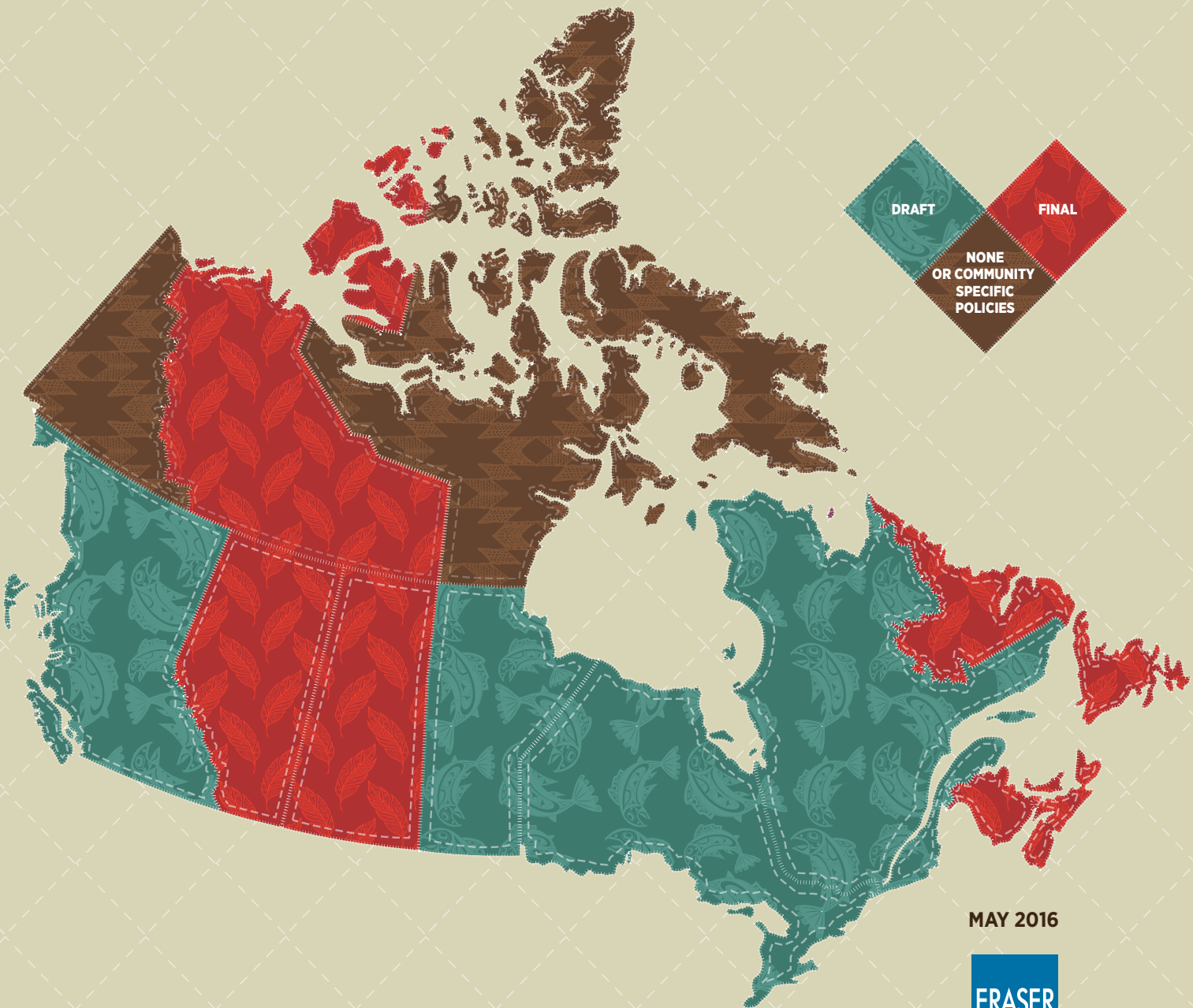


The Duty to Consult with Aboriginal Peoples

A PATCHWORK OF CANADIAN POLICIES

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Executive summary

Section 35 of the Canadian Constitution states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. In an attempt to provide greater clarity the constitution defines “treaty rights” as rights that now exist by way of “land claim agreements or may be so acquired”. It is through this constitutional provision that the duty to consult has been constructed by Canadian courts. The department of Indigenous and Northern Affairs Canada estimates that the legal duty to consult is triggered for some provinces over 100,000 times per year and for the federal government over 5,000 times per year.

Over the past decade, the Supreme Court of Canada has attempted to define how provincial and federal governments are to put into practice their duty to consult with First Nations. They have done this through various judgments including: *Haida Nation v. British Columbia*, *Taku River Tlingit First Nation v. British Columbia*, *Mikisew Cree First Nation v. Canada*, and *Tsilhqot’in Nation v. Canada*. In an effort to address the Crown’s legal obligation to consult with aboriginal groups, provinces have created consultation guides for their departments and project proponents. However, these guidelines are vastly different depending on which jurisdiction a project is in. This creates a patchwork of consultation policies across the country.

There are some principles that all jurisdictions share, such as the Crown’s taking responsibility for the duty to consult; and yet there are other principles that differ dramatically depending on the province in which a project is located. For example, British Columbia, Manitoba, and Quebec are the only jurisdictions that do not state in their policies that aboriginal communities are required to participate in the consultation process. British Columbia, Manitoba, Ontario, and Quebec also all still have “draft” aboriginal consultation policies. In the case of Ontario, their policy has been in draft form since 2006. The consultation process could be improved for project proponents and First Nation communities across the country.

Recommendations

-  British Columbia, Manitoba, Ontario, and Quebec could provide additional certainty to First Nations and project proponents by finalizing their “draft” consultation guidelines.

- ❖ British Columbia, Manitoba, and Quebec could outline the roles and responsibilities of First Nations during the consultation process. The rest of the jurisdictions analyzed for this paper have clear expectations of engagement from First Nations communities.
- ❖ Timelines around the consultation process to ensure the duty to consult is implemented in a timely way is another improvement jurisdictions could adopt. Timelines will help guide project proponents who are undertaking procedural aspects of the duty to consult and it will also provide First Nations a clear indication of how long they have to engage in the consultation process. First Nations' capacity to engage in the consultation process should be taken into consideration when developing timelines.
- ❖ Manitoba could improve their process by including clear offloading provisions in their duty-to-consult policy and highlighting what, if any, procedural duties can be offloaded to project proponents in the consultation process.

Introduction

Canada's First Nations people existed in communities across the country prior to European settlement. As a result, following Canadian sovereignty First Nations communities asserted that their distinct rights were never extinguished and these rights were recognized and protected within the Canadian constitution. In fact, section 35 of the constitution states that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". In an attempt to provide greater clarity the constitution defines "treaty rights" as rights that now exist by way of "land claim agreements or may be so acquired" (Canada, Gov't of, 2016). It is through this constitutional provision that the duty to consult has been constructed by Canadian courts. Over the past decade, the Supreme Court of Canada has attempted to define how provincial and federal governments are to put into practice their duty to consult with First Nations. Although the doctrine is to apply to governments whose actions might have an adverse impact on aboriginal or treaty rights, in practice, governments are offloading some of these responsibilities to entities that wish to undertake projects or development in or near First Nations lands.

Furthermore, without an overarching framework, the legal principle of the duty to consult has been implemented by different governments in different ways across the country, resulting in a checker board of policy approaches that are difficult to navigate for both First Nations and project proponents. This would not be an issue if the legal duty to consult were triggered on rare occasions across the country. However, the federal department of Indigenous and Northern Affairs Canada estimates that the legal duty to consult is "triggered for some provinces over 100,000 times per year and for the federal government over 5,000 times per year" (Tremblay, 2011).

This publication will discuss the evolution of the jurisprudence on the duty to consult, take a look at how provincial and federal policies implementing the duty to consult differ across the country, and give recommendations on how to improve the consultation process for First Nations, project proponents, and governments.

Evolution of Jurisprudence

Judgments of the Supreme Court of Canada over the past two decades regarding the duty to consult demonstrate that the legal principle of the duty to consult has evolved dramatically with every decision. Although there are many lower-level court decisions regarding the principle of the duty to consult, this section focuses on key Supreme Court of Canada cases regarding the duty to consult that have affected the responsibilities and rights of First Nations, project proponents, and governments in regards to consultation and accommodation of aboriginal people.

Haida Nation v. British Columbia—Supreme Court of Canada, 2004

The *Haida Nation* Supreme Court of Canada decision of 2004 [1] stems from the BC government's deciding, in 1961, to issue a tree-farm licence on the Queen Charlotte Islands, where the Haida Nation had a pending land claim that had not yet been settled. In 1999, the BC government transferred the tree-farm licence to a private company without consulting the Haida Nation. In 2004, the Supreme Court of Canada found that the BC government breached their duty to consult the Haida Nation before transferring the licence. This decision also clarified for governments when the Crown needed to engage in the duty to consult. The judgment states that consultation needs to occur when the Crown is considering engaging in conduct that has the potential to adversely affect an aboriginal group's ability to exercise their rights such as harvesting and cultural practices. The judgment highlighted that governments should develop consultation guidelines that can help guide the consultation process and make all parties aware of the rules throughout the consultation process. The judgment is also clear that the duty to consult does not extend to third parties or private parties; however, governments are able to delegate procedural aspects of the duty to consult to private parties such as natural resource companies. Furthermore, one of the important components of the Haida case was the explicit reference to a First Nations veto: the judgment states that, although there is a duty to consult on the part of the Crown, this in no way gives aboriginal groups a veto over project decisions.

[1] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.

“Uncertainty surrounding First Nations issues and implementation of court decisions is still a concern. Threat by First Nations to block resource development regardless of process and company’s approval through the outlined process is also a worry”. — vice-president, exploration company, British Columbia (Jackson and Green, 2016)

Taku River Tlingit First Nation v. British Columbia— Supreme Court of Canada, 2004

The Supreme Court of Canada’s judgment in *Taku River Tlingit* [2] stems from the BC government’s decision in 1998 to grant approval for Redfern Resources Ltd., a mining company, to build an access road through the First Nations traditional territory. Before approval was granted, the First Nation, Redfern Resources Ltd., and the province engaged in a three-year environmental consultation process. The Taku River Tlingit First Nation, however, brought forward a case based on aboriginal title and a lack of consultation. The Supreme Court of Canada found that by involving the First Nation in the environmental process and making the First Nation a member of the project committee, the province of British Columbia did meaningfully consult with Taku River Tlingit First Nation and upheld the Crown’s duty to consult. By ruling that the province of British Columbia did in fact fulfill its duty to consult with the Taku River Tlingit First Nation, the judgment affirms that provincial governments can rely on regulatory processes to fulfill the duty to consult. It also clarified that the consultation process can occur in stages and that the province does not need to reach an agreement with a First Nation in order to meet its duty to consult.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)— Supreme Court of Canada, 2005

Unlike the two cases outlined above, the *Mikisew* case [3] dealt with treaty lands. In 2000, the federal government approved a winter road that ran through the Mikisew First Nation’s reserve land. After protest by the Mikisew Cree First Nation, the federal government moved the location of the road to go around the boundary of the First Nation’s reserve but did so without consulting the First Nation. The community argued that it was not consulted about the winter road and that its construction would have adverse impacts to Mikisew Cree First Nation’s hunting and trapping rights. The Supreme Court of Canada judgment found that the federal government did not adequately consult with the First Nation and that it breached its duty to consult. The Mikisew First Nation is located on Treaty 8 territory and so this judgment affirmed that the duty to consult also applies to historic treaty areas and not just reserve and traditional territory lands. It also clarified that, when governments propose to “take up” lands in treaty areas, they need to consult with First Nations. Further, if there

[2] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550.

[3] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69

is an impact on the rights of First Nations people, such as those to hunting and trapping, First Nations are able to claim infringement on their rights and should be accommodated accordingly.

Tsilhqot'in Nation v. Canada—Supreme Court of Canada, 2014

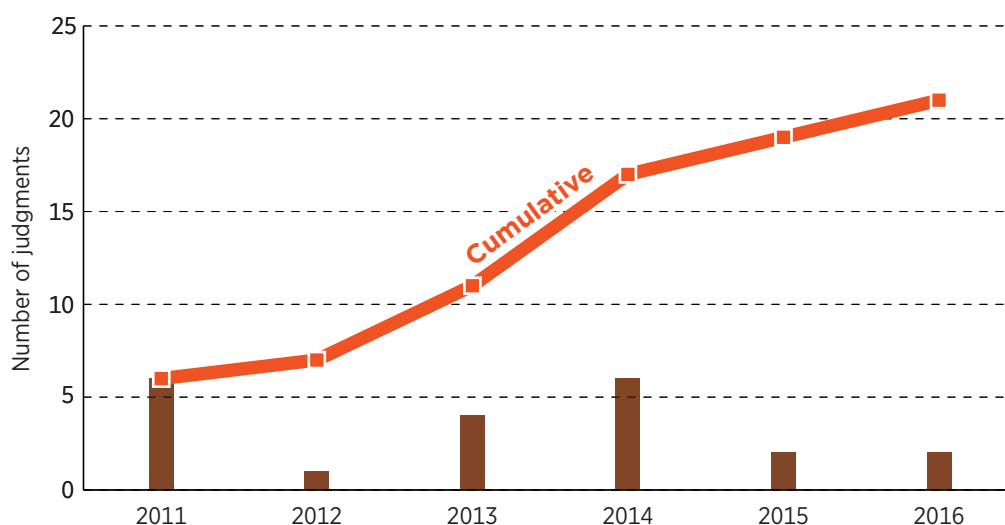
The Supreme Court of Canada's judgment in *Tsilhqot'in Nation v. British Columbia* [4] represents the first time in Canadian history that Aboriginal title for a First Nation has been granted on territory outside an Indian reserve. The unanimous judgment recognized Aboriginal title to over 1,700 square kilometres of land in the interior of British Columbia. Despite having characteristics of fee simple, Aboriginal title represents communal ownership, not individual property rights. This judgment provides a clear test for when Aboriginal title can be recognized on traditional territory. Where Aboriginal title has been recognized, economic development will require the consent of the First Nation that holds title. However, the Crown can push through development without the consent of the First Nation if it is able to demonstrate a compelling and substantial public purpose for the proposed activity. The judgment reaffirms that consultation processes and the justification of infringements of Aboriginal rights and title are the responsibility of the Crown and not of project proponents. It will mean that, if development is to occur on Aboriginal title land against the wishes of the First Nation, governments will have to be advocates for third-party projects. Where there is no consent, and the potential infringement cannot be justified, proposed projects may be set aside by the court. This is also true for existing development projects. This judgment requires that, in addition to consultation, consent is required from First Nations on land where aboriginal title has been established.

[4] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, 2014 SCC 44

Why Should We Be Concerned with the Duty to Consult?

There are many reasons that project proponents and governments should be concerned with the evolution of jurisprudence regarding the duty to consult and government policies on how to implement consultation with First Nations. First, research has shown that, in regards to energy projects in Canada, there is not a single proposed oil and gas project that does not affect at least one First Nation community's traditional territory (Bains, 2013). And, since the duty-to-consult doctrine states that the consultation process is triggered if there is a chance that there may be an adverse impact on a community's rights and traditional uses, that would mean that every oil and gas project currently being proposed in Canada requires consultation with First Nations communities. Furthermore, in addition to the Supreme Court of Canada's judgments described earlier there have been numerous decisions by lower-level courts about the duty to consult and an increase in litigation around the issue. In British Columbia where, through competing and overlapping claims, First Nations have asserted ownership of the whole province as traditional territory, there has been a steady increase in the number of court decisions about the duty to consult within the BC Supreme Court. As [figure 1](#) demonstrates, in 2011 alone there were six duty-to-consult judgments rendered by

Figure 1: Duty-to-consult judgments in British Columbia, 2011-2016

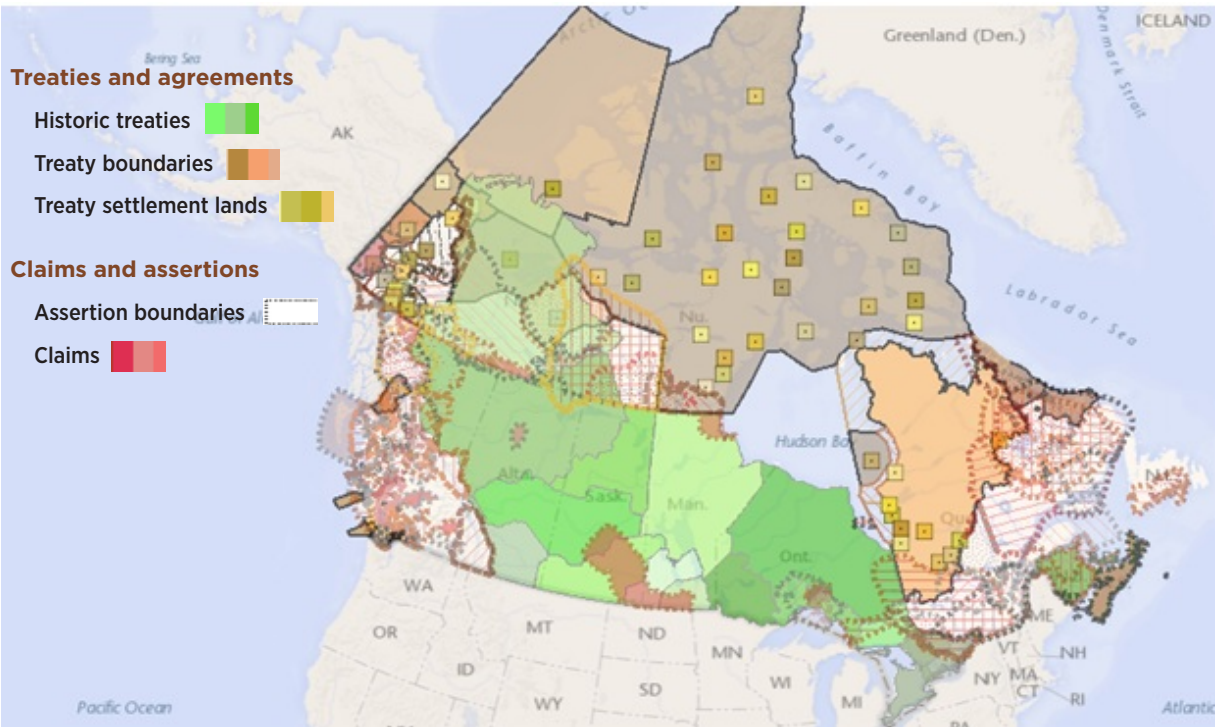


Source: Courts of British Columbia, 2009.

the BC Supreme Court. By 2015, the cumulative number of judgments had risen to 19 and we have already seen two decisions on the duty to consult come forward in 2016. Furthermore, as [figure 2](#) demonstrates, when First Nations' traditional territory and land claims are taken into consideration, there is not a single corner of the country where consultation with aboriginal communities may not be required.

With an increase in litigation surrounding the duty to consult and with natural resource development projects affecting First Nations' traditional territory, it is important that we have in place sound policies on the duty to consult that can help guide project proponents through the consultation process and ensure that governments are fulfilling their duties to consult with First Nations.

Figure 2: Land in Canada subject to Aboriginal treaties and agreements or claims and assertions as of 2016



Source: Department of Indigenous and Northern Affairs Canada, 2016: ATRIS.

Provincial Discrepancies in Policies and Guidelines on the Duty to Consult

“Long drawn-out environmental approvals; lack of clarity on negotiations with First Nations; no guidelines and uncertainty of cost outcomes; unrealistic government requirements for NL benefits, are all deterrents in Newfoundland & Labrador”. — consultant, exploration company, Newfoundland & Labrador, Quebec (Jackson and Green, 2016)

The duty to consult applies to all provinces and territories as well as to the federal government. Although an overarching framework for the duty to consult has been provided by the federal government, it does not apply on a provincial level because management of natural resource and provincial crown land falls under provincial jurisdiction, even though First Nation reserve lands are under federal jurisdiction. In fact, each province has its own guideline on consultation, which can differ greatly from province to province. There are extensive differences among the consultation guides provided by the provinces ([table 1](#)). There are some principles that all jurisdictions share, such as the Crown taking responsibility for the duty to consult; and yet there are other principles, such as placing a time frame around the consultation process, that is shared by only a couple of provinces.

Aboriginal participation required in the consultation process

There is a clear indication in the jurisprudence that there is a requirement for the Crown to consult with First Nations but do First Nations have a responsibility to participate? Many provinces have proactively addressed this question in their consultation policies and accompanying guidelines. Notably, British Columbia, Manitoba, and Quebec are the only jurisdictions that do not explicitly state that First Nations have a responsibility to participate during the consultation process. Alberta states that

First Nations have a reciprocal onus to respond with any concerns specific to the anticipated Crown decision in a timely and reasonable manner and to work with Alberta and project proponents on resolving issues as they arise during consultation. (Alberta, Aboriginal Relations, 2014: 4)

Saskatchewan states that First Nations are “[r]esponsible for participating in the consultation process in good faith and a timely manner, making their concerns known about adverse impacts on treaty and aboriginal rights and traditional uses, and responding to the government’s attempts to consult” (Saskatchewan, Gov’t

Table 1: Discrepancies among provincial duty-to-consult provisions

Feature	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL	Canada
Aboriginal participation required		●	●		●		●	●	●	●	●
Crown takes responsibility for the duty to consult	●	●	●	●	●	●	●	●	●	●	●
Clear offloading procedures for proponents	●	●	●		●	●	●	●	●	●	●
Draft policy	●			●	●	●					
Final policy		●	●				●	●	●	●	●
Time frame for consultation process		●	●								
Coordination with other levels of government (municipal/federal/provincial)	●	●	●	●	●	●	●	●	●	●	●
Legislation around the duty to consult policy											

of, 2010: 8). Ontario states that aboriginal communities need to make their concerns known to ministries and respond to the ministry’s attempts to meet their concerns (Ontario, 2006: 9). Furthermore, Ontario states the ramifications for aboriginal communities who choose not to engage in the consultation process: if a aboriginal community does not to engage in the consultation process, this will not prevent a decision from the government from moving forward. Through its early exploration guidelines, Ontario highlights that an aboriginal community’s role in the consultation process is to not frustrate good faith efforts to consult and to not make unreasonable attempts to prevent the government from making decisions or prevent the project from proceeding (Ontario, 2012: 4). All the Atlantic provinces have provisions in their consultation guides that state the responsibility of First Nations to engage in the consultation process. In fact, the guidelines of Nova Scotia explicitly state that aboriginal groups have a reciprocal

duty to voice their concerns and make them known to the government but cannot “frustrate the government’s attempts to consult or take unreasonable positions” (Nova Scotia, Office of Aboriginal Affairs, 2015: 7).

Although Quebec does not explicitly state that aboriginal groups must participate in the consultation process, their guidelines do state that all parties must engage in the consultation process in good faith (Quebec, Interministerial Working Group, 2008: 9). Furthermore, although Manitoba also does not explicitly state that First Nations are not required to participate in the consultation process, the guidelines do state that if a First Nation or Métis community chooses not to participate in the consultation process it might make it harder for them to challenge a government action or decision regarding a failure to consult claim (Manitoba, Aboriginal and Northern Affairs, 2009: 5). Finally, the federal guidelines for consultation explicitly state that “aboriginal groups also have a reciprocal responsibility to participate in the consultation processes” (Canada, 2011: 13).

As this analysis of the 11 provincial and federal duty-to-consult guidelines demonstrates, the requirement that aboriginal groups participate in the consultation process is explicitly stated in eight of the 11 jurisdictions. The only jurisdictions that do not explicitly state this principle in their guidelines are British Columbia, Manitoba, and Quebec.

Crown takes responsibility for the duty to consult

As table 1 demonstrates, all provinces and the federal government explicitly take responsibility for the duty to consult. All jurisdictions state that they are responsible for undertaking the duty and for ensuring that aboriginal communities are consulted and accommodated appropriately. Nevertheless, some jurisdictions explicitly state which departments and offices within the provincial government are responsible for undertaking the duty. For example, British Columbia’s consultation document, *Building Relationships with First Nations*, states that the Environmental Assessment office can discharge the duty of the crown to consult and accommodate where necessary (British Columbia, 2010: 13). Furthermore, the government of Alberta, through their updated 2014 consultation policy, created a standalone Aboriginal Consultation Office, which is responsible for monitoring, directing, and supporting the consultation activities of the province (Alberta, 2014: 3). In contrast, the federal guidelines state that all federal departments are responsible for supporting the Crown’s duty to consult (Canada, 2011: 17).

Every Supreme Court of Canada judgment that has been rendered regarding the duty to consult has explicitly stated that the responsibility for fulfilling the duty to consult rests with the Crown. It is, therefore, reassuring to see that all the guidelines analyzed for this paper explicitly state the role of the Crown in discharging the duty to consult.

“Alberta has put the responsibility for crown consultation with aboriginal people onto companies”. — vice president, producer company with more than US\$50M, Alberta (Jackson and Green, 2016)

Offloading responsibilities and support for project proponents

Despite the fact that all jurisdictions take responsibility for discharging the duty to consult, the Supreme Court of Canada’s *Haida* decision allows for governments to delegate procedural aspects of the duty to consult to private parties such as natural-resource companies or project proponents. In other words, a government is able to fulfil its duty to consult by relying on project proponents on the ground to undertake the consultation process. Interestingly, Manitoba is the only jurisdiction analyzed that does not explicitly state what, if anything, the government can offload to third parties and project proponents. For example, British Columbia clearly states that the government “can delegate certain procedural aspects of consultation” to proponents (British Columbia, 2010: 12). They go on to list the support that is provided to proponents if responsibilities are offloaded: identifying which groups need to be consulted, providing the proponent non-confidential information about the affected First Nation group, and identifying the level of consultation that is required (British Columbia, 2010: 13).

In contrast, Saskatchewan makes a point of stating that the government cannot delegate the duty to consult but does identify areas where project proponents and third parties can be involved in the consultation process. For example, Saskatchewan says that proponents have an “important role to play in the procedural phase of the consultation process”, such as outlining the project in question to First Nations communities and describing how the project may affect a community’s rights like those to hunting and trapping in traditional territories (Saskatchewan, Gov’t of, 2010: 4). In Ontario, the government describes a natural resource company’s role during the early exploration process as one of information sharing. Specifically, the guidelines state that proponents are to provide additional details to the aboriginal community about proposed activity and how the proposed activity could affect aboriginal rights (Ontario, 2012: 3).

The federal guidelines for consultation state that the Crown may delegate some tasks to the proponent, such as information gathering and assessing the impact of the project on aboriginal rights. It also identifies some formalized processes in provincial jurisdictions for involving industry and project proponents in the consultation process (Canada, 2011: 19). One example of a formalized process is that with the Mi’kmaq First Nations in Nova Scotia. The proponent’s guide outlines the role of industry members in the consultation process with the Mi’kmaq of Nova Scotia. As the guide demonstrates, the role for third parties in Nova Scotia includes providing information on the project to affected aboriginal communities as well as undertaking ecological studies for projects that are located on Crown land or that have high archaeological and cultural significance (Nova Scotia, 2012: 4).

The Supreme Court of Canada has stated that governments are able to delegate procedural duties regarding the duty to consult to project proponents, and some jurisdictions do have clear procedures on how proponents can undertake these procedural duties. For example, the Mi'kmaq communities have a separate and clear procedural guide for proponents who wish to undertake consultation processes with aboriginal communities in Nova Scotia. Clear offloading procedures are an important process for provincial jurisdictions to consider because a lack of clarity over the delegation of procedural consultation activities to project proponents and government departments can undermine the Crown's consultation efforts. For example, in the Supreme Court of Canada *Little Salmon/Carmacks* decision, the court found that the Government of Yukon, through a delegated regulatory process had fulfilled its duty to consult with the Little Salmon/Carmacks First Nation (2010 SCC 53, [2010] 3 S.C.R. 103).

Draft guidelines and final guidelines

There is also discrepancy between provinces that have draft or interim policies and those that have final policies. For example, four jurisdictions in Canada identify their guidelines as “draft” or “interim”: British Columbia, Manitoba, Ontario, and Quebec. Interestingly, these jurisdictions have had draft guidelines for over five years. Manitoba's provincial policy for Crown consultations with First Nations Métis communities and other aboriginal communities was created in 2009 and is still marked as a draft; Ontario's *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights* was created in 2006 and a decade later is still designated as a draft; British Columbia's interim *Procedures for Meeting Legal Obligations When Consulting First Nations* was created in 2010; and finally Quebec's *Interim Guide for Consulting with the Aboriginal Communities* was updated in 2008 but still has a distinction of being identified as interim. It is concerning that British Columbia, Manitoba, Ontario, and Quebec still have “draft” policies and guidelines that, in the case of Ontario, are now a decade old when these jurisdictions have almost 500 First Nations communities engaging in consultation processes. Furthermore, the province of Ontario, rather than updating or finalizing their draft guidelines from 2006, created an additional subset of guidelines in 2012 specifically for mining projects in the province. Furthermore, although the other jurisdictions analyzed for this study have final consultation guidelines and policies, none of them have been updated to take into account Supreme Court of Canada's judgment in the fall 2014 in *Tsilhqot'in Nation v. British Columbia*. The most recent consultation guidelines can be found in Nova Scotia (April, 2015), Alberta (summer of 2014), and in Newfoundland & Labrador (April, 2013).

For First Nations and project proponents involved in the consultation process it is imperative that the guidelines and policies that they are operating under are final and do not alter throughout the consultation process and, if they are, a strategy should be put into place for dealing with situations where a policy is altered in midst of a consultation process.

Time frame for consultation process

An important question to ask during the consultation process and in regards to different jurisdiction's policies is when consultation is complete? When has the duty been fulfilled? Interestingly, only two jurisdictions have identified time limits on the consultation process. Alberta and Saskatchewan explicitly state timelines for when consultation should be complete. For example, in the updated 2014 guidelines Alberta identifies a time limit for First Nations to respond to consultation notifications. Specifically, they state that First Nations have 15 working days to respond to project notification for streamlined and standard consultation processes and 20 working days for extensive consultation processes that may involve an environmental assessment (Alberta, 2014: 13). Alberta also imposes a deadline of 20 business days on the government to respond to project proponents and First Nations regarding a decision on the project. Saskatchewan also states explicit timelines for First Nations and project proponents to engage in the consultation process and on the government to render a decision regarding a project. For example, in its 2010 guidelines Saskatchewan states that if there is a "permanent disturbance to land and/or change in resource availability" for the First Nation affected, the community will be given 45 days to respond to the consultation request and a decision from the government regarding the proposed project is anticipated to exceed 90 days (Saskatchewan, 2010: 10).

Timelines for the consultation process are important because they provide time limits for governments, project proponents, and First Nations to complete the consultation process. Timelines can help ensure that the duty to consult is executed in a timely manner with all parties participating in good faith. However, if other jurisdictions intend to include specific timelines in their policies it is important that they do so keeping in mind the capacity of the First Nations; ensuring that the First Nations communities involved in the consultation process will be able to adhere to meet the suggested timelines.

Legislated duty to consult

Interestingly, no jurisdiction has legislation supporting the duty to consult. Alberta, however, in 2013 introduced the *Aboriginal Consultation Levy Act* and created the Aboriginal Consultation office. The creation of the office and fund

"Native land claims procedure was excessively long and entailed the claims of four different bands. Demands were excessive by some and replies were slow by others." — president, exploration company, British Columbia (Jackson and Green, 2016)

allowed the government of Alberta to collect consultation levies from project proponents that were then used to provide grants to First Nations “to assist them in developing capacity to participate in, and in meeting the costs of, any required Crown consultation in respect of provincial regulated activities” (Alberta, Aboriginal Relations, 2013: 4).

Despite not having the consultation process legislated, provinces such as Nova Scotia have signed tripartite agreements that encompass the federal, provincial, and aboriginal governments on the consultation process. However, these agreements are not legislated.

Veto or no veto

The Supreme Court of Canada *Haida* judgement stipulates that consultation of First Nations does not grant a veto to communities over decisions about a project. However, some First Nations believe that the federal government’s renewed support, without qualification, of the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP) and the principle of free prior and informed consent has given First Nations communities a veto right over resource projects. For example, Ron Tremblay, Grand Chief of the Wolastoq Grand Council, believes that the adoption of UNDRIP has given his community veto power over the proposed Energy East pipeline (Hazlewood, 2016, May 11). Currently, only a few provinces have taken the non-veto principle from the *Haida* judgement and applied it to their consulting guidelines. For example, the Nova Scotia guidelines state that aboriginal groups do not have a veto over government action and that the goal of consultation is to find a way to avoid adverse impacts on aboriginal or treaty rights (Nova Scotia, Office of Aboriginal Affairs, 2015: 7). Ontario states that the consultation process does not provide aboriginal communities with a veto (Ontario, 2006: 8). Finally, Quebec explicitly states “the right to be consulted does not give the aboriginal communities a veto right over the Crown’s decisions” (Quebec, Interministerial Working Group, 2008: 7). Given the renewed support, without qualification, of UNDRIP by the federal government, more provinces may begin including no-veto clauses in their policies, if they are concerned about how the “free prior and informed consent” provision may be applied to their jurisdiction.

This section has highlighted the discrepancies around duty-to-consult policies and guidelines across the country. Consistency across jurisdictions regarding the duty to consult is important. For example, many projects, whether they be natural resource or transportation projects, cross provincial borders and the stark contrasts in consultation policy between these jurisdictions and how First Nations should be consulted in different provinces can cause confusion

and uncertainty for project proponents. Take, for example, the Northern Gateway resource project, which spans two provincial jurisdictions, British Columbia and Alberta, and over a dozen First Nations communities. Having different consultation processes and different expectations can make the consultation process more lengthy and difficult for projects that span a number of jurisdictions.

Conclusion

“By taking the proper approach of engaging First Nations and listening to their concerns, combined with friendly dialogue with regulators, I’ve never had any problems in receiving permits. In 2014, it was the First Nation that leaned on the government to approve expedited permits, and we received them the next day”. — president, exploration company, British Columbia (Jackson and Green, 2016)

Each province in Canada has a unique relationship with First Nations communities. In jurisdictions like British Columbia, where there are hundreds of First Nations communities and very few historic treaties and where, through competing and overlapping claims, First Nations have asserted ownership of the whole province as traditional territory, the duty to consult can apply to every corner of the province. In places like Nova Scotia, where the main aboriginal relationship is with the Mi’kmaq, there are clear guidelines that have been created on how to engage and consult with the Mi’kmaq nation. The patchwork of requirements outlined in table 1 creates different expectations from First Nations communities across the country and makes it more difficult to navigate the consultation process for proponents who are trying to advance projects that cross provincial boundaries. With that in mind, the following recommendations are suggested in an effort to streamline the consultation process across the country.

Four recommendations

- 1** British Columbia, Manitoba, Ontario, and Quebec could provide additional certainty to First Nations and project proponents by finalizing their “draft” consultation guidelines.
- 2** British Columbia, Manitoba, and Quebec could outline the roles and responsibilities of First Nations during the consultation process. The rest of the jurisdictions analyzed for this paper have clear expectations of engagement from First Nations communities.
- 3** Timelines around the consultation process to ensure the duty to consult is implemented in a timely way is another improvement jurisdictions could adopt. Timelines will help guide project proponents who are undertaking procedural aspects of the duty to consult and it will also provide First Nations a clear indication of how long they have to engage in the consultation process. First Nations’ capacity to engage in the consultation process should be taken into consideration when developing timelines.
- 4** Manitoba could improve their process by including clear offloading provisions in their duty-to-consult policy and highlighting what, if any, procedural duties can be offloaded to project proponents in the consultation process.

The duty to consult policy is triggered over 100,000 times every year in provinces across the country. With over 100,000 consultations being undertaken every year, it is imperative that provinces have policies that are consistent and provide clarity to project proponents and First Nations. As this analysis has shown, every province across the country has room to improve their consultation guidelines. Otherwise, without strong consultation frameworks in place, the courts will continue to hand down judgments that will create additional uncertainty and confusion in the consultation process.

References

- Alberta, Aboriginal Relations (2013). *Bill 22—Aboriginal Consultation Levy Act*. <http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_28/session_1/20120523_bill-022.pdf>.
- Alberta, Indigenous Relations (2014). *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management*. <http://www.aboriginal.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf>.
- Bains, Ravina (2013). *Opportunities for First Nations Prosperity through Oil and Gas Development*. Fraser Institute. <<https://www.fraserinstitute.org/sites/default/files/opportunities-for-first-nation-prosperity-through-oil-and-gas-development.pdf>>.
- British Columbia (no date). *Building Relationships with First Nations: Respecting Rights and Doing Good Business*. <http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/building_relationships_with_first_nations__english.pdf>.
- British Columbia (2010). *Updated Procedures for Meeting Legal Obligations When Consulting First Nations*. <http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/legal_obligations_when_consulting_with_first_nations.pdf>.
- Canada, Government of (2016). Part II: Rights of the Aboriginal Peoples of Canada, Constitution Act, 1982. Justice Laws Website. <<http://laws-lois.justice.gc.ca/eng/Const/page-16.html>>.
- Canada, Indigenous and Northern Affairs Canada (2011). *Aboriginal Consultation and Accommodation: Guidelines for Federal Officials to Fulfil the Duty to Consult*.
- Courts of British Columbia (2009). *Search Judgments (Court of Appeal and Supreme Court)*. <http://www.courts.gov.bc.ca/search_judgments.aspx?court=0>.

Hazlewood, Julianne (2016, May 11). UN Declaration Will Allow Pipeline Veto: N.B. Aboriginal Leaders. *CBC News*. <<http://www.cbc.ca/news/canada/new-brunswick/un-declaration-energy-east-pipeline-veto-1.3576710>>.

Jackson, Taylor, and Kenneth P. Green (2016). *Fraser Institute Annual Survey of Mining Companies, 2015*. Fraser Institute. <<https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2015>>.

Manitoba, Aboriginal and Northern Affairs (2009). *Interim Provincial Policy for Crown Consultations with First Nations, Metis Communities and Other Aboriginal Communities*. <http://www.gov.mb.ca/ana/pdf/pubs/interim_aboriginal_consultation_policy_and_guidelines.pdf>.

Manitoba, Mineral Resources (2009). *Procedures for Crown Consultation with Aboriginal Communities on Mine Development Projects – Mineral Resources Division, Manitoba Science, Technology, Energy and Mines*. <http://www.gov.mb.ca/iem/mines/procedures/pdfs/procedures_minedevelopment.pdf>.

New Brunswick, Aboriginal Affairs Secretariat (2011). *Government of New Brunswick Duty to Consult Policy*. <<http://www2.gnb.ca/content/dam/gnb/Departments/aas-saa/pdf/en/DutytoConsultPolicy.pdf>>.

Newfoundland & Labrador, Labrador and Aboriginal Affairs Office (2013). *The Government of Newfoundland and Labrador's Aboriginal Consultation Policy on Land and Resource Development Decisions ("The Policy")*. <http://www.laa.gov.nl.ca/laa/publications/aboriginal_consultation.pdf>.

Nova Scotia, Office of Aboriginal Affairs (2010). *Terms of Reference for a Mi'kmaq- Nova Scotia- Canada Consultation Process*. <http://novascotia.ca/abor/docs/MK_NS_CAN_Consultation_TOR_Sept2010_English.pdf>.

Nova Scotia, Office of Aboriginal Affairs (2012). *Proponents Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia*. <<http://novascotia.ca/abor/docs/Proponents%20Guide%20November%202011%20ecopy.pdf>>.

Nova Scotia, Office of Aboriginal Affairs (2013). *Memorandum of Understanding: Canada-Nova Scotia Memorandum of Understanding (MOU) on Cooperation Regarding Duty to Consult*. <<http://novascotia.ca/abor/docs/Consultation/NOVASCOTIACANADAMOUFINAL.pdf>>.

Nova Scotia, Office of Aboriginal Affairs (2015). *Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia*. <http://www.novascotia.ca/abor/docs/april%202015_gns%20mi'kmaq%20consultation%20policy%20and%20guidelines%20final.pdf>.

Ontario, Secretariat for Aboriginal Affairs (2006). *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights*. <<http://metisportals.ca/MetisRights/wp/wp-admin/images/Ontario.Draft%20Guidelines%20on%20Consultation.2006.pdf>>.

Ontario, Northern Development and Mines (2012). *MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration*. <http://www.mndm.gov.on.ca/sites/default/files/aboriginal_exploration_consultation_policy.pdf>.

Prince Edward Island, Aboriginal Affairs Secretariat (2014). *Provincial Policy on Consultation with the Mi'kmaq*. Revised March 3, 2014. <<http://www.gov.pe.ca/photos/sites/aboriginalaffairs/file/Provincial%20Policy%20on%20Consultation%20with%20the%20Mikmaq%20-%20Revised%20March%203,%202014.pdf>>.

Prince Edward Island, Government of (2012). *Mi'kmaq - Prince Edward Island - Canada Consultation Agreement*. <http://www.gov.pe.ca/photos/original/aas_consult.pdf>.

Quebec, Interministerial Working Group on the Consultation of the Aboriginal People. (2008). *Interim Guide for Consulting with the Aboriginal Communities*. <http://autochtones.gouv.qc.ca/publications_documentation/publications/guide_inter_2008_en.pdf>.

Saskatchewan, Government of (2010). *First Nation and Metis Consultation Policy Framework*. <<http://www.gov.sk.ca/adx/asp/adxGetMedia.aspx?mediald=1164&PN=Shared>>.

Tremblay, Jean-François (2011). *Statement by the Observer Delegation of Canada delivered by Jean-François Tremblay, Senior Assistant Deputy Minister, Indian and Northern Affairs Canada, at the tenth session of the United Nations Permanent Forum on Indigenous Issues: Follow-Up to the Recommendations of the Permanent Forum on Free, Prior and Informed Consent*. New York (May 17). <<http://cendoc.docip.org/collect/cendocdo/index/assoc/HASHdadb/d0ee6b07.dir/PF11jean059x.pdf>>.

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