies with potential consultation obligations in relation to the Aboriginal group(s) and establish any coordination mechanisms that may assist (e.g. environmental assessment process).

- Federal departments/agencies should consider conferring with other departments/ agencies and/or governments to canvas opportunities to collaborate and to identify existing processes and relationships that can assist to meet the legal duty to consult, and can be complemented by other consultation activities.

✓ Determine whether an existing consultation process is in place, and whether it could meet the requirements for a Crown consultation process.

- The Courts have indicated that where the duty to consult lies at the lower end of the spectrum, participation of the Aboriginal group in a multilateral or public consultation process may be sufficient. Where the duty lies at the high end of the spectrum, a separate bilateral consultation between the Crown and the Aboriginal group may be required.

- The Courts have not required a separate process for Crown consultation where the process that is in place can adequately address the established or potential section 35 rights (e.g. *Taku River* – B.C.'s ***Environmental Assessment Act*** process as implemented was sufficient. In contrast, in the *Mikisew Cree* case, while the statutory requirements of the Acts at issue were all met, inclusion in the public process was not sufficient).

✓ Determine which Crown departments/agencies will speak on behalf of the government for purposes of the consultation process. Seek legal advice to determine the scope of mandates and whether there is a need to inform and

involve other federal entities and whether any additional mandates may be required to meet the duty.

- The Crown is considered to be the whole government, but each federal department/agency is responsible to carry out consultation triggered by the legal duty to consult;
- Mandates and legislation of each federal department/agency should be reviewed to see what, if any, limitations exist that would confine consultation efforts or the ability to respond to accommodation issues.

✓ Determine the content (i.e. the "What") of the consultation and take steps to make certain that the focus of discussions is on how to substantively address concerns, minimize adverse impacts, and effectively respond to concerns regarding the particular Crown conduct and its adverse impacts on the established or potential section 35 rights.

✓ Consider the involvement of provincial or territorial governments or private industry in the Crown consultation process or vice versa. Can participation in third party or provincially run consultation processes inform or satisfy some or all of the federal needs?

✓ Further clarify "Who" to consult, mindful of the following:

- The Crown must consult directly with the section 35 rights holders or the representatives of those rights holders;
- The Crown should remember that political organizations are not necessarily the rights holders although they may be authorized to speak on behalf of them. The role of such organizations may be unique when dealing with Métis claimant groups. There may also be good policy reasons to consider including political organizations in consultation plans as they may be able to provide information as to who may represent the particular group of rights holders that may be adversely impacted;
- If it is difficult to ascertain appropriate spokespeople, or if there appears to be factions in the groups consulted, seek legal advice on the identity of the proper representatives, and whether any special measures are necessary such as obtaining releases from those consulted;
- If the project is going to be carried out on, or may have effects on a reserve, consult with the Band for whose benefit it has been set aside; and,
- Be aware that more than one Aboriginal group may have a legitimate interest in the affected lands by virtue of a claim to unextinguished

Aboriginal title or usage rights. Such overlaps must be assessed accordingly.

✓ Contact Aboriginal groups (when feasible) to help determine effective methods and timing for consultation.

✓ Consider whether there is a need or desire for a consultation agreement or protocol. Such agreements are becoming increasingly common in different regions of the country and although such a commitment would take more time and effort, they could have value by ensuring that all the parties understand the proposed consultation process. DOJ counsel is prepared to assist in this regard.

✓ Identify potential challenges to the Crown consultation process (language, geography, cultural practices, seasonal activities, current litigation).

✓ Create a budget and timeframes for consultation activities.

✓ Identify indicators for an evaluation process should one be undertaken.

Phase 2: Crown Consultation

Implement the consultation process

Federal departments/agencies should keep in mind the following considerations when implementing a consultation process depending on what has been determined in Step 5 in the "Pre-Consultation and Analysis and Planning" phase:

✓ Initiate the consultation process as early as possible after determining consultation will be required.

✓ Clearly identify who has the authority to consult on behalf of Canada in the particular context – which departments/agencies have the mandates and the ability to sign any agreements or protocols reached on behalf of Canada. It may be appropriate to designate one representative where a number of government departments or agencies are involved (DOJ counsel is not responsible for and generally not required for the consultation process itself, but rather may provide support and advice.)

✓ Integrate, to the maximum extent possible, the Crown consultation with the Aboriginal group(s) with an existing regulatory process for the project/activity (e.g. environmental assessment process), if the regulatory process proceeds at the same time. Need to communicate this to the Aboriginal group(s) in

question, so they know that it is the Crown's expectation that an existing process will form part of the consultation process/record.

- ✓ Notify the Aboriginal group(s) of the proposed activity; provide a government contact for any questions or concerns; and offer to meet to discuss the matter further (via public or specific process as may be determined appropriate in the context).
- ✓ If necessary, request detailed information from the Aboriginal group(s) about the nature of the established or potential right and the geographic location where it is exercised.
- ✓ Seek confirmation about who speaks for the Aboriginal group(s) that claim(s) to hold section 35 rights, and identify any overlaps to such claims.
- ✓ Provide the potentially affected Aboriginal group(s) with clear, relevant information in a timely manner.
- ✓ Provide information about the proposed project/activity, and address what the Crown knows of the Aboriginal interests and what the Crown anticipates may be the potential adverse impact on those interests.
- ✓ Where the project/activity is to be designed and carried out by a third party, consider whether their experts would assist in outlining the technical and particular aspects of the project/activity and assist in facilitating such meetings.
- ✓ Consult with DOJ counsel about the documents you plan to disclose, to prevent inadvertently waiving any privilege or disclosing a Cabinet confidence.
- ✓ Provide the Aboriginal group(s) with enough time to assess the adverse impacts of the proposed project/activity, to prepare its views on the matter, and to present its concerns. Notably, ask whether those consulted were provided with sufficient information concerning the proposed project/activity so as to enable them to provide meaningful input.
- ✓ Engage the potentially affected Aboriginal group(s) regarding the proposed project/activity so that they have an opportunity to articulate concerns regarding its effects (i.e. schedule follow-up meetings to discuss concerns, as required).
- ✓ Consider the concerns of the affected Aboriginal group(s) and respond in a timely fashion to concerns that have been identified throughout the consultation process. Communicate the Crown's decision to the potentially affected Aboriginal group(s) to demonstrate and document which of the

Aboriginal group(s) concerns were addressed, how they were addressed as well as which concerns were not addressed, and the reasons.

✓ Depending on the nature of the concerns, ensure that the third party (i.e. proponent) is involved as it is better able to consider and outline possible measures to prevent or diminish any potential adverse impact of certain kinds of projects (e.g. placement of docks, pipelines, electrical generators, etc.).

✓ Ensure that throughout the consultation process, information is shared with other government departments/agencies and their legal counsel who are either directly or indirectly involved.

Federal departments/agencies should approach Aboriginal consultation with awareness that they may be required to demonstrate the completeness and integrity of the process at a later date. To this end, they should keep detailed records documenting each step in the process. Examples of the activities to be recorded are:

✓ Government or non-governmental sources regarding the identity of Aboriginal group(s) who might be affected by the proposed project/activity.

✓ Each contact made with Aboriginal group(s).

✓ Information shared with Aboriginal group(s) regarding the proposed project/activity and any feedback.

✓ Each meeting with Aboriginal group(s) to discuss the proposed project/activity and any feedback from the meeting.

✓ Response to any information requests made by Aboriginal group(s).

✓ Legal advice sought at any point during the consultation process.

✓ Summaries of Aboriginal concerns conveyed to government decision makers where appropriate.

✓ Decisions by government decision makers and implementation instructions.

It is recommended practice for federal departments/agencies to maintain detailed records which contain the following information:

✓ Who created the record;

✓ Where and when the record was made;

✓ Who performed the activity recorded;

✓ Date and place of each activity; and,

✓ Copies of all relevant correspondence that relate to the record (including notes of meetings, conversations, e-mail messages and telephone calls).

Dispute Resolution

Except for those contexts that involve Aboriginal lands over which title has been established, the legal duty to consult does not include a requirement to agree on a resolution to the issues raised during the consultation process. Nevertheless, there may be benefit in considering various means to overcome disagreements, such as dispute resolution mechanisms, as they may assist in minimizing conflict and providing less litigious means in dealing with disagreements in the course of consultation or in the implementation of accommodation measures.

In order to research the contents of dispute resolution mechanisms, go to the following website which contains a listing of all dispute resolution mechanisms described in Treaties and final agreements: **http://www.ainc-inac.gc.ca/pr/agr/index_e.html**

This is only to be used as a guide when you are consulting with Aboriginal group(s) having existing agreements with the Crown, or as a guide to the types of clauses or approaches to a dispute resolution process to be included in a consultation protocol or agreement.

Phase 3: Accommodation

In summary, at this point in the consultation process, it will have been determined that:

✓ There is a federal project/activity.

✓ The project/activity touches upon established or potential Aboriginal and treaty rights.

✓ The strength of the established or potential rights will have been assessed.

✓ The project/activity will have a potential adverse impact on the rights.

✓ The nature and scope of the adverse impact will have been identified.

While the term "accommodation" may appear to be new, federal departments/agencies will undoubtedly be able to point to a number of situations where some form of accommodation has been implemented. Consultation may uncover issues or concerns about the activity that the Crown should attempt to accommodate. Whether accommodation is necessary and what form it will take is dependent on the findings of the consultation process. Accommodation may take the form of a minor or major change to the project plan; it may involve land transactions or exchanges; it could extend to compensation packages or impact-benefit agreements with Aboriginal group(s).

Accommodation may be required where there is a strong claim to a section 35 right and a potentially significant adverse impact on the claimed right. The courts have said that consultation would be meaningless if it excluded from the outset any form of accommodation.

Where accommodation is required, responsible departments/agencies should work with the Aboriginal group and attempt to identify solutions that balance the interests of the particular Aboriginal group with the societal interests of all Canadians that the Crown is obligated to uphold. Where accommodation measures may be made between an Aboriginal group and a third party proponent, the Crown will need to determine if it wishes to be involved in that arrangement, what role it may have and if it can require that such be made "with prejudice" such that the Crown may be able to rely on it if necessary (e.g. Income Benefits Agreements, Forest Range Agreements in British Columbia), should there be a future Court challenge as to the adequacy of Crown consultation.

The Courts have emphasized the need for flexibility and responsiveness; 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. In the end, the Crown must demonstrate that as a whole, it did what it could to reconcile Aboriginal concerns with other societal interests and that the consultation process it implemented was reasonable. This may require direct accommodation measures by the Crown if it is the proponent or the placement of terms or conditions on approvals or authorizations granted to third party proponents.

While there is no duty to agree, that is, the process does not give Aboriginal groups a veto, good faith and reasonable efforts by the parties to understand concerns and seek solutions are required.

When managing accommodation, the following key factors should be considered when establishing an internal process to address accommodation matters:

✓ An understanding of the mandates of participating federal departments/agencies in order to understand the contribution that the federal departments/agencies can make in the accommodation.

✓ Determining whether additional departments/agencies need to be engaged in the process or if additional mandates need to be sought:

- Limits based on particular mandates of departments/agencies or other federal bodies will not limit the nature, scope or content of the consultation duty or accommodation that may be appropriate in the context.

✓ An understanding of the decision-making process within the federal department or agency.

✓ The need for coordination among departments/agencies.

✓ The need for communication that is clear and inclusive of all federal entities where there is more than one federal department/agency involved.

✓ The need for documentation of the decision-making process and decisions taken on outstanding concerns, and societal interests.

The following section of the document will outline four steps to follow, along with the key factors mentioned above, for managing accommodation. Note that this section of these Interim Guidelines will be informed by future policy direction and practical experience in dealing with accommodation.

Step 1: Collect background information supporting the basis for accommodation

Federal departments and agencies might consider assembling the following facts to support an approach to accommodation (much of this information should have already been established in the "Pre-consultation Analysis and Planning" phase):

✓ The status of the established or potential Aboriginal and treaty rights.

- An "established" right or title may suggest a requirement for consent from the Aboriginal group(s). As this is not always the case, it is important to consult legal counsel when making the assessment.

✓ The strength of the claim as determined by DOJ legal counsel (see Step 4 in the "Pre-Consultation Analysis and Planning" phase) as such has been identified by the Courts as a basis for determining how deep consultation efforts must be and whether accommodation measures are necessary.

✓ The degree of adverse impact on the established or potential Aboriginal and treaty rights (as established in the Pre-consultation Analysis Planning phase and outlined in Figures 2 and 3).

✓ The concerns identified by the Aboriginal group(s) regarding the adverse impacts.

✓ The broader societal interests and valid Crown objectives as identified by the federal departments/agencies.

✓ The range of possible measures or solutions to address adverse impacts determined in conjunction with all parties (including the provinces, territories and third party proponents as appropriate).

Step 2: Review and determine accommodation option(s)

After determining that accommodation is appropriate in the circumstances, the next step in managing accommodation involves first, assessing the range of measures, and next, determining the accommodation options for implementation. An assessment at this stage is an internal process and should involve DOJ, keeping in mind consultations and concerns raised by the Aboriginal groups. The assessment to determine accommodation options could take into account:

✓ The balance between other societal interests and the reasonableness of the solution using the facts collected from Step 1 above.

✓ The possible changes to the design or approach to a proposed project/activity (e.g. changes to the specifications of a project) and the steps required to make the changes.

✓ The role of third parties in addressing adverse affects to established or potential Aboriginal and treaty rights. Requirements for such adjustments and potential demands for compensation for such by proponents.

✓ The financial requirements for the accommodation options.

✓ The identification of current or new authorities required to implement the accommodation measures:

- What are the federal department/agency mandates with respect to the accommodation options?

- What could other departments/agencies offer under their current mandate (i.e. Human Resources and Social Development Canada – job training; Fisheries and Oceans Canada – alternative fishing opportunities; purchase of other lands; etc.)? Such measures may meet the concerns and interests without requiring new resources.
- What financial authorities do the federal departments/agencies have available to support the accommodation options?
- What other federal/provincial/territorial departments have authorities (mandate and/ or financial) that would support the accommodation options?
- What new mandates are required?

✓ The need for collaboration within the Crown for accommodating and reconciling different federal interests and for reaching a resolution of competing or incompatible interests using existing interdepartmental processes is crucial to establishing a consistent Crown position and representation.

This assessment process would outline the Crown position on accommodation options for discussion with Aboriginal rights holders. It is essential that federal departments and agencies have the appropriate internal approvals and that potential accommodation measures proposed are reviewed by and approved by senior management of the department/agency.

Step 3: Determine the selected accommodation options(s):

The legal duty to consult does not include a duty to agree on a resolution to the issues raised during consultations. The Crown must determine the preferred accommodation option(s); this phase of the process may include discussions or negotiation with Aboriginal group(s).

Step 4: Document and communicate the decision(s)

It is important to document and communicate directly (in writing) to all parties the terms of the accommodation whether or not it is mutually agreed upon and document any outstanding issues.

The following could be described in the documentation when clarifying the content of the decision:

✓ Consultation process used to arrive at the decision to demonstrate that a meaningful process was employed and the Crown was reasonable and acted in good faith.

✓ Accommodation measures considered, offered and accepted.

✓ Aboriginal rights holders to which the measures apply.

✓ Roles and responsibilities of all parties involved (e.g. Crown, Aboriginal rights holders, third parties).

✓ Approach for addressing the concerns.

✓ Outstanding issues and why they were not addressed.

✓ Rationale (if appropriate) for proceeding with the proposed activity.

It is essential to communicate the understanding of the accommodation to all parties. Such communication should be coordinated if more than one federal department/agency and/or government is involved. It is also recommended that the department/agency maintain a roster or inventory of the various accommodation measures adopted for projects/activities.

Phase 4: Implementation, Monitoring and Follow-Up

The success of the consultation and, where appropriate, accommodation will be realized in this phase, which involves the design of how the decisions will be implemented; what is necessary to ensure that the plan has been followed or what issues might have arisen in the implementation; and the follow-up on the lessons learned from the process.

Step 1: Implement the decision

Federal departments/agencies may want to consider the development of an implementation plan that is:

✓ based on the approved decision;

✓ constructed in conjunction with the Aboriginal group(s) and other parties; and,

✓ includes monitoring.

Step 2: Monitoring

Monitor the fulfilment of commitments made to the Aboriginal rights holders. Do this by ensuring the Crown is coordinated in fulfilling any commitments. This could be accomplished by establishing a means to track activities and report on them. Consideration could be given to:

- ✓ using existing tracking and reporting processes that may already be in place; and,
- ✓ identifying the federal responsibility centre for the reporting and tracking process if more than one department/agency or level of government is involved.

Further, engage in on-going communication with Aboriginal rights holders as necessary when implementing the decision.

Step 3: Follow-up

Following the implementation of the decision, federal departments/agencies should consider evaluating the process. Follow-up should take into consideration:

- ✓ the design of evaluation criteria at the outset of the undertaking so the goals/objectives/results to be achieved are clear and can be tracked over a reasonable period of time;
- ✓ advice from department/agency's Evaluation units on the practicality of groupings or one-off evaluations; and,
- ✓ involvement of Aboriginal group(s) in the development of the criteria.

End Notes

[1] *Haida Nation* v. *British Columbia* (*Minister of Forests)*, [2004] S.C.J. No. 70.

[2] *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69

[3] *Mikisew Cree First Nation* v. *Canada Minister of Heritage)*, [2005] S.C.J. 71.

[4] S.35(1), ***Constitution Act, 1982*** – Recognition of existing aboriginal and treaty rights – The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[5] "Existing" includes established and potential Aboriginal and treaty rights. Paragraph 25 of *Haida Nation* v. *British Columbia* states: "The potential rights embedded in these claims are protected by s. 35 of the ***Constitution Act, 1982***. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[6] There is significant variability across the country. For example, in British Columbia and Quebec, there are 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 of the Prairies provinces. This landscape differs from those modern treaties in the territories North of 60º, northern B.C., and in James Bay which contain specified consultation processes. Each context will require some measure of adaptation to the consultation approach to ensure that it reflects the reality of the rights and interests that exist.

[7] See *Mikisew Cree* at paragraph 1: "…The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of mutual respect inherent in that indifference has been destructive of the process of reconciliation as some of the larger more explosive controversies".

[8] The Crown may be deemed to have constructive knowledge of a treaty right or potential Aboriginal right, even if only one department/agency is aware of the assertion.