



Duty to Consult: Overview, Recent Developments and Best Practices

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New Government of Canada Priorities

- Canada has signaled the value it is placing on building relationships with Indigenous peoples – First Nations, Inuit and Métis
- Every Minister's mandate letter from the Prime Minister contains the following statement:

“No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.”

- The focus on renewing a nation-to-nation rapport with Indigenous peoples is in keeping with the commitment to advance reconciliation and to respect the rights of Indigenous peoples
- Various federal commitments have been made that may have an impact on Canada's approach to the duty to consult moving forward, in addition to informing how departments and agencies will consult and engage with Indigenous groups.



Recommendations of the Truth and Reconciliation Commission

- The Government of Canada has committed to working in partnership with Indigenous communities, the provinces, territories, to fully implement the Calls to Action of the Truth and Reconciliation Commission and to design a national engagement strategy for developing and implementing a national reconciliation framework, informed by the Truth and Reconciliation Commission's recommendations
- The Calls to Action included the recommendation that the federal, provincial, territorial and municipal governments fully adopt the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*



United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

- The Government of Canada has stated that it is a full supporter, without qualification, of the UNDRIP and has committed to adopt and implement the Declaration in accordance with the Canadian Constitution
- Canada will be engaging with Indigenous groups on how to implement the principles of the Declaration and this engagement will include provinces and territories
- Canada's position on "Free, prior and informed consent":
 - At its core, the concept of Free, Prior, and Informed Consent is about meaningful consultation with Indigenous Peoples on issues of concern to them with a goal of achieving consensus
 - This is about government, Indigenous communities and industry striving towards consensus and there are many examples where this is occurring
- James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, has stated that seeking the consent of Indigenous Peoples should not be interpreted as a veto right, but as the objective of consultation





Review of Laws, Policies and Operational Practices

- A key priority as set out in the INAC Minister's mandate letter is to *“undertake, with advice from the Minister of Justice, in full partnership and consultation with First Nations, Inuit, and the Métis Nation, a review of laws, policies, and operational practices to ensure that the Crown is fully executing its consultation and accommodation obligations, in accordance with its constitutional and international human rights obligations, including Aboriginal and Treaty rights”*
- This is in keeping with the Government of Canada's commitment to renewing the relationship between the Crown and Indigenous Peoples in Canada based on the recognition of rights, respect, co-operation, and partnership
- The Government will work in full partnership with First Nations, Inuit, and the Métis Nation to advance this commitment

Status

- The work being undertaken towards the development of a National Reconciliation Framework will inform the Review of Laws, Policies, and Operational Practices
- In addition, a review of Canada's environmental and regulatory processes is underway to identify ways to strengthen and improve federal environmental assessment processes





What is the Duty to Consult?

The Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights.

In 2004, the Supreme Court of Canada found that the Crown had a duty to consult if three elements exist:

- Contemplated Crown conduct (e.g. permitting and licensing for resource projects, land disposal, etc)
- Potential or established Aboriginal or Treaty rights (e.g. hunting, fishing, trapping, other cultural practices related to land, water, air); and
- Potential adverse impact (e.g. limitations on Aboriginal groups' ability to exercise various rights and cultural practices, could be related to a disruption in wildlife migration patterns and habitat)

Where the duty arises, the Crown will be required to:

- Carry out a fair and reasonable process for consultations; and,
- Demonstrate reasonable efforts to respond and/accommodate





What is the Duty to Consult (continued)?

- The duty to consult is a Crown responsibility, primarily triggered, although not limited to, lands and resource-related activities.
- Given jurisdictional responsibilities (e.g. natural resources), provincial and territorial activities trigger the duty to consult more often than federal government.
- Each department and agency is responsible for meeting their consultation obligations.
- Departments and agencies need to understand their business, and how and when their business could have an adverse impact on Aboriginal and Treaty rights.





Canada's Approach to the Duty to Consult

- Canada has adopted a “whole of government” approach to consultation and accommodation that emphasizes coordination and collaboration, strengthening partnerships and continuing to operationalize consultation and accommodation
- INAC supports this approach through the development of policies, tools and training for federal officials to fulfill the duty to consult:
 - *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (March 2011)*
 - Management of up to date information on Aboriginal and Treaty rights assertions with region-specific expertise and advisement using two services – the Consultation Information Service (CIS) and the Aboriginal and Treaty Rights Information System (ATRIS)
 - Delivering consultation-related policy development, training modules, department/agency specific training sessions and providing support to departments and agencies, tools for consistency and policy development
 - Outlining processes for consultation by negotiating and implementing consultation protocols with provinces and Indigenous groups
 - Strengthening collaboration with provinces and territories through Memoranda of Understanding
 - Establishing and maintaining interdepartmental structures (HQ and regions) and points of contact to support and advise departments and agencies involved in Indigenous consultation and accommodation





Impact on Canada's approach to consultation

- Canada is committed to working in genuine partnership with Indigenous communities and will strive for consensus on issues that affect them
- The commitment to renewing a relationship with Indigenous peoples supports departments and agencies who continue to consult Indigenous groups where a proposed activity may have an adverse impact on potential or established Aboriginal or Treaty rights
- In addition, departments and agencies whose activities don't normally trigger the duty to consult, are now engaging with Indigenous groups and seeking input on new programs/policies – becoming a best practice
- All federal memoranda to Cabinet must now include an assessment as to whether the proposal has implications for nation-to-nation relations and set out the proposed engagement approach with Indigenous groups
- INAC, on behalf of the Government of Canada, also seeks opportunities for enhanced communication and coordination between provincial or territorial governments and the Government of Canada to:
 - better share information on consultation processes
 - strengthen a community of practice
 - discuss key issues for collaboration
 - reduce overlapping processes of consultation and accommodation with other jurisdictions and consultation fatigue on the part of Indigenous groups





Issues for Consideration

- Importance of building the relationship in to the day-to-day business of government
- Insufficient capacity and funding
- Risk of consultation fatigue – with a focus on renewing a nation-to-nation rapport with Indigenous peoples and advancing reconciliation, government and industry are increasingly seeking to engage with Indigenous peoples for good governance reasons, not necessarily because of a legal duty to consult
- Different perspectives Indigenous groups have on consultation
- With respect to consulting with Métis groups, need greater awareness of:
 - Métis rights and interests and how they differ from First Nations
 - Métis representation and governance – who are the rights bearing Métis communities that should be consulted in a given situation
 - Alignment of federal and provincial approaches to Métis consultation





Best Practices for Consultation

Some Lessons Learned...

- Benefits of building long-term relationships with Indigenous groups that go beyond transactional approaches or one-off consultations
- Importance of consulting early and often
- There is no perfect model - need to have a consultation process which is adaptable, flexible, respectful, responsive
- Benefits of integrating consultation into existing processes where possible, and building consultation into everyday practices
- Benefits of negotiating agreements and arrangements with Indigenous groups to facilitate consultation, like consultation protocols (Annex B)
- Importance of the role for industry in assisting the Crown in meeting its consultation obligations in addition to building long-term relationships





Annex A - Consultation Protocols and Arrangements

- INAC, on behalf of Canada, negotiates Consultation Protocols with Indigenous groups to establish an agreed-upon process to follow when addressing the constitutional duty to consult

Benefits

- Protocols provide a more efficient approach through which governments can consult Indigenous groups
- By entering into protocols, Canada hopes to strengthen relationships and promote more meaningful consultation processes to:
 - Assist communities in addressing capacity challenges
 - Help reduce duplication and consultation fatigue for communities
 - Build working relationships outside of project specific consultations
 - Facilitate engagement
 - Clarify roles and responsibilities between governments and Indigenous groups
- INAC has entered into 8 consultation protocols to strengthen and clarify consultation processes with communities in British Columbia, Alberta, Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island, others are in various stages of negotiation including one with the Manitoba Métis Federation
- INAC is actively seeking other opportunities to conclude more protocols



Annex C – Contact Information and Helpful Resources

- The Consultation and Accommodation Unit: cau-uca@aadnc-aandc.gc.ca
- Consultation, engagement and the duty to consult:
<https://www.aadnc-aandc.gc.ca/eng/1100100014649/1100100014653>
- Aboriginal and Treaty Rights Information System (ATRIS):
http://sidait-atris.aadnc-aandc.gc.ca/atris_online/home-accueil.aspx
- Online version of *The Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*:
http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf
- Consultation Protocols:
<https://www.aadnc-aandc.gc.ca/eng/1331832510888/1331832636303#sec4>

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