

Understanding the GNWT's Duty to Consult

*A Guide for NWT Community Governments
on the Community Plan Review Process*

AUGUST | 2025



Government of
Northwest Territories



This page intentionally left blank

Foreword

This guide is one in a series of guides developed by the Department of Municipal and Community Affairs (MACA) to support the *NWT Community Planning Framework*. It is intended to provide guidance for community governments that are in the process of reviewing their community plans, and the professional Community Planners they retain to assist with this work.

Other guides in this series:

- Accessibility and Age-Friendly Design Considerations
- Archaeological Site Management and Protection
- Best Practices for Municipal Public Engagement
- Community Civic Addressing
- Climate Change and Land Use Planning
- Land Development and Capital Planning

Acknowledgements

MACA thanks the NWT Association of Communities for its support of, and contributions to, the NWT Community Planning Framework.



MACA thanks April Taylor, Senior Community Planner and the staff from the GNWT's Department of Executive and Indigenous Affairs and Department of Justice for their contributions to this guide.

This page intentionally left blank

If you would like this information in another official language, call us.

English

Si vous voulez ces informations dans une autre langue officielle, contactez-nous.

French

Kîspin ki nitawihîtin ē nîhîyawihk ōma ācimōwin, tipwāsinān.

Cree

Tłı chQ yatı K'èè. Dı wegodi newQ dè, gots'ō gonede.

Tłıchq

ʔerihł'is Dēne Sųlıné yatı t'a huts'elkēr xa beyáyatı theɁ Ɂat'e, nuwe ts'ēn yółı.

Chipewyan

Edı gondı dehgáh got'ı e zhaté K'éé edat'éh enahddhę nıde naxets'ę edahlı. South Slavey

K'áhshó got'ı ne xadā k'é hederı Ɂedjht'é yerınwę ní dé dúle.

North Slavey

Jii gwandak izhii ginjik vat'atr'ijāhch'uu zhit yinoththan jı', diits'āt ginohkhii.

Gwich'in

Uvanittuaq ilitchurisukupku Inuvialuktun, ququaqluta.

Inuvialuktun

ᑕᑦᑭᑦ ᑎᑎᑦᑭᑦ ᑕᑦᑭᑦ ᑕᑦᑭᑦ ᑕᑦᑭᑦ ᑕᑦᑭᑦ ᑕᑦᑭᑦ ᑕᑦᑭᑦ ᑕᑦᑭᑦ ᑕᑦᑭᑦ ᑕᑦᑭᑦ.

Inuktitut

Hapkua titiqqat pijumagupkit Inuinnaqtun, uvaptinnut hivajarlutit.

Inuinnaqtun

Indigenous Languages Secretariat: 867-767-9346 ext. 71037

Francophone Affairs Secretariat: 867-767-9343

Toll Free: 866-561-1664

This page intentionally left blank

Table of Contents

Introduction.....	1
Purpose.....	1
Consultation Versus Engagement.....	2
General Differences between the Duty to Consult and Public Engagement	2
Understanding the GNWT’s Consultation Obligations	3
Aboriginal and Treaty Rights	3
Duty to Consult and Potentially Accommodate.....	4
Honour of the Crown	4
Triggering the Duty to Consult.....	5
Determining Scope of Consultation	6
Duty to Accommodate	8
Municipalities Have No Duty to Consult at this Time	10
MACA Has Not Delegated its Duty to Consult to Municipalities	10
How MACA Undertakes Aboriginal Consultation During Community Plan Approvals.....	11
Community Plan Review and Approval Parallel Process	13
Additional Reading	i
References	ii
Contacts	iii

This page intentionally left blank

Introduction

In the Northwest Territories (NWT), community governments (i.e. cities, towns, villages, hamlets, charter communities, and municipal corporations established under self-government agreements) use community plans to provide a policy framework to guide the land use and physical development of communities. Community plans are prepared having regard to sustainability, the environment, and the economic, social, and cultural development of the community.

Feedback from community residents, partners, interested parties and affected groups is essential to the development of a comprehensive, well-rounded and relevant community plan. A robust and well-documented public engagement process can build positive government-to-government relationships and advance the process of reconciliation between Indigenous and non-Indigenous residents of a community or region. This process differs from the process of consultation to be undertaken by the Minister of Municipal and Community Affairs (MACA) before approving a community plan.

As set-out in s.5(1) of the *Community Planning and Development Act*¹, a community plan has no effect unless it is approved by the Minister and adopted by a Council bylaw. In s.5(2) the Council may, in accordance with the regulations, submit a community plan to the Minister for approval. A thorough engagement process can help expedite these statutory approvals, by the Minister of Municipal and Community Affairs (MACA), of the community bylaws adopting or amending an official community plan.

Purpose

This guide is one in a series of guides developed by MACA to support the *NWT Community Planning Framework*. It is intended to provide guidance for community governments that are in the process of adopting or reviewing their community plans, and the professional Community Planners they retain to assist with this work.

The guide explains how the municipal public engagement process, that must be undertaken by a community government in the preparation or amendment of its community plan, is distinct from Aboriginal² consultation that the Government of the Northwest Territories (GNWT) is legally required to undertake with Indigenous governments and Indigenous organizations with asserted or established Aboriginal and/or Treaty rights that may be adversely impacted. This duty to consult arises from section 35 of the *Constitution Act, 1982*³. It also explains how the municipality's public engagement process can support the GNWT's duty to consult and expedite the plan approval process.

This guide is accompanied by a companion guide on *Best Practices for Municipal Public Engagement*, which provides further details on the municipal public engagement process.

¹ *Community Planning and Development Act*, section 5(1), SNWT 2011, c. 22.

² The Government of the Northwest Territories is committed to demonstrating respect to Indigenous governments and Indigenous organizations and recognizes the shift in preferred terminology from “Aboriginal” to Indigenous. The use of the term “Aboriginal Peoples” or “Aboriginal rights” is defined in the *Constitution Act, 1982*, and is used in this context, and throughout this document, as a reference to legally defined Aboriginal rights.

³ *Constitution Act, 1982*, section 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

Consultation Versus Engagement

In 2004 and 2005, the Supreme Court of Canada (Supreme Court) released three landmark decisions⁴ establishing that the Crown has a duty to consult with and, if applicable, accommodate Aboriginal peoples whose asserted or established Aboriginal and/or Treaty rights may be adversely impacted by a proposed government action, such as a project, or high-level strategic decision.

Prior to this, the terms “consultation” and “engagement” were often used interchangeably to describe any intentional effort by governments to obtain public, partners, interested and affected groups’ feedback on planned initiatives. As a result of case law, use of the term “consult” has changed over time to take on a specific legal meaning related to fulfilling the constitutional and common law (judge made) obligation of the Crown to consult with Indigenous governments and Indigenous organizations with asserted or established Aboriginal and/or Treaty rights that may be adversely impacted by a proposed government action.

Consequently, the two terms are now used separately by the Government of the Northwest Territories (GNWT) to describe the process of obtaining public, partners, interested and affected groups’ input for two distinct purposes. Consultation refers to the process of obtaining, being advised of, considering, and potentially accommodating concerns from leadership, or an authorized delegate, of an Indigenous government or Indigenous organization regarding potential adverse impacts of a proposed Crown action on that Indigenous government’s or Indigenous organization’s asserted or established Aboriginal and/or Treaty rights. When the GNWT proposes an action with the potential to adversely impact any asserted or established Aboriginal and/or Treaty right, including the approval of a community plan, the GNWT must fulfill the Crown’s legal duty to consult and, if applicable, accommodate. Engagement refers to the process of obtaining public input on proposed government initiatives for the purpose of good governance and includes any communication with an Indigenous government or Indigenous organization that does not constitute consultation.

General Differences between the Duty to Consult and Public Engagement

	Good Governance Public Engagement	Common Law Duty to Consult and Potentially Accommodate
Type of obligation	Politically advisable (optional unless codified in legislation or regulation)	Constitutional duty (mandatory) if any potential impact to rights exists
Who can do it?	Anyone or any public group	GNWT to elected leaders or authorized delegates of Indigenous governments or Indigenous organizations
Who is the audience?	NWT Public	Indigenous governments and Indigenous organizations with asserted or established Aboriginal and/or Treaty rights that may be adversely impacted

⁴ [Haida Nation v British Columbia \(Minister of Forests\)](#) [Haida], 2004 SCC 73; [Taku River Tlingit First Nation v British Columbia \(Project Assessment Director\)](#) [Taku River], 2004 SCC 74; and [Mikisew Cree First Nation v Canada \(Minister of Canadian Heritage\)](#) [Mikisew Cree], 2005 SCC 69; collectively referred to as the “Haida Trilogy.”

What is the focus of discussion?	General impacts	Potential adverse impacts on Aboriginal and/or Treaty rights
Goal	Good governance	Reconciliation

Understanding the GNWT's Consultation Obligations

Aboriginal and Treaty Rights

First Nations, Inuit and Métis peoples in Canada, collectively referred to in the Canadian Constitution as “Aboriginal Peoples,” have Aboriginal and/or Treaty rights that are explicitly affirmed under section 35 of the *Constitution Act, 1982*.

Aboriginal rights are the collective rights of distinctive Indigenous societies which flow from their continued use and occupation of certain areas prior to European contact. Given the collective nature of these rights, they are viewed by the courts as being held communally by all members of an Indigenous group. This is important to note because any consultation carried out in fulfillment of the duty to consult must be carried out with the elected leadership or an authorized delegate of each applicable Indigenous government and Indigenous organization in the Northwest Territories.

The *Constitution Act, 1982*, does not define Aboriginal rights. Aboriginal rights vary amongst Indigenous peoples depending on the customs, practices and traditions that have formed part of their unique cultures for millennia. Clarification of what is required to prove an Aboriginal right, and what Aboriginal rights exist, has arisen from Canadian case law. Aboriginal rights may include, but are not limited to:

- Aboriginal title (ownership rights to land).
- Rights to occupy and use lands and resources, such as hunting, gathering, fishing, and trapping rights.
- A right to trade.
- An inherent right to self-determination, self-government rights, and freedom to practice one's own culture and customs including language, childcare, and religion.
- Cultural and social rights.

Aboriginal Rights versus Treaty Rights

“Aboriginal rights flow from the practices, traditions and customs of Aboriginal societies that existed prior to European contact, whereas treaty rights are specific and may be exercised only by the Indigenous groups that are signatories to treaties...Treaties between Indigenous peoples and Canada include historic treaties (signed between 1701 and 1923) and modern treaties, made following comprehensive land claims settlements. The Constitution Act, 1982 recognizes and affirms treaty rights already in existence in 1982 and those that came after.”

The Duty to Consult Indigenous Peoples (Background Paper), Library of Parliament, Canada, 2019 [Publication No. 2019-17-E] p. 10.

Treaty rights are negotiated and formalized in historic treaties or modern comprehensive land claim and self-government agreements (also known as modern treaties). Modern treaties may contain

provisions specifying consultation requirements with Aboriginal signatories, which public governments are obligated to follow. The relevant provisions contained in modern treaties in the NWT, which obligate municipalities to engage, are detailed in the companion guide *Best Practices for Municipal Engagement*. In a modern Treaty, the inclusion of clauses requiring consultation does not negate the duty to consult, described in detail below, that has arisen through Supreme Court decisions.

Duty to Consult and Potentially Accommodate

Canadian courts have developed the legal doctrine of the “duty to consult,” which includes a corresponding “duty to accommodate” that may be applicable when there is a duty to consult. These duties are intended to protect asserted or established Aboriginal and/or Treaty rights and to encourage reconciliation between Indigenous and non-Indigenous people.

Rooted in section 35 of the *Constitution Act, 1982*, the duty to consult is a constitutional obligation of the Crown. The Crown includes the executive branches and boards of both the federal and provincial/territorial governments, but does not include legislatures, which form the legislative branch of government. The duty to consult, and potentially accommodate, is described by decisions made in Canadian courts, which continue to refine what the duty to consult entails. Thus, the duty to consult is constantly evolving.

As noted by the Supreme Court in the Haida decision, “*the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.*”⁵

Honour of the Crown

In fulfilling the duty to consult, the federal, provincial, and territorial governments are required to act in a manner that upholds the honour of the Crown. The origin of this concept relates to the power of the Monarch in feudal England to issue land grants, and the expectation that the Crown would conduct its business in a noble manner.

The concept of the honour of the Crown has become a foundational principle in Aboriginal law in Canada, the branch of Canadian law concerning the constitutional rights of Aboriginal peoples and their relationship with the Crown. This relationship stretches back to first contact but was formalized in the 18th century in the *Royal Proclamation of 1763*. In that document, King George III promised to protect Aboriginal peoples from exploitation, recognizing that they had rights to the lands they occupied. The Royal Proclamation also acknowledged that these lands had not been ceded or sold to the Crown.

When the Crown asserted its sovereignty over these lands, it imposed its own laws and customs upon pre-existing Aboriginal societies. In so doing, the Crown assumed a duty-of-care to the Aboriginal people it vowed to protect. The honour of the Crown characterizes the unique relationship between

⁵ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73, at paragraph 32.

Aboriginal peoples and the Crown, arising from the colonial assertion of sovereignty and the Crown's obligation to act fairly and impartially.

*"In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)."*⁶

In the series of decisions shaping the duty to consult, the Supreme Court has recognized that the unilateral assumption of sovereignty by the Crown, the historic imbalance of power inherent in Crown-Aboriginal relationships, and the recognition of the Crown's past failures to act honourably when asserting its authority over Aboriginal peoples require the government to act in a manner that promotes reconciliation. The duty to consult is intended to be a means by which government achieves reconciliation with Aboriginal peoples.

Triggering the Duty to Consult

The duty to consult is triggered when government knows, or ought to know, about the existence of an asserted or established Aboriginal and/or Treaty right and contemplates conduct that might adversely impact that right. The *Haida* decision confirmed that the scope of the duty to consult also pertains to asserted Aboriginal rights, a concept that was explored in an earlier Supreme Court decision with respect to established Aboriginal rights only.⁷ Therefore, to trigger the duty to consult, an Indigenous government or Indigenous organization only needs to assert the right – proof is not required.

*"The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation."*⁸

If the GNWT's duty to consult is triggered, the GNWT must, through a process of meaningful consultation with Indigenous governments and Indigenous organizations with asserted or established Aboriginal and/or Treaty rights, provide an appropriate opportunity to be advised of the potential adverse impacts of its proposed action on asserted or established Aboriginal and/or Treaty rights, and then consider ways to avoid or mitigate those potential adverse impacts before any action is taken.

Meaningful consultation requires the government to consider, in good faith, potential accommodation measures to avoid or mitigate adverse impacts on asserted or established Aboriginal and/or Treaty rights as identified by the Indigenous government or Indigenous organization. With reconciliation being the objective, the duty to consult requires government to balance the avoidance or mitigation of impacts to asserted or established Aboriginal and/or Treaty rights and general societal interests.

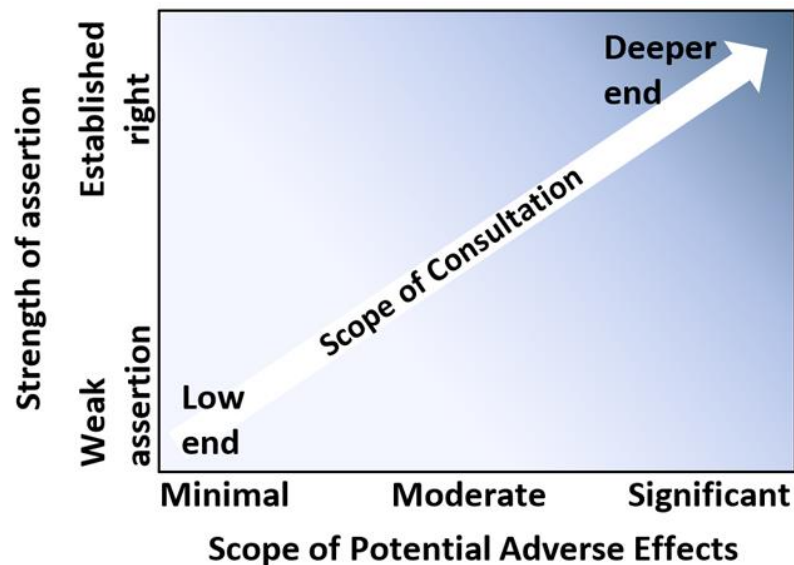
⁶ [*Taku River Tlingit First Nation v British Columbia \(Project Assessment Director\)*](#), 2004 SCC 74, at paragraph 24.

⁷ [*Delgamuukw v. British Columbia*](#) [Delgamuukw], 1997 3 SCR 1010, at paragraph 168.

⁸ [*Taku River Tlingit First Nation v British Columbia \(Project Assessment Director\)*](#), 2004 SCC 74, at paragraph 25.

Determining Scope of Consultation

The duty to consult exists on a spectrum. What constitutes appropriate consultation and, if appropriate, accommodation must be determined on a case-by-case basis.



At the low end of the spectrum, where the impact is minimal and the claim for a right is weak, it may be sufficient to write to Indigenous governments or Indigenous organizations, with asserted or established Aboriginal and/or Treaty rights in the area, advising of the proposed action and requesting that they identify any potential adverse impacts. Government must give good faith consideration to any response received and respond to the Indigenous governments and Indigenous organizations, setting out whether any accommodations were made.

At the deeper end of the spectrum, where the impact is significant and the right is established in a Treaty or there is high strength of claim to an asserted right, a lengthier and reciprocal process, involving multiple rounds of correspondence and meetings with substantial accommodation, may be required.

The test for determining the level of consultation required involves identifying the Indigenous Governments and/or Indigenous organizations and the asserted or established Aboriginal and/or Treaty rights that may be adversely impacted. The depth of consultation required with each potentially impacted Indigenous government and Indigenous organization is then based on: (i) whether the Aboriginal or Treaty right is established and, if not, the strength of the Indigenous government or Indigenous organization's claim to the asserted right; and (ii) the degree to which these rights may potentially be adversely impacted by the proposed action. In terms of the strength of claim, GNWT does not conduct strength of claim analysis, and assumes that the strength of claim for any asserted right is high.

The standard of review that courts apply to this determination is "correctness," rather than "reasonableness." This means that if the level of consultation determined by government to be required is lower than what a court concludes it should have been, unless the actual consultation that

occurred went beyond what was required at the level identified, the consultation will be found to be inadequate if legally challenged in court.

The Supreme Court of Canada on the Scope of Consultation

“The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue.”

[Delgamuukw v British Columbia](#) 1997 3 SCR 1010, at paragraph 168.

“At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice... At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision...Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. 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 peoples with respect to the interests at stake.”

[Haida Nation v British Columbia \(Minister of Forests\)](#) 2004 SCC 73, at paragraphs 43-45.

Once government has determined where on the spectrum that the duty to consult and, if applicable, accommodation is located, then it must consult and, if applicable, accommodate in a way that is reasonable to fulfill the duty at the applicable point on the spectrum.

It has also been outlined by the Supreme Court that an Indigenous government or Indigenous organization cannot intentionally frustrate government’s attempts to consult in any way, such as by unreasonably seeking repeated extensions of deadlines or indicating that a meeting must occur before the Indigenous government or Indigenous organization is willing to advise in writing of its initial concerns regarding adverse impacts to rights.

Deep consultation is more likely to be necessary in the cases of negotiation of lands, resources and self-government agreements, environmental assessment of and authorizations for major infrastructure or mining projects, and in any context in which potential adverse impacts are high. For the review of a proposed community plan bylaw, the duty to consult and, if applicable, accommodate will typically fall at a low to moderate level on the spectrum. Nonetheless, should a community plan approval reveal the need for deep consultation, the responsibility for ensuring that takes place, and

appropriate accommodation is achieved, remains with the Minister of Municipal and Community Affairs.

Duty to Accommodate

Accommodation describes the effort made by government to avoid or mitigate a potential negative impact of a proposed government action on asserted or established Aboriginal and/or Treaty rights.

A duty to accommodate may arise when consultation falls at a higher level on the spectrum and the Indigenous government or Indigenous organization raises concerns about potential impacts to rights that are capable of being accommodated.

The greater the strength of the duty to consult, the more extensive the accommodation that may be required. Even at the very highest level on the spectrum, the required accommodation does not amount to giving the Indigenous government or Indigenous organization a veto over the proposed government action, nor does this process impose a duty on government to agree to every

accommodation requested by an Indigenous government or Indigenous organization. However, it may require government to take steps to avoid irreparable harm or to minimize the adverse impact on asserted or established Aboriginal and/or Treaty rights.

The amount and volume of ongoing consultation between GNWT and Indigenous governments and/or Indigenous organizations on separate matters, at any given point in time, raises the very real potential that Indigenous governments or Indigenous organizations may face capacity issues and consultation fatigue. As a result, the government may risk a court finding that its consultation efforts were inadequate if it fails to support the capacity Indigenous governments or Indigenous organizations need to meaningfully participate in the process.

Good Faith Dealing is Essential

“At all stages, good faith on both sides is required. The common thread on the Crown’s part must be “the intention of substantially addressing [Aboriginal] concerns” as they are raised (Delgamuukw, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.”

Haida Nation v British Columbia (Minister of Forests) 2004 SCC 73, at paragraphs 43-45.

Duty to Consult – Frequently Asked Questions

1. *What is the duty to consult?*

The duty to consult and, if applicable, accommodate Indigenous governments and/or Indigenous organizations with asserted or established Aboriginal and/or Treaty rights is a requirement under Canadian law developed by the Supreme Court of Canada. It is rooted in section 35 of the *Constitution Act, 1982*, which recognizes and affirms the Aboriginal and Treaty rights of the Aboriginal peoples of Canada.

2. *Where does it come from?*

The Supreme Court of Canada confirmed the Crown's constitutional duty to consult in a series of landmark decisions led by the case *Haida Nation v British Columbia (Minister of Forests)* in 2004. The nature of the duty to consult, and the ways it must be fulfilled, continue to be shaped in common law through subsequent court rulings, thus the duty to consult is ever evolving.

3. *When does the duty to consult arise?*

The duty to consult is triggered when the Crown knows, or ought to have known, about the potential existence of an established or asserted Aboriginal and/or Treaty right and contemplates conduct that might adversely impact it. The existence of the right does not need to be proven to be considered.

4. *Who is responsible for fulfilling this duty?*

The federal, provincial, territorial governments, and their boards and agencies that are empowered through legislation to represent the Crown, responsible for fulfilling the duty to consult.

5. *What is the purpose of the duty to consult?*

The purpose of the duty to consult is twofold: To protect established and asserted Aboriginal and Treaty rights; and, to promote reconciliation between Aboriginal and non-Aboriginal people.

6. *What is the honour of the Crown and why is it important?*

The honour of the Crown is a fundamental tenet in the body of Aboriginal law governing the constitutional relationship between the Crown and Aboriginal peoples, which requires fairness and transparency in government decision-making and holds that representatives of the Crown must act honourably in dealings with Aboriginal peoples. It is important because it infuses everything the Crown does in relation to Aboriginal peoples.

7. *What is the scope of the duty to consult?*

The duty to consult, and potentially accommodate, Indigenous governments and/or Indigenous organizations with asserted or established Aboriginal and/or Treaty rights exists on a depth spectrum from low to high and varies from case to case. Where on the spectrum the duty falls depends on (i) whether the right is established and, if not, the strength of the asserted right, and (ii) how great the potential impact of the proposed Crown action will be on the right.

8. *What is the duty to accommodate?*

A duty to accommodate may arise if the duty to consult and accommodate is beyond the low end of the depth spectrum and a consulted Indigenous government or Indigenous organization raises one or more concerns regarding potential impacts to rights that can be accommodated. The higher up the spectrum the duty is, the greater the extent of accommodation that will be required of concerns regarding potential impacts to rights raised by an Indigenous government or Indigenous organization.

Municipalities Have No Duty to Consult at this Time

The Supreme Court has yet to consider whether and how the duty to consult applies to municipalities. *“Courts are increasingly scrutinizing the conduct of agents, including administrative regulatory tribunals, acting on behalf of the Crown...Even though Crown agents are bound by the duty to consult, municipalities have so far escaped such a duty. There is limited jurisprudence on the specific relationships between municipalities and the duty to consult. However, where courts have weighed in, they have generally excluded municipalities from owing such an obligation.”*⁹

Perhaps the most significant decision to date on this matter was made by the British Columbia Court of Appeal in the 2012 case *Neskonlith Indian Band v Salmon Arm (City)*¹⁰ which determined that municipalities do not have a duty to consult unless the province or territory expressly delegates, in legislation, all or part of the duty to them for a specific Crown action.

The decision in *Neskonlith* has been widely debated¹¹ and criticized for failing to ask the right question (i.e. Not whether the municipality has a duty to consult, but whether the Crown fulfilled its duty to consult).¹² While the merits of such a debate are outside the scope of this guide, the pushback related to the *Neskonlith* decision is mentioned here to illustrate that attention is being paid to the role of municipalities with respect to the duty to consult and a future Supreme Court decision could affect municipal consultation obligations.

MACA Has Not Delegated its Duty to Consult to Municipalities

The Crown exercises its authority directly through government, but also through agencies such as Crown corporations and regulatory tribunals. Three Supreme Court of Canada decisions clarified that the Crown can delegate its duty to consult wholly or partly to regulatory tribunals,¹³ provided certain conditions are met. Specifically, such a delegation must either be done expressly or implicitly, by a tribunal being given consultation and accommodation powers in legislation, so that it has the ability to carry out the duty,¹⁴ and it is made clear to the Indigenous governments and/or Indigenous organizations with potentially adversely impacted asserted or established Aboriginal and/or Treaty rights that the Crown is relying on the regulatory tribunal to wholly or partly meet the duty to consult.¹⁵

⁹ Cameron, C., Polowin, M.S. et al. (2022), [“The Duty to Consult: What Will it Take for Municipalities to Come Within the Scope?”](#) *Gowlings WLG*.

¹⁰ *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379.

¹¹ Cameron, C., Polowin, M.S. et al. (2022), [“The Duty to Consult: What Will it Take for Municipalities to Come Within the Scope?”](#) *Gowlings WLG*; D’Elia Decembrini, A. and Imai, S. (2019), [“Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to Put Neskonlith to Rest.”](#) *Alberta Law Review*, 56(3); Hoehn, F. and Stevens, M. (2018), [“Local Governments and the Crown’s Duty to Consult.”](#) *Alberta Law Review* 55(1); Austin, N. (2023).

¹² Imai, S. and Stacey, A. (2014), [“Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on Neskonlith Indian Band v. Salmon Arm \(City\) Case Comments.”](#) *UBC Law Review*, 47(1), Article 8.

¹³ *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, at paragraph 56; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, at paragraph 30.

¹⁴ *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, at paragraph 32.

¹⁵ *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, at paragraph 23; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, at paragraph 32.

Given the Supreme Court's position on delegating the duty to consult to regulatory tribunals and the British Columbia Court of Appeal's *Neskonlith* decision, it is almost certain that the duty to consult could be delegated wholly or partly to municipalities through legislation, even though they are not regulatory agencies.

Since no legislation in the Northwest Territories delegates the Minister of MACA's duty to consult, MACA has not delegated this duty to municipalities in relation to the review or amendment of community plans. Instead, MACA employs parallel processes: one for fulfilling its duty to consult with Indigenous government and Indigenous organizations in relation to review and amendment of community plans; and the other for municipal public engagement, as described below.

How MACA Undertakes Aboriginal Consultation During Community Plan Approvals

In the community plan approval process, it is not until a draft community plan bylaw is submitted by a municipality for ministerial approval after second reading, that the Minister of MACA can determine if the duty to consult is triggered or assess the scope of consultation required. Practically-speaking, this has the potential to create a consultation process that duplicates aspects of the municipal public engagement process. This could increase the level of consultation fatigue felt by Indigenous governments and/or Indigenous organizations with potentially adversely impacted asserted or established Aboriginal and/or Treaty rights and has the potential to create an unnecessarily lengthy and tedious approval process.

Additionally, while the Minister is ultimately responsible under the *Community Planning and Development Act* for approval of a community plan, MACA recognizes that a community plan is a municipal document, created at the local level to meet local goals and objectives. Accommodating concerns raised by Indigenous governments and/or Indigenous organizations about potential adverse impacts to rights, in the context of the community planning process, is therefore most likely to be achieved by amending the draft community plan to address those concerns. Completing and implementing any accommodations, during the community plan review and public engagement process conducted at the local level, will expedite the Ministerial community plan approval process and encourage positive working relationships between community governments, the territorial government, Indigenous governments, and Indigenous organizations.

For these reasons, MACA uses a parallel process, when conducting consultation on community plan approvals. In this, the Minister relies, to the greatest extent appropriate, on the municipal public engagement process to inform any decisions made regarding consultation and accommodation, while still maintaining responsibility for meeting the duty to consult.

Upon notification by a community government of its intention to commence a community plan review, MACA issues a letter to Indigenous governments and Indigenous organizations with asserted or established Aboriginal and/or Treaty rights to provide early engagement notification. This notification informs potentially affected Indigenous governments and Indigenous organizations that a municipality

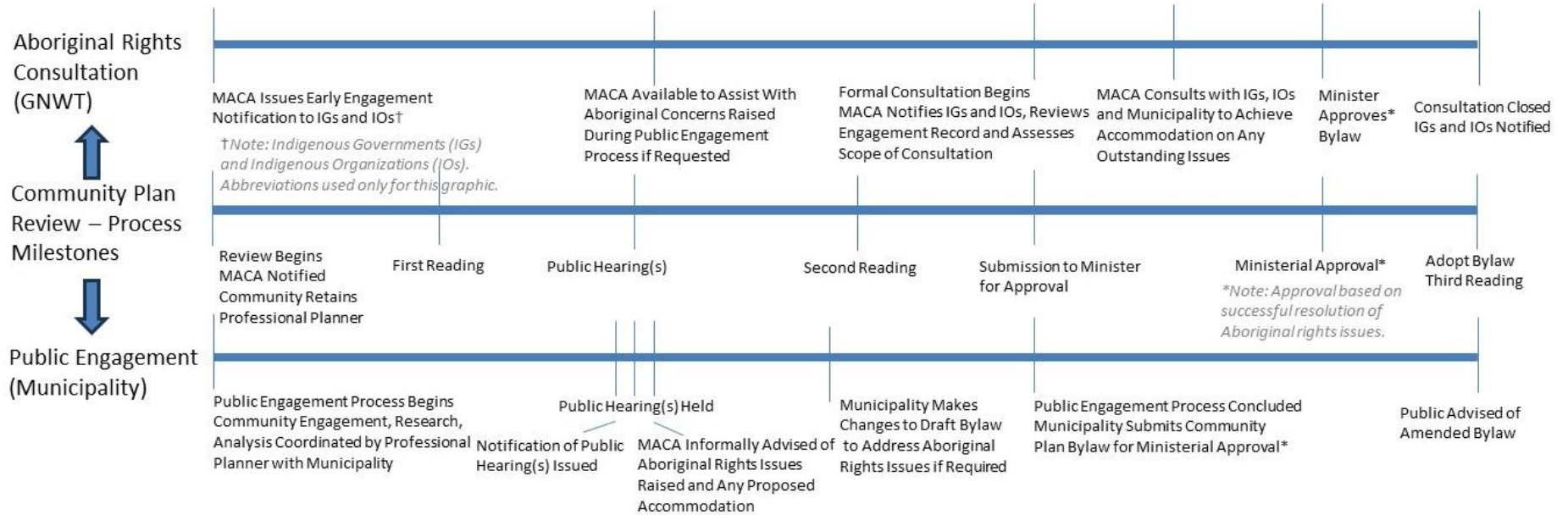
will be reviewing its community plan, which may potentially adversely impact asserted or established Aboriginal and/or Treaty rights. In the Ministerial notification letter, the Minister:

- Encourages potentially affected Indigenous governments and Indigenous organizations to participate in the municipal public engagement process;
- Invites them to identify any concerns related to any potential impact on asserted or established Aboriginal and/or Treaty rights; and
- Notifies them that this process may present an early opportunity to identify and possibly mitigate any potential adverse impacts on asserted or established Aboriginal and/or Treaty rights before the community plan bylaw is submitted for Ministerial approval triggering formal consultation.

Once a municipality submits its community plan bylaw for approval, the Minister will consider the draft community plan, the public engagement record, and any correspondence provided to the department in response to the early engagement notification. If the duty to consult is triggered and the concerns of Indigenous governments and Indigenous organizations of potential adverse impacts to rights could not be resolved during the public engagement process, the Minister will notify potentially adversely impacted Indigenous governments and/or Indigenous organizations. Prior to sending out this notification, the Minister determines where on the consultation and accommodation spectrum the duty falls. Upon receiving response letters from Indigenous government and Indigenous organizations with asserted or established Aboriginal and/or Treaty rights that may be adversely impacted, the Minister assesses whether additional accommodation is required beyond what was provided through the municipality's public engagement process.

This approach requires a high degree of collaboration between community governments, Indigenous governments and Indigenous organizations, and MACA, but it strives to achieve a smooth review process in which all parties work together to develop a community plan that meets a municipality's goals and objectives while also appropriately accommodating potential adverse impacts on asserted or established Aboriginal and/or Treaty rights.

Community Plan Review and Approval Parallel Process



Municipal Public Engagement and Aboriginal Rights Consultation

Additional Reading

[*The GNWT's Approach to Consultation with Aboriginal Governments and Organizations*](#)

[*Respect, Recognition, Responsibility: The Government of the Northwest Territories' Approach to Engaging with Aboriginal Governments*](#)

[*Understanding Aboriginal and Treaty Rights in the Northwest Territories, GNWT*](#)

References

- Association of Municipalities of Ontario, [*Municipal Governments and the Crown's 'Duty to Consult': Towards a Process that Works for Local Communities*](#), 2019.
- Austin, Naomi, [*Re-imagining the Duty to Consult: Requiring a Substantive Outcome to Further Reconciliation*](#), Vol 32(1) Dalhousie Journal of Legal Studies, 2023.
- Brideau, Isabelle, [*The Duty to Consult Indigenous Peoples*](#), Library of Parliament, Publication No. 2019-17-E, 2019.
- Cameron, C., Polowin, M.S. et al., [*"The Duty to Consult: What Will it Take for Municipalities to Come Within the Scope?"*](#) Gowlings WLG, 2022.
- Centre for Constitutional Studies, [*Duty to Consult*](#), 2019.
- Centre for Constitutional Studies, [*Honour of the Crown*](#), 2021.
- [*Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*](#), 2017 SCC 41.
- [*Clyde River \(Hamlet\) v Petroleum Geo-Services Inc.*](#), 2017 SCC 40.
- [*Community Planning and Development Act*](#), SNWT 2011, c. 22.
- [*Constitution Act, 1982, section 35\(1\)*](#), being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
- [*Delgamuukw v. British Columbia*](#), 1997 3 SCR 1010.
- D'Elia Decembrini, A. and Imai, S. (2019), [*"Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to Put Neskonalith to Rest."*](#) Alberta Law Review, 56(3).
- Gonzales, Alejandro, [*The Evolution of the Duty to Consult: A Framework for Improving Consultations, Negotiations and Reconciliation*](#), 2020 CanLII Docs 680.
- [*Haida Nation v British Columbia \(Minister of Forests\)*](#), 2004 SCC 73.
- Hoehn, F. and Stevens, M. (2018), [*"Local Governments and the Crown's Duty to Consult."*](#) Alberta Law Review 55(1); Austin, N. (2023).
- Imai, S. and Stacey, A. (2014), [*"Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on Neskonalith Indian Band v. Salmon Arm \(City\) Case Comments."*](#) UBC Law Review, 47(1), Article 8.
- Inman, Derek, et al., [*"We Will Remain Idle No More": The Shortcomings of Canada's 'Duty to Consult' Indigenous Peoples*](#), Goettingen Journal of International Law 5 (2013) 1, p. 251-285.
- [*Mikisew Cree First Nation v Canada \(Minister of Canadian Heritage\)*](#), 2005 SCC 69.
- [*Neskonalith Indian Band v Salmon Arm \(City\)*](#), 2012 BCSC 499.
- [*Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*](#), 2010 SCC 43.
- Shemtov, Elan, [*The Crown's Honourable and Fiduciary Duties to Aboriginal Peoples: Good Law, Bad Practice*](#), 2022 CanLII Docs 371.
- [*Squamish Nation v British Columbia \(Community, Sport and Cultural Development\)*](#), 2014 BCSC 991.
- [*Taku River Tlingit First Nation v British Columbia \(Project Assessment Director\)*](#), 2004 SCC 74.

Contacts

For additional information or help with questions on the *NWT Community Planning Framework* or its associated guides, please contact the Regional Superintendent with Department of Municipal and Community Affairs:

MACA Regional Offices:

North Slave	1-(867)767-9167
South Slave	1-(867)-872-6531
Deh Cho	1-(867)-695-7220
Sahtu	1-(867)-597-7105
Inuvik	1-(867)-777-7120