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The Duty to Consult and Accommodate Aboriginal Groups in Canada

OVERVIEW

Many projects in extractive and infrastructure industries such as electricity, oil, gas, mining and pipelines are situated on lands used by Aboriginal peoples for hunting, fishing, burial grounds and other cultural purposes. As a result of statutory requirements, government has a duty to consult with and, where appropriate, accommodate Aboriginal interests when projects cross their lands. Precise definitions of consultation and accommodation are not specified in legislation, however, and have instead evolved in common law through landmark court cases, requiring a case-by-case approach to the development of applicable expectations and standards.

The duty to consult and accommodate flows from the honour of the Crown and the need to avoid infringement of Aboriginal and treaty rights. Aboriginal rights stem from ancestors' long-standing use of the land, whereas treaty rights are specified in a written treaty. The specifics of each vary from one Aboriginal group to another based on their customs and traditions prior to European contact, and the treaty to which they are signatory. Aboriginal rights were recognized, though not formally defined, in the *Constitution Act, 1982*. Much like the rights protected by the *Charter of Rights and Freedoms*, Aboriginal and treaty rights are not absolute if a constitutional infringement is justified.

The duty to consult is automatically triggered when government has knowledge of real or asserted Aboriginal or treaty rights and is making a decision that may adversely impact the exercise of those rights. However, consultation is highly contextual in both scope and discharge. A leading explanation on the duty to consult comes from *Haida Nation v. British Columbia (Minister of Forests)* where the Supreme Court of Canada court ruled:

> *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. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required […], the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.*[1]

[1] *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, 2004 SCC 73.

Navigating the consultation and accommodation process can be challenging for government and for project proponents due to the lack of generally applicable and objective standards for defining these rights, for judging the adequacy of consultation, or for determining when accommodation is required by law. However, an understanding of the origins and evolution of the duty can shed light on the intent and goals of the process. This report provides an overview of the origins of the duty to consult and accommodate and of current practices.

BACKGROUND ON ABORIGINAL GROUPS IN CANADA

Aboriginals include all indigenous people of Canada, including First Nations, Métis and Inuit. Individuals identifying as Aboriginal number approximately 1.4 million, representing 4.3% of the 2011 Canadian population. The distribution of Aboriginal populations varies significantly among provinces. Nunavut and the Northwest Territories are predominantly inhabited by Aboriginals, accounting for 86% and 52% of the population, respectively.[2] However, Aboriginals are a minority in most provinces. Aboriginals live in over 600 reserve communities as well as off-reserve and in urban areas. See Figure 1 for a map showing Aboriginal reserves in Canada.In the 2011 National Household Survey (NHS), 851,560 people identified as a First Nations person, 60.8% of the total Aboriginal population.[3] "First Nation" can refer to a band, community, or a tribal group. A "band" or "Indian band" is defined as:

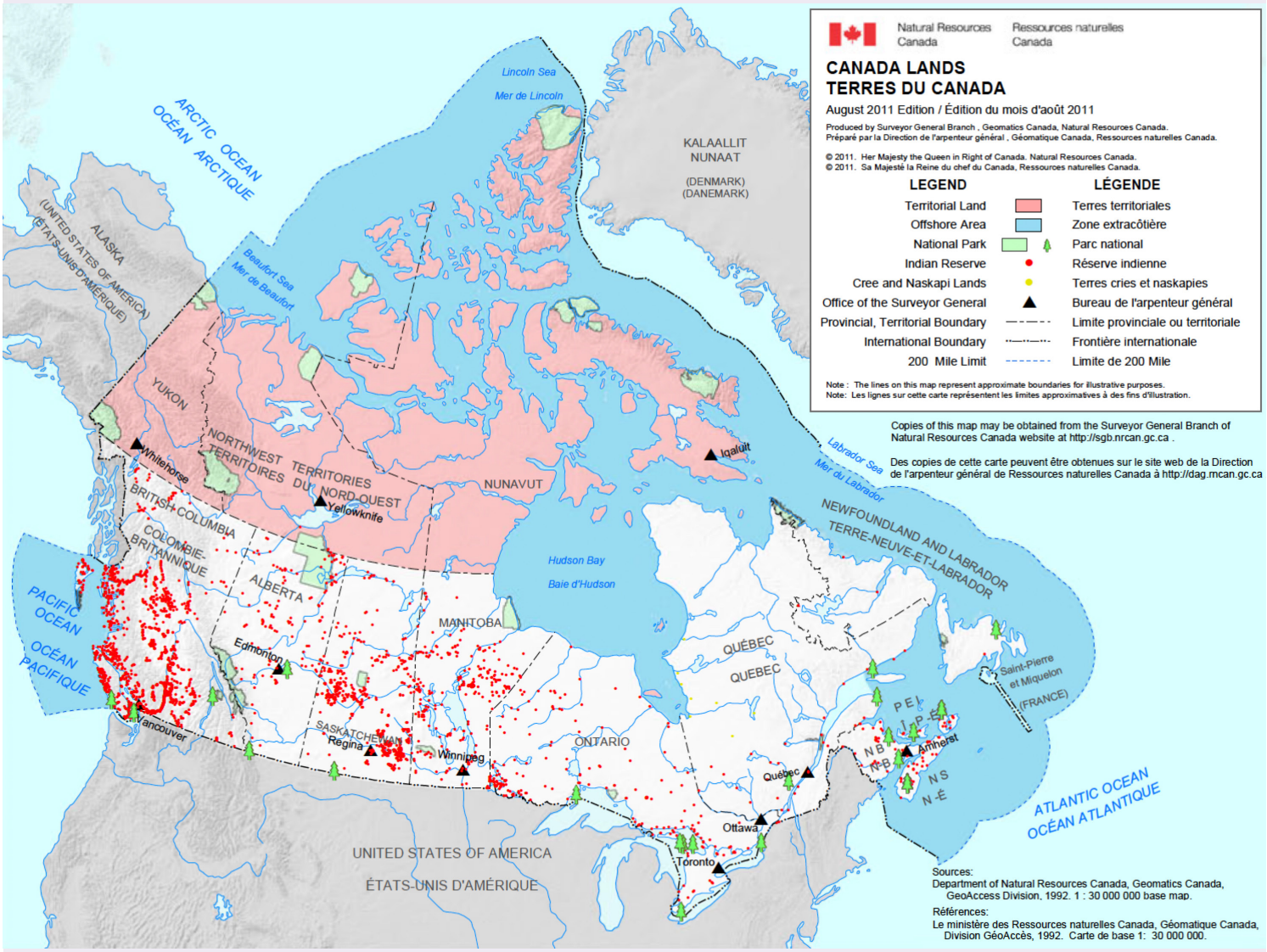
> *A body of Indians for whose collective use and benefit lands have been set apart or money is held by the Crown, or declared to be a band for the purposes of the Indian Act. Each band has its own governing band council, usually consisting of one chief and several councillors. Community members choose the chief and councillors by election, or sometimes through custom. The members of a band generally share common values, traditions and practices rooted in their ancestral heritage. Today, many bands prefer to be known as First Nations.*[4]

Métis are people of mixed Aboriginal and European ancestry and identify themselves as distinct from other Aboriginal groups and non-Aboriginals. They represented 32.3% of the total Aboriginal population in 2011 with 451,795 individuals identifying themselves as Métis in the NHS. The Inuit are an Aboriginal people from Arctic Canada, specifically Nunavut, the Northwest Territories (Inuvialuit), Northern Quebec (Nunavik) and Northern Labrador (Nunatisiavut). Each of the four Inuit groups have settled land claims, resulting in Inuit regions covering one-third of Canada's land mass.[5] In 2011, nearly 60,000 people identified themselves as Inuit in the NHS or 4.2% of the total Aboriginal population. The remaining 2.7% of the total Aboriginal population is comprised of those who identify with multiple Aboriginal groups or with a group not specifically identified in the NHS.[6]

Education and employment levels for members of Aboriginal groups tend to be significantly lower than for non-Aboriginals on average. In addition to a lower percentage of the population achieving high school or post-secondary education, labour force participation rates and employment rates are also lower among Aboriginals. In 2011, the Aboriginal labour force participation and unemployment rates were 61.3% and 15% respectively, compared to population-wide levels of 66% and 7.8%.[7] Aboriginal populations also tend to have lower income levels. The median income for Aboriginals was $9,494 lower than for non-Aboriginals in 2010.

[2] Statistics Canada, "National Household Survey Profile – 2011 National Household Survey"
[3] Statistics Canada, "Aboriginal Peoples in Canada: First Nations People, Métis and Inuit – 2011 National Household Survey"
[4] Aboriginal Affairs and Northern Development Canada, "Terminology"
[5] Aboriginal Affairs and Northern Development Canada, "Inuit"
[6] Statistics Canada, "Aboriginal Peoples in Canada: First Nations People, Métis and Inuit – 2011 National Household Survey"
[7] Statistics Canada, "Aboriginal Population Profile – 2011 National Household Survey"

Figure 1: Map of Aboriginal Reserves in Canada



Source: *Natural Resources Canada, Earth Sciences Sector, Surveyor General Branch. National Map of Canada Lands.*
Note: This is a copy of an official work that is published by the Government of Canada and has not been produced in affiliation with, or with the endorsement of the Government of Canada.

THE ORIGINS AND DEVELOPMENT OF ABORIGINAL RIGHTS

The duty to consult applies to Aboriginal rights, treaty rights and Aboriginal title. Aboriginal title extends beyond Aboriginal rights to hunt, fish and gather, and is defined as the right to the land itself. The Crown's duty to consult is based on the Royal Proclamation of 1763, the signature of treaties with Aboriginal groups, the *Constitution Act, 1982*, and major court cases. The role of each is discussed in this section.

Royal Proclamation of 1763

The Royal Proclamation of 1763 has been categorized as a "fundamental document" in defining the relationships between the Crown and Aboriginals.[8] The document was intended to "delineate boundaries and define jurisdictions" between Aboriginal groups and the Crown

while assuring lands would not be taken without consent.[9] The Proclamation created a procedure for establishing Aboriginal rights and title whereby governments could not survey or grant lands not previously ceded, could not allow Europeans to settle or purchase "Indian" lands, and created a system of public purchases to end Aboriginal title. Consequently, only the government may purchase surrendered land, which is one of the major sources of the Crown's fiduciary duty towards Aboriginals. Since surrender options are limited, the Crown is expected to use surrendered lands in a manner consistent with the interests of Aboriginal communities. The Royal Proclamation represents the Crown's first recognition of Aboriginal rights and title to the land.

Treaties

Treaties were the main mechanism for resolving land ownership issues during the British settlement and colonization of Canada. Figure 2 provides a map illustrating the area covered by Canada's historic treaties. Prior to the Royal Proclamation, both French and English colonizers signed numerous treaties with Aboriginal groups. However, these treaties tended to focus on ensuring peace, security and trade as opposed to land surrender. The Treaties of Peace and Neutrality, signed from 1701 to 1760, saw First Nations agree to sell their land in exchange for protection from the British and continued rights to hunt and fish. After the French defeat in 1760, the Seven Nations allied with the French signed a treaty guaranteeing their continued freedom to move through Canada, continued rights to their villages and land, and a promise to not be treated as enemies. At the same time, the Mi'kmaq and Maliseet people of the Maritime provinces signed Peace and Friendship treaties which were only intended to re-establish commercial trade after conflict with no provisions for land surrender.

The first land surrender treaty occurred in 1764 as part of the Niagara conference with the Seneca who surrendered two miles on each side of the Niagara River to the British. By 1783, three smaller treaties followed. The American War of Independence prompted a new series of land surrenders in order to accommodate the influx of loyalists from the United States. From 1783 to 1818, additional treaties were signed with the Anishinaabe people along the St. Lawrence River and lower Great Lakes. These treaties included a one-time payment of cash and goods but made no provision for reserves or ongoing obligations. After the War of 1812, treaty making continued with treaties covering the area from Lake Huron to Lake Superior. After 1818, the Crown shifted toward paying annuities instead of one-time payments to allow the rapid pace of treaty making necessary for settlement to continue while reducing its financial burden. By 1867, almost all of Ontario had been surrendered.

As mining prospectors moved into northern Ontario, the Crown negotiated the Robinson-Superior and Robinson-Huron treaties with the Abishnawbe of the Upper Great Lakes. These treaties represented an evolution in treaties by transferring larger tracts of land, providing reserves for each group, specifying annuities paid directly to band members, and granting the continued right to hunt and fish on unoccupied lands. From 1850 to 1854, fourteen land purchases were organized in a similar manner with First Nations ceding all lands except for their reserves while maintaining hunting and fishing rights.

Westward expansion led to a new wave of treaties known as the Numbered Treaties during the period from 1871 to 1921. These treaties followed a consistent format with only minor variations. In general, they guaranteed reserves of a given acreage per band member, set annuities per band member, granted rights to hunt and fish on unoccupied Crown land, and provided for agricultural equipment and teachers to help with the transition in lifestyle.

Today, the comprehensive claims process aims to resolve outstanding land surrender and management issues and to clarify Aboriginal rights. In contrast, specific claims address the failure to perform obligations under existing

[8] Hall, J. in *Calder v. A.G.B.C.* [1973] S.C.R. 313 AT 395, 34 D.L.R. (3) 145 at 203. Quoted in John Borrows, "Constitutional Law From A First Nation Perspective: Self-Government and The Royal Proclamation," *University of British Columbia Law Review,* 1994, 3.
[9] Ibid, 16-17.

Figure 2: Map of Canada's Historic Treaties

Source: *Aboriginal Affairs and Northern Development Canada. Pre-1975 Treaties of Canada.*
Note: This is a copy of the version available at http://www.aadnc-aandc.gc.ca/eng/1100100032297/1100100032309

treaties. Nationally, settled claims cover over 50% of Canada's territory. The comprehensive claims process is intended to address claims from Aboriginal groups that have never signed a treaty. Consequently, it is used primarily in British Columbia, the Yukon, the Northwest Territories, northern Québec, Newfoundland and Nunavut where historical treaties were never signed. Comprehensive land claims are seen as major step towards encouraging private investment by providing stability and certainty around land use. However, the process is lengthy, with an average negotiating time of 15 years. The process has been criticized because it requires Aboriginal communities

to prove their claim is "valid" before opening negotiations and to rely on Western concepts of evidence, proof of ownership and discourse, which run counter to the use of traditional knowledge and oral history in Aboriginal communities. However, the 2014 Tsilhqot'in Nation decision by the Supreme Court of Canada, discussed further subsequently, may lead to changes in these negotiations.

Constitution Act, 1982

Section 25 of the *Constitution Act, 1982* guarantees that the rights in the *Charter of Rights and Freedoms* do not adversely impact any existing Aboriginal rights or those recognized by the Royal Proclamation. Section 35 "recognizes and reaffirms" existing Aboriginal and treaty rights and defines the term Aboriginal. The term "existing" in section 35 has been deemed to mean those rights that have not been extinguished. Prior to 1982, rights could be extinguished by surrender in a treaty, constitutional enactment or valid federal legislation if it explicitly stated that its purpose was to extinguish Aboriginal rights. Today, only surrender and constitutional enactments are valid ways of extinguishing Aboriginal rights.[10]

Court cases and the "honour of the Crown"

Landmark decisions regarding the duty to consult and accommodate have primarily come from the Supreme Court of Canada (SCC) with 40 decisions since 1982. The SCC's first decision to address the issue of Aboriginal rights and section 35 of the *Constitution Act, 1982* was *R. v. Sparrow* in 1990. The SCC proposed a three-part test for determining whether infringement of Aboriginal rights existed, including whether the limitation was reasonable, whether the regulation imposed undue hardship and whether the limitation denied the preferred manner of exercise of the right. If infringement had occurred, it should be assessed for reasonableness by determining whether the "special trust relationship" based on the honour of the Crown was kept in mind and whether it served a valid legislative objective (i.e.: safety, conservation, etc.). The SCC suggested that this special relationship would require Aboriginals to be given priority after the stated objective. For example, in a conservation scenario, Aboriginals should have priority in any fishing quota left after conservation. Other considerations include whether the infringement could be smaller and whether compensation was provided. In these cases, Aboriginals have the burden of proving their right while the Crown must prove that the infringement is valid. The SCC also created the guiding principle for section 35 by stating that "[t]he relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[11] In the *Sparrow* decision, the Court also noted that the existence of a fiduciary relationship means that any decisions where there is doubt or ambiguity should be settled in favour of Aboriginals.

R. v. Van der Peet in 1996 helped establish the definition of an Aboriginal right by outlining it as a practice, custom or tradition distinctive to a group that has existed prior to contact with Europeans and has been continuous since then, although the form of exercising the right may have varied. Among the factors the SCC ruled should be considered in cases involving Aboriginal rights are the perspective of Aboriginal people, the precise nature of the claim, the significance of the claimed practice or activity, and the Aboriginals' relationship to the land. The Court also ruled that oral history should be allowed given its use to transmit history in Aboriginal cultures.

In the *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* and *Haida Nation v. British Columbia (Minister of Forests)* cases in 2004, one of the major issues before the court was whether government was required to consult Aboriginals before they had proven their rights or title to the land. The Supreme Court of Canada ruled that government has a duty to consult, and if appropriate accommodate, when the Crown has

[10] Teillet, 2-13 and 2-14.
[11] *R. v. Sparrow,* [1990] 1 S.C.R. 1075, *supra* note 12. Quoted in Canada. Parliament. Senate. Standing Senate Committee on Legal and Constitutional Affairs. *Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights.* 2d sess., 39th Parliament, 2007, 7.

knowledge of a proven or potential Aboriginal right and the decision being undertaken may adversely impact those rights. In the *Taku River Tlingit* case, the Court emphasized that consultation is critical to maintaining the Crown's honour in cases where there is uncertainty and honour could be at stake. The Court also noted that the ultimate goal of reconciliation favours consultation given past treatment of Aboriginals. As a result, the threshold for consultation is low. The Court used the *Haida Nation* case to highlight the need for good faith on both sides, the need for a regulatory framework and that, while project proponents may be responsible for procedural aspects of consultation, the legal responsibility belongs solely to the Crown. The Court also noted that the scope of the duty varies according to the preliminary strength of the asserted right.

The *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* in 2005 addressed consultation in the context of treaty rights. The Court found that the depth of consultation requires an analysis of the clarity of treaty promises, the seriousness of the proposed action, the history of the relationship and whether the treaty provides guidance on resolving issues. In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* in 2010, the SCC reaffirmed that past wrongs do not trigger consultation or accommodation and that the duty is intended to be forward looking to avoid future infringement of asserted rights. The SCC also used this opportunity to reassert the need for consultation to focus reconciliation with the ultimate goal of avoiding injunctions that shut down projects.

In addition to these cases dealing with Aboriginal rights, another series of cases deals with the issue of Aboriginal title, including *Calder et. al. v. Attorney-General of British Columbia, Guerin v. The Queen*, and *Delgamuukw v. British Columbia*. The concept of Aboriginal title remains unclear and the subject of ongoing litigation, especially in areas like British Columbia where formal land surrenders never occurred. As a result, the courts continue to refine their definition of Aboriginal title. In *Calder v. British Columbia* in 1973, the SCC recognized that aboriginal title existed at the time of the Royal Proclamation and marked the first time title was recognized in Canadian law. In *Guerin v. The Queen in 1984*, the Court ruled that, given the fiduciary duty owed by the Crown, land surrendered and reserve lands must be used to the benefit of Aboriginals. This obligation stems from the historical occupation and use of the land as well as the statutory framework requiring surrender of lands to the Crown. In *Delgamuukw v. British Columbia (1997)*, the SCC confirmed that Aboriginal title exists in British Columbia, represents the right to the land itself and not merely the right to hunt, fish and gather on that land, and that the government must consult, and if appropriate, compensate affected Aboriginal groups. The SCC also provided details about Aboriginal title including that it can only be held communally, that decisions about land usage must be communal, the relationship with the land precludes uses that are inconsistent with this relationship and that Aboriginal title can only be interfered with if the government can justify a constitutional infringement. The SCC refrained from specifying where Aboriginal title exists, leaving the determination to be made on a case-by-case basis when not covered by a treaty.

In June 2014, the Supreme Court issued its most detailed ruling on Aboriginal title in T*silhqot'in Nation v. British Columbia,* 21 years after a permit was issued. The appeal granted the Tsilhqot'in Nation title to large tract of land in British Columbia. In its ruling, the court said that title is based on a culturally-sensitive view of sufficient pre-sovereignty occupation. Title was defined to allow the holders of title "the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations."[12] The Court noted that Aboriginal title was not absolute though and government infringement could occur in situations with a "compelling and substantial objective" achieved with the least possible infringement and where the benefits outweighed the costs.

[12] *Tsilhqot'in Nation v. British Columbia.* Supreme Court of Canada. 2014 SSC 44.

In addition, the Court addressed limitations on provincial regulatory legislation that might affect the exercise of Aboriginal rights.

Through a variety of court cases aboriginal rights have gradually strengthened over time, giving them a strong influence, though not an absolute veto, over natural resource projects on their lands. However, much ambiguity remains in legal terms regarding the duties to consult and accommodate. Despite decisions in several cases on Aboriginal title, one of the remaining issues in Canada is overlapping territorial claims since several groups may claim title to the same area of land. Competing claims can create challenges for project proponents since they determine which communities are eligible to receive benefits.

THE DUTY TO CONSULT

The duty to consult occurs as part of both the provincial and federal regulatory process for various activities including permit approvals and licenses. Increasingly, government is attempting to integrate aboriginal consultation with environmental assessments and regulatory approvals. This section provides an overview of the current practice of the consultation process as it typically arises, an example of which is illustrated in Figure 3.

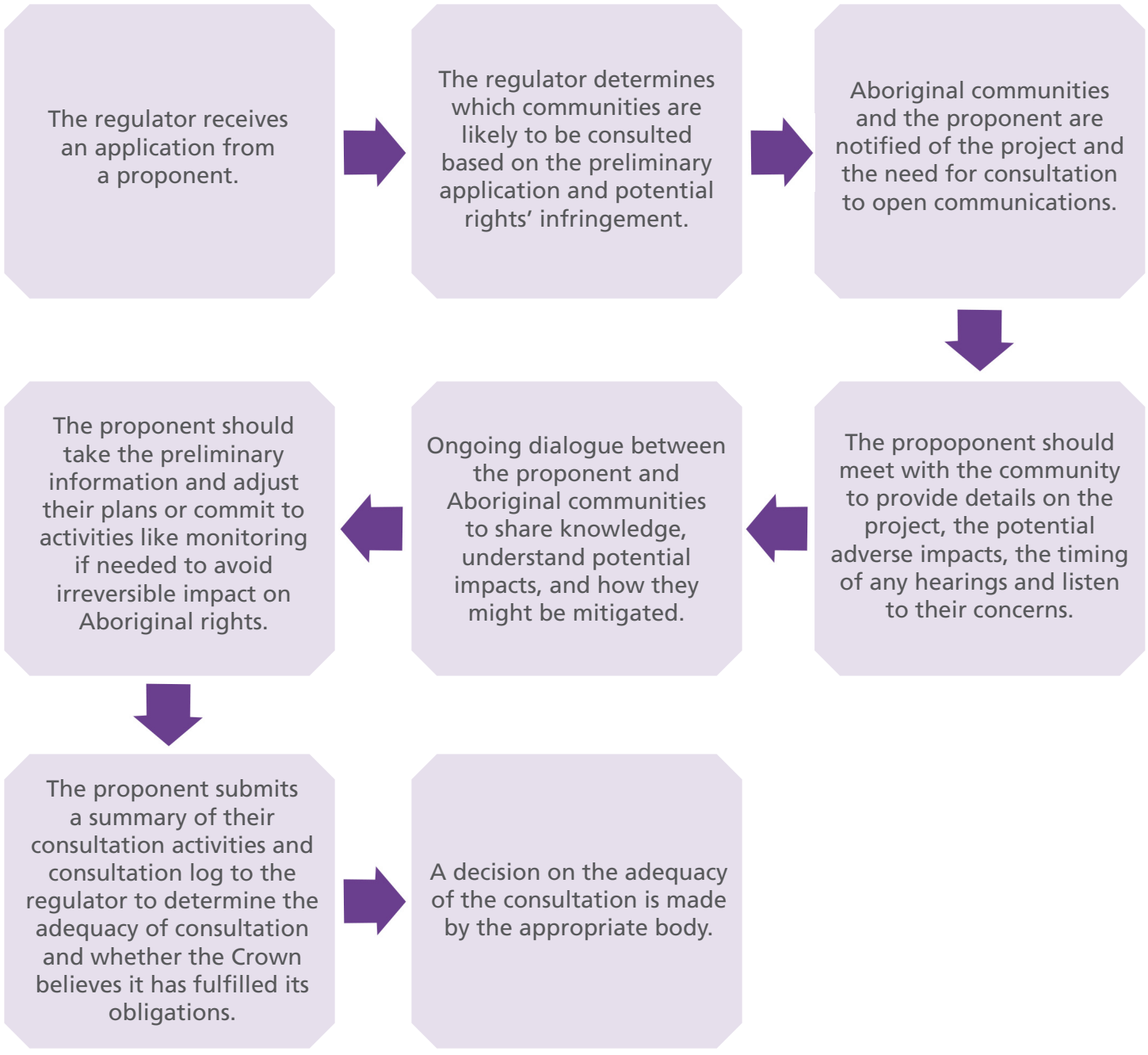
The genesis of consultation activities is often the submission by a proponent of a request for regulatory approval of a proposed project. The project proponent is not legally responsible for fulfilling the duty to consult, but governments often ask proponents to take on procedural aspects of the process. Proponents are also expected to develop accommodation mechanisms in cases where the original design of a project would cause severe or irreversible harm to Aboriginals' rights.

Once an application is submitted to a government or regulatory authority the communities that should be consulted are decided. The regulator typically also determines the depth of consultation required based on the preliminary strength of the rights claimed and an assessment of potential impacts. After determining which groups need to be consulted, the regulator will inform the affected Aboriginal communities and the proponent in order to begin communications.

At this stage, proponents are expected to begin meeting with affected communities to provide information on the project in plain language, explain any potential impacts on the Aboriginals' rights and use of the land, and begin discussing accommodation strategies. This phase begins an ongoing dialogue where the proponent shares information about the project and works to develop accommodation strategies while the Aboriginal groups have an opportunity to voice concerns and share traditional knowledge. Aboriginal groups are expected to engage in the consultation process in good faith. Given the small size and limited resources of many communities, consultation may represent a large undertaking. Aboriginals are also expected to clearly indicate who is leading consultation for their community such as the Chief and council, a dedicated department or a council of elders. Simultaneously, government will often begin engaging the affected communities directly.

Throughout the process, the proponent is expected to keep detailed consultation logs detailing the information shared, dates and locations of meetings and the concerns expressed as well as how they are being mitigated. Aboriginal agreement is not necessarily required in order for a project to go forward. The courts have established that the regulatory and consultation process must balance competing interests, which further contributes to the ambiguous nature of consultation. The regulator will then review the proponent's consultation efforts and may direct additional consultation.

Figure 3: Generic Overview of the Consultation Process



Sources: *Environmental Assessment Office. Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process. Government of British Columbia. December 2013.;*
Ministry of the Environment. Aboriginal Consultation Guide for preparing a Renewable Energy Approval (REA) Application. Government of Ontario. Fall 2013.; Government of Alberta. First Nations Consultation Guidelines on Land Management and Resource Development. Government of Alberta. November 2007.

To date, no clear rules exist to address the required depth or adequacy of consultation in general. Various governments have introduced guidelines reflecting their expectations but these issues continue to evolve in court cases. For example, whether the regulator can assess the adequacy of consultation remains an issue. Many acts including the *Canada Environmental Assessment Act, 2012* do not explicitly indicate who will review the adequacy. However, other acts like *Alberta's Responsible Energy Development Act* explicitly state that the regulator cannot determine whether consultation is adequate. In Alberta's case, the province is moving to set up the Aboriginal Consultation Office as the primary point of contact and adjudicator on adequacy of consultation. In contrast, the Environmental Assessment branch in Saskatchewan is charged with assessing the adequacy of consultation. In cases where the adequacy of consultation is debated, the courts may be required to adjudicate these disputes.

Factors that may help determine the adequacy of consultation include:

- Whether the consultation was meaningful and collaborative;
- Whether the consultation occurred in a reasonable amount of time before the project's start;
- Whether the proponent made a reasonable effort to mitigate concerns;
- The Aboriginal groups' participation in the process;
- Whether specific adverse impacts were identified; and,
- Whether the scope of potential impacts was properly communicated.

Proponents are often encouraged to begin consultation well before submitting a proposal for regulatory approval and to adopt a focus on reconciling interests. One potential benefit of this approach is avoiding court battles that can stretch for years. The *Taku River Tlingit* case stemmed from a 1994 mining application but was not resolved by the Supreme Court of Canada until 2004. Additional benefits from early, relationship-based consultation include increased certainty by ensuring issues are resolved, reduced ambiguity, improved access to a local labour force and local services in remote areas, and easier information sharing, including traditional and local knowledge.

The lack of set timelines means consultation represents a major source of uncertainty for project proponents. While governments are attempting to set timelines for each stage in the consultation process, these timelines remain weak at best. Part of this uncertainty arises because of the Crown's need to ensure adequate consultation and because proponents have no authority to determine what is "adequate" consultation. Delays may also arise from a lack of expertise in order to evaluate a proposal on the part of the affected Aboriginal group, depending on the complexity of the issues at hand.

CONCLUSION

The duty to consult and accommodate Aboriginal groups remains a complex issue with definitions and standards that continue to evolve as courts provide more interpretation and guidance. Firms that understand the complexity of Aboriginal rights and their role within the process will be better positioned to achieve mutually beneficial agreements in a timely fashion. The implications for practicing mangers are several-fold. First, proponents should begin consultation early and before project proposal submission when possible. Once consultation has commenced proponents need to identify all the concerns of affected Aboriginal groups. This includes understanding traditional uses of the land in order to develop potential accommodation strategies that avoid infringing the exercise of Aboriginal rights. In addition, it is necessary to ensure that affected groups have the resources to participate in adequate consultation, including having sufficient expertise to evaluate the proposal's impacts. Proponents should also be mindful of the courts' position that where there is doubt or ambiguity in Aboriginal rights, settlement is often in favour of Aboriginals. Accordingly, they should be prepared to adapt project plans to provide meaningful accommodation and mitigation for affected Aboriginal groups.

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