SECTION 2

Duty to Consult and Accommodate

Ontario and Canada may rely on EA to fulfill at least parts of their duty to consult and accommodate Indigenous rights holders.

What is the Duty to Consult and Accommodate?

Where a project may cause significant impacts to your rights, accommodation is required. **Accommodation means changes will be made to the project to avoid irreparable harms and to minimize the effects of the project on your rights**.[18]

The **Crown has the duty to consult and accommodate Indigenous rights holders any time their asserted or proven Aboriginal or treaty rights may be impacted by a Crown decision**.[19] The duty flows from s. 35 of the *Constitution Act*, which says that the existing Aboriginal and treaty rights of Indigenous Peoples in Canada are recognized and affirmed. The duty is grounded in the honour of the Crown.[20]

What the Duty to Consult and Accommodate is Not

Under Canadian law, the duty to consult and accommodate does not necessarily recognize First Nations' distinctive decision-making authority, let alone sovereignty on the land. While consultation can be a jumping-off point for First Nations to assert and protect their rights and their jurisdiction, it can also be used by the Crown as a tool toward justifying infringements of Indigenous rights.

Who is Responsible for Consulting and Accommodating?

The Crown – which includes the **federal government, provincial governments, and sometimes municipalities** – has the duty to consult and accommodate.

While it is the Crown that has this duty, the **Crown can delegate procedural aspects**

18 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 47.
19 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 35.
20 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 16.

of the duty to third parties.[21] This means that the Crown can delegate some of the consultation and accommodation to the proponent.

In the context of EAs, the Crown can also delegate some of its duty to the administrative body that is undertaking the EA for the government. For example, the federal Crown may delegate parts of the duty to consult and accommodate to regulators such as the Canada Energy Regulator and the Canadian Nuclear Safety Commission. So, Canada and Ontario can rely on the EA process to fulfill much of their duty to consult and accommodate. However, the honour of the Crown cannot be delegated, and the **Crown must maintain oversight over the consultation** that occurs and cannot approve the project until the Crown is satisfied that the duty has been met.[22]

Note that **even if Canada or Ontario do not conduct an EA for a project proposed within a First Nation's territory, the Crown may still have a duty to consult with and accommodate the First Nation if the project may negatively impact the First Nation's rights and interests**. So, the principles in this section of the Toolkit apply to all projects in a First Nation's traditional territory that may negatively impact the First Nation's rights and interests, regardless of whether or not there is an EA for the project.

If there is an EA process but it does not provide enough opportunity for meaningful consultation or accommodation, then the Crown must provide other ways for the First Nation to engage in meaningful consultation and achieve accommodation outside of the EA process. In practice, this means that the Crown will use the EA process as the vehicle to engage First Nations in consultation. However, if the **EA process does not give you a full opportunity for meaningful consultation, then you can demand that the government engage outside of the EA process to fulfill their duty**. You can do this by writing to the Crown to indicate that there is a need for more consultation or asking for a more robust EA, and, if that fails, bringing a judicial review application challenging the Crown decision to approve the project without discharging its duty.

When is the Duty to Consult and Accommodate Triggered?

The duty to consult and accommodate is **"triggered" when the Crown has knowledge, whether real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect those rights**.[23] "Triggered" means that the Crown is required to consult and accommodate.

There are three parts to the test to trigger the duty:

1. The Crown has knowledge of your rights;
2. The Crown is contemplating conduct; and
3. The Crown conduct may adversely affect your rights.

21 Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43 at para 56.

22 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 25; Michipicoten First Nation v Ontario (MNRF), 2016 ONSC 6899 at para 86; Tsleil-Waututh Nation v Canada, 2018 FCA 153 at para 517.

23 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 35.

Knowledge of Your Rights

To be triggered, the Crown has to have **"real or constructive" knowledge of your rights**. The threshold here is not high. The Crown has to either actually know about your claim to rights in the area of the project (real knowledge), or the project will be on lands that are known or could reasonably be suspected to have been traditionally occupied by you and so the Crown ought to know you would have impacted rights (constructive knowledge).[24]

First Nations have an obligation to clearly outline the claim to rights that may be impacted by a project, and **ensure that the Crown is aware of that claim**.[25] The Crown does not have a duty to seek out and consult First Nations unless the Crown has that real or constructive knowledge that your rights may be impacted.[26] Some of the **ways the Crown can get that knowledge of your rights** include:

- You have filed a claim in court setting out the nature of your rights, and the Crown is party to that case;
- You have told the Crown about your rights in negotiations or consultations for other projects;
- The rights at issue are treaty rights, so the Crown is assumed to know about them; or
- You have sent the Crown notice asking for consultation in respect of the activities proposed in your territory and have provided a map or other support for your claim that the project may impact your rights.[27]

You do not need to have a strong claim to rights in the area to trigger the duty to consult.[28] But the strength of your claim becomes relevant for deciding the scope of the content of the duty owed – or, in other words, how much consultation is required.

Crown Contemplating Conduct

The proposed Crown conduct can be an exercise of a power under a statute, such as an approval for a project or issuance of a permit. The Crown conduct can also be a strategic, higher-level decision such as a planning decision.[29] In the context of EAs, the Crown conduct is usually either:

a. a Crown approval of a project or granting of a permit, licence or authorization for a project; or

b. a Crown-led project such as an infrastructure or utility project.

Conduct May Adversely Affect Your Rights

You must show that there is a causal connection between the proposed Crown conduct and the potential for adverse impacts. This means that the Crown conduct is what is going to cause an impact on your rights. Addressing past wrongs is not enough.[30]

The Crown should take a generous approach here, but guessing that there could be an impact will not be enough without a bit of support to show that impacts will likely follow from the Crown conduct.[31]

24 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 36; Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43 at para 40.
25 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 36.
26 R v Desautel, 2021 SCC 17 at para 75.
27 Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69 at para 34.
28 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 37.
29 Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43 at para 44.
30 Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43 at para 45.
31 Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43 at para 46.

What is the Content of the Duty to Consult and Accommodate?

The content of the Crown's duty to consult and accommodate will depend on a preliminary assessment of both:

1. the strength of your claim to Aboriginal or treaty rights in the area; and
2. the potential impact of the proposed project or activity on your rights.[32]

Strength of Claim

For the first part, the Crown will look at evidence you may provide to assess the strength of your claim to an Aboriginal or treaty right in the area of the project or activity that may be impacted. While there is no obligation on First Nations to provide this information, the **Crown will assess the strength of your claim based on the information that it has**, so if you are able to send the Crown information to support the strength of your claim, it will help in establishing that deeper consultation and accommodation is required.[33]

Potential Impact of Project

The Crown should look at the nature of the potential impacts. Will they cause irreversible harm to your rights? Can the impacts be mitigated by the imposition of conditions on the project? The more severe the potential impacts, the higher the level of consultation that will be required.

It is often difficult for a First Nation to know the nature of the impacts of a project without having information from the proponent and hiring your own experts to help you interpret that information and assess the potential impacts. The **content of the duty to consult can change over time** as more information is gathered.[34] So if new information reveals that severe impacts are likely, the Crown should change the level of consultation it is engaging in with you.

Spectrum of the Content of the Duty to Consult

Once the strength of the claim and the seriousness of the potential impacts have been assessed, the Crown can assess the content of the duty it owes. The content of the duty to consult and accommodate required lies on a **spectrum**. At the low end, the duty may require only that the Crown notify you that the activity will take place on your traditional territory. At the high end of the spectrum, the Crown is required to engage meaningfully on all aspects of the project, and adequately accommodate your rights by making changes to the project as needed to mitigate impacts.

The duty to consult and accommodate may extend to requiring that the First Nation **consent to the project** if the potential impacts are very serious and the right is proven.[35] First Nations are encouraged to advocate for the inclusion of FPIC in consultation and accommodation. As discussed in the section on FPIC, the purpose of the duty to consult and accommodate ought to be obtaining the First Nation's consent for the project, and the Indigenous government's power to withhold consent should be present throughout the process. For Canada, Ontario and proponents, getting the consent of an affected First Nation avoids the legal uncertainty, delays and expense of a potential court challenge.[36]

32 Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43 at para 36.
33 Saugeen First Nation v Ontario (MNRF), 2017 ONSC 3456 (Div Ct) at para 74.
34 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 45.
35 Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 168.
36 Tsilhqot'in Nation v British Columbia, 2014 SCC 44 at para 97.

Guidance on the Duty to Consult and Accommodate

Canadian courts have made findings that help us understand requirements of the Crown in a given case. Below is a summary of the general principles of consultation:

- Consultation must begin at the **earliest stages** of planning and cannot be postponed.[37]
- Governments must consult in **good faith** and with an **honest intention of substantially addressing** Indigenous rights holders' concerns.[38]
- Consultation has to be **more than an opportunity** for the First Nation to **"blow off steam."**[39]
- Consultation has to be **meaningful**.[40]
- To have meaningful participation in consultations, a First Nation must have **sufficient expertise and resources**.[41]
- The **Crown must act with honour and integrity** during the process and avoid sharp dealing.[42]
- **Crown officials must have the required powers to change the project**, because consultation without the possibility of accommodation is meaningless.[43]
- The **Crown must listen carefully** to First Nations' concerns and work to minimize adverse effects on Aboriginal rights and treaty rights.[44]
- The **level of consultation owed may change over time** as the process moves forward and new information may come to light.[45]
- Crown officials should be **open to abandoning or rejecting proposals**.[46]
- If the decision is made to proceed, the **Crown should demonstrably integrate responses to First Nations' concerns** into revised plans of action and explain how Indigenous input, including Traditional Knowledge, influenced the Crown's decision.[47]
- If suggestions from First Nations for changes to a project are rejected, an **explanation is required**.[48]

Obligations of First Nations

Canadian court have said that Indigenous rights holders that are engaged in consultations with the Crown also have obligations. You must not frustrate the Crown's reasonable good faith efforts to engage in consultation and you cannot take unreasonable positions that thwart the Crown's efforts,[49] which in some cases means that you cannot refuse to meet the Crown to discuss the project without good reason.[50] You are also required to define your rights and the potential impacts with clarity (see more in Section 3 on gathering your team).[51]

37 Louis v British Columbia (Minister of Energy, Mines and Petroleum Resources), 2013 BCCA 412 at para 106.
38 Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 168.
39 West Moberly First Nations v British Columbia (Chief Inspector of Mines), 2011 BCCA 247 at para 144.
40 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 10.
41 Saugeen First Nation v Ontario (MNRF), 2017 ONSC 3456 (Div Ct) at para 26.
42 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 19.
43 Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69 at para 54.
44 Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69 at para 64.
45 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 45.
46 Gitxaala Nation v Canada, 2016 FCA 187 at paras 233-234.
47 Halfway River First Nation v British Columbia (Ministry of Forests),1999 BCCA 470 at para 160.
48 West Moberly First Nations v British Columbia (Chief Inspector of Mines), 2011 BCCA 247 at para 148.
49 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at paras 36, 42.
50 *Coldwater First Nation v Canada*, 2020 FCA 34 at para 56.
51 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 36.

Cumulative Effects

While the duty to consult and accommodate is about future actions, it does not happen in a vacuum; the **historical context is essential** to properly understanding the seriousness of potential impacts.[52] For example, if the local wildlife population has already been devastated by past projects in your territory, that is relevant to assessing the impact of another project. Where the rights are already impacted, any new impact will be more significant.

Likewise, the Crown also has to look at the project in the context of what other projects may flow from it. The consultation should look at the **overall project and not just the current small step**.[53]

To decide if Aboriginal or treaty rights have been infringed, a court will look at **cumulative effects of Crown actions**. When the cumulative effects of projects have significantly diminished First Nations' ability to exercise their rights, the Crown may be found to have infringed s. 35 rights.[54]

When engaging with the Crown, **you should document and communicate how the sum of Crown action in your territory is impacting the exercise of your rights**. For consultation to be meaningful, each project needs to be considered in the context of what has happened and what will happen, and what effect all of that has on your rights.[55]

Traditional Knowledge is particularly helpful in understanding cumulative impacts in any given territory as well as cumulative impacts over time. So, it is essential that the Crown or proponent fund you to collect Traditional Knowledge that will be used to assess and evaluate cumulative impacts.

Yahey v British Columbia

Blueberry River First Nation (BRFN) argued that cumulative effects from provincially authorized activities, projects and developments – including oil and gas, forestry, mining, hydroelectric, and agriculture – within and adjacent to their traditional territory resulted in significant adverse impacts on the meaningful exercise of their treaty rights. BRFN argued this amounted to a breach of Treaty 8 obligations by the Crown. The Crown argued the test for treaty infringement is whether so much land has been taken up in BRFN's traditional territory that members cannot meaningfully exercise their treaty rights. The Court determined that the Crown did breach its honourable and fiduciary Treaty 8 obligations to BRFN. The Court found that the Crown has "taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for [BRFN's] meaningful exercise of their treaty rights... has therefore unjustifiably infringed [BRFN's] treaty rights in permitting the cumulative impacts of industrial development" (Yahey v British Columbia, 2021 BCSC 1287 at para 1894).

52 West Moberly First Nations v British Columbia (Chief Inspector of Mines), 2011 BCCA 247 at para 117.
53 West Moberly First Nations v British Columbia (Chief Inspector of Mines), 2011 BCCA 247 at para 125.
54 Yahey v British Columbia, 2021 BCSC 1287 at para 3.
55 Yahey v British Columbia, 2021 BCSC 1287.

Funding for Consultation and Accommodation

In order for you to meaningfully participate in the consultation process, you will likely need funding. It is not reasonable for the Crown to expect you to use your own community resources to review and evaluate someone else's project.[57] If **you do not have adequate funding, this may significantly impair the quality of the consultation process** because it will not be a level playing field.[58] You need funding for staff to engage with the Crown, to hire your own experts to review information about the project, and sometimes to engage in your own studies, including Traditional Knowledge studies, and review processes.

Funding is Crucial

Appropriate funding is essential to a fair and balanced consultation process so that the playing field is fair.[56] This includes funding to hire western science experts to help you understand and evaluate proponent studies as well as funding to conduct a Traditional Knowledge study. See Section 3 for more on gathering your team, as well as the studies and work you may want to do in order to be able to meaningfully engage in consultation. The funding of studies alone is not consultation, but the information that will come from those studies is essential for you to be able to adequately understand the potential impacts of the project so that informed consultation can occur, and accommodation measures can be negotiated.

56 Saugeen First Nation v Ontario (MNRF), 2017 ONSC 3456 (Div Ct) at para 27; Enge (North Slave Metis Alliance) v Mandeville, 2013 NWTSC 33 at para 269.

57 *Saugeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456 (Div Ct) para 158.

58 Clyde River (Hamlet) v Petroleum Geo-Services Inc., 2017 SCC 40 at para 49.

Consultation Checklist

Steps First Nations should take when participating in consultations with the Crown

Notify the Crown that you have rights in the area of the project that may be impacted.

Give the Crown detail about the nature of your rights near the project. This may require more study (e.g., Land Use Study, IK study), which the Crown or proponent should fund.

Hire your own scientific advisors to review and critique the proponent's studies. The Crown or proponent should fund the cost or hiring your own advisors.

Conduct any studies needed to properly assess the impact of the project on your rights.

With the help of your advisors, tell the Crown about the potential impacts of the project on your rights.

Do not refuse to meet with the Crown, unless it is reasonable to refuse in the circumstances.

Build a consultation record that shows that you are willing to meaningfully engage in consultation.

What Happens if the Crown Does Not Fulfill the Duty to Consult and Accommodate?

If the Crown does not fulfill its duty, then the contemplated Crown conduct should not go ahead. For example, the Crown should not approve a project through an EA or grant the required authorization until the duty is fulfilled. If the Crown goes ahead with the action and you do not think that the Crown has fulfilled its duty, then you can challenge the Crown's decision to proceed. A common way to do that is to **bring a claim in court through a judicial review** of the Crown decision. The court will look at the project details and the consultation that occurred, and decide if the duty was met. The court could let the project go ahead, revoke the decision, or send it back for more consultation.[59]

While you wait for the court case to be heard, there is a risk that the Crown and proponent will go ahead with the project. You can negotiate for an agreement to stop the project until the case is decided or, if you cannot get the agreement, it is possible to bring an application for an injunction – that is, seeking a court order to make the work stop until the case is decided. The legal test to get an injunction is very strict.

If you are in a situation where you are thinking of bringing a legal challenge or application for an injunction, you should seek legal advice before doing so.

Participating in the Consultation Process While Building a Case to Challenge

While the hope is that the Crown will always engage in a meaningful consultation process and accommodate your rights, that does not always happen. It is important that while you engage in any consultation process – including consultation that takes place in an EA – you keep a record of all communication and meetings so that if the Crown does not fulfill its duty, you have the evidence you need for a court challenge.

59 Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43 at para 37.

How to Build a Good Consultation Record

Develop an **internal record-keeping system**. You can print everything and keep it in a paper file or use an electronic filing system to keep documents related to a project together.

Keep all emails and copies of letters sent and received.

Prepare dated and signed **meeting minutes** after important phone calls and meetings and **send a copy of your notes to the Crown** for their file.

Consider **following up** a phone call or meeting wtih a **written letter** confirming what was discussed and next steps.

For important correspondence, **use letters instead of emails**. Emails can get bogged down with replies, making the chain of communication hard to follow.

Sometimes letters are drafted but never sent. For sent letters, use a stamp or handwrite on the letter the date and how it was sent so that you can **confirm it was sent** and is not just a draft.

When in doubt, **put it in writing**. Written evidence will likely have more weight than your oral evidence given later describing what you remember happened.

Send the Crown copies of all documents you want them to consider so that the **Crown can include those documents in its "consultation record."** If it is not in the consultation record, you may need the court's permission to use it as evidence.

If you think that the proponent or Crown is not sharing all information with you, file a **freedom of information or access to information request** asking for all correspondence and documents related to the project and consultation with you.

Make sure your written correspondence reflects a **willingness to participate in a meaningful consultation process**.

CASE STUDY

SAUGEEN OJIBWAY NATION AND AGGREGATES MINING[60]

The Saugeen First Nation and the Chippewas of Nawash Unceded First Nation (together the Saugeen Ojibway Nation ["SON"]) challenged a decision by Ontario to approve a quarry in SON's traditional territory, on the basis of inadequate consultation.

In 2008, T&P Hayes – a quarry operator – applied to the Ministry of Natural Resources and Forestry for a licence to operate a limestone quarry in SON's territory, right next to lands that were subject to a claim filed by SON in court. Despite that, SON did not find out about the application until 2011. Once they found out about the application, SON wrote to Ontario flagging that the duty to consult and accommodate was triggered.

From there, there was over five years of back and forth between the First Nations and Ontario. SON maintained the position that consultation was required, and that they needed funding to be able to review the impact studies that had been completed (about natural environment, lands and water) in order to identify potential adverse impacts. The Crown and the proponent disagreed, taking different positions at different times over the years about whether consultation was required and what level of consultation was due. While there were years of exchanged letters and some meetings, the record showed that none of it amounted to meaningful or substantive conversation about the project and its impacts on rights. The court quashed Ontario's decision to approve the quarry, sending it back for proper consultation.

In deciding if there has been enough consultation, the court will look at what is called the "consultation record." This is a record of all the correspondence and meetings that happened. Usually, the court will look only at the Crown's version of the consultation record, but there are exceptions.[61]

Part of what helped SON win the case is that over the five years of back-and-forth, they had sent letters setting out their rights and interests and asking for a meaningful consultation process. SON also asked for funding to engage experts. At various times Ontario promised a consultation process and also some funding, but never delivered.

Through their letters and meeting notes, SON had developed a written consultation record showing that SON had tried to engage with the Crown and made reasonable requests over five years for a fair and clear consultation process, but the Crown did not ever fulfill its duty to consult.

60 Saugeen First Nation and Chippewas of Nawash Unceded First Nation v Ontario (MNRF), 2017 ONSC 3456.

61 Pimicikamak v Manitoba, 2018 MBCA 49.