

## Consultation Involves All Parties

Where the duty to consult arises, the Crown, Aboriginal groups, and developers all have a role to play in the process. All parties are expected to act in good faith in order to better understand and address each others' concerns. This is done by:

- exchanging information
- identifying Aboriginal concerns related to specific projects
- taking steps to avoid or minimize any adverse impacts based on information obtained during consultation.

For example, if a developer has applied to INAC for a quarry permit, and it is determined that the Crown's duty to consult arises, INAC might include terms and conditions in the quarry permit to mitigate or avoid the anticipated adverse impacts on the Aboriginal or treaty right in question.

## Role of Aboriginal Groups/Communities

An Aboriginal group/community asserting an established or potential Aboriginal or treaty right is responsible for clearly outlining the nature and scope of its assertion(s), as well as the potential adverse impacts of a given project or initiative. It is essential that Aboriginal people actively participate in and contribute to the consultation process by communicating their concerns and providing information in a timely manner. This includes participation in regulatory processes, such as those set out in the *Mackenzie Valley Resource Management Act* – notably, environmental assessment and land and water permitting and licensing.

It is essential that Aboriginal people actively participate in, and contribute to, the consultation process by communicating their concerns and providing information in a timely manner.



### START CONSULTATION AND ENGAGEMENT EARLY

- Meet with Aboriginal group(s) at the beginning
- Record & document all activity
- Contact INAC for additional information

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# Aboriginal Consultation

in the NORTHWEST TERRITORIES



## Respecting Rights & Doing Good Business

Indian and Northern Affairs Canada (INAC) as part of the Crown, recognizes the importance of consultation and the need to respect Aboriginal and treaty rights. The Department takes this duty very seriously.

It is recognized that Crown consultation is complex and that there is a shared goal for clarity and improved efficiency. In the Northwest Territories (NWT), INAC takes an approach to Crown consultation that is responsive to the unique regulatory environment of the NWT. This brochure is aimed at providing industry with an overview of Crown consultation within that context in the NWT.



### WHY DOES THE CROWN CONSULT?

The Crown regularly engages on a wide variety of topics with Aboriginal people, other members of the public and interested groups and organizations. These discussions support three overarching responsibilities of the Crown:

- Good governance – making informed decisions based on good working relationships with people and their organizations
- Contractual or statutory obligations – arising from legislation, treaties, land claim agreements, and other laws and regulations
- Crown's Duty to Consult – gives rise to the Crown's common law duty to consult regarding adverse impacts on established or potential Aboriginal and treaty rights protected by s.35 of the Constitution Act, 1982.

## Role of INAC

INAC, as part of the Crown, recognizes the importance of consultation, the need to respect Aboriginal and treaty rights, and the desire for clarity and improved efficiency.

In the Northwest Territories, INAC has developed an approach to Crown consultation that is responsive to the unique regulatory environment of the NWT. This approach applies to resource developments not associated with the Mackenzie Valley Gas Pipeline which has a separate process.

The INAC-NT Region recognizes that its approach to consultation is evolving and it is committed to continuing to work with Aboriginal groups, industry and other partners in the interim of comprehensive claims being settled in the NWT.

Through this consultation approach, INAC completes a preliminary assessment to determine if the legal duty to consult arises and how it can be met. To discharge its duty to consult, the Crown will rely, to the extent possible, on the regulatory processes set out in the *Mackenzie Valley Resource Management Act*. If this duty arises, the NT Region will ensure that an appropriate level of consultation is undertaken and provide industry with information and advice to assist in this process.



The goals of the interim approach are to:

- Meet the Crown's legal duty to consult with, and where appropriate, accommodate Aboriginal groups
- Avoid duplication of existing consultation processes (for example, those set out in the *Mackenzie Valley Management Resource Act*), in an effort to avoid 'consultation fatigue', and recognize the current demands on the capacity of Aboriginal groups and government
- Respect agreements reached through negotiation processes such as Interim Measures Agreements, while at the same time recognize that individual situations, where the duty to consult may arise, must be reviewed and assessed on a case-by-case basis

## What does Crown consultation mean for Third Parties?

The courts have stated that third parties, such as developers, do not have a Section 35 based legal duty to consult with Aboriginal people. However, the engagement and consultation done by developers and other third parties may be taken into account when the Crown is assessing consultation obligations.

For example, a mining exploration company may meet with a First Nation to explain a proposed drilling exploration project, answer any questions and possibly address their concerns. If the duty to consult arises in this particular case (i.e. the Crown decision that would allow the

permitting of the proposed project), the Crown might take the company's consultation efforts into account, as well as consultation that the Crown may have conducted, when assessing its consultation obligations.

A third party benefits from being proactive, building relationships and sharing information with potentially affected Aboriginal groups from the very beginning stages of its proposed project – it makes good business sense. Timing is critical – the Crown and third parties should start the consultation process as early as possible.

Photo: Canadian Zinc



Consultation and engagement activities, meetings, discussions, issues, commitments and outcomes should all be recorded and well-documented.

## What is the Crown's duty to consult?

The purpose of Section 35 based Crown consultation is the reconciliation of Aboriginal rights with the exercise of Crown sovereignty. Practically, it is the process of ensuring that Aboriginal peoples' rights are fairly considered in government conduct that could potentially affect those rights, particularly in the approval of developments involving land and resources.

In recent years, the Supreme Court of Canada has provided further definition to the Crown's legal duty to consult in its rulings on the Haida Nation (2004), Taku River Tlingit (2004) and the Mikisew Cree (2005) decisions. These court rulings have had a significant influence on how the Crown consults with Aboriginal people.

The courts have ruled that it is the Crown's duty to consult, and where appropriate accommodate, when it has knowledge that its proposed conduct might adversely impact an established or potential Aboriginal

or treaty right. The courts have also said that:

- Procedural aspects may be delegated to third parties, but consultation is ultimately the Crown's responsibility
- Consultation should be meaningful, proactive and done in good faith by all parties
- Where the duty to consult arises, the scope of the consultation will be proportionate to the strength of claim to a potential right and to the seriousness of the potential adverse impact on that right

- Consultation may reveal a need to accommodate
- Full agreement is not a necessary outcome of consultation; Aboriginal groups do not have a veto over the Crown's contemplated conduct

Interim Consultation Guidelines have been developed to assist federal departments and agencies in fulfilling the Crown's duty to consult. They can be found at <http://www.ainc-inac.gc.ca/ai/mr/is/acp/integui--eng.asp>

Crown conduct includes the work of government that allows projects to move forward, such as the issuance of authorizations. Some examples of these are: a water license, a quarry permit, or a land use permit.

The Crown has a duty to consult, and where appropriate accommodate, when it has real or constructive knowledge that its proposed conduct might adversely impact an established or potential Aboriginal or treaty right.