

HONOUR OF THE CROWN

Strengthening Constitutional Consultation Standards for Major Projects Affecting Our Territories

A Discussion Paper and Proposed Resolution

Prepared for Consideration by Chiefs and Proxies

Assembly of First Nations

Annual General Assembly

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Prepared by

Johnny Hawke

ACTION- Anishinaabek Clans to Invoke our Nation

www.anishinaabek.com

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Part I

DRAFT RESOLUTION #__/2026

Affirming the Honour of the Crown, The Constitutional Duty to Consult, and The Participation of All Inherent and Treaty Rights Holders in Major Project Decision Making

SUBJECT: Rights & Justice / Environment / Lands / Treaties / Major Projects

MOVED BY: _____

SECONDED BY: _____

WHEREAS

A. Articles 3, 18, 19, 25, 26, 29 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples recognize the rights of Indigenous Peoples to self-determination, participation in decision-making, protection of their lands, waters and environment, and require States to consult and cooperate in good faith to obtain their free, prior and informed consent before approving projects affecting their lands or resources;

B. Section 35 of the Constitution Act, 1982 recognizes and affirms existing Aboriginal and Treaty Rights, and the Honour of the Crown requires meaningful consultation where Crown conduct may adversely affect those rights;

C. First Nations continue to experience increasing pressure from federal and provincial initiatives intended to accelerate approvals for energy, nuclear, mining, transportation, defence, and other major infrastructure projects across Canada;

D. First Nations have consistently maintained that consultation must be meaningful, transparent, conducted in good faith, and capable of substantially addressing concerns raised by affected First Nations before irreversible decisions are made;

E. Chiefs and First Nations across Canada have expressed concerns that consultation processes relating to major projects have, in some circumstances, failed to provide adequate information, sufficient time, meaningful participation, or effective accommodation of Aboriginal and Treaty Rights;

F. The Assembly recognizes that consultation is a constitutional obligation grounded in the Honour of the Crown and the protection of Aboriginal and Treaty Rights. Consultation should not be reduced to, replaced by, or presumed satisfied through commercial negotiations, economic

partnership agreements, equity arrangements, or other economic development initiatives undertaken in relation to major projects.

G. The Assembly further recognizes that First Nations possess diverse governance traditions and decision-making structures, and that meaningful consultation should respect the constitutional rights, laws, governance systems, and voices of the Indigenous Nations and rights holders whose Aboriginal or Treaty Rights may be affected.

H. The Assembly affirms that economic reconciliation should complement — not diminish — the constitutional obligations owed by the Crown. Economic participation in major projects should not be interpreted as a waiver of Aboriginal or Treaty Rights, nor should it be presumed to resolve outstanding constitutional consultation obligations.

I. The Assembly recognizes that many First Nations continue to assert that consultation processes should strengthen Indigenous self-determination, Treaty relationships, and Nation-to-Nation governance, rather than being limited to administrative or transactional processes associated with project approvals.

J. Questions respecting the scope of the constitutional Duty to Consult, the implementation of the United Nations Declaration on the Rights of Indigenous Peoples, environmental protection, cumulative impacts, and meaningful participation continue to be the subject of public debate, negotiations, and ongoing legal proceedings across Canada;

K. Protecting Aboriginal and Treaty Rights while providing certainty, transparency, and accountability in decision-making benefits both First Nations and the Crown.

THEREFORE BE IT RESOLVED that the First Nations-in-Assembly:

1. Reaffirm that the Honour of the Crown requires meaningful consultation whenever federal decisions may adversely affect Aboriginal or Treaty Rights.

2. Direct the Assembly of First Nations to continue advocating that Canada fully implement the consultation standards reflected in the United Nations Declaration on the Rights of Indigenous Peoples.

3. Call upon Canada to ensure that consultation processes relating to major projects remain constitutional processes grounded in the Honour of the Crown and Section 35 of the Constitution Act, 1982, are initiated at the earliest stages of planning, are adequately funded, transparent, conducted in good faith, and are capable of meaningfully addressing concerns raised by the Indigenous Nations and rights holders whose Aboriginal or Treaty Rights may be affected.

4. Affirm that economic partnership agreements, impact benefit agreements, equity arrangements, commercial negotiations, or other economic development initiatives should not, in

and of themselves, be treated as fulfilling or replacing the Crown's constitutional Duty to Consult where consultation obligations arise under section 35 of the Constitution Act, 1982.

5. Call upon Canada, federal regulators, and project proponents to recognize that meaningful consultation should respect the diversity of First Nations governance systems and should seek to engage the Indigenous Nations and communities whose Aboriginal or Treaty Rights may be affected, while recognizing that the appropriate consultation process will depend on the constitutional and factual circumstances of each project.

6. Direct the Assembly of First Nations to examine emerging legal, constitutional and policy developments respecting the Duty to Consult and provide recommendations to future Chiefs-in-Assembly.

7. Strengthen consultation processes in a manner that protects the integrity of Section 35, respects Treaty relationships, upholds the Honour of the Crown, advances Indigenous self-determination, and maintains a clear distinction between constitutional consultation and commercial or economic negotiations.

8. Affirm that Aboriginal and Treaty Rights belong to Indigenous peoples and Nations and are protected by the Constitution. Consultation processes should therefore be directed toward the protection of those constitutional rights and the maintenance of Nation-to-Nation relationships, and should not be understood solely through the lens of project approvals or economic development.

Part II

Executive Summary

Canada is entering a period of unprecedented investment in major infrastructure, nuclear energy, electricity transmission, mining, critical minerals, transportation, defence installations, and other nationally significant projects. Many of these developments intersect with lands, waters, and Aboriginal and Treaty Rights protected by section 35 of the *Constitution Act, 1982*.

The constitutional Duty to Consult exists to uphold the Honour of the Crown and advance reconciliation by ensuring that First Nations are meaningfully involved in decisions that may adversely affect their rights. Over the past three decades, the Supreme Court of Canada has developed a substantial body of jurisprudence defining the scope and purpose of this constitutional obligation.

At the same time, governments across Canada have pursued initiatives to accelerate approvals for major projects. These developments have prompted continuing discussion among First Nations, governments, industry, and the courts regarding how consultation processes can both respect constitutional obligations and provide certainty for project proponents and Indigenous communities.

This discussion paper proposes an Assembly of First Nations resolution reaffirming constitutional consultation principles and recommending continued work toward nationally consistent standards that uphold the Honour of the Crown, environmental stewardship, and meaningful First Nations participation in decisions affecting Aboriginal and Treaty Rights.

The recommendations contained in this paper are intended to contribute constructively to ongoing discussions among First Nations leadership, governments, and Canadians regarding reconciliation and the implementation of section 35 of the *Constitution Act, 1982* and the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

PART III

Constitutional Foundations

The Constitutional Framework for Consultation, Reconciliation, and Major Project Decision-Making

Introduction

Canada's constitutional framework recognizes that Aboriginal and Treaty Rights occupy a unique place within the legal order.¹ These rights are not created by governments; rather, they are recognized and affirmed by section 35² of the *Constitution Act, 1982*. Since 1982, Canadian courts—and particularly the Supreme Court of Canada—have developed a substantial body of jurisprudence explaining how governments must exercise their constitutional authority in a manner consistent with these rights.

The constitutional Duty to Consult is one component of this broader framework.³ It reflects the principle that decisions affecting Aboriginal and Treaty Rights should be made in a manner that respects the Honour of the Crown and advances the constitutional objective of reconciliation.⁴ Consultation is therefore not merely an administrative procedure; it is one means through which constitutional relationships between the Crown and Indigenous peoples are maintained. This chapter outlines the constitutional foundations that inform consultation and major project decision-making in Canada.

3.1 The Constitution Act, 1982

The *Constitution Act, 1982* forms part of the supreme law of Canada.⁵ Section 52 declares that the Constitution is the supreme law⁶ of Canada and provides that any law inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect.

¹ *Constitution Act, 1982*, s. 35. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

² *Constitution Act, 1982*, s. 35., *R. v. Sparrow*, *Van der Peet*, [1996] 2 S.C.R. 507

³ *Haida Nation*, 2004 SCC 73, *Taku River*, 2004 SCC 74.

⁴ *Haida Nation*, *Tsilhqot'in Nation*, *Mikisew Cree* (2005).

⁵ *Constitution Act, 1982*, s. 52.

⁶ *Constitution Act, 1982*, s. 52(1).

Among its provisions, section 35 recognizes and affirms⁷ the existing Aboriginal and Treaty Rights of the Aboriginal peoples of Canada. Unlike many statutory rights, these constitutional rights cannot ordinarily be altered by legislation alone;⁸ governments must exercise their authority in a manner consistent with the Constitution.

Section 35 provides:

35(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

Subsequent subsections clarify that the Aboriginal peoples of Canada include the First Nations, Inuit and Métis peoples and provide interpretive guidance regarding treaty rights and gender equality.

Section 35 does not contain a detailed code governing consultation. Instead, over several decades the Supreme Court of Canada has interpreted the constitutional implications of section 35⁹ through a series of landmark decisions that together establish the modern framework for consultation, accommodation and reconciliation.

Accordingly, understanding section 35 requires consideration of both the constitutional text and the jurisprudence that has developed around it.

3.2 The Honour of the Crown

The Honour of the Crown is one of the foundational constitutional principles governing relations between the Crown and Indigenous peoples.¹⁰ The Supreme Court of Canada has described it as a constitutional principle that arises from the Crown's assertion of sovereignty over lands and peoples who were already present.

The Honour of the Crown is intended to guide the conduct of governments in their dealings with Indigenous peoples. It reflects the expectation that the Crown will act with integrity, avoid sharp

⁷ *Constitution Act, 1982*, s. 35

⁸ *Sparrow. Tsilhqot'in Nation*.

⁹ *Sparrow, Van der Peet, Delgamuukw, Haida Nation, Tsilhqot'in Nation*

¹⁰ *Haida Nation*, paras. 16–25, *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14.

dealing, and seek to fulfill its constitutional obligations in a manner consistent with reconciliation.¹¹

The Supreme Court has explained that the Duty to Consult flows from the Honour of the Crown.¹² Where the Crown has knowledge—actual or constructive—of a potential Aboriginal or Treaty Right and contemplates conduct that may adversely affect that right, the Honour of the Crown may require consultation, and where appropriate, accommodation.¹³ The specific content of the duty depends on the circumstances, including the strength of the claimed right and the seriousness of the potential impact, as articulated in *Haida Nation* (2004).¹⁴

The Honour of the Crown is therefore not limited to litigation. It informs treaty implementation, consultation, negotiations, and other Crown conduct affecting Indigenous peoples.¹⁵

3.3 Reconciliation

The Supreme Court of Canada has repeatedly identified reconciliation as a fundamental objective of section 35.

In constitutional law, reconciliation refers to the ongoing process of reconciling the prior occupation of North America by Indigenous peoples with the assertion of Crown sovereignty. It recognizes that Indigenous peoples possessed legal orders, societies, and relationships with their lands long before the establishment of the modern Canadian state.

The Court has emphasized that reconciliation is not achieved solely through litigation. It is also pursued through negotiations, treaty implementation, consultation processes, legislative action, and respectful Nation-to-Nation relationships.

Meaningful consultation contributes to reconciliation by providing opportunities for Indigenous peoples to participate in decisions that may affect their Aboriginal and Treaty Rights. Effective consultation may also help identify concerns early, reduce conflict, improve decision-making, and encourage mutually acceptable solutions.

While consultation does not necessarily require agreement in every circumstance, it is intended to ensure that constitutional rights receive meaningful consideration before decisions are made.

¹¹ *Haida Nation, Manitoba Métis Federation*.

¹² *Haida Nation, Rio Tinto*.

¹³ *Haida Nation*.

¹⁴ *Haida Nation*.

¹⁵ *Mikisew Cree (2005), Manitoba Métis Federation*.

3.4 The Rule of Law and Constitutional Governance

Canada's constitutional order is founded upon the rule of law.¹⁶ Governments possess broad authority to pursue important public objectives—including infrastructure development, energy security, environmental protection, economic growth, and national defence—but those objectives must be pursued consistently with constitutional requirements.¹⁷

The rule of law requires that executive and legislative action remain subject to the Constitution. Constitutional obligations are not displaced simply because a project is considered economically significant, strategically important, or in the public interest. Rather, governments are expected to integrate constitutional requirements into their decision-making processes.¹⁸

This principle has practical implications for major projects. Infrastructure, energy, mining, transportation, defence, and other nationally significant initiatives frequently involve multiple public interests. At the same time, they may engage Aboriginal or Treaty Rights protected by section 35. The constitutional framework seeks to ensure that these interests are considered together rather than treating them as mutually exclusive.

The Duty to Consult is one mechanism through which governments attempt to reconcile these overlapping responsibilities while maintaining public confidence in constitutional governance.¹⁹

3.5 Constitutional Principles Working Together

Section 35, the Honour of the Crown, reconciliation, and the rule of law should not be viewed as isolated concepts. Together they form an integrated constitutional framework that guides Crown decision-making affecting Indigenous peoples.

Within this framework:

¹⁶ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

Constitution Act, 1982, s.52. *The Secession Reference* is the Supreme Court's leading authority on the constitutional principles of:

- Rule of Law
- Constitutionalism
- Federalism
- Democracy

¹⁷ *Tsilhqot'in Nation*, Haida Nation.

¹⁸ Haida Nation, Clyde River.

¹⁹ Haida Nation, Rio Tinto.

- **Section 35** recognizes and affirms Aboriginal and Treaty Rights.²⁰
- **The Honour of the Crown** informs how governments must conduct themselves in relation to those rights.²¹
- **The Duty to Consult** is one expression of the Honour of the Crown where Crown conduct may adversely affect Aboriginal or Treaty Rights.²²
- **Reconciliation** is the overarching constitutional objective that consultation is intended to advance.²³
- **The Rule of Law** requires that all governmental action—including decisions respecting major projects—be exercised consistently with constitutional obligations.²⁴

These principles collectively support a constitutional approach that seeks to balance the exercise of Crown authority with the protection of Aboriginal and Treaty Rights in a manner that promotes certainty, fairness, and respectful Nation-to-Nation relationships.

Notes for the final version

When we prepare the polished edition, I'd recommend adding footnotes throughout this chapter to primary legal authorities rather than relying on secondary commentary. For example:

- Constitution Act, 1982, ss. 35 and 52.
- *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
- *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.
- *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.
- *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.
- *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43.
- *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
- *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40.

Manitoba Métis Federation Inc. v. Canada (Attorney General), 2013 SCC 14

That will give the paper the appearance and rigor of a professional constitutional policy document while ensuring each legal proposition is supported by authoritative sources.

²⁰ *Constitution Act, 1982, s.35.*

²¹ *Haida Nation, Manitoba Métis Federation*

²² *Haida Nation, Taku River, Rio Tinto*

²³ *Tsilhqot'in Nation, Mikisew Cree, Sparrow*

²⁴ *Reference re Secession of Quebec. Constitution Act, 1982, s.52.*

PART IV

The Evolution of the Constitutional Duty to Consult

Introduction

The constitutional Duty to Consult did not emerge from a single judicial decision. Rather, it has developed through a series of Supreme Court of Canada decisions interpreting section 35 of the *Constitution Act, 1982*. Together, these cases establish the legal framework governing how the Crown must conduct itself when contemplating actions that may adversely affect Aboriginal or Treaty Rights.

This chapter traces the evolution of the doctrine, highlighting the constitutional principles established by the Court and explaining their continuing significance for consultation processes relating to major projects.

R. v. Sparrow (1990)

Background

R. v. Sparrow was the Supreme Court of Canada's first major interpretation of section 35 following the patriation of the Constitution in 1982. Ronald Sparrow, a member of the Musqueam Indian Band, was charged with fishing using a drift net longer than permitted by his food fishing licence. He argued that his fishing activity was protected as an Aboriginal right under section 35.

Although the case did not concern consultation, it established the constitutional framework for interpreting Aboriginal rights.

Decision

The Supreme Court held that section 35 provides constitutional protection for existing Aboriginal rights. While these rights are not absolute, any infringement by the Crown must be justified according to constitutional standards.

The Court rejected the view that governments possess unrestricted authority to regulate Aboriginal rights and emphasized that section 35 must be interpreted generously and purposively.

Legal Principles Established

- Section 35 is a substantive constitutional protection.
- Governments must justify infringements of Aboriginal rights.
- Conservation may justify regulation, but Indigenous rights receive constitutional priority after conservation needs are met.

- Governments owe fiduciary obligations to Indigenous peoples when exercising authority affecting Aboriginal rights.

Importance Today

Although *Sparrow* predates the modern Duty to Consult, it established the constitutional foundation upon which later consultation jurisprudence was built. It confirmed that Aboriginal rights are constitutionally protected and that governments bear legal responsibilities when exercising powers affecting those rights.

Delgamuukw v. British Columbia (1997)

Background

The Gitksan and Wet'suwet'en Nations sought recognition of Aboriginal title over extensive traditional territories in British Columbia. The litigation became one of Canada's most significant Aboriginal title cases.

Decision

While ordering a new trial on procedural grounds, the Supreme Court clarified the legal nature of Aboriginal title and emphasized that governments should pursue negotiated solutions wherever possible.

Legal Principles Established

- Aboriginal title is a constitutionally protected interest in land.
- Oral histories must be treated as important evidence.
- Governments should seek negotiated rather than purely adversarial resolutions.
- Consultation becomes increasingly important where Aboriginal title may be affected.

Importance Today

Delgamuukw laid important groundwork for later consultation cases by emphasizing that Crown decisions affecting Indigenous lands require careful constitutional consideration.

Haida Nation v. British Columbia (Minister of Forests) (2004)

Background

British Columbia transferred and renewed a tree farm licence affecting lands claimed by the Haida Nation without first proving Aboriginal title. The Haida argued that the Province had a constitutional obligation to consult before making decisions that could affect their asserted rights. The case presented a fundamental question:

Does the Crown owe consultation obligations before Aboriginal rights or title have been proven in court?

Decision

The Supreme Court unanimously answered yes.

The Court held that the Duty to Consult arises when:

1. the Crown has knowledge, actual or constructive, of a potential Aboriginal right or title claim; and
2. the Crown contemplates conduct that may adversely affect that right or claim.

Importantly, the Court held that consultation obligations may arise before rights are finally established through litigation or treaty.

Legal Principles Established

Haida Nation remains the cornerstone of Canadian consultation law. The Court established several enduring principles:

- The Duty to Consult flows from the Honour of the Crown.
- Consultation is a constitutional obligation of the Crown.
- The duty arises before rights are proven where there is a credible claim and potential adverse effects.
- The scope of consultation exists on a spectrum, with deeper consultation required where stronger claims and more serious impacts are present.
- The Crown may delegate procedural aspects of consultation to project proponents, but the legal responsibility for fulfilling the duty remains with the Crown.

Importance Today

Nearly every consultation dispute in Canada begins with *Haida Nation*. Governments, regulators, industry proponents, and Indigenous communities continue to rely on its framework when assessing consultation obligations for major projects.

Tsilhqot'in Nation v. British Columbia (2014)

Background

The Tsilhqot'in Nation sought recognition of Aboriginal title over a large area of traditional territory in central British Columbia. Unlike earlier cases, the litigation resulted in a declaration of Aboriginal title over a defined area.

Decision

For the first time in Canadian history, the Supreme Court issued a declaration of Aboriginal title over a significant tract of land.

The Court confirmed that Aboriginal title confers the right to decide how land is used, enjoy its economic benefits, and proactively manage it, subject to an inherent limit that preserves the land for future generations.

Legal Principles Established

The Court clarified that:

- Aboriginal title confers the right to decide how the land will be used.
- Governments seeking to infringe established Aboriginal title must satisfy a demanding constitutional justification test.
- Meaningful consultation remains necessary before title is proven.
- Following a declaration of title, the Crown generally requires the consent of the title-holding Nation unless it can justify an infringement under section 35.

Importance Today

Tsilhqot'in transformed Canadian Aboriginal law by recognizing Aboriginal title in practice rather than theory. It underscored that consultation exists within a broader constitutional framework recognizing Indigenous authority over land.

Clyde River (Hamlet) v. Petroleum Geo-Services Inc. (2017)

Background

The National Energy Board approved offshore seismic testing in Baffin Bay and Davis Strait. The Inuit community of Clyde River argued that the consultation process conducted through the regulatory hearing was inadequate because it failed to meaningfully address concerns about impacts on marine mammals central to Inuit harvesting and culture.

Decision

The Supreme Court concluded that although a regulatory process may, in some circumstances, satisfy the Crown's Duty to Consult, the consultation in this case was inadequate. The Court quashed the approval because the Crown's constitutional obligations had not been met.

Legal Principles Established

Clyde River clarified several important principles:

- Administrative tribunals or regulators may play a role in fulfilling the Crown's Duty to Consult if they have the appropriate statutory authority.
- Regulatory hearings do not automatically satisfy the Duty to Consult; the adequacy of consultation depends on the circumstances and whether Indigenous concerns were meaningfully addressed.
- The Crown remains responsible for ensuring that constitutional obligations are fulfilled, even when consultation occurs through a regulatory process.

Lessons for Modern Energy Projects

Clyde River remains one of the leading cases for energy and resource development. It demonstrates that consultation cannot be treated as a procedural checklist. For projects reviewed by administrative bodies, meaningful engagement with Indigenous concerns and careful consideration of potential impacts remain essential to meeting constitutional standards.

Case	Why it's important
<i>Taku River Tlingit First Nation v. British Columbia</i>	Companion case to <i>Haida</i> showing that an environmental assessment process can, depending on the facts, satisfy the Duty to
<i>Mikisew Cree First Nation v. Canada</i> (2005)	Applied the Duty to Consult to Treaty rights and confirmed that the Honour of the Crown informs treaty implementation.
<i>Rio Tinto Alcan Inc. v. Carrier Sekani Tribal</i>	Clarified when the Duty to Consult is triggered and explained that there must be a causal link between the Crown decision and a
<i>Chippewas of the Thames First Nation v. Enbridge</i>	Decided alongside <i>Clyde River</i> , illustrating that a regulator's process can satisfy the Duty to Consult where the consultation
<i>Mikisew Cree First Nation v. Canada</i> (Governor	Clarified that the Duty to Consult does not generally apply to the legislative process itself, while emphasizing that the Honour of the

PART V

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Canadian Law

Introduction

The constitutional Duty to Consult developed through the interpretation of section 35 of the *Constitution Act, 1982* by Canadian courts. At the same time, international human rights standards have increasingly influenced discussions concerning Indigenous rights, reconciliation, environmental stewardship, and Nation-to-Nation relationships.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations General Assembly in 2007, is the most comprehensive international instrument addressing the collective and individual rights of Indigenous peoples. Canada initially opposed the Declaration but later endorsed it and, in 2021, enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA).

While UNDRIP and section 35 arise from different legal sources, both seek to strengthen the protection of Indigenous rights and provide guidance for respectful relationships between Indigenous peoples and states.

What is UNDRIP?

UNDRIP establishes minimum standards for the survival, dignity, well-being, and rights of Indigenous peoples worldwide.

The Declaration addresses a broad range of subjects, including:

- self-determination;
- culture and language;
- education;
- governance;
- lands and resources;
- environmental protection;
- participation in decision-making;
- economic development;
- justice;
- international cooperation.

Unlike domestic legislation, UNDRIP is an international human rights instrument. It provides important guidance for governments and has increasingly informed public policy, legislation, and legal interpretation.

Canada's Implementation of UNDRIP

In 2021, Parliament enacted the United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA).

The Act affirms UNDRIP as a universal international human rights instrument with application in Canadian law and requires the Government of Canada to:

- take measures to ensure federal laws are consistent with the Declaration;
- prepare and implement an Action Plan in consultation and cooperation with Indigenous peoples;
- report annually on progress.

The Act does not itself rewrite section 35 jurisprudence. Rather, it creates an ongoing federal commitment to align laws and policies with the principles reflected in UNDRIP.

Relationship Between Section 35 and UNDRIP

Section 35 and UNDRIP arise from different legal traditions but often address similar objectives. Section 35 is part of Canada's Constitution and has been interpreted through decades of Supreme Court jurisprudence.

UNDRIP is an international human rights instrument that establishes minimum standards for Indigenous rights and has influenced public policy and legislative reform.

Together they contribute to broader discussions concerning:

- reconciliation;
- self-determination;
- consultation;
- participation in decision-making;
- stewardship of lands and waters;
- respect for Indigenous peoples.

The implementation of UNDRIP continues to develop through legislation, government policy, negotiations, and judicial interpretation.

Key UNDRIP Articles Relevant to Consultation

Article 3

Indigenous peoples have the right to self-determination.

This includes the right to determine their political status and pursue their own economic, social, and cultural development.

Article 18

Indigenous peoples have the right to participate in decision-making in matters affecting their rights through representatives chosen by themselves in accordance with their own procedures. This article recognizes the importance of Indigenous participation in decisions affecting their communities.

Article 19

States shall consult and cooperate in good faith with Indigenous peoples through their own representative institutions before adopting legislative or administrative measures that may affect them. This article is frequently discussed alongside Canada's constitutional Duty to Consult.

Article 25

Indigenous peoples have the right to maintain and strengthen their spiritual relationship with their traditionally owned or otherwise occupied lands, waters, coastal seas, and other resources.

Article 26

Indigenous peoples have rights relating to the lands, territories, and resources they have traditionally owned, occupied, or otherwise used or acquired.

Article 29

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands and resources.

Governments are encouraged to establish assistance programs for environmental protection.

Article 32

Indigenous peoples have the right to determine priorities and strategies for the development or use of their lands and resources.

States are to consult and cooperate in good faith to obtain free, prior and informed consent before approving projects affecting Indigenous lands or resources.

Free, Prior and Informed Consent (FPIC)

One of the most discussed aspects of UNDRIP is the principle of **Free, Prior and Informed Consent (FPIC)**.

FPIC emphasizes that Indigenous peoples should:

- receive information before decisions are made;
- participate freely in decision-making;
- have adequate time to consider proposals;
- engage through processes that respect their own institutions and decision-making practices.

In Canada, discussions about FPIC continue in the context of constitutional law, legislation, treaty implementation, and government policy. Courts have recognized that consultation obligations arise under section 35, while the implementation of FPIC under Canadian law continues to evolve through legislation and practice.

UNDRIP and Environmental Stewardship

UNDRIP recognizes the relationship between Indigenous peoples and their traditional lands, waters, and ecosystems.

Many contemporary consultation processes involve environmental considerations including:

- biodiversity;
- climate change;
- cumulative effects;
- species at risk;
- water protection;
- cultural landscapes;
- harvesting practices.

The Declaration encourages governments and Indigenous peoples to work cooperatively in protecting these values for present and future generations.

UNDRIP and Reconciliation

The implementation of UNDRIP forms part of Canada's broader commitment to reconciliation.

Together with section 35 jurisprudence, modern treaties, self-government agreements, and Nation-to-Nation relationships, UNDRIP contributes to an evolving framework intended to strengthen respectful relationships between Indigenous peoples and the Crown.

The continuing implementation of the Declaration presents opportunities for collaboration among First Nations, governments, industry, regulators, and civil society in developing consultation processes that are constitutionally sound, transparent, and responsive to Indigenous rights.

Looking Forward

UNDRIP is not the endpoint of reconciliation but part of an ongoing process. As Canada implements the *United Nations Declaration on the Rights of Indigenous Peoples Act*, governments and Indigenous peoples continue to examine how international human rights standards can inform domestic law, policy, and practice.

For major projects, this evolution raises important questions about how consultation processes can support meaningful participation, environmental stewardship, and respectful Nation-to-Nation relationships while operating within Canada's constitutional framework.

The ongoing dialogue between section 35 jurisprudence and the principles reflected in UNDRIP will likely continue to shape consultation practices in the years ahead.

PART VI

Major Projects in Canada Consultation Across Canada's Major Development Sectors

Introduction

Canada is experiencing significant investment in energy, infrastructure, natural resources, transportation, climate adaptation, and national defence. Many of these initiatives involve Crown decisions that may engage Aboriginal and Treaty Rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Major projects often involve multiple governments, regulatory bodies, Indigenous communities, industry proponents, and members of the public. While each project is unique, many raise similar constitutional questions concerning consultation, environmental stewardship, land use, and reconciliation.

This chapter does not assess whether particular projects should proceed. Instead, it examines how constitutional consultation may arise across different sectors of Canada's economy and public infrastructure.

The purpose is to provide a practical understanding of how consultation principles are applied in diverse regulatory and policy settings.

The Constitutional Context

Section 35 does not distinguish between mining projects, hydroelectric facilities, defence infrastructure, or transportation corridors. The constitutional principles developed by the courts apply whenever Crown decisions have the potential to adversely affect Aboriginal or Treaty Rights.

Accordingly, consultation obligations may arise across a broad range of sectors depending on the nature of the proposed decision and its potential impacts.

Although regulatory processes differ, the constitutional framework discussed in earlier chapters remains relevant throughout.

Mining and Mineral Development

Overview

Mining has played an important role in Canada's economy for more than a century. The sector supplies minerals used in construction, manufacturing, technology, renewable energy, and transportation.

Many mining projects occur in regions where Indigenous peoples exercise Aboriginal or Treaty Rights.

Consultation Considerations

Consultation may arise during:

- mineral exploration;
- permitting;
- environmental assessment;
- mine development;
- expansion projects;
- mine closure and reclamation.

Common Issues

- land disturbance;
- water quality;
- fish habitat;
- wildlife;
- cumulative environmental effects;
- harvesting activities;
- archaeological and cultural resources.

Critical Minerals

Overview

Canada's Critical Minerals Strategy identifies minerals considered essential for clean energy technologies, batteries, advanced manufacturing, telecommunications, and national security. Growing demand for these resources has increased exploration and development across the country.

Consultation Considerations

Projects may involve:

- exploration programs;
- new mines;
- processing facilities;
- transportation infrastructure;
- transmission connections.

Common Issues

- cumulative environmental effects;
- water protection;
- long-term land stewardship;
- community participation;
- regional planning.

Electricity Transmission

Overview

Expanding electricity generation often requires new transmission lines and substations to connect energy sources with homes, businesses, and industrial users.

Transmission corridors may extend across multiple Indigenous territories.

Consultation Considerations

Consultation may arise in relation to:

- route selection;
- rights-of-way;
- environmental approvals;
- construction activities;
- ongoing maintenance.

Common Issues

- forest fragmentation;
- wildlife movement;
- access routes;
- culturally significant places;
- cumulative impacts.

Hydroelectric Development

Overview

Hydroelectric facilities have contributed significantly to Canada's electricity supply for decades. Projects range from small generating stations to large reservoir developments.

Consultation Considerations

Potential consultation issues may include:

- flooding;
- water level management;
- fish habitat;
- navigation;
- downstream environmental effects.

Common Issues

- fisheries;
- harvesting;
- cultural sites;
- ecosystem changes;
- long-term monitoring.

Pipelines and Energy Corridors

Overview

Pipelines transport oil, natural gas, hydrogen, carbon dioxide, and other products across provincial and territorial boundaries.

Many projects require extensive regulatory review.

Consultation Considerations

Projects may involve:

- routing decisions;
- environmental assessment;
- regulatory hearings;
- emergency planning.

Common Issues

- waterways;
- spill prevention;
- habitat;
- traditional land use;
- cumulative effects.

Nuclear Energy

Overview

Canada's nuclear sector includes power generation, research reactors, fuel processing, waste management, and emerging Small Modular Reactor technologies.

The Canadian Nuclear Safety Commission regulates nuclear facilities under federal legislation.

Consultation Considerations

Potential consultation may arise during:

- licensing;
- environmental assessment;
- facility expansion;
- decommissioning;
- waste management.

Common Issues

- water resources;
- emergency preparedness;
- environmental monitoring;
- long-term stewardship;
- community participation.

National Defence Infrastructure

Overview

Canada continues to invest in defence infrastructure, including NORAD modernization, radar systems, military facilities, transportation networks, and Arctic sovereignty initiatives.

These projects may require federal approvals and land use decisions.

Consultation Considerations

Potential issues may include:

- environmental assessment;
- land access;

- infrastructure placement;
- ongoing operational impacts.

Common Issues

- wildlife habitat;
- archaeological resources;
- traditional harvesting;
- environmental monitoring.

Carbon Capture and Storage

Overview

Carbon Capture and Storage (CCS) is intended to reduce greenhouse gas emissions by capturing carbon dioxide and storing it in geological formations.

Projects may include industrial facilities, pipelines, and underground storage sites.

Consultation Considerations

Potential issues include:

- geological assessments;
- groundwater protection;
- long-term monitoring;
- land use.

Common Issues

- environmental stewardship;
- cumulative effects;
- community confidence;
- long-term management.

Climate Adaptation Infrastructure

Overview

Governments across Canada are investing in projects designed to reduce the impacts of climate change. Examples include:

- flood protection;
- shoreline stabilization;
- wildfire resilience;
- water infrastructure;
- erosion control.

Consultation Considerations

Adaptation projects may affect lands, waters, or ecosystems used for the exercise of Aboriginal or Treaty Rights.

Common Issues

- fisheries;
- wetlands;
- habitat;
- traditional ecological knowledge;
- long-term environmental resilience.

Common Constitutional Principles Across All Sectors

Although these sectors differ significantly in purpose and design, several constitutional principles recur throughout Canadian law.

Early Engagement

Meaningful consultation is generally more effective when engagement begins early in project planning, allowing Indigenous communities to identify potential concerns before key decisions are made.

Environmental Stewardship

Many major projects involve environmental considerations that may intersect with the exercise of Aboriginal and Treaty Rights, including impacts on water, wildlife, habitat, and cumulative environmental effects.

Respect for Indigenous Knowledge

Where shared by Indigenous communities, Indigenous Knowledge may contribute to understanding local environmental conditions, cultural values, and long-term stewardship practices.

Transparency

Providing accessible information, explaining decision-making processes, and communicating reasons for decisions can support informed participation and strengthen public confidence.

Ongoing Relationships

Consultation is often not limited to a single approval. Monitoring, follow-up, and continued dialogue may remain important throughout the life of a project.

Looking Ahead

Canada's economy and infrastructure continue to evolve in response to population growth, technological innovation, climate change, energy transition, and national security priorities.

These developments are likely to generate new opportunities and new constitutional questions concerning Aboriginal and Treaty Rights.

The Duty to Consult provides a constitutional framework through which governments, Indigenous peoples, regulators, and proponents can engage with these questions. While the appropriate consultation process will vary according to the circumstances of each project, the underlying constitutional principles of the Honour of the Crown and reconciliation remain central to Canada's legal framework.

PART VII

Emerging National Issues in Consultation and Major Project Governance

Introduction

Canada is experiencing significant investment in major infrastructure, energy, transportation, defence, mining, and nuclear projects. These initiatives frequently involve complex regulatory processes, environmental assessments, Indigenous consultation, and implementation of section 35 of the *Constitution Act, 1982*.

While each project presents unique facts and legal considerations, several recurring themes have emerged in public discussions across Canada. These include questions regarding the scope of consultation, the implementation of the United Nations Declaration on the Rights of Indigenous Peoples, cumulative environmental effects, public confidence in consultation processes, and the relationship between project approvals and constitutional obligations.

The following case studies are presented to illustrate contemporary issues that continue to shape discussions concerning consultation and major project governance. They are not intended to express conclusions regarding the legal merits of any specific project or proceeding.

CASE STUDY ONE

Darlington New Nuclear Project

Project Overview

The Darlington New Nuclear Project is located in Clarington, Ontario, on the north shore of Lake Ontario. Ontario Power Generation (OPG) is developing Canada's first grid-scale Small Modular Reactor (SMR) as part of a broader modernization and expansion of the Darlington nuclear generating station.

Federal regulatory oversight includes the Canadian Nuclear Safety Commission (CNSC), while provincial participation includes Ontario's long-term electricity planning and support for nuclear generation.

The project has been described by governments as an important component of Canada's future electricity supply and energy transition.

Project Timeline

- Environmental assessment initiated.
- Federal approvals granted.
- Site preparation.
- Construction authorization.
- Government financing announcements.
- Announcement of the Seven First Nations equity partnership.
- Continued construction activities.

Consultation Framework

Publicly available information indicates that consultation activities have been undertaken by federal authorities and the project proponent over several years.

Consultation has included:

- regulatory hearings;
- written submissions;
- Indigenous engagement activities;
- environmental assessment processes;
- ongoing discussions with participating First Nations.

Consultation obligations remain the responsibility of the Crown and are assessed within Canada's constitutional framework.

Contemporary Discussion

Public discussion surrounding the Darlington project has included a range of perspectives.

Supporters have emphasized:

- low-carbon electricity;
- energy security;
- long-term employment;
- Indigenous economic participation through equity ownership.

Other community members, rights holders, and organizations have raised questions concerning:

- consultation processes;
- environmental protection;
- long-term radioactive waste management;
- cumulative environmental effects;
- community participation in decision-making;
- transparency.

These differing perspectives demonstrate the complexity of implementing section 35 within nationally significant infrastructure projects.

Constitutional Questions Raised

Without expressing conclusions, the project illustrates broader constitutional questions including:

- What constitutes meaningful consultation in long-term nuclear projects?
- How should cumulative environmental effects be considered?
- How can consultation processes maintain public confidence while respecting constitutional obligations?
- How do equity partnerships interact with broader consultation frameworks?

These questions continue to be discussed by governments, Indigenous communities, regulators, and the courts.

CASE STUDY TWO

Arctic Over-the-Horizon Radar (A-OTHR)

Project Overview

Canada's Arctic Over-the-Horizon Radar (A-OTHR) initiative forms part of broader efforts to modernize continental defence in cooperation with the North American Aerospace Defence Command (NORAD).

Potential sites under consideration include locations in Ontario that contain agricultural lands, wetlands, forests, and areas used by First Nations in the exercise of Aboriginal and Treaty Rights.

Project Timeline

Include:

- NORAD modernization announcement.
- Federal project announcement.
- Site selection process.
- Community meetings.
- Indigenous engagement.
- Environmental planning.
- Current status.

Consultation Framework

Federal departments have indicated that Indigenous consultation forms part of the planning process.

Public documentation has referenced engagement with Indigenous communities alongside environmental and technical assessments.

As with other federal projects, consultation obligations arise within the constitutional framework established by section 35 and Supreme Court jurisprudence.

Environmental Considerations

Public materials identify issues including:

- wetlands;
- wildlife habitat;
- migratory birds;
- agricultural lands;
- species at risk;
- archaeological resources;
- watercourses.

These considerations are typical of large-scale infrastructure planning and intersect with environmental assessment processes and Indigenous consultation.

Community Perspectives

Public meetings and community discussions have reflected a range of views regarding the project.

Issues raised have included:

- impacts on farmland;
- environmental stewardship;
- defence policy;
- Indigenous consultation;
- local participation in planning.

These discussions illustrate the importance of maintaining transparent consultation processes where projects may affect Aboriginal or Treaty Rights.

CASE STUDY THREE

Consultation, Litigation, and Constitutional Development

Litigation as Part of Constitutional Dialogue

Throughout Canadian history, significant constitutional principles respecting Aboriginal and Treaty Rights have often developed through litigation.

Decisions such as *Sparrow*, *Delgamuukw*, *Haida Nation*, *Tsilhqot'in Nation*, and *Clyde River* each arose from disputes that ultimately contributed to the development of Canadian constitutional law.

Contemporary litigation continues this process by asking courts to interpret section 35 in light of evolving factual circumstances and emerging public policy challenges.

The existence of litigation does not determine the outcome of constitutional questions. Rather, it reflects that important legal issues remain active and continue to be considered by the courts.

Contemporary Proceedings

Among the proceedings presently before the Federal Court are matters that raise questions concerning consultation obligations, environmental protection, and the implementation of section 35 in relation to major projects.

Examples include proceedings commenced by:

John Hawke

Federal Court File No. **T-2232-26**

Federal Court File No. **T-2719-26**

These proceedings concern issues relating to consultation, environmental decision-making, and constitutional obligations associated with major projects. They are identified here solely as examples of ongoing constitutional litigation. No opinion is expressed regarding the merits of any proceeding, which remain for the Court to determine.

Why This Matters Nationally

The examples discussed in this chapter demonstrate that consultation is not a static legal doctrine. As Canada advances major projects in areas such as energy, critical minerals, transportation, and defence, new questions continue to arise regarding the implementation of section 35, the Honour of the Crown, and reconciliation.

While the specific facts of each project differ, they collectively illustrate the ongoing importance of consultation processes that are transparent, meaningful, and responsive to the constitutional rights of Indigenous peoples. Continued dialogue among First Nations, governments, regulators, industry, and the courts will remain an important part of shaping consultation practices in the years ahead.

PART VIII

Recommendations

Strengthening Consultation and Constitutional Governance for Major Projects

Introduction

The preceding chapters have outlined the constitutional foundations of the Duty to Consult, the evolution of Supreme Court jurisprudence, and contemporary issues arising in relation to major projects across Canada.

Canada's constitutional framework continues to evolve through judicial decisions, legislative initiatives, negotiations, and practical experience. As governments pursue major infrastructure, energy, transportation, mining, defence, and environmental initiatives, consultation processes must continue to adapt in ways that uphold the Honour of the Crown, respect Aboriginal and Treaty Rights, and promote reconciliation.

The following recommendations are intended to support continued dialogue among First Nations, governments, regulators, industry, and civil society regarding consultation practices consistent with section 35 of the *Constitution Act, 1982* and the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

Recommendation One

Develop National Consultation Principles

The Assembly of First Nations should consider developing a set of national consultation principles that reflect constitutional jurisprudence, Treaty relationships, and the diversity of First Nations governance systems across Canada.

These principles could:

- identify minimum expectations for meaningful consultation;
- recognize regional and Treaty-specific differences;
- encourage consultation at the earliest stages of project planning;
- promote consistency while respecting First Nations' autonomy.

A common framework could assist governments, proponents, and First Nations in understanding constitutional expectations while allowing flexibility to accommodate local circumstances.

Recommendation Two

Promote Best Practices for Consultation

The AFN should facilitate the sharing of practical experiences and emerging best practices from First Nations across Canada.

Areas of focus may include:

- early engagement before key decisions are made;
- accessible technical information;

- adequate time for review and community discussion;
- culturally appropriate engagement methods;
- transparent documentation of consultation activities;
- effective follow-up throughout project implementation.

Sharing successful approaches can strengthen consultation processes while reducing uncertainty for all participants.

Recommendation Three

Enhance Transparency and Access to Information

Meaningful consultation depends upon timely and accessible information.

The AFN should encourage governments and project proponents to improve transparency by:

- making consultation materials publicly available where appropriate;
- clearly identifying decision-making timelines;
- explaining how Indigenous concerns have been considered;
- providing plain-language summaries of technical reports;
- improving public access to environmental and regulatory information.

Transparent processes contribute to informed participation and strengthen public confidence.

Recommendation Four

Strengthen Rights Holder Participation

Consultation is most effective when it enables meaningful participation by those whose Aboriginal or Treaty Rights may be affected.

The AFN should continue discussions with First Nations regarding approaches to strengthening participation consistent with constitutional principles, local governance structures, and Treaty relationships.

Such discussions may include:

- community engagement practices;
- participation of Elders and Knowledge Keepers;
- youth involvement;
- technical capacity support;
- culturally appropriate decision-making processes.

Recognizing the diversity of First Nations governance structures, these discussions should respect the autonomy of each Nation in determining how participation occurs.

Recommendation Five

Promote Environmental Stewardship

Environmental protection and Indigenous rights are frequently interconnected.

The AFN should continue advocating for consultation processes that meaningfully consider:

- cumulative environmental effects;
- protection of lands and waters;
- biodiversity;
- species at risk;
- cultural landscapes;

- harvesting activities;
- long-term environmental sustainability.

Strengthening environmental stewardship contributes to the protection of Aboriginal and Treaty Rights and supports responsible decision-making for future generations.

Recommendation Six

Monitor Constitutional and Legislative Developments

The constitutional law governing consultation continues to evolve.

The AFN should establish an ongoing process to monitor:

- Supreme Court decisions;
- Federal Court and appellate decisions;
- legislative reforms;
- implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act;
- emerging regulatory practices affecting consultation.

Regular monitoring would support timely policy responses and assist First Nations in understanding new legal developments.

Recommendation Seven

Establish an Annual Consultation Report

The AFN should consider preparing an annual report reviewing developments relating to consultation and major projects affecting First Nations.

Such a report could summarize:

- significant court decisions;
- legislative developments;
- emerging consultation practices;
- major infrastructure initiatives;
- examples of successful collaboration;
- continuing challenges identified by First Nations.

An annual report would create an ongoing national record of consultation developments and support evidence-based policy discussions.

Recommendation Eight

Encourage Early and Continuous Dialogue

Experience across Canada demonstrates that consultation is generally more effective when engagement begins early and continues throughout the life of a project.

The AFN should encourage governments and proponents to:

- initiate discussions before key project decisions are finalized;
- maintain regular communication throughout project planning and implementation;
- provide opportunities for concerns to be addressed as projects evolve.

Early dialogue can reduce conflict, improve project planning, and contribute to more durable relationships.

Recommendation Nine

Support Capacity Building

Effective consultation requires resources, expertise, and institutional capacity.

The AFN should advocate for sustainable funding and technical support that enables First Nations to:

- review technical studies;
- retain independent experts where appropriate;
- participate effectively in regulatory processes;
- conduct community engagement;
- develop consultation policies and protocols.

Strengthening capacity benefits both First Nations and project proponents by improving the quality of decision-making.

Recommendation Ten

Foster Collaborative Constitutional Dialogue

The AFN should continue promoting respectful dialogue among First Nations, governments, regulators, industry, academic institutions, and civil society regarding the ongoing development of consultation practices.

The objective should be to support constitutional governance that:

- respects Aboriginal and Treaty Rights;
- advances reconciliation;
- promotes legal certainty;
- protects the environment;
- strengthens Nation-to-Nation relationships.

Recommendation Eleven

Promote Transparency and Accountability in Consultation Processes

Meaningful consultation is strengthened when governments, regulators, project proponents, and participating First Nations provide clear information regarding how consultation has been undertaken and how concerns have been considered.

The Assembly of First Nations should encourage consultation frameworks that promote transparency by documenting, where appropriate and consistent with each Nation's governance and legal traditions:

- the consultation activities undertaken;
- the Indigenous governments, organizations, and communities engaged;
- opportunities provided for community participation;
- the principal issues raised during consultation;
- the measures adopted to address or accommodate concerns;
- the rationale supporting final decisions.

Greater transparency can strengthen public confidence, improve accountability, and assist future consultation processes by providing a clear record of how constitutional obligations have been approached.

Recommendation Twelve

Encourage Community Engagement Consistent with First Nations Governance

The Assembly of First Nations should encourage continued dialogue regarding approaches that enable meaningful community engagement in decisions respecting major projects, recognizing that First Nations maintain diverse governance systems, legal traditions, and decision-making practices.

Such dialogue may consider:

- participation of Elders and Knowledge Keepers;
- opportunities for youth engagement;
- accessible community information sessions;
- mechanisms for receiving community input;
- culturally appropriate decision-making practices;
- documentation of community perspectives.

The purpose of these discussions is not to prescribe governance models, but to support informed participation in matters affecting Aboriginal and Treaty Rights.

Recommendation Thirteen

Improve Documentation of Consultation Outcomes

To support constitutional accountability and informed decision-making, the Assembly of First Nations should encourage governments and project proponents to provide clear public documentation describing, where appropriate:

- who participated in consultation;
- the consultation methods employed;
- concerns raised during consultation;
- accommodations considered or implemented;
- reasons supporting final decisions.

Accessible documentation contributes to transparency, assists communities in understanding consultation processes, and may reduce uncertainty regarding how constitutional obligations have been addressed.

PART VIII

Emerging Constitutional and Policy Questions

Introduction

The constitutional Duty to Consult has developed significantly through judicial decisions interpreting section 35 of the *Constitution Act, 1982*. While the Supreme Court of Canada has established foundational principles, consultation continues to evolve in response to changing governance structures, modern treaty relationships, economic partnerships, environmental challenges, and the increasing scale of major infrastructure projects.

As governments, First Nations, industry, and the courts continue to navigate these issues, several important constitutional and policy questions remain the subject of ongoing discussion. The following questions are presented to encourage dialogue and do not express conclusions on matters that may ultimately require further judicial, legislative, or Nation-to-Nation consideration.

Community Participation and Rights Holders

One of the continuing questions in consultation practice concerns how consultation processes can meaningfully reflect the diversity of Indigenous governance systems and the perspectives of those who hold Aboriginal and Treaty Rights.

First Nations exercise governance through a variety of legal, political, and cultural institutions. These include elected governments established under the *Indian Act*, self-government agreements, hereditary governance systems, Elders' councils, clan systems, community assemblies, and other traditional decision-making processes.

Consultation practices may therefore involve different approaches depending upon the Nation, the nature of the project, and the rights potentially affected.

Questions for continued dialogue include:

- How can consultation processes meaningfully engage communities while respecting each Nation's governance structures?
- How can consultation processes promote transparency and public confidence?
- What practices best support informed participation by those whose Aboriginal or Treaty Rights may be affected?
- How can governments better understand the governance traditions of individual Nations before consultation begins?

These questions recognize that there is no single governance model shared by all First Nations and that approaches may appropriately differ across Canada.

Consultation and Economic Participation

Across Canada, governments and project proponents increasingly enter into economic partnerships with First Nations relating to major infrastructure and resource projects.

These arrangements may include:

- equity participation;
- impact benefit agreements;
- procurement opportunities;
- revenue sharing;
- employment and training initiatives.

Economic participation has become an increasingly important aspect of reconciliation and Indigenous economic development.

At the same time, public discussion has identified questions concerning the relationship between economic participation and constitutional consultation.

For example:

- How should economic partnership initiatives relate to consultation processes?
- How can consultation remain meaningful regardless of whether a Nation chooses to participate economically?
- How should governments communicate the distinction between consultation obligations and commercial agreements?

These questions are not intended to diminish the value of economic partnerships but rather to recognize that consultation and economic participation serve different purposes within Canada's constitutional framework.

Transparency in Consultation

Meaningful consultation depends upon informed participation.

Public confidence may be strengthened where consultation processes clearly communicate:

- who was consulted;
- when consultation occurred;
- the issues that were raised;
- how those issues were considered;
- the reasons supporting final decisions.

Improved documentation may also assist future consultation efforts by creating a clear administrative record of constitutional decision-making.

Questions for future discussion include:

- What level of transparency best supports public confidence?
- How can transparency be balanced with confidentiality and Indigenous data sovereignty?
- What information should be publicly available following major consultation processes?

Cumulative Effects

Many consultation processes consider the effects of an individual project.

Increasingly, First Nations and governments have also discussed cumulative environmental, cultural, and socio-economic effects arising from multiple developments occurring within the same region.

Questions include:

- How should cumulative impacts be assessed?
- How should long-term environmental stewardship be incorporated into consultation?
- What role should Indigenous Knowledge play alongside scientific assessments?

These issues continue to receive attention in environmental assessment policy and constitutional discussions.

Emerging Questions for Future Constitutional Development

As Canada continues implementing section 35 and the *United Nations Declaration on the Rights of Indigenous Peoples Act*, additional questions may emerge through negotiations, legislation, and future court decisions.

These may include:

- consultation in relation to strategic regional planning;
- implementation of free, prior and informed consent;
- consultation respecting cumulative regional development;
- integration of Indigenous legal traditions into consultation processes;
- consultation concerning climate adaptation, energy transition, and national defence projects.

The continued evolution of these issues demonstrates that consultation remains a dynamic area of Canadian constitutional law.

8.6 Consultation and Legitimate Community Engagement

The effectiveness of consultation depends not only on the legal steps taken by governments but also on the confidence that affected First Nations have in the process. Across Canada, First Nations have diverse governance structures and decision-making traditions. Consultation practices may be strengthened by encouraging approaches that are transparent, culturally appropriate, and responsive to the governance systems identified by each Nation.

Continued dialogue among First Nations, governments, and the courts may further clarify how consultation processes can best reflect community participation while respecting the constitutional recognition of Aboriginal and Treaty Rights under section 35.

The Assembly of First Nations is well positioned to facilitate these discussions by bringing together Chiefs, Elders, Knowledge Keepers, youth, legal experts, and community representatives to share experiences and develop guidance informed by the diversity of First Nations governance traditions.

PART IX

Appendices Constitutional, Legislative, and Reference Materials

Introduction

The following appendices provide selected constitutional provisions, legislation, Supreme Court jurisprudence, policy references, and supporting materials relevant to consultation, reconciliation, and major project decision-making. They are included to assist Chiefs, First Nations leadership, legal advisors, community members, and policymakers in understanding the constitutional framework discussed throughout this paper.

The appendices are intended as a reference resource and should not be interpreted as legal advice.

APPENDIX A

Section 35 of the Constitution Act, 1982

Constitutional Recognition and Affirmation of Aboriginal and Treaty Rights

Rights of the Aboriginal Peoples of Canada

Recognition of existing aboriginal and treaty rights

- **35 (1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- **Definition of *aboriginal peoples of Canada***
(2) In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada.
- **Land claims agreements**
(3) For greater certainty, in subsection (1) *treaty rights* includes rights that now exist by way of land claims agreements or may be so acquired.
- **Aboriginal and treaty rights are guaranteed equally to both sexes**
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the *Constitution Act, 1867*, to section 25 of this Act or to this Part,

- **(a)** a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
- **(b)** the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item

Understanding Section 35

Section 35 of the *Constitution Act, 1982* is one of the most significant constitutional provisions governing the relationship between Indigenous peoples and the Crown in Canada. It recognizes and affirms the existing Aboriginal and Treaty Rights of the Aboriginal peoples of Canada and forms part of the supreme law of Canada.

Unlike ordinary legislation enacted by Parliament or a provincial legislature, constitutional provisions cannot ordinarily be amended through the regular legislative process. Governments must therefore exercise their powers in a manner consistent with the Constitution.

Section 35 does not create Aboriginal or Treaty Rights. Rather, it constitutionally recognizes and affirms rights that pre-existed the Constitution. Since 1982, the Supreme Court of Canada has interpreted the meaning and scope of section 35 through a substantial body of jurisprudence addressing Aboriginal rights, Treaty rights, Aboriginal title, consultation, accommodation, and reconciliation.

Today, section 35 serves as the constitutional foundation for much of Canadian Aboriginal law.

What Does Section 35 Protect?

Section 35 recognizes and affirms existing Aboriginal and Treaty Rights.

These include rights that arise from:

- historic treaties;
- modern treaties;
- Aboriginal rights recognized through the common law;
- Aboriginal title where established;
- constitutional relationships between Indigenous peoples and the Crown.

The content of particular rights varies among First Nations, Inuit, and Métis peoples and depends upon historical, cultural, and legal circumstances.

Who Does Section 35 Apply To?

Section 35 applies to the Aboriginal peoples of Canada.

The Constitution recognizes three distinct groups:

- First Nations
- Inuit
- Métis

The Supreme Court has repeatedly emphasized that section 35 must be interpreted in a manner consistent with its constitutional purpose.

Why Was Section 35 Included?

Prior to 1982, Aboriginal and Treaty Rights were recognized through treaties, the common law, and various statutes.

When Canada patriated its Constitution, Indigenous leaders advocated strongly for constitutional recognition of these rights.

Section 35 represented a historic constitutional commitment to recognize and affirm Aboriginal and Treaty Rights within Canada's supreme law.

Although the provision is concise, it has become one of the most influential constitutional provisions in Canadian public law.

Why Section 35 Matters

Section 35 provides the constitutional foundation for many of the legal principles discussed throughout this paper.

Among its most significant contributions are:

Constitutional Recognition

Aboriginal and Treaty Rights receive constitutional protection rather than ordinary statutory protection.

The Honour of the Crown

The Supreme Court has explained that the Honour of the Crown informs the interpretation and implementation of section 35.

This constitutional principle guides Crown conduct in relation to Indigenous peoples and underpins the Duty to Consult.

Reconciliation

The Court has repeatedly described reconciliation between the prior occupation of North America by Indigenous peoples and the assertion of Crown sovereignty as a fundamental objective of section 35.

Consultation, accommodation, negotiations, treaty implementation, and respectful Nation-to-Nation relationships are all understood as mechanisms that contribute to this constitutional objective.

Duty to Consult

Although section 35 does not expressly mention consultation, the Supreme Court has interpreted the Honour of the Crown as giving rise to the constitutional Duty to Consult where Crown conduct may adversely affect Aboriginal or Treaty Rights.

The modern consultation framework has therefore developed through judicial interpretation of section 35 rather than through constitutional amendment.

Aboriginal Title

Section 35 also provides constitutional protection for Aboriginal title where established according to Canadian law.

The Supreme Court has recognized Aboriginal title as a unique interest in land that includes the right to determine how land is used, subject to constitutional principles articulated by the Court.

Treaty Rights

Historic and modern treaties occupy an important place within section 35.

The Honour of the Crown continues to guide treaty interpretation and implementation.

The Supreme Court has emphasized that treaties must be interpreted in a manner that advances reconciliation and reflects the common intention of the parties where possible.

Section 35 and Major Projects

Many contemporary infrastructure, energy, mining, defence, transportation, and environmental decisions engage Aboriginal or Treaty Rights protected by section 35.

Where Crown decisions may adversely affect those rights, constitutional obligations—including the Duty to Consult and, where appropriate, accommodation—may arise.

For this reason, section 35 has become central to environmental assessments, regulatory approvals, resource development, and other major project decisions throughout Canada.

Section 35.1

Section 35.1 was included alongside section 35 to recognize the importance of Indigenous participation in constitutional discussions concerning Aboriginal and Treaty Rights.

While invoked less frequently in litigation than section 35 itself, it reflects the constitutional expectation that Indigenous peoples should be engaged when constitutional amendments relating to section 35 are considered.

Its inclusion reinforces the broader constitutional principle that Indigenous peoples are participants in constitutional dialogue concerning their rights.

Looking Forward

More than four decades after its adoption, section 35 remains one of the most dynamic areas of Canadian constitutional law.

Its interpretation continues to evolve through:

- Supreme Court decisions;
- Federal Court decisions;
- treaty negotiations;
- self-government agreements;
- implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act;
- legislative reform;
- practical experience with consultation and reconciliation.

As Canada continues to address major infrastructure, environmental, economic, and defence initiatives, section 35 will remain a central constitutional framework guiding the relationship between the Crown and Indigenous peoples.

Key Takeaways

- Section 35 recognizes and affirms existing Aboriginal and Treaty Rights; it does not create them.
- The Supreme Court has interpreted section 35 as advancing the constitutional objective of reconciliation.
- The Duty to Consult arises from the Honour of the Crown and has been developed through judicial interpretation of section 35.
- Governments must exercise their authority consistently with the Constitution when decisions may affect Aboriginal or Treaty Rights.
- Section 35 continues to evolve through court decisions, treaty implementation, legislation, and Nation-to-Nation dialogue.

This kind of boxed summary makes the appendix more accessible to Chiefs, councillors, youth delegates, and community members.

APPENDIX B

Section 52 of the Constitution Act, 1982 Constitutional Supremacy and the Rule of Law

Primacy of Constitution of Canada

- **52 (1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
- Constitution of Canada
 - (2) The Constitution of Canada includes
 - **(a)** the *Canada Act 1982*, including this Act;
 - **(b)** the Acts and orders referred to in the schedule; and
 - **(c)** any amendment to any Act or order referred to in paragraph (a) or (b).

Understanding Constitutional Supremacy

Section 52 of the *Constitution Act, 1982* establishes one of the foundational principles of Canada's constitutional democracy:

The Constitution is the supreme law of Canada.

This principle, commonly referred to as **constitutional supremacy**, means that every exercise of governmental authority—including legislation, regulations, executive decisions, and administrative actions—must comply with the Constitution.

Where a law or government action is inconsistent with the Constitution, courts may declare it to be of no force or effect to the extent of the inconsistency.

Constitutional supremacy ensures that governments remain accountable to the Constitution rather than exercising unlimited authority.

What Does Section 52 Do?

Section 52 serves several essential constitutional functions. It:

- establishes the Constitution as Canada's highest source of law;
- confirms that Parliament and provincial legislatures must legislate within constitutional limits;
- authorizes courts to review legislation and government action for constitutional compliance;
- protects constitutional rights from being overridden by ordinary legislation.

In practical terms, constitutional supremacy means that governments cannot simply set aside constitutional obligations because doing so would be more convenient, less expensive, or politically expedient.

Section 52 and Section 35

Sections 35 and 52 work together.

Section 35 recognizes and affirms the existing Aboriginal and Treaty Rights of the Aboriginal peoples of Canada.

Section 52 provides those constitutional protections with legal force by declaring that the Constitution is the supreme law of Canada.

Together they establish that Aboriginal and Treaty Rights are constitutional rights that governments must respect when exercising public authority.

Constitutional Supremacy and Government Decision-Making

Every day, governments make decisions concerning:

- infrastructure;
- transportation;
- mining;
- hydroelectric development;
- electricity generation;
- nuclear facilities;
- military infrastructure;
- fisheries;
- forestry;
- environmental protection;
- municipal planning.

These decisions are often made under statutes enacted by Parliament or provincial legislatures. However, because Section 52 establishes constitutional supremacy, statutory authority must always be exercised consistently with constitutional obligations. Government authority is therefore exercised **within** the Constitution—not outside it.

Constitutional Supremacy and Major Projects

Major projects frequently require numerous governmental approvals.

Examples include:

- environmental approvals;
- licences;
- permits;
- regulatory authorizations;
- funding decisions;
- land-use approvals;
- Crown authorizations.

Where those decisions may adversely affect Aboriginal or Treaty Rights protected by Section 35, constitutional obligations may arise.

Section 52 ensures that constitutional protections remain relevant throughout governmental decision-making, regardless of a project's economic importance or strategic significance.

Constitutional Governance

The Supreme Court of Canada has repeatedly emphasized that constitutional governance requires governments to exercise public authority in accordance with constitutional principles.

Among these principles are:

- constitutional supremacy;
- the rule of law;
- the Honour of the Crown;
- reconciliation;
- respect for Aboriginal and Treaty Rights.

Together these principles promote legal certainty, accountability, and public confidence in governmental decision-making.

Constitutional Supremacy and the Courts

Canadian courts play an important role in maintaining constitutional supremacy.

When constitutional questions arise, courts may be asked to determine whether government actions comply with the Constitution.

This does not mean that courts govern Canada. Rather, they perform the constitutional function of interpreting and applying the Constitution in accordance with the rule of law.

Through this process, constitutional principles continue to develop over time while remaining anchored in the text of the Constitution.

Why Section 52 Matters for Consultation

The constitutional Duty to Consult does not arise because governments choose to consult as a matter of policy.

Rather, the Supreme Court has explained that the Duty to Consult flows from the Honour of the Crown in circumstances where Crown conduct may adversely affect Aboriginal or Treaty Rights protected by Section 35.

Section 52 provides the constitutional framework within which those obligations operate. Because the Constitution is supreme law, consultation is understood not merely as a policy preference but as part of the broader constitutional relationship between the Crown and Indigenous peoples where the legal conditions for the duty are met.

Why Constitutional Supremacy Matters

Section 52 protects the integrity of Canada's constitutional order.

It ensures that:

- constitutional rights remain meaningful;
- governments remain accountable under the Constitution;
- Aboriginal and Treaty Rights receive constitutional recognition;
- courts may review governmental action for constitutional compliance;
- constitutional principles continue to guide reconciliation between Indigenous peoples and the Crown.

Without constitutional supremacy, constitutional rights could be displaced by ordinary legislation or administrative convenience. Section 52 therefore provides the legal foundation upon which the protection of all constitutional rights—including those recognized in Section 35—depends.

Key Takeaways

Section 52 at a Glance

- The Constitution is Canada's supreme law.
- Parliament, provincial legislatures, and governments must act consistently with the Constitution.
- Section 35 is constitutionally protected because it forms part of the Constitution.
- Courts have the authority to review legislation and government action for constitutional compliance.
- Constitutional supremacy reinforces the rule of law and supports the constitutional relationship between the Crown and Indigenous peoples.

APPENDIX C

Timeline of the Evolution of the Duty to Consult

Year	Constitutional Development	Significance
1982	Constitution Act, 1982 (Section 35)	Constitutional recognition of Aboriginal and Treaty Rights
1990	<i>R. v. Sparrow</i>	First major interpretation of Section 35
1997	<i>Delgamuukw</i>	Clarified Aboriginal Title
2004	<i>Haida Nation</i>	Established modern Duty to Consult
2004	<i>Taku River</i>	Environmental assessment may satisfy consultation
2005	<i>Mikisew Cree</i>	Applied consultation to Treaty Rights
2010	<i>Rio Tinto</i>	Clarified trigger for consultation
2014	<i>Tsilhqot'in Nation</i>	First declaration of Aboriginal Title
2017	<i>Chippewas of the Thames</i>	Regulators may satisfy consultation
2017	<i>Clyde River</i>	Consultation through regulators must be meaningful
2018	<i>Mikisew (Legislative)</i>	Consultation generally does not apply to the legislative process
2021	UNDRIP Act	Federal implementation framework
2026	AFN Discussion Paper	Proposed national consultation principles

APPENDIX D

Landmark Supreme Court Decisions

Sparrow (1990)

Issue: Scope of Section 35.

Held: Section 35 constitutionally protects Aboriginal rights.

Importance: Foundation of modern Aboriginal law.

Delgamuukw (1997)

Issue: Aboriginal Title.

Held: Clarified title.

Importance: Negotiation preferred over litigation.

Haida Nation (2004)

Issue: Duty before rights proven?

Held: Yes.

Importance: Birth of modern Duty to Consult.

Taku River (2004)

Issue: Environmental assessment.

Held: Assessment may satisfy consultation.

Importance: Introduced regulatory consultation.

Mikisew Cree (2005)

Issue: Treaty Rights.

Held: Consultation applies to Treaty implementation.

Importance: Expanded Haida.

Rio Tinto (2010)

Issue: Trigger.

Held: Must be adverse impact.

Importance: Clarified limits.

Tsilhqot'in (2014)

Issue: Aboriginal Title.

Held: First declaration.

Importance: Historic constitutional decision.

Chippewas (2017)

Issue: Pipeline approval.

Held: Regulators can satisfy consultation.

Importance: Clarified tribunal role.

Clyde River (2017)

Issue: Offshore seismic testing.

Held: Consultation inadequate.

Importance: Meaningful consultation required.

APPENDIX E

UNDRIP Articles

Instead of legal wording.

Plain language

Article	Plain Language
3	Self-determination
18	Participation in decision-making
19	Governments should consult and cooperate in good faith before measures affecting Indigenous peoples
25	Relationship with lands and waters
26	Rights relating to traditional lands and resources
29	Environmental protection
32	Participation in decisions affecting lands and resources, including consultation and cooperation before project approvals

APPENDIX F

The United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA)

Building Canada's Framework for Implementing UNDRIP

Introduction

On June 21, 2021, Parliament enacted the United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA).

The Act represents an important step in Canada's efforts to implement the principles contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

While section 35 of the *Constitution Act, 1982* provides constitutional recognition and affirmation of Aboriginal and Treaty Rights, the UNDA establishes a legislative framework through which the Government of Canada is to work toward aligning federal laws with the Declaration and advancing its implementation over time.

Purpose of the Act

The UNDA has three principal purposes.

1. Affirm UNDRIP

The Act affirms that UNDRIP is:

- a universal international human rights instrument;
- an instrument with application in Canadian law.

This recognizes the Declaration as an important framework informing Canada's relationship with Indigenous peoples.

2. Promote Consistency of Federal Laws

The Act requires the Government of Canada to take measures to ensure that federal laws are consistent with UNDRIP.

This is an ongoing process involving legislative review, policy development, and consultation.

3. Advance Reconciliation

The Act seeks to contribute to reconciliation by encouraging cooperation between Indigenous peoples and the Government of Canada in implementing the Declaration.

The Action Plan

One of the central features of the UNDA is the requirement for a national Action Plan.

The Action Plan identifies measures intended to advance implementation of UNDRIP.

These measures include work relating to:

- reconciliation;
- combating racism and discrimination;
- Indigenous participation in decision-making;
- justice;
- health;
- education;
- language;
- economic development;
- lands and resources;
- environmental protection.

The Action Plan is intended to evolve over time through consultation and cooperation with Indigenous peoples.

Annual Reports

The Act also requires the Minister responsible to prepare an annual report describing progress made in implementing the Act.

Annual reports generally summarize:

- legislative initiatives;
- policy developments;
- implementation activities;
- progress on the Action Plan;

- future priorities.

These reports promote transparency and allow Parliament and the public to monitor implementation efforts.

How the UNDA Relates to Canadian Law

The UNDA does **not** replace the Constitution.

Rather, it operates within Canada's existing constitutional framework.

The Act encourages federal laws and policies to be developed consistently with UNDRIP while respecting Canada's constitutional structure.

Canadian courts continue to interpret section 35 and other constitutional provisions according to established constitutional principles and judicial precedent.

UNDA and Section 35

Although they are closely related, Section 35 and the UNDA serve different legal functions.

Section 35	UNDRIP Act (UNDA)
Part of the Constitution of Canada	Federal legislation
Recognizes and affirms Aboriginal and Treaty Rights	Creates a framework for implementing UNDRIP
Interpreted by Canadian courts	Guides federal implementation and policy
Constitutionally entrenched	Can be amended by Parliament through the ordinary legislative process
Forms part of the supreme law of Canada	Must operate within Canada's constitutional framework

UNDRIP and the Duty to Consult

UNDRIP includes several articles that speak to consultation, participation in decision-making, and cooperation with Indigenous peoples.

These include:

- Article 18
- Article 19
- Article 32

The constitutional Duty to Consult, however, arises under Canadian constitutional law through section 35 jurisprudence.

While the two frameworks often address similar subject matter, they originate from different legal sources.

The continuing relationship between section 35, UNDRIP, and the UNDA continues to develop through legislation, policy, negotiations, and judicial interpretation.

Why the UNDA Matters

The Act represents an important development in Canada's approach to Indigenous rights.

It encourages governments to consider Indigenous rights proactively rather than only through litigation.

It also provides an ongoing framework for collaboration between Indigenous peoples and Canada concerning implementation of UNDRIP.

For First Nations involved in consultation concerning major projects, the Act forms part of the broader legal and policy context within which governments now operate.

Looking Forward

Implementation of the UNDA remains an ongoing process.

As governments continue reviewing legislation, developing policy, and working with Indigenous peoples, the relationship between constitutional law, statutory law, and international human rights standards will continue to evolve.

The Act therefore represents not an endpoint, but part of Canada's continuing constitutional and reconciliation journey.

Key Takeaways

UNDRIP Act at a Glance

- Passed by Parliament in **2021**.
- Affirms UNDRIP as an important international human rights instrument with application in Canadian law.
- Requires the Government of Canada to work toward consistency between federal laws and UNDRIP.
- Requires a federal Action Plan.
- Requires annual progress reports.
- Operates alongside—not instead of—Section 35 of the Constitution.

APPENDIX G

The Honour of the Crown

Understanding One of Canada's Foundational Constitutional Principles

Introduction

The Honour of the Crown is one of the foundational constitutional principles governing the relationship between the Crown and Indigenous peoples in Canada. It is not a statute or a single legal rule. Rather, it is a constitutional principle that informs how governments must exercise their authority when Aboriginal or Treaty Rights are engaged.

The Supreme Court of Canada has repeatedly described the Honour of the Crown as the constitutional foundation from which many obligations—including the Duty to Consult—are derived.

The following decisions illustrate how the Court has explained this principle over time.

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73

Key Quotation

"The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown."

What the Court Meant

In *Haida Nation*, the Supreme Court held that the Duty to Consult is not simply a matter of government policy or administrative discretion. Instead, it flows from the constitutional principle that the Crown must act honourably in its dealings with Indigenous peoples.

The Court explained that where the Crown has knowledge of a credible Aboriginal claim or right and contemplates conduct that may adversely affect that right, the Honour of the Crown may require consultation and, where appropriate, accommodation.

The depth of consultation depends on the circumstances, including the strength of the claimed right and the seriousness of the potential adverse effect.

Why It Matters

Haida Nation established the modern constitutional Duty to Consult and confirmed that consultation is rooted in constitutional principles rather than political choice.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69

Key Quotation

"The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions."

What the Court Meant

In *Mikisew Cree*, the Supreme Court considered the Crown's obligations when implementing a historic treaty.

The Court explained that treaties are not merely historical documents; they are living constitutional relationships. The Honour of the Crown continues to guide how governments implement treaty promises.

The Court emphasized that consultation helps maintain the integrity of treaty relationships and supports reconciliation between Indigenous peoples and the Crown.

Why It Matters

Mikisew Cree demonstrates that the Honour of the Crown applies not only to asserted Aboriginal rights but also to the implementation of Treaty Rights.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

Key Quotation

"The purpose of s. 35 is to facilitate the ultimate reconciliation of prior Aboriginal occupation with the assertion of Crown sovereignty."

What the Court Meant

In *Tsilhqot'in Nation*, the Supreme Court issued Canada's first declaration of Aboriginal title over a substantial area of land.

The Court reaffirmed that reconciliation remains the constitutional purpose of section 35. The Honour of the Crown requires governments to respect constitutionally protected rights while pursuing legitimate public objectives in a manner consistent with the Constitution.

The decision also clarified that, once Aboriginal title is established, governments generally require consent from the title-holding Nation unless they can justify an infringement under section 35.

Why It Matters

Tsilhqot'in Nation reinforced that reconciliation is not an abstract ideal. It is a constitutional objective that informs the relationship between Crown authority and Indigenous rights.

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

Key Quotation

"The constitutional dimension of the duty to consult gives rise to a special public interest."

What the Court Meant

In *Clyde River*, the Supreme Court considered whether a regulatory approval process satisfied the Crown's constitutional Duty to Consult.

The Court confirmed that regulatory tribunals may play an important role in consultation where legislation authorizes them to do so. However, the constitutional obligation remains the Crown's responsibility.

The Court found that, on the facts of the case, consultation had not adequately addressed the Inuit community's concerns, and the project approval was therefore set aside.

Why It Matters

Clyde River demonstrates that consultation must be meaningful in practice. A regulatory process alone does not satisfy the Constitution unless it effectively addresses the concerns that the Duty to Consult requires the Crown to consider.

Common Themes Across the Cases

Although each decision addressed different facts, several constitutional themes consistently emerge:

The Honour of the Crown is constitutional.

It is not a political aspiration or administrative guideline. It is a constitutional principle that informs the Crown's conduct toward Indigenous peoples.

Consultation flows from the Honour of the Crown.

The Duty to Consult exists because the Constitution requires the Crown to act honourably when its decisions may adversely affect Aboriginal or Treaty Rights.

Reconciliation is the constitutional objective.

The Supreme Court has repeatedly explained that the purpose of section 35 is to promote reconciliation between the prior occupation of North America by Indigenous peoples and the assertion of Crown sovereignty.

Consultation depends on context.

The depth of consultation varies according to the circumstances, including the nature of the right at issue and the seriousness of the potential impact. The Court has described this as a spectrum rather than a single procedural model.

Constitutional obligations continue throughout decision-making.

The Honour of the Crown informs more than litigation. It guides treaty implementation, consultation, negotiations, regulatory decision-making, and other exercises of Crown authority that may affect Aboriginal or Treaty Rights.

Key Takeaways

The Honour of the Crown at a Glance

- It is a constitutional principle recognized by the Supreme Court of Canada.
- It informs how governments must conduct themselves in their dealings with Indigenous peoples.
- The Duty to Consult flows from this principle where the legal conditions are met.
- Reconciliation is the overarching constitutional objective that the principle seeks to advance.
- The content of consultation depends on the facts of each case and must be assessed in context.

APPENDIX H

The Consultation Spectrum

Understanding the Spectrum of Consultation Established in *Haida Nation*

Introduction

One of the most important principles established by the Supreme Court of Canada in **Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73** is that there is **no single consultation process** that applies to every situation.

Instead, the Court explained that consultation exists along a **spectrum**.

The level of consultation required depends upon the particular circumstances of each case.

Two primary factors guide the analysis:

1. The strength of the Aboriginal or Treaty Right or claim; and
2. **The seriousness of the potential adverse effect** that the proposed Crown decision may have on that right.

As these factors increase, the depth of consultation generally increases.

The Consultation Spectrum

THE CONSULTATION SPECTRUM (Adapted from Haida Nation, 2004 SCC 73)

LOW CONSULTATION

- Notice of proposed Crown action
 - Sharing basic information
- Opportunity to provide comments
 - Consideration of concerns



MODERATE CONSULTATION

- Early engagement
- Meetings with First Nations
 - Exchange of information
 - Technical discussions
- Responses to community concerns

- Consideration of accommodation measures



DEEP CONSULTATION



- Extensive engagement over time
 - Detailed technical studies
- Participation throughout planning
- Traditional Knowledge considered
 - Collaborative problem-solving
- Serious consideration of accommodation
 - Ongoing dialogue before decisions
 - Monitoring and follow-up



GREATER CONSTITUTIONAL DUTY

What Determines the Level of Consultation?

The Supreme Court explained that consultation is not determined solely by the type of project. Rather, it depends upon the constitutional circumstances.

The Court identified two principal considerations.

1. Strength of the Aboriginal or Treaty Right

Governments consider the legal basis of the right that may be affected.

For example:

- whether the right is established by treaty;
- whether Aboriginal title has been recognized;
- whether there is a credible but unresolved claim.

The stronger the constitutional interest, the greater the potential consultation obligation.

2. Seriousness of the Potential Adverse Effect

Governments also consider the potential impact of the proposed decision.

Factors may include:

- effects on lands;
- waters;
- harvesting activities;
- sacred or culturally significant places;
- environmental impacts;
- cumulative effects;
- long-term consequences for the exercise of Aboriginal or Treaty Rights.

The more serious the potential adverse effect, the greater the level of consultation that may be required.

Consultation Is Not a Checklist

The Supreme Court emphasized that consultation is not satisfied simply by completing a series of procedural steps.

Meaningful consultation requires a process that is responsive to the circumstances and capable of addressing concerns where appropriate.

Consultation should be conducted in good faith by all participants.

Accommodation

Where appropriate, consultation may lead to accommodation.

Accommodation refers to measures considered or implemented to address potential adverse effects on Aboriginal or Treaty Rights.

Examples may include:

- modifications to project design;
- timing adjustments;
- environmental protection measures;
- monitoring programs;
- changes to project operations;
- other measures appropriate to the circumstances.
-

The appropriate form of accommodation depends on the facts of each case.

Consultation Does Not Always Produce Agreement

The Supreme Court has explained that the Duty to Consult is directed toward meaningful engagement and the pursuit of reconciliation.

The existence of a duty to consult does not necessarily mean that agreement will be reached in every case.

At the same time, consultation should not be treated as a purely procedural exercise. The process must be genuine and responsive to the constitutional context.

Relationship to Other Supreme Court Decisions

Subsequent Supreme Court decisions have expanded and clarified the consultation framework established in *Haida Nation*.

For example:

Case	Contribution
Taku River (2004)	Confirmed that an environmental assessment process may, depending on the circumstances, satisfy the Duty to Consult.
Mikisew Cree (2005)	Applied the Duty to Consult to the implementation of Treaty Rights.
Rio Tinto (2010)	Clarified that there must be a causal link between the Crown decision and a potential adverse effect on Aboriginal or Treaty Rights before the duty is triggered.
Tsilhqot'in Nation (2014)	Explained how consultation relates to Aboriginal title and the Crown's obligations once title has been established.
Clyde River (2017)	Confirmed that regulatory processes can contribute to fulfilling the Duty to Consult, but only where the consultation conducted is constitutionally adequate.

Key Principles from *Haida Nation*

The Consultation Spectrum at a Glance

- There is no universal consultation process.
- Consultation exists on a **constitutional spectrum**.
- The depth of consultation depends on:
 - the strength of the Aboriginal or Treaty Right or claim; and
 - the seriousness of the potential adverse effect.
- Consultation should be conducted in good faith and be responsive to the circumstances.
- Where appropriate, consultation may include accommodation measures.
- The ultimate objective is to uphold the Honour of the Crown and advance reconciliation.

APPENDIX I

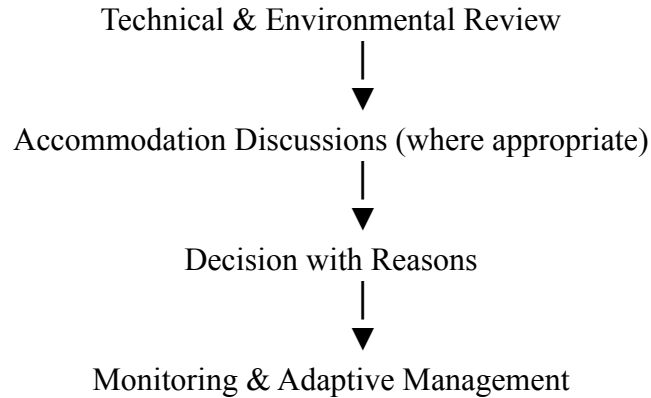
Federal Regulatory Bodies

Agency	Role
Canadian Nuclear Safety Commission	Regulates nuclear facilities and activities
Impact Assessment Agency of Canada	Coordinates federal impact assessments
Canada Energy Regulator	Interprovincial and international energy infrastructure
Fisheries and Oceans Canada	Fish habitat and aquatic ecosystems
Transport Canada	Transportation infrastructure and safety
Department of National Defence	National defence projects
Environment and Climate Change Canada	Environmental policy, wildlife, pollution, and climate
Natural Resources Canada	Energy, minerals, forestry, earth sciences
Parks Canada	Federal protected areas and heritage resources

APPENDIX J

Model Consultation Process





This is presented as a **policy model**, not as a statement of legal requirements.

APPENDIX K

Emerging National Issues in Consultation and Major Project Governance

Introduction

Canada is entering a period of significant public investment in infrastructure, energy systems, national defence, critical minerals, climate adaptation, and transportation. Many of these initiatives intersect with lands, waters, and resources where Aboriginal and Treaty Rights protected by section 35 of the *Constitution Act, 1982* may be engaged.

Each project presents unique legal, environmental, economic, and cultural circumstances. The following overview identifies emerging sectors where consultation issues frequently arise. These summaries are intended to provide context and are not intended to express conclusions regarding any specific project.

K.1

Critical Minerals Strategy

What It Is

Critical minerals—including lithium, nickel, cobalt, graphite, rare earth elements, copper, and uranium—are essential for electric vehicles, batteries, renewable energy technologies, telecommunications, and national security. Canada has adopted a national Critical Minerals Strategy to encourage exploration, mining, processing, and manufacturing.

Why Consultation May Arise

Critical mineral deposits are often located within or near areas where Aboriginal or Treaty Rights may be exercised.

Projects may involve:

- exploration activities;
- mine development;

- roads and transmission corridors;
- processing facilities;
- long-term environmental management.

Where Crown decisions may adversely affect Aboriginal or Treaty Rights, consultation obligations may arise within the constitutional framework established by section 35.

Typical Considerations

Environmental

- water quality;
- habitat fragmentation;
- mine waste management;
- cumulative effects.

Cultural

- harvesting areas;
- cultural landscapes;
- archaeological resources.

Treaty

- hunting;
- fishing;
- trapping;
- access to traditional territories.

K.2

Small Modular Reactors (SMRs)

What They Are

Small Modular Reactors are a new generation of nuclear reactors designed to produce electricity and, in some cases, industrial heat. Canada has identified SMRs as one potential component of future low-carbon energy systems.

Why Consultation May Arise

SMRs require federal regulatory approvals and often involve long-term planning, construction, operation, and eventual decommissioning.

Consultation may arise in relation to:

- nuclear licensing;
- environmental assessments;
- emergency planning;
- transportation of nuclear materials;
- long-term waste management.

Typical Considerations

Environmental

- water resources;
- radioactive waste;
- biodiversity;
- emergency preparedness.

Cultural

- relationship to water;
- harvesting activities;
- traditional land use.

Treaty

- fishing rights;
- harvesting rights;
- long-term stewardship responsibilities.

K.3

Hydrogen Economy

What It Is

Hydrogen is increasingly promoted as a low-emission energy source for transportation, electricity generation, industrial manufacturing, and export markets.

Hydrogen projects may include:

- production facilities;
- storage systems;
- pipelines;
- export terminals.

Why Consultation May Arise

Large hydrogen developments may require:

- industrial sites;
- water use;
- electricity infrastructure;
- transportation corridors.

These activities may intersect with Aboriginal or Treaty Rights.

Typical Considerations

Environmental

- water consumption;
- industrial emissions;
- cumulative impacts.

Cultural

- land use;
- community planning.

Treaty

- resource access;
- traditional activities.

K.4

Electricity Transmission

What It Is

Canada's transition toward electrification requires expanded transmission infrastructure to connect renewable energy, nuclear generation, hydroelectric facilities, and regional electricity systems.

Projects may include:

- transmission lines;
- substations;
- rights-of-way;
- interprovincial connections.

Why Consultation May Arise

Transmission corridors frequently cross multiple traditional territories and Treaty areas.

Consultation may arise where Crown approvals have the potential to affect Aboriginal or Treaty Rights.

Typical Considerations

Environmental

- forest fragmentation;
- wildlife movement;
- wetlands.

Cultural

- sacred sites;
- community access.

Treaty

- harvesting routes;
- land use;
- cumulative effects.

K.5

National Defence Modernization

What It Is

Canada is investing in modern defence infrastructure, including NORAD modernization, Arctic surveillance systems, radar installations, military facilities, and transportation infrastructure.

Why Consultation May Arise

Defence projects may require:

- federal lands;
- new infrastructure;
- environmental approvals;
- construction in remote regions.

These projects may affect Aboriginal or Treaty Rights depending on location and project design.

Typical Considerations

Environmental

- habitat disturbance;
- wetlands;
- noise;
- wildlife.

Cultural

- archaeological resources;
- culturally significant places.

Treaty

- harvesting;
- access to traditional lands.

K.6

Climate Adaptation Infrastructure

What It Is

Governments are investing in infrastructure intended to reduce the impacts of climate change.

Examples include:

- flood protection;
- shoreline stabilization;
- wildfire mitigation;
- drought management;
- coastal resilience.

Why Consultation May Arise

Adaptation projects may alter landscapes, waterways, or land use patterns that intersect with Aboriginal or Treaty Rights.

Typical Considerations

Environmental

- ecosystem restoration;
- wetlands;
- fisheries.

Cultural

- traditional ecological knowledge;
- cultural landscapes.

Treaty

- harvesting;
- access;
- stewardship.

K.7

Carbon Capture and Storage (CCS)

What It Is

Carbon Capture and Storage involves capturing carbon dioxide emissions from industrial facilities and storing them underground to reduce greenhouse gas emissions.

Projects may include:

- industrial capture facilities;
- pipelines;
- underground storage reservoirs.

Why Consultation May Arise

CCS projects may require extensive land use, geological assessments, and regulatory approvals that could intersect with Aboriginal or Treaty Rights.

Typical Considerations

Environmental

- groundwater;
- geological integrity;
- monitoring.

Cultural

- land stewardship;
- traditional land use.

Treaty

- access;
- environmental protection.

K.8

Northern Infrastructure Development

What It Is

Northern development initiatives include transportation corridors, ports, broadband, airports, renewable energy, community infrastructure, and resource development.

Many projects support economic development, Arctic sovereignty, and improved community services.

Why Consultation May Arise

Northern Canada contains extensive areas where Indigenous rights, treaties, modern land claim agreements, and self-government arrangements play central roles in governance.

Infrastructure planning therefore frequently involves consultation and collaboration with Indigenous governments and organizations.

Typical Considerations

Environmental

- permafrost;
- wildlife migration;
- climate impacts.

Cultural

- Indigenous Knowledge;
- cultural continuity.

Treaty

- modern treaties;
- land claims;
- harvesting rights.

Common Constitutional Themes

Although each sector presents unique circumstances, several common themes emerge.

Meaningful Consultation

Government decisions that may adversely affect Aboriginal or Treaty Rights may engage consultation obligations under section 35, depending on the facts.

Environmental Stewardship

Many projects involve long-term environmental considerations, including cumulative effects, biodiversity, water resources, and climate resilience.

Indigenous Participation

Early and meaningful engagement with Indigenous communities can contribute to better-informed decision-making and stronger relationships.

Reconciliation

Consultation forms part of Canada's broader constitutional framework for advancing reconciliation between Indigenous peoples and the Crown.

Looking Ahead

Canada's energy transition, infrastructure renewal, and national development strategies will continue to shape the relationship between governments, Indigenous peoples, regulators, and industry. As new technologies and projects emerge, consultation practices will likely continue to evolve through legislation, policy, agreements, and judicial decisions. Understanding these

emerging sectors helps prepare First Nations, governments, and proponents for the constitutional and practical questions that accompany major projects.

Sector	Common Crown Decisions	Typical Consultation Topics
Critical Minerals	Exploration permits, mine approvals	Water, habitat, harvesting, cumulative effects
Small Modular Reactors	Nuclear licensing, environmental approvals	Water, waste management, emergency planning
Hydrogen	Industrial approvals, pipelines	Water use, land use, infrastructure corridors
Electricity Transmission	Corridor approvals, rights-of-way	Forests, wetlands, access routes
National Defence	Land use, infrastructure approvals	Habitat, access, cultural sites
Climate Adaptation	Flood control, shoreline projects	Fisheries, wetlands, traditional knowledge
Carbon Capture & Storage	Pipelines, storage approvals	Groundwater, long-term monitoring
Northern Infrastructure	Transportation, ports, energy	Modern treaties, harvesting, climate resilience

APPENDIX L

The Evolution of Assembly of First Nations Policy on Consultation, Treaty Rights, and Major Projects

Introduction

Since its establishment in 1982, the Assembly of First Nations (AFN) has adopted hundreds of resolutions addressing constitutional rights, Treaty implementation, environmental protection, resource development, governance, and reconciliation.

Although individual resolutions respond to specific issues and historical circumstances, collectively they demonstrate the continuing evolution of AFN policy regarding the constitutional relationship between First Nations and the Crown.

This appendix identifies major policy themes that have emerged over time. It is intended to provide historical context for the recommendations contained in this discussion paper rather than to provide an exhaustive catalogue of AFN resolutions.

Evolution of AFN Policy

Period	Major Policy Focus	Constitutional Context
1982–1990	Constitutional recognition of Aboriginal and Treaty Rights	Patriation of the Constitution and adoption of Section 35
1990–2000	Treaty implementation, land rights, and self-government	<i>Sparrow</i> , <i>Delgamuukw</i> , RCAP
2000–2010	Consultation, accommodation, environmental assessment	<i>Haida Nation</i> , <i>Taku River</i> , <i>Mikisew Cree</i>
2010–2020	UNDRIP, reconciliation, climate change, resource development	<i>Rio Tinto</i> , <i>Tsilhqot'in</i> , <i>Clyde River</i>
2021–Present	UNDRIP implementation, clean energy transition, critical minerals, climate adaptation	UNDRIP Act, emerging national infrastructure initiatives

Major Policy Themes

Treaty Rights

Throughout its history, the AFN has consistently affirmed that Treaties are nation-to-nation agreements protected by section 35 of the *Constitution Act, 1982*.

AFN resolutions have frequently called for:

- implementation of historic Treaties;
- respect for modern Treaties;
- protection of Treaty harvesting rights;
- honouring Treaty relationships.

Why It Matters

Treaty implementation remains a central constitutional issue informing consultation and reconciliation.

Constitutional Rights

AFN policy has consistently emphasized:

- protection of section 35 rights;
- recognition of Aboriginal Title;
- implementation of Supreme Court decisions;
- constitutional reconciliation.

Following landmark Supreme Court decisions, AFN resolutions have often encouraged governments to respect evolving constitutional jurisprudence.

Duty to Consult

Following *Haida Nation* (2004), AFN policy increasingly addressed consultation as a constitutional responsibility of the Crown.

Common themes include:

- meaningful consultation;

- accommodation where appropriate;
- implementation of the Honour of the Crown;
- participation in environmental assessment;
- protection of Aboriginal and Treaty Rights.

As consultation law evolved, AFN policy likewise expanded from general recognition of rights to more detailed discussion of consultation practices.

Environmental Stewardship

Environmental protection has become an increasingly prominent theme within AFN resolutions.

Topics have included:

- environmental assessment;
- cumulative environmental effects;
- biodiversity;
- water protection;
- climate change;
- stewardship responsibilities;
- sustainable development.

These themes reflect the close relationship between environmental stewardship and the exercise of Aboriginal and Treaty Rights.

Resource Development

AFN policy has recognized that major resource and infrastructure projects present both opportunities and challenges.

Resolutions have addressed issues such as:

- mining;
- forestry;
- hydroelectric development;
- pipelines;
- electricity;
- renewable energy;
- critical minerals.

Across these sectors, AFN policy has generally emphasized meaningful consultation, environmental protection, respect for Indigenous rights, and opportunities for First Nations participation.

UNDRIP

Since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the United Nations in 2007—and particularly following Canada's endorsement and the enactment of the **United Nations Declaration on the Rights of Indigenous Peoples Act** in 2021—AFN policy has increasingly referenced UNDRIP as an important framework for reconciliation and Indigenous rights.

Common themes include:

- implementation of UNDRIP;

- Free, Prior and Informed Consent (FPIC);
- participation in decision-making;
- Indigenous self-determination;
- legislative reform.

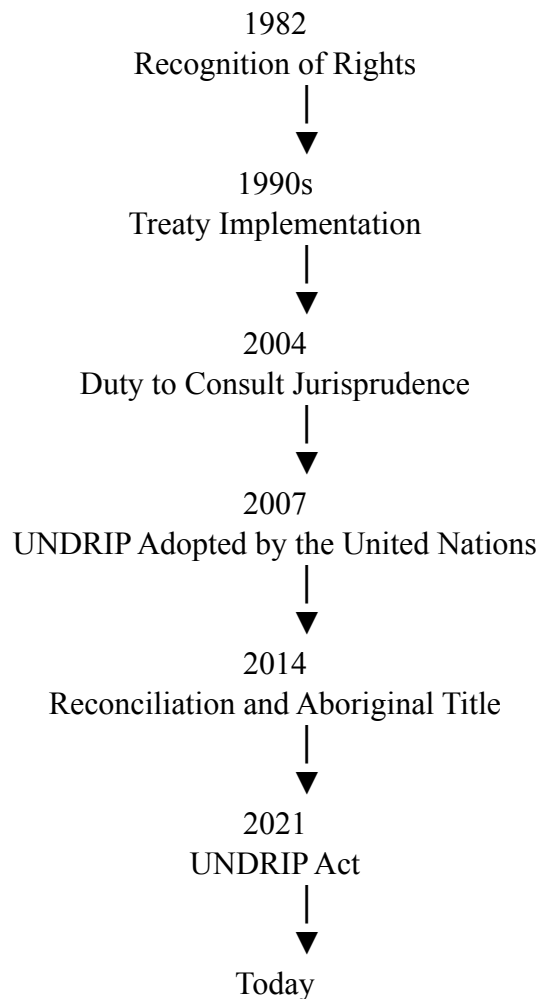
Climate Change and Energy Transition

Recent AFN resolutions increasingly address:

- climate adaptation;
- renewable energy;
- clean electricity;
- critical minerals;
- energy security;
- infrastructure resilience.

These discussions recognize that many climate-related initiatives also engage Aboriginal and Treaty Rights and therefore require constitutionally appropriate consultation.

The Evolution of Consultation Policy



Consultation, Climate, Energy Transition, Critical Minerals, Infrastructure

Common Themes Across AFN Policy

Although individual resolutions address different subjects, several recurring themes emerge over more than four decades of AFN policy development.

These include:

- protection of Aboriginal and Treaty Rights;
- implementation of section 35;
- honouring Treaties;
- strengthening Nation-to-Nation relationships;
- environmental stewardship;
- meaningful consultation;
- reconciliation;
- implementation of UNDRIP;
- First Nations participation in decisions affecting their lands, waters, and resources.

Together, these themes demonstrate a consistent commitment to advancing Indigenous rights while responding to changing constitutional, environmental, and economic circumstances.

Relationship to This Discussion Paper

The recommendations presented in this handbook build upon many of the themes reflected in past AFN policy discussions.

Rather than proposing an entirely new direction, they seek to contribute to an ongoing conversation regarding:

- constitutional consultation;
- environmental stewardship;
- implementation of section 35;
- the Honour of the Crown;
- reconciliation;
- emerging challenges associated with major projects.

The recommendations are intended to complement the continuing evolution of AFN policy while recognizing that future Chiefs-in-Assembly will determine the priorities and direction of the organization.

Future Research

This appendix is designed as a living resource.

Future editions of this handbook could include a detailed catalogue of AFN resolutions, organized by topic, such as:

Topic	Potential Content
Constitutional Rights	Resolutions on section 35, Treaties, Aboriginal title
Consultation	Resolutions on Duty to Consult, accommodation, environmental
UNDRIP	Resolutions supporting implementation of the Declaration and the
Environment	Climate change, biodiversity, cumulative effects, water protection
Energy & Infrastructure	Mining, nuclear energy, hydroelectricity, electricity transmission, critical minerals
Governance	Self-government, Nation rebuilding, Indigenous legal orders
Reconciliation	Nation-to-Nation relationships, Calls to Action, implementation

APPENDIX M

International Comparisons Indigenous Consultation and Governance in Comparative Perspective

Introduction

Around the world, governments have developed different legal and political frameworks for engaging with Indigenous peoples in decisions affecting their rights, lands, waters, and resources.

These approaches reflect each country's constitutional structure, legal history, treaties, and relationships with Indigenous peoples.

Canada's constitutional Duty to Consult under section 35 is one model among several internationally. Examining other jurisdictions provides useful context for understanding how Indigenous participation in decision-making has evolved in different legal systems.

This appendix offers a comparative overview and does not suggest that any one model should be adopted in Canada.

New Zealand

Treaty of Waitangi Framework

Background

The Treaty of Waitangi was signed in 1840 between representatives of the British Crown and many Māori leaders. It remains one of New Zealand's foundational constitutional documents and continues to influence legislation, public administration, and judicial interpretation. Although the legal status of the Treaty depends on the legislation in question, its principles have become an important part of New Zealand's constitutional landscape.

Indigenous Engagement

Government agencies frequently consider Treaty principles when making decisions that affect Māori interests.

Engagement may occur through:

- iwi (tribal authorities);
- hapū (sub-tribes);
- Māori organizations;
- statutory consultation requirements in particular legislative schemes.

The independent Waitangi Tribunal also investigates alleged breaches of the Treaty and makes recommendations to the government.

Comparison with Canada

Canada's constitutional Duty to Consult arises primarily through section 35 jurisprudence.

New Zealand relies more heavily on the Treaty of Waitangi, legislation, public policy, and the work of the Waitangi Tribunal.

Both systems seek to strengthen relationships between Indigenous peoples and the Crown, but they do so through different constitutional mechanisms.

Australia

Native Title and Consultation

Background

Australia did not recognize Native Title in Australian common law until the High Court's landmark decision in *Mabo v Queensland (No. 2)* (1992).

Following that decision, Parliament enacted the **Native Title Act 1993**, establishing a framework for recognizing Native Title and regulating future acts affecting Native Title rights.

Indigenous Engagement

Consultation may occur through:

- Native Title representative bodies;
- Prescribed Bodies Corporate;
- Indigenous Land Use Agreements;
- statutory notification and negotiation procedures.

The scope of consultation depends upon the legislation and the nature of the proposed activity.

Comparison with Canada

Australia's consultation framework is largely statutory.

Canada's Duty to Consult is grounded directly in constitutional law through section 35 and Supreme Court jurisprudence.

United States

Federal Tribal Consultation

Background

The United States recognizes Tribal Nations as sovereign governments with a government-to-government relationship with the federal government.

Numerous federal statutes and executive policies require consultation with federally recognized Tribes.

Indigenous Engagement

Federal consultation commonly occurs through:

- agency consultation policies;
- environmental review processes;
- federal permitting;
- cultural heritage legislation;
- executive orders.

Many federal departments have adopted consultation guidelines intended to strengthen Tribal participation in federal decision-making.

Comparison with Canada

Canada's Duty to Consult is a constitutional doctrine.

The United States relies primarily upon:

- federal statutes;
- executive branch policies;
- trust responsibilities;
- government-to-government relationships.

Both systems emphasize dialogue, although their legal foundations differ.

Norway

Sámi Parliament Consultation Arrangements

Background

Norway recognizes the Sámi as an Indigenous people.

The Sámi Parliament (Sámediggi), established in 1989, represents Sámi interests in matters affecting Sámi communities.

Norway has also incorporated aspects of international Indigenous rights into domestic law.

Indigenous Engagement

Consultation frequently occurs between:

- the Norwegian Government;

- the Sámi Parliament;
- Sámi organizations.

Formal consultation procedures seek to encourage dialogue before governmental decisions affecting Sámi interests are made.

Comparison with Canada

Canada has no direct equivalent to the Sámi Parliament.

Canadian consultation generally occurs with individual First Nations, Inuit, or Métis governments and organizations rather than through a single national Indigenous parliament.

United Nations Permanent Forum on Indigenous Issues

International Dialogue

Background

The United Nations Permanent Forum on Indigenous Issues (UNPFII) is an advisory body to the United Nations Economic and Social Council.

It provides a global forum for dialogue concerning Indigenous peoples' rights and issues.

Areas of Discussion

The Forum considers topics such as:

- human rights;
- lands and territories;
- environment;
- climate change;
- education;
- language;
- health;
- economic development;
- self-determination;
- implementation of UNDRIP.

Although the Forum does not make binding legal decisions, it contributes to the development of international standards and promotes dialogue among governments, Indigenous peoples, and international organizations.

Comparison with Canada

Canada participates in international discussions concerning Indigenous rights while implementing its own constitutional framework.

UNDRIP and other international instruments provide guidance for policy development but do not replace Canada's constitutional structure.

Comparative Overview

Jurisdiction	Primary Legal Foundation	Consultation Framework
Canada	Constitution Act, 1982 (Section 35) and Supreme Court jurisprudence	Constitutional Duty to Consult where legal conditions are met
New Zealand	Treaty of Waitangi, legislation, Treaty principles	Treaty-based engagement and statutory processes
Australia	Native Title Act 1993 and related legislation	Statutory consultation and negotiation processes
United States	Federal statutes, executive policies, Tribal sovereignty	Government-to-government consultation through federal agencies
Norway	Sámi Act, consultation agreements, constitutional recognition	Consultation with the Sámi Parliament and Sámi institutions
United Nations	UN Charter, UNDRIP, international human rights standards	International dialogue and guidance rather than binding domestic decision-making

Common Themes

Despite important legal differences, several common themes emerge across jurisdictions.

Recognition of Indigenous Peoples

Each jurisdiction has developed legal or political mechanisms recognizing Indigenous peoples and their distinct relationship with the state.

Participation in Decision-Making

Governments increasingly seek to involve Indigenous peoples in decisions affecting lands, waters, resources, and communities.

The legal mechanisms differ, but participation is a recurring principle.

Protection of Culture and Heritage

Many consultation frameworks recognize the importance of protecting:

- cultural heritage;
- sacred places;
- traditional knowledge;
- languages;
- historical relationships with land and water.

Environmental Stewardship

Across jurisdictions, Indigenous participation increasingly intersects with:

- biodiversity conservation;
- climate adaptation;
- natural resource management;
- cumulative environmental effects.

Reconciliation and Relationship Building

Although different terminology is used internationally, many jurisdictions seek to improve relationships between governments and Indigenous peoples through dialogue, recognition of rights, and cooperative decision-making.

Looking Forward

As countries continue to address climate change, energy transitions, infrastructure development, and environmental protection, consultation frameworks will likely continue to evolve.

Canada's constitutional Duty to Consult exists within this broader international context while remaining rooted in its own Constitution, treaties, judicial decisions, and evolving relationship between Indigenous peoples and the Crown.

Comparative analysis does not suggest that one country's model should replace another's. Instead, it highlights the diversity of approaches that governments have adopted to address common questions concerning Indigenous rights, participation, and governance.

Key Takeaways

International Comparison at a Glance

- Every country has developed its own approach based on its constitutional history and legal system.
- Canada's Duty to Consult is distinctive because it is grounded in constitutional jurisprudence under section 35.
- Other jurisdictions rely more heavily on treaties, statutes, executive policies, or representative Indigenous institutions.
- Across jurisdictions, common themes include Indigenous participation, environmental stewardship, protection of cultural heritage, and strengthening relationships between Indigenous peoples and governments.
- Comparative study provides context and opportunities for learning, while recognizing that each legal framework reflects its own constitutional and historical foundations.

APPENDIX N

Glossary

Term	Plain-language definition
Section 35	Constitutional recognition and affirmation of Aboriginal and Treaty Rights.
FPIC	Free, Prior and Informed Consent, a principle reflected in UNDRIP.
Duty to Consult	A constitutional obligation of the Crown that may arise when Crown conduct could adversely affect Aboriginal or Treaty Rights.
Accommodation	Measures considered or implemented to address Indigenous concerns where appropriate.

Aboriginal Title	A constitutionally protected interest in land recognized under Canadian law.
Environmental Assessment	A process for evaluating potential environmental effects of a proposed project.
Cumulative Effects	Combined impacts of multiple activities over time.
Administrative Tribunal	A specialized decision-making body created by legislation.
Regulatory Decision	A decision made by a regulator under statutory authority.

APPENDIX O

Frequently Asked Questions

Understanding the Duty to Consult and Section 35

What is the Duty to Consult?

The Duty to Consult is a constitutional obligation that may arise when the Crown has knowledge of a potential or established Aboriginal or Treaty Right and is considering a decision that may adversely affect that right. The Supreme Court of Canada has explained that this duty flows from the Honour of the Crown and is intended to promote reconciliation between Indigenous peoples and the Crown. The content of the duty depends on the circumstances of each case.

Who owes the Duty to Consult?

The Duty to Consult is owed by the **Crown**, meaning the federal, provincial, or territorial government, depending on which level of government is making the decision. While governments may rely on regulatory agencies or proponents to assist with information gathering or engagement, the constitutional responsibility ultimately remains with the Crown.

Does every government decision trigger the Duty to Consult?

No. The Duty to Consult does not arise every time a government acts. Generally, three elements must be present: the Crown must know of a potential or established Aboriginal or Treaty Right, it must be contemplating conduct or a decision, and that conduct must have the potential to adversely affect the right. Whether the duty is triggered depends on the specific facts and legal context.

What is meant by "consultation"?

Consultation is a process of meaningful dialogue between the Crown and Indigenous peoples when constitutional obligations arise. It may include sharing information, listening to concerns, considering alternatives, and, where appropriate, modifying decisions or implementing accommodation measures. The Supreme Court has emphasized that consultation is intended to be conducted in good faith and should be responsive to the circumstances.

Does consultation always require consent?

Not necessarily. Under current Canadian constitutional law, the Duty to Consult does not automatically require the Crown to obtain consent before making every decision. However, there are circumstances—such as where Aboriginal title has been established—in which consent may be required unless the Crown can justify an infringement under section 35. In addition, the principle of **Free, Prior and Informed Consent (FPIC)** in UNDRIP continues to influence policy discussions and implementation efforts. The relationship between constitutional law and UNDRIP continues to evolve.

What is accommodation?

Accommodation refers to measures the Crown may consider or implement to address concerns identified during consultation. Depending on the circumstances, accommodation could include project modifications, environmental protection measures, changes to timing or location, additional studies, monitoring programs, or other actions intended to reduce potential adverse effects. The nature of accommodation varies according to the facts of each case.

What is Section 35?

Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and Treaty Rights of the Aboriginal peoples of Canada. It forms part of Canada's Constitution, which is the supreme law of the country. Since 1982, the Supreme Court of Canada has interpreted section 35 through decisions addressing Aboriginal rights, Treaty rights, Aboriginal title, consultation, accommodation, and reconciliation.

What is the Honour of the Crown?

The Honour of the Crown is a constitutional principle that guides the Crown's relationship with Indigenous peoples. The Supreme Court has explained that it requires the Crown to act honourably in matters affecting Aboriginal and Treaty Rights. The Duty to Consult is one of the legal obligations that flows from this principle.

What is reconciliation?

The Supreme Court of Canada has described reconciliation as the fundamental objective of section 35. In constitutional law, reconciliation refers to the ongoing process of reconciling the prior occupation of North America by Indigenous peoples with the assertion of Crown sovereignty. Consultation, treaty implementation, negotiations, and respectful relationships all contribute to this broader constitutional objective.

What is FPIC?

FPIC stands for **Free, Prior and Informed Consent**, a principle reflected in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). FPIC emphasizes that Indigenous peoples should be able to participate meaningfully in decisions affecting their rights, lands, and resources. Canada's implementation of FPIC continues to develop through legislation, policy, negotiations, and judicial interpretation.

How does UNDRIP relate to Section 35?

Section 35 and UNDRIP come from different legal sources but often address similar themes. Section 35 is part of Canada's Constitution and is interpreted by Canadian courts. UNDRIP is an international human rights instrument, while the **United Nations Declaration on the Rights of Indigenous Peoples Act** establishes a framework for the federal government's implementation of the Declaration. Together, they contribute to Canada's evolving approach to Indigenous rights and reconciliation.

Can regulatory processes contribute to fulfilling the Duty to Consult?

Yes. The Supreme Court has recognized that regulatory processes may contribute to fulfilling the Duty to Consult where the legislation provides an appropriate framework and the consultation conducted is constitutionally adequate. However, the constitutional obligation remains the Crown's responsibility, and a regulatory process must meaningfully address the concerns required by the Constitution.

What role do environmental assessments play?

Environmental assessments often provide an important opportunity for governments, Indigenous peoples, regulators, proponents, and the public to examine the potential environmental, social, cultural, and economic effects of proposed projects. Depending on the circumstances, participation in an environmental assessment may form part of the consultation process, but whether it satisfies the Crown's constitutional obligations depends on the facts of each case.

Can private companies owe the Duty to Consult?

The constitutional Duty to Consult is owed by the Crown, not by private companies. However, project proponents frequently play an important role by sharing information, meeting with Indigenous communities, responding to concerns, and supporting the consultation process. Their activities may assist the Crown, but they do not replace the Crown's constitutional responsibility.

What happens if consultation is found to be inadequate?

If a court determines that the Crown failed to meet its constitutional consultation obligations, the available remedies depend on the circumstances. Courts have, in different cases, quashed approvals, set aside decisions, required further consultation, or granted other remedies they considered appropriate. The outcome depends on the specific facts, the legal issues before the court, and the remedy sought.

Is there one consultation process that applies to every project?

No. In *Haida Nation*, the Supreme Court explained that consultation exists on a spectrum. The appropriate level of consultation depends on factors such as the strength of the Aboriginal or Treaty Right or claim and the seriousness of the potential adverse effect. As a result, consultation processes vary depending on the project and the constitutional context.

Why is the Duty to Consult important?

The Duty to Consult helps ensure that decisions affecting Aboriginal and Treaty Rights are made within Canada's constitutional framework. By encouraging meaningful dialogue, consideration of Indigenous perspectives, and appropriate responses to potential impacts, consultation contributes to the broader constitutional objective of reconciliation between Indigenous peoples and the Crown.

Quick Reference

Question	Short Answer
What is the Duty to Consult?	A constitutional obligation that may arise when Crown decisions could adversely affect Aboriginal or Treaty Rights.
Who owes the duty?	The Crown (federal, provincial, or territorial government).
Is consent always required?	Not in every case; the legal requirements depend on the constitutional context and the rights involved.
What is accommodation?	Measures considered or implemented to address potential adverse effects where appropriate.
What is Section 35?	The constitutional provision recognizing and affirming Aboriginal and Treaty Rights.
What is FPIC?	Free, Prior and Informed Consent, a principle reflected in UNDRIP.
Can regulators contribute to consultation?	Yes, where legislation permits and the consultation is constitutionally adequate.
Does every project require the same process?	No. Consultation exists on a spectrum and depends on the circumstances.

Can consultation law continue to evolve?

Answer: Yes. Consultation law has developed significantly since the adoption of section 35 in 1982 through Supreme Court decisions, legislation, treaty implementation, policy development, and negotiations between Indigenous peoples and the Crown. As new issues emerge—including climate adaptation, energy transition, critical minerals, national defence projects, and the implementation of UNDRIP—the legal and policy framework surrounding consultation will likely continue to evolve. This handbook reflects the law and policy landscape at the time of publication while recognizing that future developments may shape how consultation is understood and implemented.

APPENDIX P

Selected References

Constitutional Law, Consultation, and Reconciliation

Introduction

The following references provide foundational legal, constitutional, historical, and policy materials relevant to Aboriginal and Treaty Rights, the Duty to Consult, reconciliation, environmental governance, and Indigenous-Crown relations in Canada.

This bibliography is intended as a starting point for further research and is organized by subject matter. It is not intended to be exhaustive.

I. Constitutional Documents

Canada. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

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

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*.

Royal Proclamation, 1763.

Historic and Modern Treaties (selected).

II. Supreme Court of Canada Decisions

Foundational Constitutional Cases

R. v. Sparrow, [1990] 1 SCR 1075.

R. v. Van der Peet, [1996] 2 SCR 507.

Delgamuukw v. British Columbia, [1997] 3 SCR 1010.

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73.

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69.

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41.

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

Mikisew Cree First Nation v. Canada (Governor General in Council), 2018 SCC 40.

III. Federal Court Decisions

Selected Federal Court decisions concerning:

- Judicial Review
- Duty to Consult
- Environmental Assessment
- Regulatory Decision-Making
- Section 35
- Administrative Law

(Future editions may include an expanded annotated bibliography of significant Federal Court decisions.)

IV. United Nations Documents

United Nations.

United Nations Declaration on the Rights of Indigenous Peoples (2007).

United Nations General Assembly Resolution 61/295.

United Nations Permanent Forum on Indigenous Issues.

Reports of the Special Rapporteur on the Rights of Indigenous Peoples.

Reports of the Expert Mechanism on the Rights of Indigenous Peoples.

V. United Nations Declaration on the Rights of Indigenous Peoples Act Canada.

United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14.
Government of Canada.

United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan (2023).
Annual Reports issued under the Act.

VI. Assembly of First Nations

Assembly of First Nations.

Annual General Assembly Resolutions.

Special Chiefs Assembly Resolutions.

AFN Policy Papers.

AFN Environmental Stewardship Reports.

AFN Climate Strategy publications.

AFN submissions concerning:

- Consultation
- UNDRIP
- Environmental Assessment
- Resource Development
- Treaty Rights
- Climate Change
- Reconciliation

VII. Truth and Reconciliation Commission of Canada

Truth and Reconciliation Commission of Canada.

Honouring the Truth, Reconciling for the Future: Summary of the Final Report (2015).

Truth and Reconciliation Commission of Canada.

Calls to Action (2015).

Truth and Reconciliation Commission of Canada.

Final Report (Volumes 1–6).

VIII. National Centre for Truth and Reconciliation

National Centre for Truth and Reconciliation.
Research publications.
Educational resources.
Archival collections.
Residential school records.
Public education materials.

IX. Royal Commission on Aboriginal Peoples

Royal Commission on Aboriginal Peoples.
Report of the Royal Commission on Aboriginal Peoples (1996).
Five-volume Final Report.
RCAP Recommendations.
Background Research Papers.

X. Federal Action Plan

Government of Canada.
United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan (2023).
Annual Progress Reports.
Federal implementation updates.
Departmental implementation reports.

XI. Government Publications

Department of Justice Canada.
Consultation Guidelines.
Impact Assessment Agency of Canada.
Impact Assessment guidance documents.
Canadian Nuclear Safety Commission.
Indigenous consultation policies.
Natural Resources Canada.
Critical Minerals Strategy.
Environment and Climate Change Canada.
Environmental assessment guidance.
Department of National Defence.
Public consultation documents relating to major projects.

XII. Academic Books

Asch, Michael.
On Being Here to Stay.
Borrows, John.
Canada's Indigenous Constitution.
Borrows, John.
Recovering Canada.
Borrows, John.

Freedom and Indigenous Constitutionalism.
Christie, Gordon.
Aboriginality and Governance.
McNeil, Kent.
Emerging Justice? Essays on Indigenous Rights.
Slattery, Brian.
Collected writings on Aboriginal Rights and Constitutional Law.
Macklem, Patrick.
Indigenous Difference and the Constitution of Canada.
Newman, Dwight.
Revisiting the Duty to Consult Aboriginal Peoples.
Newman, Dwight.
Natural Resource Jurisdiction in Canada.

XIII. Academic Journal Articles

Canadian Bar Review
University of British Columbia Law Review
McGill Law Journal
Osgoode Hall Law Journal
Dalhousie Law Journal
Constitutional Forum
Indigenous Law Journal
Canadian Journal of Environmental Law and Practice
Journal of Environmental Law and Practice

XIV. Environmental Governance

Impact Assessment literature.
Environmental Assessment scholarship.
Climate governance.
Cumulative effects assessment.
Adaptive management.
Natural resource governance.
Indigenous Protected and Conserved Areas.
Traditional Knowledge.

XV. Indigenous Governance

Nation rebuilding.
Traditional governance.
Indigenous legal orders.
Self-government.
Modern treaties.
Co-management.
Guardians programs.

XVI. International Sources

United Nations.

International Labour Organization Convention No. 169.

UN Permanent Forum publications.

New Zealand Waitangi Tribunal reports.

Australian Native Title Tribunal publications.

United States Department of the Interior consultation guidance.

Norwegian Sámi Parliament consultation materials.

XVII. Online Legal Resources

Supreme Court of Canada.

Federal Court of Canada.

Department of Justice Canada.

CanLII.

Library of Parliament.

Privy Council Office.

Assembly of First Nations.

National Centre for Truth and Reconciliation.

United Nations.

XVIII. Recommended Reading for Chiefs and Community Leaders

For readers seeking an accessible introduction to the topics discussed in this handbook, the following resources are recommended:

1. The *Constitution Act, 1982* (Sections 35 and 52).
2. Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73.
3. Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.
4. United Nations Declaration on the Rights of Indigenous Peoples (2007).
5. United Nations Declaration on the Rights of Indigenous Peoples Act (2021).
6. Truth and Reconciliation Commission of Canada, *Calls to Action*.
7. Royal Commission on Aboriginal Peoples, Final Report.
8. John Borrows, Canada's Indigenous Constitution.
9. Dwight Newman, Revisiting the Duty to Consult Aboriginal Peoples.
10. John Hawke, The Duty to Consult in Canada: A Constitutional Handbook for First Nations, Governments, Regulators, and Practitioners. Discussion Paper. Version 1.0. Gchimnissing Anishinaabe Aki, 2026.

APPENDIX P.1

Table of Cases

Purpose

This table identifies every judicial decision cited throughout this handbook. It enables readers to locate the full citation and quickly identify where each case is discussed within the handbook. Cases are listed alphabetically and include their neutral citation, court, principal legal issue, and relevant sections of this handbook.

Table P.1

Case	Citation	Court	Primary	Discussed In
Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.	2017 SCC 41	Supreme Court of	Regulatory consultation	Part IV, Appendix D
Clyde River (Hamlet) v. Petroleum Geo-Services Inc.	2017 SCC 40	Supreme Court of	Regulatory consultation	Parts IV & V, Appendices D
Delgamuukw v. British Columbia	[1997] 3 SCR	Supreme Court of	Aboriginal Title	Parts III & IV
Haida Nation v. British Columbia (Minister of Forests)	2004 SCC 73	Supreme Court of	Duty to Consult	Throughout
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)	2005 SCC 69	Supreme Court of	Treaty Rights	Parts III & IV
Mikisew Cree First Nation v. Canada (Governor General in Council)	2018 SCC 40	Supreme Court of	Legislative process	Part IV
Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council	2010 SCC 43	Supreme Court of	Trigger for consultation	Part IV
R. v. Sparrow	[1990] 1 SCR	Supreme Court of	Section 35	Parts III & IV
Tsilhqot'in Nation v. British Columbia	2014 SCC 44	Supreme Court of	Aboriginal Title	Parts III, IV & VII
Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)	2004 SCC 74	Supreme Court of	Environmental	Part IV

Future Editions

Future editions may include:

- Federal Court decisions
- Provincial appellate decisions
- Historic Privy Council decisions
- International Indigenous rights decisions

APPENDIX P.2

Table of Statutes

Purpose

This table lists the principal constitutional provisions, statutes, and legislative instruments referenced throughout this handbook.

Table P.2

Statute	Jurisdiction	Primary Subject	Discussed In
Constitution Act, 1867	Canada	Constitutional framework	Part III
Constitution Act, 1982	Canada	Constitution, Section 35, Section 52	Throughout
Canadian Charter of Rights and Freedoms	Canada	Constitutional rights	Part III
United Nations Declaration on the Rights of Indigenous Peoples Act	Canada	UNDRIP implementation	Part V
Impact Assessment Act	Canada	Federal impact assessments	Part VI
Canadian Energy Regulator Act	Canada	Energy regulation	Appendix I
Nuclear Safety and Control Act	Canada	Nuclear regulation	Appendix I
Fisheries Act	Canada	Fish and fish habitat	Appendix I
Species at Risk Act	Canada	Species protection	Appendix I
Canadian Environmental Protection Act	Canada	Environmental regulation	Appendix I

Related Constitutional Instruments

- Royal Proclamation, 1763
- Historic Treaties
- Modern Treaties
- Self-Government Agreements

APPENDIX P.3

Table of International Instruments

Purpose

Canada's constitutional framework increasingly exists within a broader international context. This table identifies international declarations, conventions, and institutions discussed throughout this handbook.

Table P.3

Instrument	Organization	Primary Topic	Discussed In
United Nations Declaration on the Rights of Indigenous Peoples	United Nations	Indigenous rights	Part V
UNDRIP Act	Parliament of Canada	Implementation	Part V
ILO Convention No. 169	International Labour Organization	Indigenous Peoples	Appendix M
Universal Declaration of Human Rights	United Nations	Human Rights	Background
International Covenant on Civil and Political Rights	United Nations	Human Rights	Appendix M
Convention on Biological Diversity	United Nations	Biodiversity	Appendix M
Paris Agreement	United Nations	Climate Change	Appendix M

APPENDIX P.4

Table of Government Institutions

Institution	Primary Responsibility
Assembly of First Nations	National advocacy organization
Canadian Nuclear Safety Commission	Nuclear regulation
Impact Assessment Agency of Canada	Federal impact assessment
Canada Energy Regulator	Energy infrastructure
Department of Justice Canada	Legal advice to Government
Department of National Defence	Defence projects
Environment and Climate Change Canada	Environmental policy
Fisheries and Oceans Canada	Fisheries and aquatic habitat
Natural Resources Canada	Energy and natural resources

APPENDIX P.5

Chronology of Constitutional Development

A Short timeline that ties together the legal history covered throughout the handbook.

1763	Royal Proclamation and 1764 Niagara Covenant Chain Wampum Belt
1867	Constitution Act
1982	Constitution Act, 1982
1990	Sparrow
1997	Delgamuukw
2004	Haida Nation
2005	Mikisew Cree
2010	Rio Tinto
2014	Tsilhqot'in
2017	Clyde River
2021	UNDRIP Act
2026	AFN Discussion Paper

APPENDIX P.6

Research Resources

Courts

- Supreme Court of Canada
- Federal Court
- Federal Court of Appeal

Legal Databases

- CanLII
- LexisNexis Canada
- Westlaw Canada

Government Sources

- Department of Justice Canada
- Parliament of Canada

- Impact Assessment Agency of Canada

Indigenous Organizations

- Assembly of First Nations
- National Centre for Truth and Reconciliation
- Indigenous Bar Association
- First Nations Major Projects Coalition

International Organizations

- United Nations
- UN Permanent Forum on Indigenous Issues
- Expert Mechanism on the Rights of Indigenous Peoples

APPENDIX P.7

Research Methodology

This handbook has been prepared using publicly available constitutional documents, legislation, judicial decisions, government publications, academic scholarship, and Indigenous policy materials. It is intended as an educational and policy resource and does not constitute legal advice.

Where legal principles are discussed, they are presented in a general manner to promote understanding of Canada's constitutional framework. Readers should consult the full text of judicial decisions, legislation, and qualified legal counsel where specific legal questions arise. The discussion of contemporary projects and litigation is intended to illustrate ongoing constitutional issues and should not be interpreted as expressing a view on the merits of any particular proceeding or proposal.

APPENDIX Q

Contemporary Case Studies and Public Documents

Applying Constitutional Principles to Contemporary Major Projects

Introduction

The constitutional principles discussed throughout this handbook are not merely historical developments. They continue to shape decision-making relating to major infrastructure, energy, environmental, and national defence initiatives across Canada.

The following case studies provide examples of contemporary projects that engage questions concerning consultation, environmental governance, regulatory decision-making, and the implementation of section 35 of the *Constitution Act, 1982*.

These case studies are presented for educational purposes. They summarize publicly available information and identify publicly accessible documents that may assist readers in understanding how constitutional consultation operates in practice.

The inclusion of a project or legal proceeding in this appendix should not be interpreted as expressing any opinion regarding its legal merits, policy desirability, or eventual outcome.

CASE STUDY ONE

Darlington New Nuclear Project (DNNP)

Project Overview

The Darlington New Nuclear Project is located at the existing Darlington Nuclear Generating Station in the Municipality of Clarington, Ontario. Ontario Power Generation (OPG) is constructing Canada's first grid-scale Small Modular Reactor (SMR) using the GE Hitachi BWRX-300 reactor technology. The project is regulated by the Canadian Nuclear Safety Commission (CNSC) and has undergone environmental assessment and licensing processes over a number of years.

Geographic Context

Province: Ontario

Location: Municipality of Clarington (Bowmanville)

Traditional Territory: The project is located within the Williams Treaties area, on the traditional territory of the Michi Saagiig Anishinaabe.

(Insert location map here.)

Project Timeline

Year	Milestone
2006	Application for Licence to Prepare Site
2007	Federal environmental assessment initiated
2008	Environmental assessment referred to Joint Review Panel
2021	OPG selects the GE Hitachi BWRX-300 SMR technology
2022	Site preparation begins; application for licence to construct submitted
2024	CNSC determines a new environmental assessment is not required for the selected reactor technology
2025	CNSC issues licence to construct one BWRX-300 reactor
2026	OPG applies for a licence to operate; first regulatory hold point removed; federal and provincial governments announce support for a Williams Treaties First Nations equity investment through approximately \$715 million in financing support

Regulatory Framework

Federal agencies involved include:

- Canadian Nuclear Safety Commission (CNSC)
- Impact Assessment Agency of Canada (historical environmental assessment process)
- Major Projects Office

Relevant legislation includes:

- Nuclear Safety and Control Act
- *Impact Assessment Act* (and predecessor legislation as applicable)
- Constitution Act, 1982 (Section 35)

Public Consultation

Publicly available information identifies consultation activities through:

- CNSC public hearings
- Environmental assessment processes
- Indigenous engagement activities
- Written submissions
- Public information sessions
- Regulatory documentation

Readers are encouraged to review the official hearing records and licensing documents for detailed information.

Publicly Available Documents

Suggested materials:

- CNSC project overview
- CNSC project timeline
- Environmental assessment records
- Public hearing transcripts
- CNSC Records of Decision
- OPG project information
- Government of Canada project summaries
- Public news releases

Constitutional Questions Commonly Discussed

This project has generated discussion regarding:

- implementation of section 35;
- consultation practices;
- environmental stewardship;
- regulatory oversight;
- Indigenous economic participation;
- long-term nuclear governance.

These questions continue to be discussed by governments, First Nations, regulators, industry, and the courts.

CASE STUDY TWO

Arctic Over-the-Horizon Radar (A-OTHR)

Project Overview

The Arctic Over-the-Horizon Radar (A-OTHR) initiative forms part of Canada's broader NORAD modernization program. The project is intended to enhance long-range surveillance capabilities and may involve new radar installations and associated infrastructure in Ontario and other regions.

Geographic Context

(Insert regional map.)

Potential project areas include lands containing:

- agricultural lands;
- wetlands;
- forests;
- wildlife habitat;
- watersheds.

Project Timeline

Suggested chronology:

- NORAD modernization announcements
- Initial project planning
- Identification of candidate sites
- Community information sessions
- Indigenous engagement activities
- Environmental planning
- Current project status

Public Environmental Information

Examples of publicly available materials include:

- project descriptions;
- environmental information;
- community information packages;
- municipal reports;
- public presentations;
- federal announcements.

Public Consultation Information

Examples may include:

- Indigenous engagement summaries;
- public meeting notices;
- consultation records (where publicly available);
- environmental planning documentation.

Constitutional Questions Commonly Discussed

Public discussion has included topics such as:

- consultation under section 35;
- environmental stewardship;
- cumulative effects;
- agricultural land use;
- defence infrastructure;
- Treaty Rights.

CASE STUDY THREE

Contemporary Federal Court Proceedings

Constitutional Litigation as Part of Constitutional Development

Throughout Canadian history, many constitutional principles relating to Aboriginal and Treaty Rights have been clarified through litigation.

Proceedings before the Federal Court may raise questions concerning consultation, environmental regulation, statutory interpretation, and constitutional obligations. The filing of a proceeding does not determine its outcome. Courts resolve these questions through the judicial process.

Example Proceedings

Federal Court File No. T-2232-26

Applicant

John Courtney Hawke

General Subject Matter

Publicly filed materials indicate that this proceeding raises constitutional questions concerning consultation, environmental protection, and the implementation of section 35 in relation to major projects.

The proceeding is included solely as an example of contemporary constitutional litigation.

No opinion is expressed regarding its merits, which remain for the Court.

Federal Court File No. T-2719-26

Applicant

John Courtney Hawke

General Subject Matter

Publicly filed materials indicate that this proceeding concerns constitutional questions relating to consultation, environmental decision-making, and section 35.

The proceeding is included solely as an example of ongoing Federal Court litigation.

No opinion is expressed regarding the merits of the proceeding.

APPENDIX R

Discussion Framework for Consultation and Major Project Governance

Introduction

The Supreme Court of Canada has consistently emphasized that there is no single consultation process applicable to every circumstance. The content of the Duty to Consult depends upon the facts of each case, including the strength of the Aboriginal or Treaty Right or claim and the seriousness of the potential adverse effect.

The framework presented below is **not intended to replace existing constitutional jurisprudence or legislative requirements**. Rather, it is offered as a discussion model that identifies practical elements which may contribute to consultation processes that are transparent, responsive, and consistent with the constitutional principles discussed throughout this handbook. The framework is intended to encourage early dialogue, informed participation, environmental stewardship, and respectful relationships among First Nations, governments, regulators, and project proponents.

Figure R-1
Proposed Consultation Framework
Project Concept Identified

1. Early Notice
2. Information Sharing
3. Preliminary Assessment of Potential Rights Impacts
4. Community Engagement and Dialogue
5. Technical, Environmental, and Cultural Assessment
6. Consideration of Accommodation Measures
7. Decision with Reasons
8. Monitoring and Follow-up
9. Adaptive Management and Continuing Dialogue

Stage 1 – Early Notice

Objective

Provide timely notice to First Nations when the Crown begins considering a project or decision that may have implications for Aboriginal or Treaty Rights.

Discussion

Early communication can help identify issues before key decisions are made. Providing notice at the earliest practical stage allows communities to prepare, identify information needs, and determine appropriate points of contact.

Possible practices include:

- early notification of proposed activities;
- preliminary project descriptions;
- identification of decision-making timelines;
- opportunities for initial discussions.

Stage 2 – Information Sharing

Objective

Ensure that relevant information is available in a timely, accessible, and understandable manner.

Discussion

Meaningful participation depends on access to reliable information. Consultation is generally more effective when communities receive sufficient information to understand the nature of the proposed activity and its potential implications.

Information may include:

- project descriptions;
- environmental studies;
- technical reports;
- maps;
- regulatory timelines;
- proposed mitigation measures.

Where appropriate, plain-language summaries may complement technical documentation.

Stage 3 – Preliminary Assessment of Potential Rights Impacts

Objective

Identify whether proposed Crown decisions may have the potential to adversely affect Aboriginal or Treaty Rights.

Discussion

This stage encourages an early assessment of the possible relationship between the proposed activity and constitutionally protected rights. It may assist governments and Indigenous communities in identifying the scope of issues requiring further discussion.

Considerations may include:

- Treaty harvesting areas;
- traditional land use;
- cultural sites;

- waterways;
- cumulative environmental effects;
- community concerns identified during preliminary engagement.

Stage 4 – Community Engagement and Dialogue

Objective

Provide meaningful opportunities for discussion with affected First Nations.

Discussion

Consultation is strengthened when dialogue occurs in a manner that respects each Nation's governance structures, legal traditions, and decision-making processes.

Engagement approaches may include:

- meetings with leadership;
- community information sessions;
- discussions with Elders and Knowledge Keepers;
- youth engagement initiatives;
- written submissions;
- technical working groups.

Recognizing that First Nations have diverse governance systems, consultation processes should be responsive to the approaches identified by each Nation.

Stage 5 – Technical, Environmental, and Cultural Assessment

Objective

Evaluate potential project impacts using available scientific, technical, and Indigenous knowledge.

Discussion

Major projects frequently involve environmental, cultural, social, and economic considerations.

Assessment may include:

- environmental effects;
- cumulative effects;
- wildlife habitat;
- water quality;
- archaeological resources;
- cultural heritage;
- traditional ecological knowledge, where shared by the community.

This stage is intended to support informed decision-making rather than simply meeting procedural requirements.

Stage 6 – Consideration of Accommodation Measures

Objective

Where appropriate, consider measures that may avoid, reduce, or address potential adverse effects identified through consultation.

Discussion

Accommodation is highly context-specific and depends on the facts of each project.

Examples may include:

- changes to project design;
- environmental mitigation measures;
- revised construction schedules;
- monitoring commitments;
- protection of culturally significant areas;
- other measures appropriate to the circumstances.

The consideration of accommodation does not predetermine any particular outcome but reflects the continuing dialogue encouraged by the consultation process.

Stage 7 – Decision with Reasons

Objective

Communicate decisions in a transparent and accountable manner.

Discussion

Providing reasons for decisions can assist all participants in understanding how information gathered during consultation was considered.

Decision documents may identify:

- issues raised during consultation;
- responses to concerns;
- accommodation measures considered or adopted;
- reasons supporting the final decision.

Clear explanations may strengthen public confidence and contribute to future consultation processes.

Stage 8 – Monitoring and Follow-up

Objective

Continue engagement after project approval, where appropriate.

Discussion

Consultation often extends beyond the initial approval process.

Monitoring activities may include:

- environmental monitoring;
- compliance reporting;
- ongoing communication;
- review of mitigation measures;
- opportunities to identify unforeseen issues.

Continuing dialogue may contribute to adaptive project management over time.

Stage 9 – Adaptive Management and Continuing Dialogue

Objective

Recognize that consultation is part of an ongoing relationship rather than a single event.

Discussion

Projects may evolve over many years. Circumstances, environmental conditions, and community priorities may also change.

Adaptive management encourages periodic review of project impacts, consultation processes, and mitigation measures, allowing governments, Indigenous communities, regulators, and proponents to respond to new information where appropriate.

Guiding Principles

This proposed framework is informed by several constitutional and policy principles discussed throughout this handbook:

- Respect for the Constitution and the rule of law;
- Recognition of Aboriginal and Treaty Rights under section 35;
- The Honour of the Crown;
- Reconciliation;
- Transparency and accountability;
- Meaningful participation;
- Environmental stewardship;
- Recognition of the diversity of First Nations governance systems.

Concluding Observations

This framework is presented as a contribution to ongoing discussions concerning consultation practices in Canada. It is **not intended to replace the constitutional framework established by the Supreme Court of Canada or the specific legal requirements applicable to individual projects**. Rather, it offers a structured approach that may assist governments, First Nations, regulators, project proponents, and policymakers in considering practical elements of consultation that support informed decision-making and respectful relationships.