



Canadian Environmental
Assessment Agency

Agence canadienne
d'évaluation environnementale



LEGAL DUTY TO CONSULT

Ontario Association for Impact Assessment - 2017 Annual Conference

CANADA.CA/CEAA

Canada 

When does a legal duty to consult arise?

- When the Crown has knowledge of potential or established Aboriginal or Treaty **rights**, and contemplates **conduct** that may **adversely affect** those rights.

(stems from the **Honour of the Crown**)

- **Three elements are required:**

1. Contemplated Crown conduct;
2. Potential adverse effect(s); and
3. Asserted or established Aboriginal or Treaty rights.

Note: The duty is triggered at a low threshold: a credible claim and the potential to adversely effect that claim (or established rights) is sufficient to trigger the Crown's duty to consult.

Why Consult with Indigenous Groups?

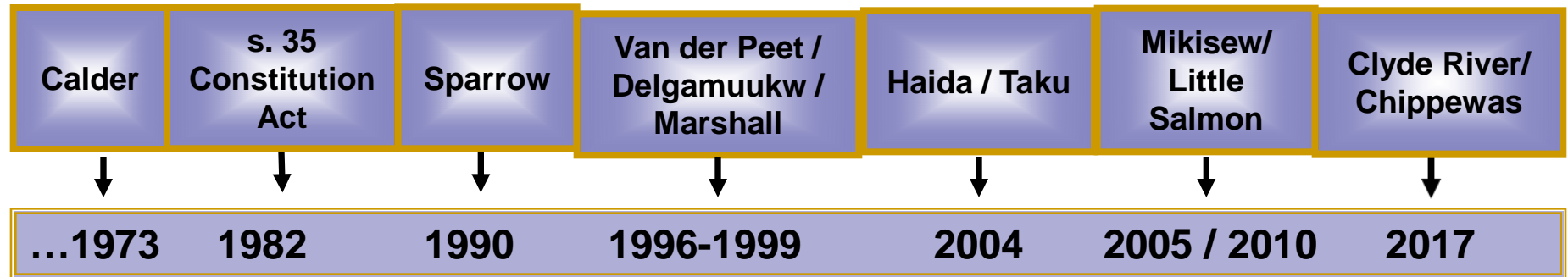
- Constitutional Duty to Consult on s.35 rights
- Requirements in Legal Agreements (e.g. in modern treaties & protocols)
- Good Governance / Policy
- Requirements in Legislation

Benefits of Consultation

- Improve and create working relations with all affected
- Make more informed and appropriate decisions
- Facilitate decision making on projects

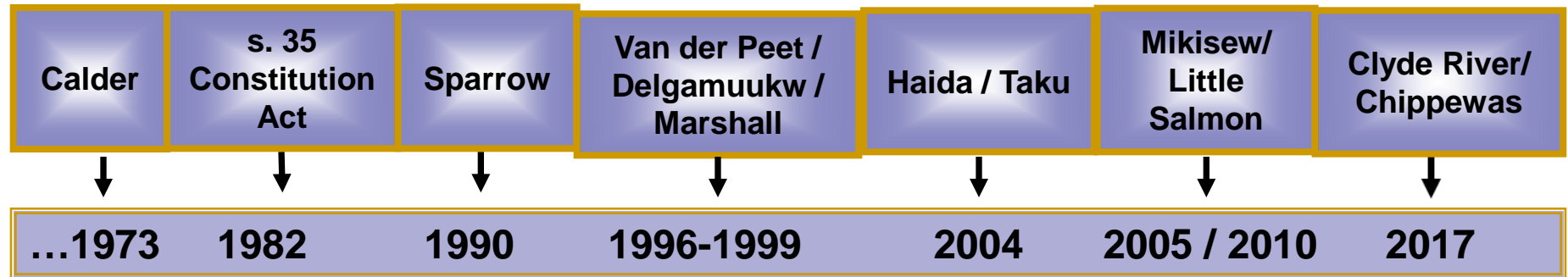
Reconciliation of s.35 rights with other societal interests (incl. Crown objectives)

Evolution of the Legal Duty to Consult



- **Calder:** Aboriginal groups existed in organized societies prior to European contact and Crown sovereignty. Aboriginal rights not extinguished by assertion of Crown sovereignty.
- **Constitution (s.35):** Recognizes and affirms existing Aboriginal and Treaty rights. Purpose is to **reconcile** prior existence of Aboriginal societies with Crown sovereignty.
- **Sparrow:** Set stage for *Haida*; Crown must consult prior to infringing established Aboriginal or Treaty rights.
- **Haida/Taku :** Created duty prior to Crown conduct, and where asserted Aboriginal rights are concerned. Honour of Crown cannot be interpreted narrowly. Consultation and accommodation does not require agreement between Crown and Indigenous group.

Evolution of the Legal Duty to Consult



- **Mikisew Cree (historic treaty):** Confirmed obligation where treaty rights may be adversely affected.
- **Little Salmon/Carmacks (modern treaty):** Requires following the consultation or other relevant provisions of the treaty; or, if no consultation or other relevant provisions, determine consultation required under the constitutional duty.
- **Clyde River/Chippewas of the Thames:** Clarifying role of regulatory bodies (NEB). The Crown may rely on regulatory procedural steps to fulfill the Crown's duty to consult.

What is Accommodation?

- Accommodation of the adverse impacts on Aboriginal or Treaty rights and related interests can take various forms
- There are three basic approaches:
 - Avoidance
 - Reduction/Mitigation
 - Compensation (non-financial or financial)

Moving Forward Collaboratively

- The Government of Canada has issued **Principles** respecting its relationship with Indigenous peoples
 - The ongoing review of impact assessment legislation federally to be guided by the principles, and by the **Working Group of Ministers'** on the Review of Laws and Policies Related to Indigenous Peoples
- The Government of Canada has committed to working in partnership with Indigenous communities and the provinces and territories
 - to fully implement the **Calls to Action of the Truth and Reconciliation Commission**, and
 - to design a national engagement strategy for developing and implementing a **national reconciliation framework**, informed by the Truth and Reconciliation Commission's recommendations
- The **Calls to Action** includes the recommendation that the federal, provincial, territorial and municipal governments fully adopt the ***United Nations Declaration on the Rights of Indigenous Peoples*** (UNDRIP)
- The Government has stated that it is a full supporter, without qualification, of the UNDRIP, which includes the concept of **Free, Prior, and Informed Consent (FPIC)**

Reference Tools

The Updated Guidelines for Federal Officials to Fulfill the Duty to Consult

http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf

The Consultation and Accommodation Unit

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Consultation, engagement and the duty to consult

<https://www.aadnc-aandc.gc.ca/eng/1100100014649/1100100014653>

Aboriginal and Treaty Rights Information System (ATRIS)

http://sidait-atris.aadnc-aandc.gc.ca/atris_online/home-accueil.aspx

Consultation Protocols

<https://www.aadnc-aandc.gc.ca/eng/1331832510888/1331832636303#sec4>

Working Group of Ministers

<https://www.canada.ca/en/privy-council/services/review-laws-policies-indigenous.html>

Technical Guidance for Assessing the Current Use of Lands and Resources for Traditional Purposes under CEAA 2012

<https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/technical-guidance-assessing-current-use-lands-resources-traditional-purposes-under-ceaa-2012.html>