

# Crown Consultation in the NWT: a case study to establish a consultation working group in the Dehcho region

**Darha Phillpot**

**Masters Project**

**School for Community and**

**Regional Planning**

**University of British Columbia**

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“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. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.”

Binnie J. (Mikisew, para 1)

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## EXECUTIVE SUMMARY

This project has three components. Section one is a review of legal and academic documents and literature relating to the Crown's legal duty to consult with Aboriginal groups. Section two is an overview of Indian and Northern Affairs Canada-Northwest Territories Region's operational response in meeting the Crown's common law duty to consult with Aboriginal groups. The final section presents a case study that builds on the context and requirements set out in sections one and two to address the question of how to set up a consultation working group in the Dehcho region of the Northwest Territories.

The project case study draws on literature, personal observation, and interviews to identify potential challenges to the establishment of a Dehcho Consultation Working Group. Challenges include: differences of interpretation of accommodation for Aboriginal title; lack of trust; cultural differences, preferences, practices and values; and lack of capacity at the community level and within INAC. A strategic response to these challenges is also set out.

The purpose, structure and a process for implementation of the proposed Dehcho Consultation Working Group are considered. Recommendations include:

1. INAC should ensure that communication processes between the working group and the negotiation table are explicitly set out, either formally through the working group terms of reference or, less formally through a written administrative understanding.
2. INAC should adequately resource the Dehcho Consultation Working Group.
3. A Terms of Reference that sets out the purpose of the proposed Dehcho Consultation Working Group should be jointly developed by the parties. Consideration should be given to:
  - Education and awareness
  - Enhancing community capacity
  - Developing and maintaining relationship and trust
4. INAC should engage both the DFN and Community Chiefs and Councils at initial stages of

developing the Dehcho Consultation Working Group.

5. In communities where there are no Dehcho Lands and Resources Staff, INAC should draw upon the expertise and knowledge community members and INAC staff to determine an appropriate community representative.
6. INAC should provide adequate administrative support to ensure the Dehcho Consultation Working Group will function well.
7. INAC should hold as many face-to-face meetings as resources permit with the leadership in Aboriginal communities in advance of the first Dehcho Consultation Working Group meeting.
8. INAC should fund and host a Dehcho Consultation Workshop in Fort Simpson in the fall of 2010.

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# INTRODUCTION

Jurisprudence on Crown consultation has emerged as a significant driver to changes in operational processes for land and resource management. Canadian judicial decisions from higher and lower courts have consistently stated that the honour of the Crown requires consultation if established or potential Aboriginal or treaty rights may be adversely impacted, including appropriate accommodation. These court decisions have led to significant changes to land-use decision making processes, especially in regions of Canada with yet unsettled land claims.

The legal duty of the Crown to consult with Aboriginal groups is grounded in the larger process of reconciliation between Crown interests and the interests of Aboriginal people. In regions where original treaties were not signed (e.g., large areas of British Columbia) or where the meaning of original treaties is contested (e.g., the so-called numbered treaties, including the Northwest Territories) consultation is an important interim mechanism through which Aboriginal groups participate in land use decisions in advance of uncontested treaties, (i.e., comprehensive land claim agreements. Narrowly considered, consultation can be viewed as a means through which Aboriginal and treaty rights can be protected from the negative impacts of Crown decisions while the frequently slow process of negotiations unfold. More broadly, the legal duty to consult is a responsibility of the Crown, grounded in the honour of the crown and ongoing processes of reconciliation. In practice, court rulings on Crown consultation have shifted the power balance and provided Aboriginal groups with some degree of power to influence governance processes for lands and resources. The form and content of meaningful consultation is a rapidly developing and fiercely contested field that poses formidable challenges for communities and government organizations.

## ***0.1 Purpose & Structure of the Project***

This project has three components. The first component sets out the findings of a literature review on the subject of the Crown's legal duty to consult. It seeks to

provide a snap shot of the rapidly developing policy and operational fields. It addresses the question: *“What does the literature say about Crown Consultation?”*. The literature review includes jurisprudence on Crown consultation, key policy documents, and academic literature.

The second component of this project documents Indian and Northern Affairs Canada Northwest Territories (INAC-NT) region’s policy and operational response to emerging jurisprudence. This section of the project maps out the socio-political and regulatory context within which INAC-NT has addressed the Crown’s duty to consult with Aboriginal groups. This section answers the question: *“What is INAC-NT region’s operational response to meet the legal duty to consult?”* This section is based on personal communication and professional experience with INAC-NT.

The third component of this project is a case study that draws on the first two components to scope out options and considerations for establishing a Consultation Working Group in the Dehcho Region of the Northwest Territories. It answers the question: *“How should INAC-NT set up a Consultation Working Group in the Dehcho Region of the NWT?”* The section considers potential challenges and the Consultation Working Group’s purpose, structure, and broad process for implementation. This section is based on analysis of interviews conducted by the author in February 2010.

This project is deeply imbedded in legal concepts. To assist the reader, a reference of important terms and definitions has been assembled in Appendix I. A list of acronyms has been attached in Appendix II.

## ***0.2 Methodology***

The research method for this Masters Project included a focused literature review on the subject of s. 35 Crown consultation, including relevant jurisprudence, academic literature and policy and procedural documents. Seven open-ended interviews were conducted between January 20<sup>th</sup> and February 24<sup>th</sup>. Five interviewees were INAC

employees, one interview was conducted with a staff member of an Aboriginal organization, and one interview was conducted with an ex-INAC employee who now works for another federal department. The sample was not intended to be representative but rather to target individuals with first-hand experience with Crown consultation in the Northwest Territories. Four of the interviews were transcribed. All interviews were analyzed for important themes. Each interview was assigned a code to ensure confidentiality (i.e., P1 through P7). The information gained from these interviews has informed the project as a whole, although it has been predominantly used to provide recommendations on the establishment of the proposed Dehcho Consultation Working Group. The scope of this research project is intended to be exploratory. The results are intended to inform and guide further in-depth discussions with Aboriginal leaders and staff in the Dehcho as the Consultation Working Group is established.

The analysis presented here does not reflect the perspective of Aboriginal communities, although this is important to consider when moving forward. Time restraints and the prohibitively high cost of travel to communities was a barrier to conducting additional interviews. Because of this, ongoing discussion with Aboriginal leaders and staff as the project is implemented is absolutely essential. During the period that I worked on this project, I was employed with INAC-NT in the Consultation Support Unit (CSU). Direct participation in INAC-NT's consultation efforts has greatly enriched my understanding of Crown consultation. My employment also carries with it a particular bias, which I acknowledge here.

# SECTION ONE: LITERATURE REVIEW

## ***1.1 The Legal Context***

There are many reasons that government agencies consult with stakeholders when making decisions. Consultations occur pursuant to statutory requirements, contractual obligations, and as a central component to good governance. Crown consultation, in terms of Aboriginal groups is a specific, legally delineated, type of consultation undertaken by the Crown. The government's duty to consult with Aboriginal people and to accommodate their interests is grounded in the honour of the Crown which derives from the Crown's assertion of sovereignty in the face of prior aboriginal occupation. The Supreme Court of Canada (SCC) has defined consultation as a duty of the Crown grounded in s. 35 of the *Constitution Act, 1982*, which recognizes and affirms the existing right of the Aboriginal peoples of Canada.

The nature and scope of the Crown's 'duty to consult' with Aboriginal groups is a rapidly evolving area of common law. This section sets out important common-law consultation principles based on SCC decisions. Crown consultation case law from the lower courts of Canada will also be considered insofar as it provides indication of the future direction of the common law. Specific attention will be paid to lower court decisions relevant to the NWT.

### **1.1.1 Supreme Court of Canada Cases**

To date, the Supreme Court has issued three decisions that collectively give shape to the common law duty to consult. The three decisions are:

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

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

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

*The Haida* and *Taku* decisions, released simultaneously in 2004, involved lands subject to yet *unproven* claims of Aboriginal rights and title. The 2005 *Mikisew* decision considered the Crown's duty to consult, and accommodate as appropriate, in the context of historical treaty rights. Collectively, these decisions have had broad implications across Canada, as much of the country's land base is subject to historic treaties and Aboriginal land claims.

### **1.1.2 When does the duty to consult arise?**

The *Haida and Taku* and *Mikisew* Supreme Court of Canada decisions clearly set out that the Crown has a legal duty to consult and, where indicated, to accommodate the concerns of Aboriginal groups when:

1. The Crown has, or should have, knowledge of the potential existence of an Aboriginal or treaty right (real or constructive knowledge);
2. The Crown contemplates conduct; and
3. The contemplated conduct might adversely impact asserted or proven Aboriginal or treaty rights.

In the *Haida* case, the alleged infringement was the Province's decision to transfer a tree-farm license in the Queen Charlotte Islands of British Columbia (BC). The province of BC was aware of the Haida Nation's claims to Aboriginal title due to their participation in the BC treaty process. The potential negative impact was on their Aboriginal right to harvest red cedar and the assertion of Aboriginal title.

In the *Taku* case, the infringement was a decision to reopen a gold mine and build an access road through previously undisturbed area. Again, the Province of BC was aware of the Taku's assertion of Aboriginal title. The specific impacts were potential effects on wildlife and traditional land use as well as the lack of adequate baseline information by which to measure possible impacts (para. 12).

In *Haida*, McLaughlin C. J. notes:

But, when precisely does the duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it...(para. 35)

Government officials must therefore be fully informed of any Aboriginal assertions to title in areas that could be impacted by a decision that they are considering.

At issue in the *Mikisew* case was whether or not the Crown (in this case Parks Canada) had sufficiently consulted with the Mikisew Cree First Nation before approving the construction of a winter road through Wood Buffalo National Park. The proposed route traversed the trap lines of 14 Mikisew families, and would have potentially impacted traditional harvesting, and traditional lifestyle practices. In the Mikisew case, Parks Canada was aware that the Mikisew were signatories to the historic Treaty 8. In *Mikisew*, Parks Canada argued that its duty to consult was discharged by negotiations leading to the signing of Treaty 8 in 1899 and therefore did not arise in this decision. The Court disagreed, and found that pre-treaty discussions were only one stage in the reconciliation process, and that "...none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signaled the advancing dawn of transition" (*Mikisew*, para. 27).

The Crown must therefore consider if the duty arises in historic treaty areas and be fully informed of the consultation duty derived from treaty obligations. Variables such as the specificity of promises, the seriousness of the impact on the Aboriginal people, and the history of the dealings between the Crown and the Aboriginal group are significant, and must be considered on a case by case basis.

### 1.1.3 What is the scope and content of the duty to consult and accommodate?

The *Haida, Taku and Mikisew* Supreme Court decisions provide a framework to delineate the appropriate scope and content of Crown consultation and accommodation. These decisions held that the kind of duties that the Crown may have exist on a spectrum depending upon:

1. The strength of the claim to Aboriginal rights, and
2. The seriousness of the potential negative impacts of the contemplated Crown action.

On the lower end of the sliding scale where the strength of claim may be “peripheral or dubious” and the impact less significant, then notification is sufficient. On the other end of the spectrum where there is a strong *prima facie* claim and/or there is a treaty and the potential infringement on the rights is more significant, a deeper more robust consultation may be required. In the case of established treaty rights, the Crown must consider the impact a project will have on the ability of the Aboriginal group to exercise treaty rights. The specific facts of the circumstances must be considered. The spectrum analogy is detailed in *Haida*:

...the concept of the spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice (para. 43).

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of highest significance to Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required (para. 44).

#### 1.1.4 Discharging the duty through existing consultation processes

In *Taku*, the First Nation participated fully in the provincial Environmental Assessment (EA) process, including membership in the Project Committee. Through the EA process the First Nation's concerns were considered by the appropriate Provincial Ministers and the final project approval contained measures designed to address both immediate and long-term concerns of the First Nation. In this case, the court found that the Environmental Assessment process was an appropriate mechanism through which the Crown can discharge its duty to consult and accommodate. Parallel processes are not necessary if a suitable process is in place. The *Taku* decision states that the Province of BC

...was not required to develop special consultation measures to address [First Nation] concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples. (*Taku*, para. 40.)

Lower court decisions have further addressed the suitability of environmental assessment processes to meet the duty to consult. In *Ka'a'Gee Tu First Nation v. Canada (Ka'a'Gee Tu)* the Ka'a'Gee Tu First Nation (KTFN) participated in the environmental assessment process for a proposed oil and gas project in their traditional territory. The EA resulted in recommendations from the Mackenzie Valley Environmental Impact Review Board (MVEIRB) that included a series of mitigation measures that were, among other things, intended to address the impacts of the project on the KTFN's asserted Aboriginal and treaty rights. Subsequent to the decision, the responsible Ministers and MVEIRB engaged in a 'consult to modify' process, as set out in Section 130(1)(b)(ii) of the *Mackenzie Valley Resource Management Act* (MVRMA). KTFN was notified but was not involved in the modification of the mitigation measures. The NWT Supreme Court found that up until the point that the Responsible Ministers modified the mitigation measures, the EA process had upheld the honour of the Crown; it had provided many



opportunities for consultation and resulted in recommendations for measures to mitigate the adverse effects of the development on the KTFN.

### **1.1.5 Opportunity to participate directly**

The *Mikisew* decision addressed whether the duty could be discharged with a unilateral decision on the part of the Crown intended to mitigate against potential impacts. In this case, the Mikisew Cree were provided with the same information as other members of the public, and invited to open houses. Parks Canada made changes to road alignment to accommodate the Mikisew, however, this decision was made without consultation. Parks Canada's view was that the duty to consult was discharged through the public consultation opportunities, and that it was the responsibility of the Mikisew Cree to take advantage of them.

The Court found that the Crown failed to meet its duty. Duty requires the Crown

... to provide notice to the Mikisew and to engage directly with them (and not as seems to have been the case, here, as an afterthought to a general public consultation with Park users). The engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be their potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. *The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary.* (para. 64, emphasis added)

The honour of the Crown requires opportunity to participate in a fair consultation process as well as fair outcomes.

### **1.1.6 Onus on Aboriginal groups to participate**

The case law has indicated that Aboriginal groups have an onus to participate in Crown consultation and to make their views known. In *Haida*, the Court stated that Aboriginal claimants

... must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached." (*Haida*, para.42)

Similarly, in *Mikisew* the Court suggested that had consultation gotten off the ground, the Mikisew Cree would have had obligations to participate.

It is true, as the Minister [of Canadian Heritage] argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, the consultation never reached that stage. It never got off the ground. (*Mikisew*, para.65)

Lower court decisions, too, have echoed higher court decisions. The *Ka'a'Gee Tu* decision addressed the issue of whether the sensitivity of Traditional Knowledge (TK) was grounds not to provide information on potential impacts (e.g., the location of traplines, etc.). The Court found that there were methods for protecting sensitive information and that "... any future consultative process will require the Applicants sharing their traditional knowledge and full meaningful participation in the consultative process" (*Ka'a'Gee Tu*, para. 120).

### **1.1.7 No duty to reach agreement**

Linked to the issue of the scope and content of the duty to consult, is the issue of whether an Aboriginal group and the Crown must come to consensus. In *Taku*, the SCC found that the Province of BC was not under a duty to reach agreement with the First Nation. The Province's failure to reach agreement did not breach its duty of good faith

consultations. The implication of this is that the legal duty to consult does not give Aboriginal groups a veto.

“The [First Nation] in this case disputes the adequacy of the accommodation ultimately provided by the terms of the Project Approval Certificate. It argues that the Certificate should not have been issued *until its concerns were addressed to its satisfaction*, particularly with regard to the establishment of baseline information.

“With respect, I disagree.” (*Taku*, para. 44, emphasis added)

Meaningful consultation conducted in good faith and sincere attempts to find accommodation will discharge the Crown’s duty. Ultimately the potential impacts to Aboriginal groups must be weighed against the benefits to the public interest.

### **1.1.8 The duty cannot be delegated (but procedural aspects can)**

The 2004 *Haida* and *Taku* decisions provided clarity on the issue of who holds the duty to consult, and to what degree the duty can be delegated to a non-Crown actor. *Haida* confirmed that the duty to consult lies with the Crown. “...the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.” (*Haida*, para. 53)

Further, *Haida* clearly set out that there is no duty on third parties to engage in Crown consultation. “The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal people. ... But they cannot be held liable for failing to discharge the Crown’s duty to consult and accommodate.” (*Haida*, para. 56)

Procedural aspects of consultation can be, and frequently are, delegated. As noted above, in the *Ka’a’Gee Tu* case, the Crown can sometimes rely upon already existing consultative processes, and take them into account when considering adequacy.

### **1.1.9 Consultation as part of a larger process of reconciliation**

Arguably, the fundamental principle that each Crown consultation court decision has reinforced is the role of consultation as a part of Canada's ongoing process of reconciliation with Aboriginal groups. *Haida*, *Taku*, and lower court decisions have consistently reiterated this principle. In *Mikisew*, the SCC ruled that

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. (Para. 1)

Consultation can only be fully understood within the context of the Crown's overall approach to reconciliation.

### **1.1.10 The jurisdiction of quasi-judicial boards to determine adequacy**

An emerging issue within rapidly evolving jurisprudence is whether quasi-judicial boards have the jurisdiction to determine adequacy of consultation. Two cases considered together by the British Columbia Court of Appeal (BCCA) addressed the jurisdiction of quasi-judicial regulatory boards to determine adequacy of consultation. A third case was considered by the federal Court of appeal. These cases are:

*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (*Carrier Sekani*)

*Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (*Kwikwetlem*)

*Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 (*Standing Buffalo*)

#### **The Carrier Sekani Case**

*The Carrier Sekani* case arose from a British Columbia Utility Commission (the Commission) hearing regarding the approval of an Electricity Purchase Agreement (EPA) between the British Columbia Hydro and Power Authority (BC Hydro) and Rio Tinto

Alcan Inc. (Alcan). In the 1950s, Alcan built an aluminum smelter and power generation facilities in north-western BC. Construction of the power facility involved building a reservoir and re-routing the Nechako River. The Crown granted Alcan the necessary water licences to carry out this project. Much later, when the power facilities produced more energy than needed for smelting, Alcan began to sell excess power.

In 2007, BC Hydro entered into an EPA with Alcan for the purchase and sale of surplus power. BC Hydro applied under s. 71 of the *Utilities Commission Act* (the Act) to determine that the EPA was in the public interest. This determination of public interest was one of a series of approvals required before the project could go ahead.

The Carrier Sekani Tribal Council (Carrier Sekani) “sought to be heard in the s. 71 proceedings before the Commission on the issue of whether the Crown fulfilled its duty to consult before BC Hydro entered into the EPA” (*Carrier Sekani*, para. 4)<sup>1</sup>. The Commission decided not to hear arguments by the Carrier Sekani. “In brief, the Commission rejected the [Carrier Sekani] motion because it found as a fact that since there were no “new physical impacts” created by the EPA, the duty to consult was not triggered ” (*Carrier Sekani*, para. 11).

The BC Court of Appeal found that the Commission’s decision was unreasonable and sent the matter of the adequacy of consultation back to the Commission for consideration. In reaching this decision, the court considered if the Commission had the power and jurisdiction to address matters of constitutional law and specifically whether the Crown has discharged its duty to consult with Aboriginal groups. Further, the case

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<sup>1</sup> The Carrier Sekani claimed the original 1950s facility construction (including power facilities, water diversion, reservoir creation) were all infringements of their Aboriginal rights and title, and that no consultation in relation to the original infringement had ever occurred. In addition, the Carrier Sekani claimed that the newly executed EPA posed additional physical impacts on the reservoir and associated watershed, and could potentially impact their Aboriginal rights.

considered whether, in considering issues of "public interest," the Commission was to consider the honour of the Crown and the Crown's duty to consult.

The BC Court of Appeal found that where the legislation creating a tribunal implicitly or explicitly grants that tribunal the ability to interpret or decide questions of law, the tribunal will be assumed also to have authority to interpret or decide questions of constitutional law. Consideration of whether constitutional duties such as consultation are satisfied in respect of an EPA should form part of the public interest inquiry.

Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter (*Carrier Sekani*, para. 51).

The honour of the Crown requires not only that the Crown actor consult, but also that the regulatory tribunal decides any consultation dispute which arises within the scheme of its regulation (*Carrier Sekani*, para. 54).

Also significant in this case was the BC Court of Appeal's direction to the Commission to consider past infringements of Aboriginal rights of the Carrier Sekani. This implication that present-day consultation processes may need to be expanded to address historical wrongs is significant given the difficult historic relationship between the Crown and Aboriginal people of Canada.

### **The Kwikwetlem Case**

The *Kwikwetlem case* (2009) considered a decision before the British Columbia Utilities Commission (the Commission) to provide the Certificate of Public Convenience and Necessity (CPCN) for the proposed transmission line project by the British Columbia Transmission Corporation (Transmission Corporation). The Commission argued that it did not need to consider the adequacy of the Crown's consultation and accommodation

effort (i.e., the Transmission Corporation<sup>2</sup>) with the First Nations and that it could and should defer any assessment of whether the Crown's duty of consultation and accommodation had been fulfilled to the ministers responsible for issuance of a certificate pursuant to the *BC Environmental Assessment Act*, which would occur at a later stage of the regulatory process.

After consideration of the project review processes in the *Utilities Commission Act* and the *Environmental Assessment Act*, the BC Court of Appeal noted they were effectively two separate processes, aimed at two different stages and involving different decision makers with different considerations. "Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion" (*Kwikwetlem*, para. 55).

The court found, therefore, that the First Nations were entitled to be consulted and accommodated at the first stage by the Transmission Corporation during its application for the CPCN and to have the adequacy of such consultation and accommodation assessed by the Commission before it certified the project as being in the public interest. (*Kwikwetlem*, para. 60 - 65) It was not enough to anticipate that future opportunities will allow for an assessment of adequacy before a final go-ahead.

Both the *Carrier Sekani* and *Kwikwetlem* cases suggest that regulatory bodies have the duty to determine adequacy of Crown consultation and accommodation for projects that appear before them. The Standing Buffalo case, which is considered next, differed.

### **The Standing Buffalo Case**

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<sup>2</sup> The BC Court of Appeal explicitly stated in this case that Transmission Corporation was considered to be an 'agent of the Crown'.

*Standing Buffalo* considered a decision of the National Energy Board (NEB) to approve a certificate of public convenience and necessity to Enbridge Pipelines for the Alida to Cromer Capacity Expansion Project. The Project in this case consists of two components: the construction of a 60 km pipeline to transport natural gas liquids from Alida, Saskatchewan to Cromer, Manitoba. Standing Buffalo Dakota First Nation intervened in the NEB proceedings to oppose the Enbridge application, stating that they have a credible claim of Aboriginal title to the land on which the Project is located. The Government of Canada did not participate in the hearing, nor did they provide a submission. When the NEB issued the certificate of public convenience, Standing Buffalo Dakota First Nation applied to the Federal Court of Appeal for judicial review of the decision. Standing Buffalo argued that the NEB should have compelled the Government of Canada to appear at the hearing to address the issue of consultation. The Court denied the appeal, finding that because the applicants for the pipelines were all private sector entities, the NEB's determinations on the applications did not need to encompass conclusions on the Crown's consultation. Importantly, the court also found that "the NEB itself is not under a *Haida* duty" (*Standing Buffalo*, para. 34).

Policy makers, aboriginal rights specialists, and those engaged in consultation are watching closely as these cases make their way to the Supreme Court of Canada. Application for leave to appeal *Standing Buffalo* had been filed. The *Carrier Sekani* decision is on appeal before the Supreme Court of Canada in *Rio Tinto Alcan Inc., et al v. Carrier Sekani Tribal Council and British Columbia Utilities Commission* (British Columbia) (Civil) (By Leave) Docket 33132 on the question whether "the honour of the Crown require[s] administrative tribunals to decide disputes about the Crown's duty to consult First Nations, that "arise within the scheme of [their] regulation." "(para 54).

### **1.1.11 Implications for operational practices in the NWT**

The cases summarized above have broad implications for operational policies and procedures of Crown agencies across the country including the NWT. The questions



of whether quasi-judicial boards have jurisdiction to determine adequacy has implications for meeting the duty to consult within the NWT regulatory regime in which co-management regulatory boards are the final decision maker for certain authorizations. The *Carrier Sekani*, and *Kwikwetlem* cases suggest that the honour of the Crown may impart not only a duty to consult, but also a duty on tribunals to determine whether consultation efforts have been adequate when this question is raised in proceedings before them. The *Standing Buffalo* case reasoning suggests the opposite. However, this is also dependent upon the nature of the tribunal, its mandate, and its foundational legislation. The implications of these cases to Crown consultation operational practices in the NWT will be addressed in more detail in section 2.4.

This section addressed the legal context for Crown consultation. Key Legal Principles are summarized in Table 1. I now turn to Academic critiques before setting out how INAC-NT has organized itself to respond to consultation common law within the NWT regulatory regime.

**Table 1: Summary of Legal Crown Consultation Principles**

The Crown has a duty to consult with Aboriginal groups when contemplating an action that could negatively impact established or potential Aboriginal or treaty rights.
The duty to consult is <i>always</i> triggered where there is a potentially negative impact on established or potential Aboriginal or treaty rights, but the content of the duty will vary.
The degree of consultation that will be required will depend on the strength of the Aboriginal rights claim, and on the degree of seriousness of the impacts. .
Where the case is strong and the impacts potentially serious, the duty will likely include the duty to accommodate.
Consultation must be meaningful, uphold the honour of the Crown and contribute to ongoing processes of reconciliation.
The duty cannot be delegated, but procedural aspects of the duty can.
The Crown may make use of existing consultative processes (i.e., public review processes established through regulatory and environmental review).
Aboriginal groups have an onus to participate in consultation, and to provide information about potential impacts to Aboriginal or treaty rights.
Aboriginal groups do not have a veto over decisions that are made in the public interest.

## ***1.2 Academic and Policy Critiques of Crown Consultation***

A review of academic literature on the subject of Crown consultation revealed only a small selection of studies that addressed Crown consultation from an academic perspective. Whereas legal analyses abound (Lawrence and Macklem 2000, Treacy et al. 2006, Isaac and Knox 2003), academic studies that provide a critical analysis of Crown consultation and accommodation, in principle or in practice, were infrequent. The overview provided here is not intended to be exhaustive. Rather, it aims to touch on key examples that can provide practical insight on the challenges of attaining meaningful Aboriginal consultation and to look at systemic challenges.

An important source for the academic literature review is Andrea Kennedy's Doctoral dissertation *Deeper than Mere Consultation: Negotiating Land Resource Management in British Columbia, Post-Delgamuukw* (2009). Using a case-study methodology, Kennedy's research addresses the question of how to set up consultative processes "to enable the just inclusion of First Nations, their community values, and world views" (Kennedy, p. xxiv). This work is particularly instructive because it moves beyond the theoretical underpinnings and investigates individual First Nations people's experiences with consultation cases related to decisions about resource use. Her analysis provides a rich description of the challenges and "aspects of consultation and negotiation that made the interactions more meaningful for the First Nations peoples involved" (Kennedy, p. 1). The critiques set out here draws considerably on the findings from Kennedy's research. Select studies from within State-Aboriginal relationships, co-management, and planning literature are also drawn on as appropriate.

While academic studies from jurisdictions outside of the NWT can provide insight and perspective, Crown consultation is always case and context specific. Care should be taken not to make overly simplistic or universal conclusions. A direct link between the findings set out in the literature below and the NWT context should not be made without consideration of the recent historic governance relationship jointly developed

between the federal department of Indian and Northern Affairs, the Government of the Northwest Territories and Aboriginal groups. This includes agreements reached through land and resource negotiations, settled claims and the co-management regulatory regime that flows from them. Specific detailed description of this context is considered in section two of this project.

### **1.2.1 Moving Beyond Window Dressing Participation**

Sherry Arnstein's renowned 'Ladder of Citizen Participation' looks at citizen involvement in planning decisions (Arnstein 1969). Arnstein offers a conceptual model to analyse citizens' power in determining the outcomes of the end product. In this model, consultation is located on the fourth rung of an eight step ladder. Consultation is one step better than 'informing' and one step below 'placation'. Consultation is located squarely in the realm of 'token involvement'. Arnstein cautions that '[i]nviting citizens' opinions, like informing them, can be a legitimate step towards their full participation. But if consulting them is not combined with other modes of participation, this rung of the ladder is still a sham since it offers no assurance that citizen concerns and ideas will be taken into account" (Arnstein p. 6). Meaningful Crown consultation, and accommodation as appropriate, goes far beyond consultation described by Arnstein's consultation step. Nevertheless, it is useful to consider the dangers of "window dressing participation" intended to allow "powerholders [to] achieve... the evidence that they have gone through the required motions of involving "those people" (Arnstein, p. 6). Precisely this concern emerged in Crown consultation literature.

Kennedy's research also touches on challenges both real and perceived of moving beyond 'window dressing' consultation. Her research revealed a perceived disconnect between the motivating factors of individual First Nation people to participate in consultation and the perceived motivating factors of government and industry representatives. Justice and fairness, specifically issues of unresolved Aboriginal title, were critical motivating factors expressed by Aboriginal individuals to participate in

consultation. In contrast, government and industry representatives were perceived by the First Nations people to be motivated by a desire to meet legal requirements, reduce project completion risk, increase or speed access to natural resources, and avoid costly court challenges (Kennedy, p. 256). Different motivating factors, whether real or imagined, can impact the success of a consultation case. Individuals engaging in consultation should be aware that these perceptions exist.

### **1.2.2 A difference in interpretation of purpose - Aboriginal title**

Many Aboriginal groups engage in Crown consultation as a means to exercise unrecognized Aboriginal title. In contrast, government officials do not have a mandate to address the issue of Aboriginal title; In the NWT, for example, resolution of claims to Aboriginal title is dealt with in the realm of land claim negotiations.<sup>3</sup> From the federal perspective, the immediate driving purpose of consultation is to engage on project specific impacts to Aboriginal and treaty rights. The 2009 review from the National Centre for First Nations Governance entitled *Crown Consultation and Practices Across Canada* reveals this disconnect at a policy level. The report highlights a policy gap for Aboriginal title and subsurface mineral rights within federal and provincial consultation policy (NCFNG 2009).

There is a fundamental disconnect between Aboriginal groups' interest in using consultation as a means to achieve redress on outstanding issues of Aboriginal title and the interest of representatives from industry or government agencies to gain input on a project specific basis (Kennedy 2009). Given such differences, moving beyond rhetoric and achieving meaningful consultation can be challenging. The scope of the purpose of each of these views is so vastly different that what may be meaningful to one may fall far short of meaningful consultation to another.

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<sup>3</sup> Recognition of title is not a clear policy mandate in the NWT. Land claim negotiations in the NWT have been entered into on a policy basis.

### **1.2.3 Enhancing trust and relationships**

Successful consultation processes require progressive deepening of trust between individuals (Kennedy 2009, personal communication, INAC 2009). Conversely, barriers to achieving trust and building effective relationships include inconsistency, changing personnel, and representation by individuals without authority to make decisions or commitments (Kennedy, p. 257). Successful consultation and accommodation requires requires collaboration, creativity and joint learning. A significant challenge for government representatives is that any interaction comes on the heels of a long and difficult history between the Crown and Aboriginal people (Report of the Royal Commission on Aboriginal Peoples, 1996). When visiting a community, government officials have the responsibility to be aware of the consultation 'context', including the historical relationship, and any specific concerns that have been voiced by the community that may be relevant to the issue at hand. Table 2 draws on the literature to set out a summary of strategies to build stronger relationships.

**Table 2: Strategies to build strong relationships with Aboriginal groups in a consultation context<sup>4</sup>**

<b>Preparation:</b> Learn about the community before visiting. Determine if there are local protocols for consultation. Learn what past concerns have been. Review land use plans, either draft or approved to learn about local land use and values associated with land.
<b>Approach with respect:</b> Recognise you are a visitor in their territory, and acknowledge the existence of Aboriginal rights and title. <sup>5</sup>
<b>Approach early:</b> Contact should be made at the earliest possible stage and at a point that accommodation can be made to project plans. Be clear about what the project plans are and what changes can be made, and which ones cannot (i.e., for technical reasons, etc).
<b>Find and make personal introductions:</b> If possible, ask someone with a connection to the community make the introduction for you.
<b>Approach with an open mind and heart:</b> Listen without assumptions and with an open mind to stories and traditional knowledge. Recognise that you are attempting to bridge different worldviews. Recognise that not all Aboriginal groups are the same. Do not make assumptions that what worked with one group will work for another.
<b>Send invitations to meet, rather than requests:</b> Invitations to participate in a process may be more welcoming than a request for presence at a meeting.
<b>Meet in person:</b> Face-to-face contact is important. Visit the community and the band or council office. Hold meetings in the community, whenever possible.
<b>Build Trust:</b> Be clear, direct, truthful and forthright in your discussions. Do not make commitments you cannot keep. Keep the commitments that you make. Plan a long term relationship.

### 1.2.4 Capacity to engage in consultation

The common law duty to consult has created an environment in which Aboriginal groups are inundated with referrals for projects and requests for consultation. The spectrum of issues is vast. From resource development, to health initiatives, to governance negotiations, the range of technical expertise required for a community to understand and engage critically in consultation processes is formidable. It is almost inconceivable to imagine how some Aboriginal communities, some as small as one

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<sup>4</sup> Adapted from Kennedy (2009, p. 261) and Whiteman and Mamen (2005, p. 24)

<sup>5</sup> The acknowledgement of Aboriginal title is not possible from an official federal representative's perspective because Canada's position is that title was extinguished through treaties 8 & 11.

hundred people, can be prepared to engage meaningfully on so many complex issues. Without a doubt, this raises issues of capacity.

Meaningful consultation requires that Aboriginal groups have the capacity to be fully informed and provide meaningful input (CIER 2007, Kennedy 2009, Whiteman and Mamen 2005). Often this requires adequate financial resources for an Aboriginal group to hire the technical expertise that they do not have internally. Dedicated capacity funding for Aboriginal groups to engage in consultation does not currently exist in the NWT (P3).

Despite the limitations that Aboriginal communities may face to engage meaningfully in consultation, consultation processes have also been identified as an opportunity to build up technical capacity within the community. Given the challenges of consultation fatigue, if consultation is done appropriately, consultation has the potential to leave the community better off (Kennedy 2009).

### **1.2.5 Power inequities – capacity to define the process**

Despite the leverage that Aboriginal groups have gained to move their interests forward based on the Crown's duty to consult and subsequent court action, there remains a fundamental issue of power imbalance. In reference to the challenges inherent in consultation Kennedy notes that "ultimately, the questions [of what constitutes meaningful consultation] will return to the theatre of the public and politics, where the tables are lopsided and the distribution of power is vastly unbalanced" (Kennedy, p. 275).

The ability, or lack thereof, of an Aboriginal group to define the process of consultation is one example. A critique of the Crown's interpretation of meaningful consultation is that reliance on consultation processes within regulatory and environmental processes is not appropriate for meaningful Crown consultation on Aboriginal groups' terms. From some Aboriginal group's perspective, restrictive time-



lines and reliance on technical expertise make them ill suited processes (Kennedy 2009). This view is also expressed in the comments from a participant at the National Chiefs Task Force on Consultation and Accommodation (NCTFCA 2009):

Timeframes are also an issue in Environmental Assessment Processes (EAs), and they start the moment the EA process gets triggered. There is danger in limiting consultation to the EA process for that reason. The duty to consult is triggered when the Crown has knowledge that a right may be infringed and dialogue must begin at the initial planning stages via a concerted effort. There is lots of work that needs to be done in the EA process, but this can be a critical tool in informing consultation by making sure technical information is there. There is a need to make sure First Nations are full partners in EAs – [they] should be a complement to the consultation process, *not the vehicle* (NCTFCA, p.17).

Another challenge posed by limited timelines is that it takes time to involve community members in decision making. In the words of Chief Marcel Balfour of Norway House Cree Nation in Manitoba, “It takes time to educate people and council members – time that is often not afforded by decision-makers” (NCTFCA, 2009 p. 6).

Aboriginal groups find themselves in a double bind. To refrain from engagement in the consultative processes is viewed as consent. Yet to engage is to accept the terms determined by the government. Paul Nadasdy’s analysis of power inequities within the land claim negotiation processes can be likened to the challenges inherent in crown Consultation. He could be speaking of the dynamics that have emerged around Crown consultation when he says:

If, in the context of the modern nation-state, Aboriginal people want to claim some form of control over their lands, and they wish those claims to be seen as legitimate by others, then they must speak in a language that power understands (Nadasdy, p. 236).

The language of assertion of impacts to rights wields a degree of power. However, that power does not extend to setting the rules of engagement. While the issue of unequal power in the negotiation process has been and continues to be a challenge for

Aboriginal groups, the literature points to strategies that can be employed to level the playing field. “An important element in redressing the power balance is developing a negotiation platform that is based on mutually developed and recognized goals or objectives” (Kennedy, p.275).

### **1.2.6 Integrating Traditional Knowledge into the Consultation Process**

The process of bringing Traditional Knowledge into Crown consultation processes raises a particular set of challenges. As it stands, a significant component of Crown consultation occurs within the parameters of the regulatory and environmental assessment processes.<sup>6</sup> EA and regulatory processes have been criticized for their high reliance on technical expertise, which makes it difficult for Aboriginal groups to engage effectively (Ellis 2005). In some jurisdictions, including the NWT, much has been done to make space for alternate systems of knowledge within regulatory processes. For example, in the NWT, the powers of the *Mackenzie Valley Resource Management Act* (MVRMA) to take into account the concerns of Aboriginal people are quite broad. Nevertheless, there continue to be ongoing difficulties in incorporating TK into EA processes that stem from language barriers, cultural differences and differences in value.

There is a vast literature that addresses the issue of how to ‘integrate’ traditional knowledge into decision makings, and the relative value and costs of combining traditional knowledge systems with western scientific knowledge systems (Berkes 1999 and 2009, Ellis 2005, Kofinas et al 2007). This debate touches on wide ranging issues of knowledge, power, worldview, language, and cultural and personal values. TK is not just ‘information’ but carries with it collective values and experiential understanding of the

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<sup>6</sup> A full description of how the INAC-NT region has built upon the regulatory and environmental assessment processes to meet the Crown’s duty to consult is provided in section two of this project.

land and people's relationship to it. These nuances can be missed, misunderstood, or sometimes rejected if the values differ from the dominant perspective.

Cultural worldview and value systems are embedded in Aboriginal languages (Basso 1996, Cruikshank 1998, Cruikshank 2005, Ellis 2005). Many scientific terms do not exist in Aboriginal languages. Similarly, many Aboriginal concepts do not translate easily, if at all, into English, and the western perspective. As a result, translations can be oversimplified, incorrect, or fundamentally misunderstood. Nuanced interpretation requires a high degree of skill and training. Finding an effective interpreter can be a challenge. Not having one can act as a barrier to effective integration of traditional knowledge at public hearings and community meetings.

### **1.2.7 Strategic Level Consultation**

Many Aboriginal groups hold the view that the current interpretation and application of Supreme Court of Canada decisions on consultation represent only a very minimum standard for involvement of Aboriginal groups in decision making (NCTFCA, p. 2). In a recent paper, the National Centre for First Nations Governance argues that although cases such as *Haida* and *Mikisew* highlight the need for strategic level planning, it is often absent or insufficient in scope. "Addressing land use and resource development decisions, through strategic level consultations with First Nations and the appropriate line Ministries, is a sound and practical alternative to the "death by a thousand cuts" scenario." (NCFNG 2009, p. 8).

## **SECTION TWO: CROWN CONSULTATION IN THE NWT**

### ***2.1 The Political and Regulatory Regime in the NWT***

The court decisions summarized above illustrate that the process through which the Crown can discharge the duty to consult is always context specific. An analysis of the political and regulatory regime that governs lands and resource decision-making in the NWT is therefore a critical piece of the approach developed by INAC to meet the duty to consult. Also, the analysis provides a high-level overview of the political and regulatory regime in the NWT, with a focus on INAC's role. This section sets the stage for a more detailed description of how INAC has made use of the consultative processes set out in the MVRMA, the *NWT Waters Act* and land claim negotiation Interim Measures Agreements as a basis to meet the Crown's duty to consult.

### ***2.2 Comprehensive Land and Resource Agreements***

Comprehensive Land and Resource Agreements between Aboriginal groups in the NWT and the Crown are a fundamental aspect of the land and resource regime. The dynamics of today's relationship between the Crown and Aboriginal groups has its roots in historic agreements. At the end of the nineteenth Century, the federal government's interest in the natural resource potential of the far north led the Crown to seek treaty with the Dene people in the NWT. Two historic numbered treaties were signed by the Dene and the Crown; Treaty 8 was signed in 1899, and Treaty 11 was signed in 1921. During the 1970s, the Dene and Métis of Mackenzie Valley came together to challenge the interpretations of Treaties 8 and 11. They argued that the federal government hadn't fulfilled treaty obligations. They also argued that the treaties didn't actually represent land surrender, given that at that time, the Dene people believed they were simply signing peace treaties (Fumoleau, 2004).

Official tri-partite negotiations for a comprehensive land claim agreement between the Dene and Métis, the government of Canada, and the government of the

NWT began in 1981. From the federal government's perspective, the decision to negotiate was made on a policy basis (personal communication).<sup>7</sup> In September of 1988, an agreement-in-principle was reached. However, the negotiations ultimately failed when the deadline for the Dene/Métis to ratify the final agreement passed. After the breakdown of the Dene/Métis claim, negotiations unfolded on a regional basis, giving rise to the current political and regulatory regime. In 1992, the Gwich'in of the Upper Mackenzie Delta signed the Gwich'in Comprehensive Land Claim Agreement. In 1994, the Sahtu Dene and Métis of the Great Bear Lake region concluded negotiations for the Sahtu Dene and Métis Comprehensive Land Claim Agreement. In 2005, the Tlicho Land Claims and Self-government Agreement came into effect as the first combined land, resource, and self-government agreement in the NWT. Negotiations continue in the southern part of the NWT with the Dehcho First Nation in the Dehcho region, and with the Akaitcho and the Northwest Territory Métis (NWTMN) in the South Slave Region. The Akaitcho Interim Measures Agreement (2001), the Dehcho Interim Measures Agreement (2004), and the NWTMN<sup>8</sup> Interim Measures Agreements (1996) include important provisions for the management of lands and resources in advance of signing final agreements.

### ***2.3 Resource Management Roles and Responsibilities in the NWT***

The political devolution of powers from the federal Crown to the Government of the Northwest Territories (GNWT) and to Aboriginal groups through the negotiation of comprehensive land claim agreements and land and self government agreements has

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<sup>7</sup> The Federal decision to enter into land claim negotiations was made on a policy basis. The significance of this to Crown consultation is that strength of claim analysis has not been done for Aboriginal groups within whom Canada is negotiating in the NWT. The strength of the Aboriginal group's claim forms a critical component of facts necessary to undertake pre-consultation planning and Crown consultation assessments, and is a significant policy gap.

<sup>8</sup> The NWTMN was previously referred to as the South Slave Métis Tribal Council. The IMA bears this name and is referred as such in the bibliography.

led to a unique resource management regime in the NWT. INAC, as the lead federal department in the NWT, continues to exercise province-like authorities over Crown land and resources. This includes the issuance of rights for minerals, oil and gas, surface granular materials, as well as some regulatory responsibilities and responsibility for inspection and enforcement.

Aboriginal groups are responsible for managing private lands which include a combination of both surface and subsurface rights. In 1998, *the Mackenzie Valley Resource Management Act* came into force. This act sets up an integrated resource management regime whereby public co-management boards oversee land use planning, environmental assessment and issuing permits for land use activities.

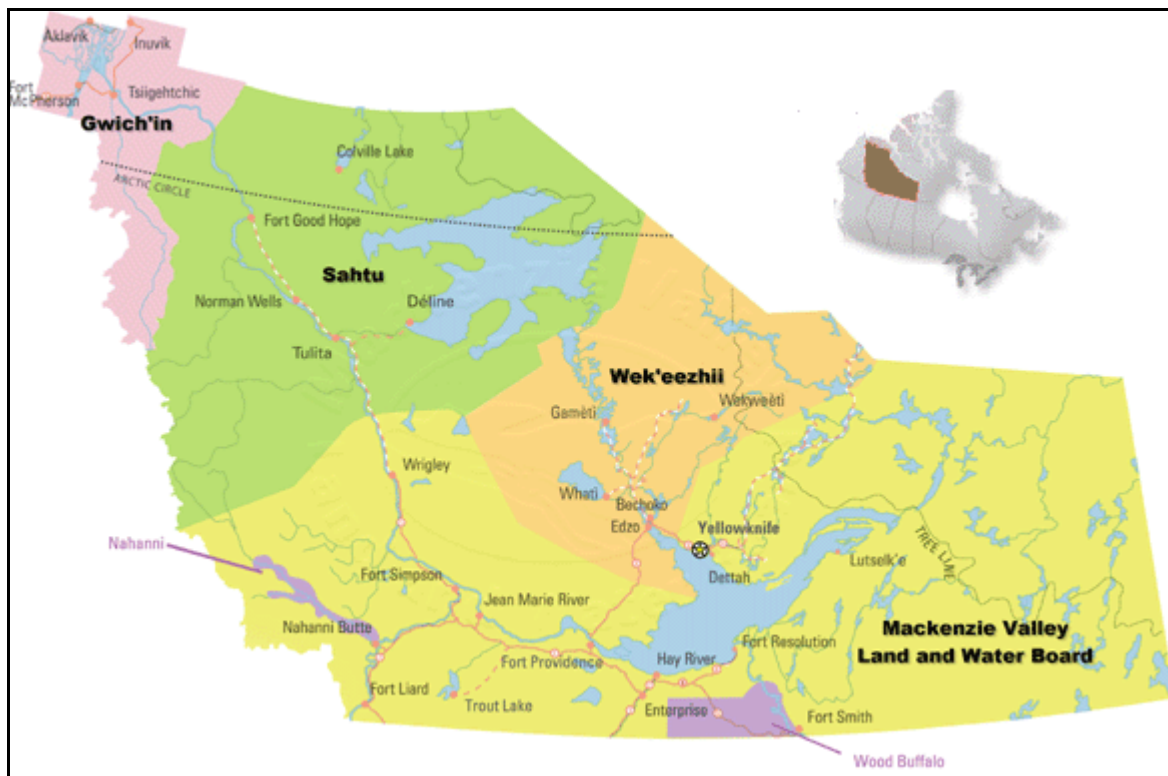
When the *Mackenzie Valley Resource Management Act* came into force in 1998, the Act provided for the establishment of a land and water board, made up of regional panels with authority to perform regulatory functions that had previously been undertaken by INAC. The Board consists of two permanent 5-member panels, the Gwich'in Land and Water Board and the Sahtu Land and Water Board, one 4-member regional panel, the Wek'eezhii Land and Water Board. The Gwich'in Land and Water Board, the Sahtu Land and Water Board and the Wek'eezhii Land and Water Board each have jurisdiction over the issuance of land use permits and water licenses in their own settlement areas. In addition to the panels above, the Mackenzie Valley Land and Water Board (MVLWB) consists of four members: two nominated by First Nations, one nominated by the GNWT and one other. The Chairperson for the MVLWB is nominated by a majority of the Board and appointed by the federal Minister. The MVLWB has three main functions:

- Issuing land use permits and water licenses in the unsettled claims area until the balance of the land claims are settled in the Mackenzie Valley;
- Processing transboundary land and water use applications in the Mackenzie Valley ; and

- Ensuring consistency in the application of the legislation throughout the Mackenzie Valley.

According to the MVLWB website, “the mandate of the boards is to regulate the use of land and waters and the deposit of waste so as to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit to the residents of the settlement area and of the Mackenzie Valley and to all Canadians” (MVLWB website). Figure 1 illustrates the jurisdiction for Regional Land and Water Boards.

All ‘above threshold’ activities require either Type A or B permits and/or water licences issued by the appropriate land and water board. Specific thresholds are set out in the Mackenzie Valley Land Use Regulations. The MVLWB is the final decision maker for Type A and Type B land use permits. The MVLWB makes recommendations to the Minister of INAC for the issuance of Type A water licences.



**Figure 1: Regional Jurisdiction of the Land and Water Boards**

The *Mackenzie Valley Environmental Impact Review Board* (MVEIRB) is a co-management board responsible for the environmental impact assessment process in the Mackenzie Valley. Pursuant to Part 5 the MVRMA, this board has been established as an independent administrative tribunal with a mandate to review development proposals that are put before it with regard to (a) the protection of the environment from the significant adverse impacts of proposed developments; and (b) the protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley. (MVRMA, s.115) The board consists of nine members, all appointed by the Minister of INAC. The chairperson is typically appointed after being nominated by the other review board members. The other eight members are appointed in equal numbers from nominations submitted by the federal and territorial governments and by aboriginal land claimant organizations.



This section has set out the general roles and responsibilities of the regulatory and environmental assessment Board pursuant to the MVRMA. The INAC-NT region has been working with the Mackenzie Valley Land and Water Board to determine roles and responsibilities to ensure the duty to consult is met, including conducting Crown consultation and determining if consultation is adequate in advance of issuing a permit or licence. The next section will address INAC-NT Region's Policy for Consultation including specific processes in place to meet the duty to consult within this context.

## ***2.4 INAC-NT Interim Approach***

### **2.4.1 Principles of INAC-NT Interim Approach to Consultation**

In February, 2006, INAC-NT Region, INAC Headquarters and legal counsel from the Federal Department of Justice worked together to establish INAC-NT Region's Interim Approach to s. 35 Consultation (P3). The approach is considered 'interim' for two main reasons. First, the Regional approach is considered 'interim' in deference to the ongoing federal Consultation and Accommodation Policy development process. Second, the majority of consultation issues arise in unsettled claim areas. Therefore, the approach was considered interim to land claims being settled. In addition, an effective approach must be responsive to the rapidly unfolding jurisprudence relating to Crown consultation.

INAC-NT does not currently have formally documented policy and procedures for consultation and accommodation. The operational requirements of the department to respond to ongoing consultation priorities outpaced the organization's ability to formally document a consultation policy<sup>9</sup>. Instead, the region has been operating according to what is referred to as 'Policy by Letter'. This section draws on relevant

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<sup>9</sup> A preliminary draft policy was written but not approved (INAC, 2009). The draft policy was used as reference in conjunction with personal communication with the Consultation Support Unit Manager from July 2009 to March 2010.

correspondence, presentations, and draft policy documents to document the principles of INAC-NT Region's approach to consultation and accommodation.

The principles<sup>10</sup> of INAC-NT's regional approach were developed to respond to the common law on Crown consultation and to respond within the operational realities of the regulatory system and the rapidly developing political context. The principles are:

1. **Uphold the honour of the Crown** - to meet or exceed the Crown's legal duty to consult with and, where appropriate, accommodate Aboriginal groups.
2. **Efficiency** - avoid duplication of existing consultation processes such as those set out in the *Mackenzie Valley Resource Management Act*, in an effort to avoid consultation fatigue and to recognize the current demands on the capacity of Aboriginal groups and government.
3. **Politically responsive** - respect agreements reached through negotiation processes such as Interim Measures Agreements (also linked to the efficiency principle, as the IMAs contain a number of consultation provisions).

These principles form the basis for the consultation processes described below. They form the foundation for the interim approach while at the same time recognizing that individual situations, where the duty to consult may arise, must be reviewed and assessed on case-by-case basis.

In addition to these foundational principles, there are also a number of key considerations that the region took into account when developing the procedural aspects of the interim approach. Key considerations included:

The interim approach is geared towards unsettled claims areas (i.e., the Dehcho and South Slave regions and the Northwest Territory Métis Nation asserted traditional territory). Generally speaking, settled claims have mechanisms to address possible

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<sup>10</sup> These principles have been drawn from a number of sources including the letter of May 30, 2007 from INAC Acting Regional Director General to Grand Chief of the Dehcho First Nation.

adverse impacts to s.35 rights.<sup>11</sup> Notably the interim approach does not include consultation efforts related to the proposed Mackenzie Gas Project.

Ambiguity exists over the issue of whether or not the institutions of public government (i.e., the land and water boards established pursuant to the MVRMA) are actually ‘agents of the Crown’. This distinction is specifically important when it comes to the MVLWB’s responsibility to uphold the honour of the Crown in issuing Land Use Permits and Water Licences. Without prejudice to future determination about roles and responsibilities, INAC has agreed to conduct Crown Consultation Assessments where required, including when the MVLWB is the final decision maker. However, this is anticipated that this arrangement may change in the near future due to current/ongoing litigation with direct implications to the INAC’s Interim approach.

The public consultation processes within MVEIRB’s environmental assessment and MVLWB’s regulatory processes are designed to elicit information about potential environmental impacts and to determine mitigation measures to address impacts. Given that Aboriginal and treaty rights are so closely tied to the land (e.g., the right to hunt, fish, trap and the right to undertake practices, traditions and customs integral to the distinctive culture of the Aboriginal group), INAC’s NT-Region considers these consultative processes to be well suited to elicit necessary information to assess the nature and seriousness of potential adverse impacts on Aboriginal or treaty rights (P3). For example, the guiding principles for environmental impact review processes set out in Part 5 of the MVRMA include:

- s. 115 (a) The protection of the environment from the significant adverse impact of proposed developments; and

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<sup>11</sup> The issue of the scope and content of the duty to consult in areas covered by Land Claim Agreements is currently before the Supreme Court in *Little Salmon/Carmacks v. Yukon (Minister of Energy Mines and Resources)*, 2007 YKSC 28

- (b) The protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley.

Information and/or assertions of negative impacts to asserted or established Aboriginal or treaty rights made through these processes can form part of the consultation process and may be taken into account for the purposes of Crown consultation. Depending upon the circumstances of each case, Crown consultation may be required before during and after the EA and regulatory processes.

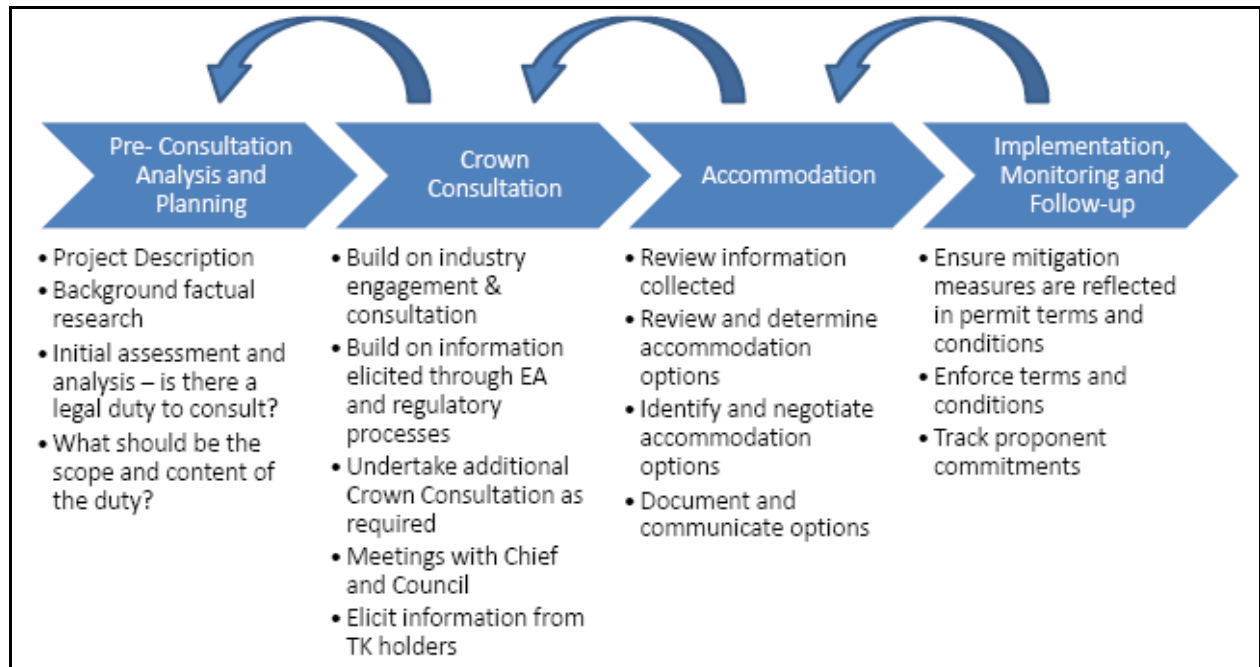
### **2.4.2 Consultation Support Unit**

The Consultation Support Unit (CSU) was established in 2008 to address Consultation capacity pressures. Created in response to recommendations from the INAC regional Consultation Working Group (now called the Consultation Advisory Group), the CSU functions as a corporate service-type division to provide support, and direction to regional directorates. The driving purpose of the unit is to assist the region to undertake s. 35 Crown consultation activities, if and when the duty to consult arises. The Manager and the Consultation Advisors provide subject matter expertise in relation to operational matters involving s. 35 Crown consultation (P3).

### **2.4.3 INAC-NT Interim Approach Consultation Processes**

This section sets out the general framework for the interim approach to Crown consultation. The consultation processes are conceptualized within four general steps: 1) Pre-consultation Analysis and Planning, 2) Crown Consultation, 3) Accommodation, and 4) Implementation, Monitoring and Follow-up. Frequently conceptualized as a linear process, in practice the Consultation process is iterative. Pre-consultation analysis and planning may reveal a lack of information about potential impacts to Aboriginal and Treaty rights beyond general assertions of infringement. In this instance, consultation would be required *before* any significant analysis of the scope or content of the duty to consult could be done. Similarly, an analysis of potential mitigation could lead to additional Crown consultation to negotiate mitigation measures. Figure 2 shows the

four steps to conduct Crown consultation. A more detailed description of each step is below.



**Figure 2: INAC-NT Interim Approach Consultation Processes**

## Step 1: Pre-Consultation Analysis and Planning

The first step in determining a consultation plan is to gather information about the proposed project. The majority of projects that the Consultation Support Unit (CSU) currently deals with are land use permits and water licences, quarry permits, and leases. Some of the information may be available in the proponent's application package. Background factual research is required to determine:

- The geographic location of the project and if it falls within one or more Aboriginal group's traditional asserted territories;
- The anticipated impacts on land and water of the project and any mitigation measures the proponent has already identified;
- Any assertions by Aboriginal groups of impacts to Aboriginal and treaty rights;
- The record of consultation/community engagement undertaken by the proponent with Aboriginal groups thus far;
- Information elicited through previous consultation efforts; and
- Draft land use plans.

At this point, a preliminary assessment of the scope and content of the duty to consult may be undertaken. Or, if there is not enough specific detail about the infringement, further communication may be required to elicit additional information from the proponent and/or the Aboriginal groups.

As determined by *Haida* and *Taku*, in theory there are two factors to consider in determining the scope and content of the duty to consult: 1) the strength of the Aboriginal groups' claims, and 2) the seriousness of the potential negative impacts. The scope of the consultation plan should be proportionate to these two factors. At the lower end of the spectrum notification by letter may be adequate, whereas at the higher end, a robust consultation plan would be required.

In practice, all First Nations groups in the NWT have established treaty rights.<sup>12</sup> However, not all parties are in agreement about what the established treaty rights are. A strength of claim analysis is necessary to determine the scope and content of consultation when:

- The nature of established rights is disputed (e.g., interpretation of historic treaty rights);
- The nature of asserted rights is disputed (e.g., economic development);
- The extent of consultation/accommodation is disputed (how much is enough?); and
- Two or more Aboriginal groups claim rights in the same area.

A lack of strength of claim analysis makes it difficult to properly assess the scope and content of the duty. Historic, archaeological, or legal research that constitutes the ‘facts’ within a strength of claim analysis may not exist. Aboriginal groups may not have this information themselves, nor the capacity to hire people to do the research or Traditional Knowledge studies. This type of work requires time and money. If the work has not been done in advance, it is not realistic to think that it can be done within the limited regulatory time lines. Furthermore, there is no dedicated money to have strength of claim analysis work done at this point.

## **Step 2: Crown Consultation**

INAC’s record of consultation may take into account any consultation undertaken by industry, and other third parties. In the case of MVLWB regulatory

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<sup>12</sup> The case of Métis rights in the NWT is not so clear. Some Regional Dene and Métis groups have joined with the Dene to sign comprehensive and claim agreements (e.g., Sahtu and the ongoing Acho Dene Koe community based negotiation). In the South Slave, Canada is negotiating a land and resource agreement with the Northwest Territory Métis Nation. Currently, Canada does not recognise the North Slave Métis Alliance as a group that officially represents Aboriginal rights holders (P3).



processes, this includes consultation done by a proponent in advance of submitting their application for a water licence or land use permit. The record of consultation will also take into account any comments or assertions made during the consultative processes within the EA and public review for the regulatory processes. If required, additional chief and council meetings, or meetings with the community or traditional knowledge holders will be conducted by INAC. If consultation was undertaken to gather information for pre-consultation planning, Step 1 will be repeated.

### **Step 3: Identify or Negotiate Accommodation**

The next step in the consultation process is to review all information collected, to jointly determine accommodation options, and to negotiate accommodation options with the Aboriginal groups. In instances where potential impacts cannot be mitigated, any infringements should be weighed against the public interest of the project. The reasons for any decisions should be documented and communicated to the Aboriginal groups involved.

### **Step 4: Implementation, Monitoring and Follow-up**

The final step in the consultation process is to implement accommodation measures. Implementation may include commitments made by a proponent during pre-consultation to make alterations to the project design. If so, a review of the project application should be undertaken. Implementation also includes a review of the draft permit conditions to ensure mitigation measures are accurately reflected.<sup>13</sup> For projects that go through EA, and where adequacy of consultation is assessed based on mitigation measures set out in the Report of EA, implementation requires ensuring that mitigation

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<sup>13</sup> The issue of whether or not the MVLWB would provide an opportunity to review the draft permit conditions in advance of issuing the permit has been a point of discussion between INAC and the MVLWB. It is INAC's view that this is an essential step in assessing if the duty has been met. To date, circulation of draft permits and licences has been inconsistent. Discussions are ongoing between INAC and the MVLWB to determine procedures.

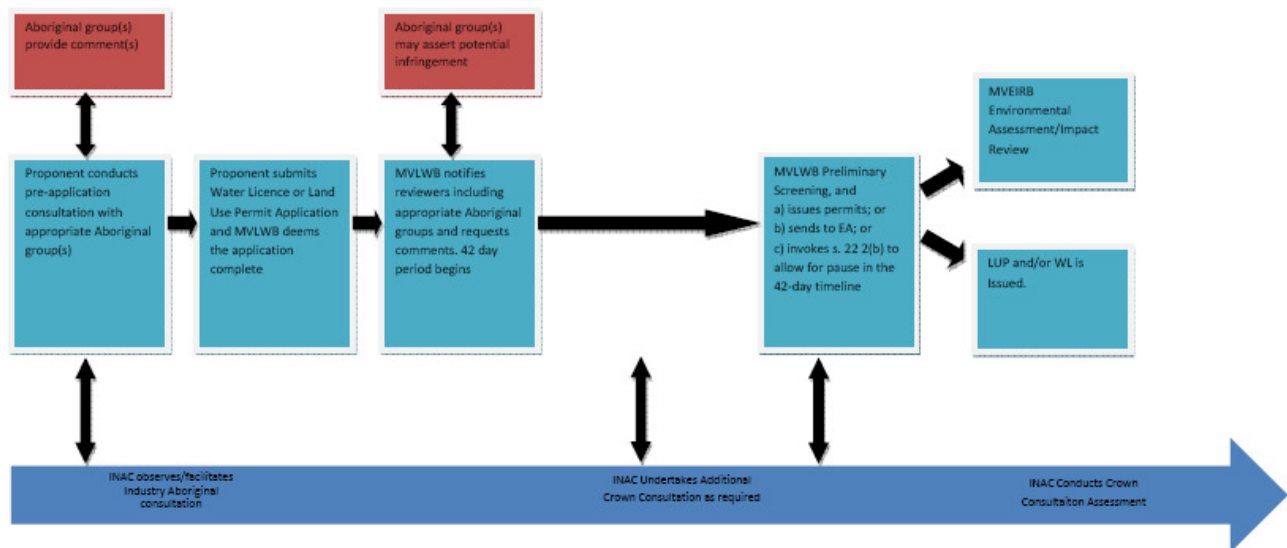
measures are included in the terms and conditions of the licences and permits when the application returns to the regulatory phase (See below.)

#### **2.4.4 Crown Consultation within Regulatory and Environmental Assessment Processes**

The previous section looked at the conceptual model for consultation. This section describes the role of the Consultation Support Unit within the context of the MVRMA regulatory and environmental assessment processes. Currently, the majority of Crown consultation efforts undertaken by the Consultation Support Unit are directed towards authorizations issued within the MVRMA regulatory process (i.e., Land use permits and water licences).

The Consultation Support Unit will become involved in the regulatory process if an Aboriginal group asserts a potential impact to Aboriginal and Treaty rights. This may occur at any time during the regulatory or environmental process: in the pre-application consultation between industry and Aboriginal groups, during the 42 day public review period, or during the Environmental Assessment if the *MVLWB* or other parties refer the project to the *MVEIRB* for an environmental assessment. Figure 3 illustrates how the CSU has built upon the regulatory and Environmental Assessment Process to develop an approach to meet the Crown's duty to consult in the NWT.

### Crown Consultation within the MVRMA Regulatory Process



**Figure 3: Crown Consultation within the MVLWB Permitting Processes**

**NB: A LARGER VERSION OF FIGURE 3 WILL BE INSERTED IN THE FINAL VERSION**

**Table 3: Summary of INAC-NT's challenges to achieving meaningful Crown consultation in the NWT**

A lack of a consistent position as it relates to Aboriginal rights and lack of strength of claim analysis.
Differences of expectations of Aboriginal groups regarding consultation & accommodation.
Differences of view between Aboriginal groups and INAC about issues relating to interpretation of historic treaties, Aboriginal title, and associated access benefits.
Significant issues of capacity (human and fiscal resources) among Aboriginal groups. There is currently no real dedicated funding for communities to access for consultation capacity, although other funding sources are utilized and made available on an ad hoc basis. The issue of capacity is further compounded by frequent failure of Aboriginal groups to meet INAC's internal financial reporting requirements leaving them ineligible to receive funding (i.e., being placed on the suspended funding list).
Limited internal capacity. As noted above, the Consultation Support Unit was established in 2008 to provide support and direction to line staff on consultation and accommodation. The CSU is currently funded using temporary resources for an activity which will continue on in perpetuity for the Crown.
An absence of completed land claims and land use plans. Regional land use planning processes provide a broad process for input from Aboriginal groups. They set out where development is and is not appropriate, based in part on traditional land use areas. Completed land use plans give strategic direction to proponents and the land and water boards about future development.
There are policy gaps on a number of issues such as strength of claim analysis.
A lack of clarity regarding roles and responsibilities between Indian and Northern Affairs Canada and the Mackenzie Valley Land and Water Board, specifically with regards to the requirements to determine if consultation had been adequate in advance of issuance of a permit where the Mackenzie Valley Land and Water Board is the final decision maker.
A lack of understanding amongst some proponents about the requirements and benefits to consult with Aboriginal groups and lack of sensitivity regarding some concerns (e.g., sensitivity around sacred or sensitive areas).

## **SECTION THREE: SCOPING OUT A DEHCHO CONSULTATION WORKING GROUP**

The Consultation Support Unit understands the value and importance of a proactive approach to Crown consultation, including information sharing and relationship building. Now that the Consultation Support Unit has been established and staffed, a priority for the next fiscal year is to ‘step up’ engagement efforts with Aboriginal groups in the Dehcho region. Very little engagement has been done thus far, due to lack of resources, both human and fiscal. Given the lack of attention to date on pro-active engagement, coupled with a recognition of the value of it, the Consultation Support Unit has set the objective of setting up a consultation working group in the Dehcho region. The final component of this project addresses the question of *how* to set up a Consultation Working Group in the Dehcho region.

Drawing on the literature reviews, and taking into account the operational context, and based on findings from the interviews, this section sets out to

1. Identify potential challenges and strategies
2. Considers the purpose of a Dehcho Consultation Working Group
3. Considers the structure of a Dehcho Consultation Working Group
4. Sets out a brief implementation strategy

Before turning to the case study, a more detailed overview of the Dehcho region will be provided. A brief description of a consultation working group set up in the Akaitcho region will also be provided.

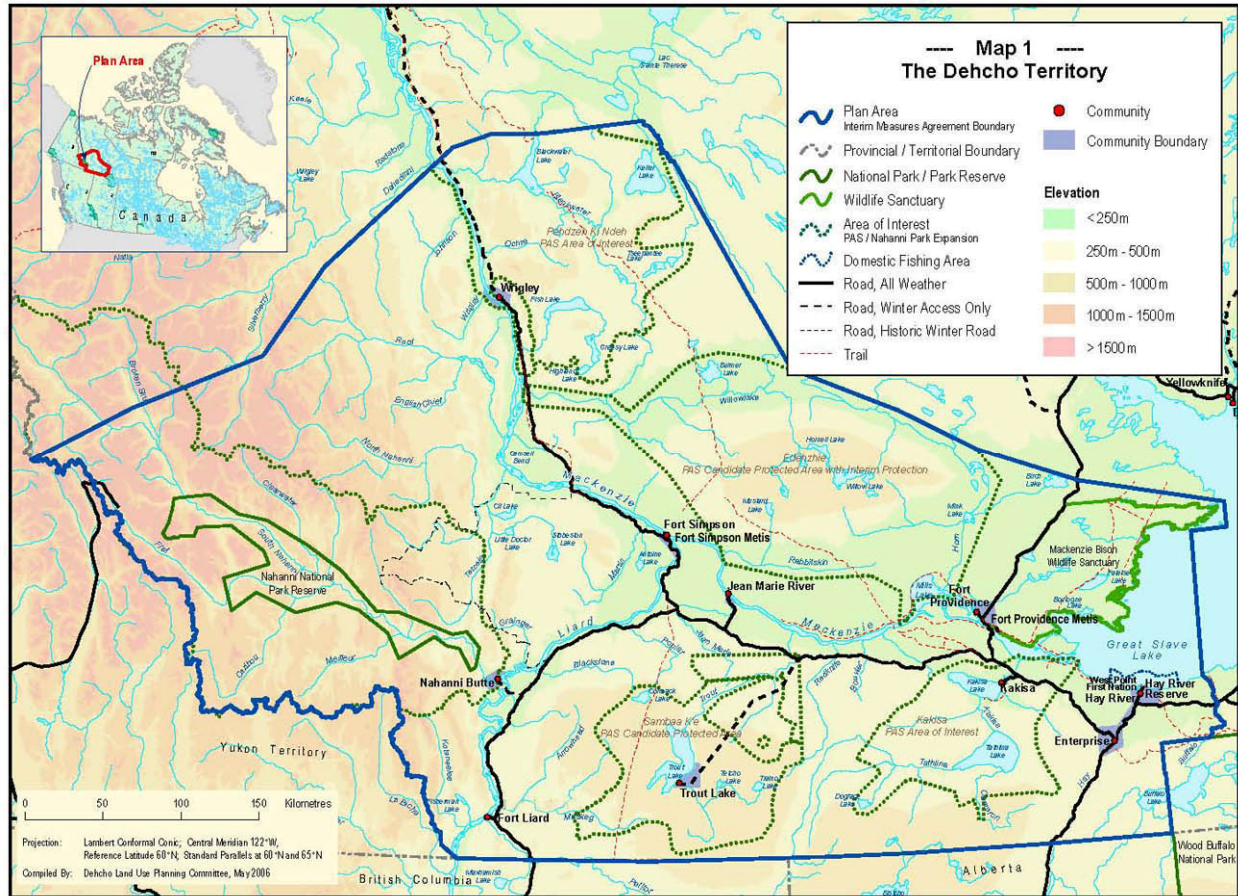
The recommendations included in this section are derived from the literature review, policy documents, personal observations and views expressed in interviews. A summary of recommendations is provided in Table 5.

### ***3.1 The Dehcho Region***

The Dehcho region is located in the southwest corner of the NWT, spanning an area of over 200,000 square kilometers (see Figure 4). Distances are vast and transportation infrastructure between communities is limited. All season roads do not exist for several of the communities. Where scheduled flights exist, travel by air is expensive. The Dehcho is composed of thirteen local Aboriginal groups in the region, residing in eleven communities. They groups are listed below with the community names in brackets:

- Acho Den Koe First Nation (Fort Liard)
- K'atlodeeche First Nation (Hay River Dene Reserve)
- Ka'a'gee Tu First Nation (Kakisa)
- Nahanni Butte Dene Band (Nahanni Butte)
- Deh Gah Got'ie Dene Council (Fort Providence )
- Jean Marie River First Nation (Jean Marie River)
- Fort Liard Métis Local (Fort Liard)
- Liidlíi Kue First Nation (Fort Simpson)
- Pehdzeh Ki First Nation (Wrigley)
- Sambaa K'e Dene Band (Trout Lake)
- West Point First Nation ( Hay River)
- Fort Simpson Métis Local (Fort Simpson)
- Fort Providence Métis Local (Fort Providence)

There are challenging logistical implications of setting up a working group that may include up to thirteen groups spread over great distances that include: prohibitive costs, unreliable transportation, lack of facilities to meet, etc..



**Figure 4: Dehcho Region**

[http://www.dehchofirstnations.com/members\\_map\\_dehcho\\_territory.htm](http://www.dehchofirstnations.com/members_map_dehcho_territory.htm)

### ***3.2 The Land Claim Context - Dehcho Process***

After the NWT Dene and Métis negotiation process fell apart in 1990, Canada agreed to negotiate on a regional basis with Aboriginal groups in the NWT. Canada, the GNWT and the Dehcho First Nations (DFN) (the regional representative body for Aboriginal groups in the Dehcho region) began to negotiate a comprehensive land, resource, and self-government agreement in September 1999. Since that time, important milestones have been reached including the Deh Cho Framework Agreement and Interim Measures Agreement (IMA) in 2001, and an Interim Resource Development Agreement (IRDA) in 2003. According to DFN, the intention of the Dehcho process is to

“produce a final agreement which will achieve certainty by clarifying and building upon Treaties 11 and 8” (Dehcho Process resolution 2008). The Dehcho process is notably different from other comprehensive land claim negotiations in that “the Dehcho Proposal rejected Canada’s Comprehensive Land Claims agreement model based on land selection as a means of achieving certainty and instead offered an agreement with Canada which would achieve certainty through shared stewardship of the whole Dehcho territory” (Dehcho Process Resolution 2008). The Dehcho’s approach to negotiations is rooted in a strong belief in their inherent sovereignty over the region. This view is reflected in the Dehcho Dene Declaration of Rights, which has been attached in Appendix IV for illustrative purposes.

The relationship between Canada and the Dehcho has been a difficult one. The difficult legacy includes ongoing disagreements over the intent and interpretation of agreements, including Treaties 8 and 11. While the scope of this project does not permit full exploration of this history, or the nuances of disagreements over interpretation, understanding the historic and contemporary relationship between Canada and the people of the Dehcho is contextually important. The process and substance of the negotiated agreements such as Treaties 8 and 11, the IMA, the IRDA, and the Dehcho Land Use Plan is at the heart of the process of reconciliation in the Dehcho. The legacy of these agreements sets the stage for Crown consultation today.

INAC-NT’s interim approach to consultation respects the consultation provisions agreed to in the Dehcho IMA. The IMA is also considered by INAC to be a form of accommodation to assertion of Aboriginal rights. However, the IMA was signed prior to the Supreme Court of Canada *Haida* and *Taku* decisions, and it was not intended to address Crown consultation. From INAC’s perspective, the intent is to use the consultation provisions in the IMA to find practical ways of consulting with communities in the Dehcho Region. Appendix III provides key provisions from the Dehcho IMA pertaining to Crown consultation.



### ***3.3 The Akaitcho Consultation Working Group as a Model***

The majority of Crown consultation issues emerge in the two unsettled claim areas of the NWT, the Dehcho and the Akaitcho. INAC's interest in setting up a consultation working group in the Dehcho is, in part, due to the perceived successes of a similar initiative in the Akaitcho region. The Akaitcho Consultation Working Group was established in 2007 to deal with consultation processes and to improve working relations with the Akaitcho First Nations groups. Consideration of the Akaitcho Consultation Working Group (ACWG), in terms of the group's purpose, how it was set up, and how well it functioned to meet the needs of all parties can provide valuable insight moving forward in the Dehcho. Lessons learned from the ACWG experience can be applied to the proposed Dehcho Consultation Working Group. Interviewees who had firsthand knowledge with the Akaitcho Consultation Working Group were asked to reflect on their involvement in that group.

### ***3.4 Identification of Potential Challenges***

The seven interviews identify a number of challenges that one might expect to encounter whilst establishing a Dehcho Consultation Working Group. The challenges have been organized under a number of themes below.

#### **3.4.1 Differences of interpretation of accommodation for Aboriginal Title**

INAC and the Dehcho have radically different views on Aboriginal title, the degree to which title has already been accommodated through negotiation, and how title should be acknowledged and accommodated through consultation. This theme emerged repeatedly in interviews, and is a momentous challenge. It is particularly problematic in the NWT where asserted Aboriginal title has never been acknowledged as a basis for entering into negotiations. As noted earlier, the federal position is that negotiations are on a policy basis, and that the signing of Treaties 8 & 11 extinguished Aboriginal title. One federal official explained that

...in the Dehcho they really do view their heritage land as being their land. It really is their land and they mean it. So when we come in and we have our ways of administering land, managing crown land...[this difference in perspective] will be one of your biggest problems. [You will be] coming up against the interpretation of Treaty and how they view that. How they didn't give up the land, thanks very much, when they signed the Treaty. And there's no easy answer to that (P1).

Another official echoed this and noted an expected challenge:

The very specific issue that drives Kakisa will come up in this working group: the Dehcho's concept... that accommodation for their asserted title [is] fundamental to moving on. And [in contrast] the federal positioning that....we've reached accommodation through a number of means, particularly the interim measures. That's a raw and sore point for [both groups] (P5).

The operational challenges of determining functional working relationships despite these fundamental philosophical differences are formidable. According to one individual, finding workable ways to agree to disagree is the only way forward. It was noted that

these [differences of perspective] need to be taken head on in the working group. You can't shy away from them. A certain amount of the working group's time has to be given to putting these contentious and raw issues on the table and talking through them regardless of the difficulty...We're not going to get beyond them by ignoring them (P5).

....

I think we have to be aware that like the Akaitcho working group [INAC] is going to probably hit a wall to agree to disagree on some of the fundamental interpretative issues of the common law (P5).

There are two obvious ways to respond to this challenge. The first is to ensure that the working group provides a forum through which these issues can be addressed. Some practical examples of how that this can be achieved are through development of

the Working Group Terms of Reference, bringing in negotiators from both teams to provide a historic explanation, a neutral facilitator, etc.). This view was expressed as follows:

[You should] engage other federal players, like negotiators, for help in explaining how we got here and what it means (P5).

The second strategy to deal with radically different perspectives, specifically about issues of title, is to be prepared for when these issues come up with clear and consistent messaging. Federal officials must take the time to know the history, and be prepared to acknowledge differences in perspective, and clearly articulate the federal position and the reasons behind them. Attention to these differences and providing a satisfactory way for all parties to proceed, despite fundamental differences, will require a delicate approach and deft facilitation skills.

### **3.4.2 Lack of trust**

Trust is a fundamental building block to a good working relationship. In a recent meeting with a new Chief and Council, the Chief told the INAC group that there were many historic reasons not to trust the group, but that given it was a new group of people sitting at the table, until such a time that there was a reason not to trust, that he would be open to working together. The Chief's attitude that so far as there was no reason *not* to trust on an individual level, that a working relationship can proceed, is probably the most that INAC can hope for at this time. However, it highlights the fragility of the trust relationship and the need to be responsive and honourable on a personal level at all times.

This is a tough one. This is a tough one. I think [setting up the working group] is a good thing but you will have challenges. It comes back to the same old piece of advice – establish relationships with the communities and get out there a lot and make yourself known and it will take time. It will take time. But over time they'll be willing to work with you, I think (P1).

Responses to this challenge include building on the relationships that others from the department have already established in the community, spending as much time as possible in the community, and persevering on a personal level.

### **3.4.3 On-going communication with Main Table negotiations**

There are important interconnections between the negotiation processes that deal with accommodation on a project by project basis through Crown consultation, and the negotiations that deal with accommodation to asserted Aboriginal title at the Main Negotiation Table. Challenging issues in one area have the potential to impact the other.

The more work that you're able to do with the Consultation Working Group and the better it functions, the less time negotiators have to hear about issuing of interest on crown land at our table...That allows us to proceed with negotiations rather than dealing with every interest that's issued within the region. This is an issue for most tables so I expect that well functioning Consultation working groups will alleviate much of this discussion and place the issue where it can actually be dealt with (P2).

We try to keep [consultation and negotiation] separate...and it's not easy depending on the size of the project, and where the project is....We will be looking at land selection fairly shortly, probably within a year [at the Acho Dene Koe table]. And you can bet that we'll probably want to be a little closer to you in understanding what other permit applications are out there. But as a general rule we try and keep those sorts of operational issues away from the Table (P1).

Main Table federal negotiators are strongly motivated to make progress at the negotiation table. Although some federal negotiators may recognize the implications of case-specific consultation files to the Main Table, other negotiators may be less attuned to what is happening on the ground in the region. It may prove to be a challenge to ensure that federal negotiators are cognizant of the need for a close working relationship and are supportive of the establishment of the Consultation Working Group.

Information flows between the negotiation table and case specific consultation issues are crucial. Strategic political information flows down from the negotiation table, informing internal understanding of positions etc. Consultation case-specific information flows up, alerting negotiators to an issue that could slow or stall the table if not dealt with. The consultation working group has the potential to provide a place where specific issues can be worked out, away from the political sensitivities of Main Table negotiations. Furthermore, Crown consultation is by nature ‘with prejudice’, meaning that what is said will form the record, and can be held up in court. Negotiations, on the other hand are by nature ‘without prejudice’, meaning what is said is off the record.

***Recommendation 1: INAC should ensure that communication processes between the working group and the negotiation table are explicitly set out, either formally through the working group terms of reference or, less formally through a written administrative understanding.***

#### **3.4.4. Cultural differences, preferences, practices and values**

Cultural differences, preferences, practices and values have the potential to become a barrier to successful establishment and functioning of the Dehcho Consultation Working Group if not recognized and accommodated. One official spoke from personal experience of what can go wrong when cultural differences are not taken into account.

We came once in late June into Ft. Simpson and tried to [meet] on the Mackenzie Gas Project. [We had] a terrible turnout even though we had a big feast, lots of food...People would come in and eat and then leave of course because there's lots of fishing time left and it's a beautiful June evening....so don't do it in June! ...We would often try and schedule our meetings at times... when the Winter Road was out – when they're stuck in the community and there's nothing better to do, then they'll come to your meeting (P1).

Sensitivity to the community preferences, values and practices must be taken into account when planning meetings. This includes attention to:

- Seasonal rhythms such as hunting, fishing, trapping
- Community celebrations and festivals
- Annual assemblies
- Cultural practices surrounding deaths
- Importance of seeking counsel from Elders

### **3.4.5 Lack of capacity at community level and within INAC**

Capacity within the community to engage meaningfully is an inevitable barrier to a fully functioning Dehcho Consultation Working Group. Community capacity challenges include a lack of dedicated staff to deal with land and resources issues, numerous other important and competing issues demanding attention, turnover in Chief and Council, community social problems, etc. It will be a challenge to ensure that the working group does not add to capacity issues, and that it is viewed at the community level as an avenue to improve a community's ability to engage in meaningful consultation.

We need to underscore the importance of [the working group to their work. [Consultation requirements] do affect their work and despite all of our busyness [the working group] is pretty key and they need to fit it in (P5).

Political tensions internal to the Dehcho region and Dehcho communities should also be anticipated. The regional organization and individual communities do not always speak with one voice. Differences in priorities, positions and political strategies between DFN and individual First Nations and Métis locals can lead to friction and confusion. One interviewee explained how this can impact on developing a consultation relationship.

Families get going on one another so the chiefs turn over...so that where you think you may have a consultation process you almost have to start all over again when they change their chief and their councilors....You'll think you have a good relationship with the community and then all goes to hell in a hand basket (P1).

Aboriginal groups are not alone in shortcomings in capacity to engage. Capacity, in terms of funding and staff, is also an issue internally within INAC. Currently there is no funding allocated to establish and run a Dehcho Consultation Working Group.

Current resources are already frequently insufficient to fund case-specific consultation meeting costs properly.

Sharing of resources within INAC and between federal departments is a logical response to limited capacity. This can include travel costs (e.g., charter costs), and sharing of expertise through increased communication. Limited funding demands creative collaboration, and communication between communities and between government agencies.

Piggybacking and careful planning to take advantage of people's existing schedule is one of the only techniques we have in a territory of 40,000 people (P5).

***Recommendation 2: INAC should adequately resource the Dehcho Consultation Working Group.***

**Table 4: Summary of potential challenges and strategic response**

Potential Challenge	Strategic Response
Aboriginal groups perspective that Aboriginal title should be accommodated through Consultation, including economic measures	Recognition that difference of perspective exists - try to find ways to 'agree to disagree'  Draw upon, or develop as needed, consistent federal messaging (e.g., consultation is not a rights recognition process. Consultation is a process through which accommodation can be made to ensure that recognized rights are not impacted. Economic issues are dealt with at the Main table. And so on, as required)
Aboriginal groups' perspective that IMAs are not accommodation measures	Bring in negotiators from both teams to provide perspective on agreements
Lack of Trust	Ongoing presence in community  Consistency of effort  Ensuring commitments (no matter how

	small) are met
Cultural differences	<p>Take care to use appropriate language</p> <p>Work with the communities to determine appropriate times and formats for working group meetings</p> <p>Cross Cultural training for non Dene federal employees</p>
Lack of capacity at the community level	<p>Hold workshops in the community to build understanding about Crown consultation</p> <p>Ensure that the Working Group is perceived to lighten the consultation work load</p> <p>Address community capacity in the working group terms of reference</p> <p>Work collaboratively with community members whenever possible (e.g., planning a meeting, etc.)</p> <p>Provide information about existing funding sources (e.g., Interim Resource Management Assistance Program, Cumulative Impacts Monitoring Program)</p> <p>Lobby internally for consultation capacity funding</p>
Lack of Capacity within INAC	<p>Lobby internally</p> <p>Share information and costs with other divisions and departments (charter costs, TK studies, etc.)</p>

### ***3.5 Purpose of the Dehcho Consultation Working Group***

The driving imperative for a Dehcho Consultation Working Group is to provide a forum through which INAC staff and representatives of Dehcho communities can develop a shared understanding of the processes through which Crown consultation occurs. Grounded in the legal imperative to ensure the Crown's duty to consult is



discharged, a Consultation Working Group can provide a place where operational logistics can be discussed and addressed on a pragmatic level. Aspects of this overarching purpose include: 1) education and awareness 2) enhancing capacity 3) developing an understanding of each other's perspectives, 4) leveraging involvement from other parties, and 5) developing and maintaining relationships and trust.

### **3.5.1 Education and Awareness**

A key purpose to the proposed Dehcho Consultation Working Group is to improve community understanding about processes for the issuance of land use permits, water licences, quarry permits, leases and licences of occupation etc., including the consultation processes developed within these. Reflecting on the role of information sharing within the Akaitcho Consultation Working Group, one federal official noted:

At the Akaitcho Consultation Working Group meeting there was a presentation on inspection enforcement...from the INAC operation district office in Yellowknife. [The staff member] gave a very detailed PowerPoint presentation on how his office does his work. That was of importance to the Akaitcho participants because they wanted to know more about what we do, how we do it and what our responsibilities are, who directs us, how this fits in with legislation enforcement, how much what we do may be subjective or objective, how much discretion we have (P4).

There is also a wide range of degrees of awareness about Crown consultation within communities. In some communities, the leadership is highly mobilized to participate in the regulatory process to ensure potential impacts to Aboriginal and treaty rights are known to the Crown or to seek recourse with the courts if they feel consultation is not adequate (e.g., Nahanni Butte Dene Band for the former, and Ka' a' Gee' Tu First Nation for the latter). In contrast, other Dehcho communities rarely or never assert potentially adverse impacts on Aboriginal or treaty rights through the MVLWB public review process (e.g., Jean Marie River First Nation).

There is a disparity in community understanding of the work that the CSU does, and the potential to work together:

Other communities still don't know that [the CSU] is out there and it would be a good thing if they did. They would know how to work the system a little bit better on the government side....They definitely see that government has a role in consultation and are wondering "Well, when are you going to start consulting, government?" (P1).

Without further engagement and discussion within individual communities, it is difficult to ascertain levels of understanding, and to identify the reasons communities currently do or do not engage in MVLWB consultation processes, and understand why some communities do not raise concerns or assertions about potential impacts to Aboriginal or treaty rights. There are a number of possible reasons. It could be the community has no concerns. It could be a lack of understanding that INAC is highly involved with consultation related to the MVLWB processes to discharge the Crown's duty. It could be a lack of capacity to engage in the processes. It could be a philosophical difference in perspective on the appropriateness of the regulatory and EA process for Crown consultation, and so on.

A main purpose of the Dehcho Consultation Working Group is to raise awareness and understanding at the community level and within INAC about precisely these challenges and issues. The Dehcho Consultation Working Group should function as the place to deepen all the parties' understanding and awareness, and fulfill information needs. The exact information requirements need to be determined by the Dehcho Consultation Working Group, and may include information about government process, government contacts, INAC's consultation processes, and community views and interests about consultation preferences.

### 3.5.2 Enhancing Community Capacity

Bringing Dehcho Communities together in a Consultation Working Group has the potential to provide a forum to share views, and explore solutions to issues that are common to the region as a whole. Where capacity is limited at a community level, finding more efficient ways of achieving community interests is important. The working group can potentially provide a much needed 'economy of scale' that small communities deal with when working with large numbers and complexity of issues, limited staff, and limited expertise.

If we do it right, this should supplant the need for some of the other meetings and some of the other time spent on reviewing the regulatory system...or reviewing court cases, or running around trying to achieve consultation interests through other routes....If we understand each other better....we should be able to lessen the workload in consultation. Because right now there's a lot of duplication; there's a lot of extraneous activity; there's a lot of heavy lifting of light objects going on...when it comes to addressing the interests of communities. And, I don't think it needs to be that way (P5).

A working group can also be the catalyst to bring communities together where there is shared interest or a common challenge. One interviewee noted:

If communities do share a common interest, respecting the issuance of an interest, they may find it beneficial to work together. There is often strength in numbers (P2).

Community capacity building should be considered as a fundamental purpose of the working group and considered at all levels, including the structure, and operations. The following quote provides an example of how this might play out:

I think it's worthwhile trying to encourage capacity building when going out to the communities and holding working group meetings. Ask the Aboriginal groups if they might have some junior people who would like to come along and learn more about what is being discussed. It is often difficult to connect with people in the

communities so the more people who are aware of the issues, the more likely your working group will continue function. It would be helpful if you can call a community and find someone who is familiar with the process you are engaged in. (P2).

### **3.5.3 Leveraging involvement from other parties**

Achieving meaningful Crown consultation is a challenge faced by government and Aboriginal groups across the country. Bringing in outsiders who deal with consultation issues in another jurisdiction (i.e., government officials, Aboriginal groups, or industry) can provide a broader perspective. Learning together from outsiders can also help build common understanding among working group participants.

Have outside facilitators, trainers, presenters come to the group. Part of [the challenge] with the Akaitcho Working Group is that it was us against them, as opposed to us and them...If you got someone to come, say from a BC First Nation talking about their perspective it might lighten the load a bit in terms of us against them... [It needs to be] us *and* them - finding our way through the world together (P5).

Bringing in outsiders has the potential to lessen a potentially antagonistic and adversarial environment.

### **3.5.4 Developing and Maintaining Relationships & Trust**

A common theme to all interviews was that the fundamental purpose to the proposed Dehcho Consultation Working Group would be to develop relationships and build trust amongst participants. "It's all about the relationship and beginning to understand each other's view point" (P5).

Another staff member commented on the delicacy of building and retaining trust, given the inherent power imbalances.

The tricky thing with a working group is that you need to be able to trust each other...you need to put some trust on the table and building trust takes time and patience .... this means you have to be prepared to listen to what you don't necessarily want to listen to or you might

not otherwise have the opportunity to hear. [You have to] try and argue it out and yet sometimes what happens outside the room affects what happens inside the room – litigation is one example as it can make it difficult, very difficult in some cases for government to work in a collaborative capacity in one forum while it is engaged or put on the defensive in an adversarial capacity in another forum (P4).

***Recommendation 3: A Terms of Reference that sets out the purpose of the proposed Dehcho Consultation Working Group should be jointly developed by the parties.***

***Consideration should be given to:***

***Education and awareness***

***Enhancing community capacity***

***Developing and maintaining relationship and trust***

### ***3.6 Structure of the Working Group***

The structure of the proposed Dehcho Consultation Working Group will ultimately shape and inform the quality of the interaction amongst participants. The Akaitcho Consultation Working group was characterized ‘a strong federal model’ by one participant. Chaired by the Manager of the Consultation Support Unit, agendas were developed collaboratively with input from all parties. One interviewee noted that ideally, INAC should be seeking to

design a working group set up which allows a certain independence of input – significant input by all the actors so that it’s not just top down, everybody has the chance to and shape the issues and have their issues heard...to contribute meaningfully to the dialogue at hand (P4).

There are a number of design elements that can support meaningful participation of all representatives, despite the realities of inequities in capacity. These include agreeing upon ground rules, jointly determining a terms of reference, etc.

#### ***3.6.1 Representation***

The question of representation and participation in the proposed working group is a key consideration. There is a fundamental discord in INAC’s consultation relationship

with communities and DFN, the Dehcho regional Aboriginal organization. On one hand, INAC has a consultation relationship with DFN, by virtue of the fact that INAC considers the IMAs as both a consultation mechanism and accommodation measure and that the DFN are the signatory to the document. On the other hand, INAC considers the communities, specifically, the Chief and Councils, to be the official representative bodies of the rights holders. This dichotomy must be addressed:

No one should shy away from the fact that [that's] an issue. And it's a shared issue and it's one that people are going to grapple with within the context of recent history of the negotiations and political relationships...So clarity has to be brought to the issue. Who are the rights holders, who are the right representatives, who are the people we talk to, regional or community (P5)?

Difficulties can emerge when DFN and individual communities do not speak with one voice. Speaking about the decision to engage on a community level, one interviewee noted:

We came to that conclusion in the Mackenzie Gas Project. ..We were looking to the regional leadership to help us in some way, but what we found was that communities did have views on the project and that they wanted to say them, but they were afraid that somebody was looking over their shoulder and it was their own regional office that they were a bit afraid of. They thought that because it was such a point of leverage in the negotiations and a public issue that they were afraid of saying the wrong thing (P1).

The proposed purpose of the Dehcho Consultation Working Group is to deal with operational issues related to Crown consultation. INAC will therefore want to engage Community staff who on a regular basis with requests for public review from the MVLWB. In some communities, lands and resources staff are the clearly the appropriate person to approach. In other communities, for example Wrigley or Jean Marie River, where there are no dedicated staff in place to deal with lands and resource, it will take

some time to determine who should sit on the proposed Dehcho Consultation Working Group. This should be determined through engagement with community leadership and with staff, and with advice from knowledgeable INAC staff.

It is also important to acknowledge that while the purpose of the proposed Dehcho Consultation Working Group is to deal with pragmatic issues, consultation is an inherently political activity. It is one of the most powerful leverage points that communities have to influence land and resource management. This reality must be kept front of mind. Leadership at the regional and at the community level must be fully engaged from the outset to gain support if this working group is to get off the ground. As one interviewee noted:

I think that before you set it up, you really need to think about it carefully, [think about] where it could go. Because it could be a fireworks you know, it could just spiral out of control and become a political firework (P4).

It was further noted that for this reason, government sometimes hand picks working group members to ensure collaboration has a real chance of working. Ensuring the right people are engaged in a working group, with the right attitude and skills can be instrumental. An interviewee also notes that caution should be taken because some people may engage to a certain degree but for “the wrong reasons”(P4). This can result in less than meaningful dialogue or progress and the working group may never reach its full potential.

***Recommendation 4: INAC should engage both the DFN and the Community Chiefs and Councils at initial stages of developing the Dehcho Consultation Working Group.***

***Recommendation 5: In communities where there are no Dehcho Lands and Resources staff, INAC should draw upon the expertise and knowledge of community members and INAC staff to determine an appropriate community representative.***

### 3.6.2 Roles and Responsibilities

Clarity over roles and responsibilities of participants is important to determine at the outset. Specific issues such as who will chair the working group and how communication issues will be addressed are important considerations.

...[i]t is very complicated if you're actually managing the group you're setting up. Some people see it as a conflict of interest. You need to have someone independent to manage and facilitate it (P4).

The interviewee also notes that limited resources may mean that an independent facilitator may not be an option, requiring compromise. Further, while Working Groups can be a lot of work to manage or facilitate effectively, and it can help to have someone independent to manage and facilitate (P4) this can bring with it other power relations problems.

Establishing effective ground rules at the outset will provide a strong platform to move forward. Ground rules that address:

- Communication as a shared responsibility: including communication processes internal to the Working Group, internal to INAC, internal to communities, and between the working group and the Main Negotiation Table (off record and on record discussions, etc.).
- Potentially inflammatory language: seemingly 'normal' terms such as 'crown land' are sometimes considered offensive to Aboriginal people who do not recognize the legitimacy of Crown. Addressing the difference of worldview contained in some important terms that are frequently used can defuse potential conflict.
- Meeting frequency and location
- Funding to participate
- Naming a member and alternate, and the responsibility of alternates

### 3.6.3 Administrative Responsibilities

There will be an unavoidable administrative burden associated with the Dehcho Consultation Working Group that could include up to thirteen aboriginal groups. Determining to whom fall the administrative responsibilities of the working group is



important to consider. Issues such as coordinating meetings times, travel logistics, agenda, per diems, etc, can be incredibly time consuming.

[I]t becomes very time consuming the bigger the group. The more people, the more time it's going to take...It's a crude reality that it's going to take you away from some other part of your job (P4).

***Recommendation 6: INAC should provide adequate administrative support to ensure the Dehcho Consultation Working Group will function well.***

### ***3.7 Process for Implementation***

This section provides broad direction to move forward with the establishment of proposed Dehcho Consultation Working Group.

#### **An Incremental Approach**

There is a considerable amount of work to be done to build rapport with individual communities and to raise awareness about the Consultation Support Unit in advance of establishing a Dehcho Consultation Working Group. Ideally, a face-to-face meeting should be held with the Chief and Council from each Aboriginal group in the region before any invitations are issued for the first meeting. However, given the prohibitive logistical hurdles including high travel costs, limited budgets and busy schedules, such an approach would take well over a year. In addition, some communities will likely prove more difficult to engage as a result of past and ongoing conflict (i.e., ongoing litigation between INAC and Kakisa). Specific care should be taken to determine an initial approach on a community-by-community basis.

The benefit of face-to-face meetings is that there is increased likelihood that busy and/or adversarial Aboriginal groups will take notice and respond to an invitation to participate. Without face-to-face meetings it is likely that not all communities will be 'on board' at the beginning. Moving ahead without representation from each community means that late-comers would not have the opportunity to participate in

initial discussions, the setting of ground rules, etc. This, in turn, has the potential to lessen the sense of ownership of the process.

***Recommendation 7: INAC should hold as many face-to-face meetings as resources permit with the leadership in Aboriginal communities in advance of the first Dehcho Consultation Working Group meeting.***

Given that there is no dedicated funding in place for the proposed Dehcho Consultation Working Group, care should be taken not to unduly raise expectations. Holding an initial two-day workshop would function as a good first step to bring people together to begin to discuss pragmatic consultation issues. A workshop would begin to build momentum, and set the stage for future meetings, if and when funding becomes available. Fort Simpson would be the most practical location, due to its central location. A Fort Simpson meeting would cut down on workshop costs and respond to the interest that some communities have expressed in holding meetings close to home.

***Recommendation 8: INAC should fund and host a Dehcho Consultation Workshop in Fort Simpson in the fall of 2010.***

**Table 5: Summary of Recommendations**

1. INAC should ensure that communication processes between the working group and the negotiation table are explicitly set out, either formally through the working group terms of reference or, less formally through a written administrative understanding.
2. INAC should adequately resource the Dehcho Consultation Working Group.
3. A Terms of Reference that sets out the purpose of the proposed Dehcho Consultation Working Group should be jointly developed by the parties. Consideration should be given to:  Education and awareness Enhancing community capacity Developing and maintaining relationship and trust
4. INAC should engage both the DFN and Community Chiefs and Councils at initial stages of developing the Dehcho Consultation Working Group.
5. In communities where there are no Dehcho Lands and Resources Staff, INAC should draw upon the expertise and knowledge community members and INAC staff to determine an appropriate community representative.
6. INAC should provide adequate administrative support to ensure the Dehcho Consultation Working Group will function well.
7. INAC should hold as many face-to-face meetings as resources permit with the leadership in Aboriginal communities in advance of the first Dehcho Consultation Working Group meeting.
8. INAC should fund and host a Dehcho Consultation Workshop in Fort Simpson in the fall of 2010.

## CONCLUSION

The honour of the crown requires that government consult with Aboriginal groups in advance of making a decision that could negatively impact potential or established Aboriginal or treaty rights. Grounded in the objective of reconciliation, the Crown's legal duty to consult provides Aboriginal groups with an opportunity to participate in decision-making related to lands and resources. The operational implication of the rapidly emerging jurisprudence on Crown consultation poses formidable challenges to governments and Aboriginal groups alike.

Section one of this project provided an overview of the legal and academic literature on the subject of Crown consultation, teasing out some of the emerging themes and challenges. Section two of this project moved from the theoretical perspective to the applied and looked at Crown consultation within a specific context; it set out how INAC-NT has organized itself operationally to meet the Crown's duty to consult.

Section three of this project looked at the question of how to set up a consultation working group in the Dehcho region of the NWT. This case study provides a concrete example of one way in which some of the challenges associated with Crown consultation, can be addressed. If done with care and attention, the proposed Dehcho Consultation Working Group has the potential to enhance relationships and develop a shared understanding of the operational challenges that Aboriginal people and the INAC jointly share.

## BIBLIOGRAPHY

Akaiicho Interim Measures Agreement. 2001.

<http://www.daair.gov.nt.ca/live/documents/documentManagerUpload/AkaitchoIMA.pdf>.

Last accessed January 3, 2010.

Alfred, Taiaiake. 1999. *Peace Power Righteousness: an indigenous manifesto*. Oxford University Press Canada.

Arnstein, Sherry R. 1969, July. "A Ladder of Citizen Participation", *JAIP*, 35 (4), 216 - 224.

Available at <http://lithgrow-schmidt.dk/sherry-arnstein/ladder-of-citizen-participation.pdf> Last accessed March 5, 2010.

Basso, Keith. 1996. *Wisdom Sits in Places: Landscapes and Language Among the Western Apache*. Albuquerque, University of New Mexico Press.

Berkes, Fikret. 1999. *Sacred Ecology: Traditional Ecological Knowledge and Resource Managements*. Taylor & Francis. Philadelphia, PA.

-----, 2009. *Adaptive Co-Management: Collaboration, Learning, and Multi-Level Governance*. Armitage, Derek, Fikret Berkes, and Nancy Doubleday, eds. UBC Press, 2007.

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission), 2009 BCCA 67

Centre for Indigenous Environmental Resource (CIER). 2007. *Consulting with the Crown: A Guide for First Nations*.

*Constitution Act, 1982*. <http://laws.justice.gc.ca/en/const/index.html> Last accessed January 3, 2010.

Cruikshank, Julie. 1998. *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory*. Lincoln, University of Nebraska Press.

-----, 2005. *Do Glaciers Listen? Local Knowledge, Colonial Encounters and Social Imagination*. Vancouver, UBC Press.

Dehcho Interim Measures Agreement. 2004.

<http://www.daair.gov.nt.ca/live/documents/documentManagerUpload/DehchoFirstNationsInterimMeasuresAgreementsigned.pdf>. Last accessed January 3, 2010.

Dehcho Dene Declaration of Rights. <http://www.dehchofirstnations.com/home.htm> last accessed March 20, 2010

Dehcho Process Resolution. 2008, June 27. Dehcho First Nations Annual General Assembly, Kakisa, NT <http://www.dehchofirstnations.com/negotiations.htm> Last accessed March 5, 2010.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 771

Ellis, Stephen C. 2005. Meaningful Consideration? A Review of Traditional Knowledge in Environmental Decision Making. 58(1) *ARCTIC* pp. 66 –77.

Fumoleau, Rene. 2004. *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939*. University of Calgary Press ed., rev. Co-published with the Arctic Institute of North America.

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73

INAC, 2007. Letter of May 30, 2007 from INAC Acting Regional Director General to Grand Chief of the Dehcho First Nation.

INAC, 2008. *Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult*.

INAC, 2009. *Draft Section 35 Crown Consultation Policy and Procedural Guidelines for Indian and Northern Affairs Canada, Northwest Territories Region*.

Isaac, Thomas and Anthony Knox . 2003, July. The Crown's Duty to Consult Aboriginal People. 41(1) *Alberta Law Review* pp.49-78

Ka'a'Gee Tu First Nation v. Canada (Attorney General), 2007 FC 763

Kwikwetlem First Nation v. B. C. (Utilities Commission), 2009 BCCA 68

Kennedy, Andrea Holly. 2009. *Deeper than Mere Consultation: Negotiating Land and Resource management in British Columbia, Post Delgamuukw*. PhD Dissertation. University of British Columbia. <http://hdl.handle.net/2429/7381> Last accessed March 3, 2010.

Kofines, Gary P. 2007. *Novel Problems Require Novel Solutions: Innovation as an Outcome of Adaptive Co-management*. A chapter in Armitage, Derek, Fikret Berkes and Nancy Doubleday, eds., *Adaptive Co-Management: Collaboration, Learning and Multi-Level Governance*. Vancouver: UBC Press.

Lawrence, S., and P. Macklem. 2000. From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult. 79 *Canadian Bar Review* pp. 252-79

Little Salmon/Carmacks v. Yukon (Minister of Energy Mines and Resources), 2007 YKSC 28

Mackenzie Valley Land and Water Board Website.  
<http://www.mvlwb.com/html/introduction.htm>. Last accessed March 27, 2010.

*Mackenzie Valley Resource Management Act*. 1998, c. 25. <http://laws.justice.gc.ca/en/M-0.2/index.html>. Last accessed January 3, 2009

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 6

Nadasdy, Paul. 2003. *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon*. Vancouver: UBC Press.

-----, 2005. Reevaluating the Co-Management Success Story. Arctic Vol. 56, No. 4 (December 2003). P. 367-380.

National Centre for First Nations Governance. 2009. *Crown Consultation and Practices Across Canada*. [http://www.fngovernance.org/pdf/NCFNG\\_Crown\\_Consultation\\_and\\_Practices.pdf](http://www.fngovernance.org/pdf/NCFNG_Crown_Consultation_and_Practices.pdf) Last accessed March 1, 2010.

National Chiefs Task Force on Consultation and Accommodation. 2009. Meeting Notes, dated January 28, 2009. <http://www.afn.ca/misc/NCTFCA-final-notes.pdf> Last accessed March 19, 2010.

*Northwest Territories Waters Act*. 1992, c. 39. <http://laws.justice.gc.ca/en/N-27.3/index.html>. Last accessed March 8, 2010

Paul v. B.C. Forest Appeals Commission, 2003 SCC 55

R. v. Badger, [1996] 1 S.C.R. 771

R. v. Sparrow, [1990] 1 S.C.R. 1075

R. v. Sundown, [1999] 1 S.C.R. 393

R. v. Marshall, [1999] 3 S.C.R. 533

R v. Powley, [2003] S.C.R. 43

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

Royal Commission on Aboriginal Peoples. 1996. Report of the Royal Commission of Aboriginal Peoples.  
[http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html) Last accessed Feb 23, 2010.

South Slave Métis Tribal Council and Her Majesty the Queen in Right of Canada and the Government of the Northwest Territories. *Interim Measures Agreement*. 1996.  
<http://www.nwtmetisnation.ca/interim.pdf> Last accessed March 19, 2010.

Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc., 2009 FCA 308

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550, 2004 SCC 74

Treacy, Heather L. , Tara L. Campbell, and Jamie D. Dickson. 2006. The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development. 44(3) *Alberta Law Review* pp. 571 -618

Tsilhqot'in v. British Columbia, 2007 BCSC 1700

Whiteman, Gail and Katy Mamen. 2005. Meaningful Consultation and Participation in the Mining Sector? A Review of the Consultation and Participation of Indigenous Peoples within the

International Mining Sector. *The North-South Institute*. [http://www.nsi-ins.ca/english/pdf/lit\\_rev/lit\\_rev\\_final.pdf](http://www.nsi-ins.ca/english/pdf/lit_rev/lit_rev_final.pdf) Last accessed March 1, 2010.



# APPENDIX I

## TERMS AND DEFINITIONS

The Crown's legal duty to consult is being delineated through legal decisions. Within this legal context, the specific meaning or definition of terms is important. The groundwork for subsequent sections of this project is set out by defining key terms here. Many of these are drawn from the Government of Canada's Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult (INAC, 2008).

**Aboriginal groups:** A community of Indian, Inuit or Métis people that hold or may hold Aboriginal or treaty rights as articulated by section 35 of the *Constitution Act, 1982*. 'Aboriginal' has broader legal meaning than the commonly used term First Nation, which does not include Métis or Inuit peoples.

**Aboriginal rights:** Practices, traditions and customs integral to the distinctive culture of the Aboriginal group claiming the right that existed prior to contact with the Europeans (as per *R. v. Van der Peet* 1996). In the context of Métis groups Aboriginal rights' means practices, traditions and customs integral to the distinctive culture of the Métis group that existed prior to effective European control, (i.e. prior to the time when Europeans effectively established political and legal control in the claimed area) (*R. v. Powley* 2003). Aboriginal rights are fact and site specific. The Canadian Charter of Rights and Freedoms, the Constitution Act, 1982, and the jurisprudence recognize that the existing treaty and Aboriginal rights of the Aboriginal peoples of Canada include certain rights of a *collective* nature. Although these collective rights have yet to be fully defined, they include matters such as the inherent right to self-government; hunting, fishing and gathering rights; collective land rights; and the right to the preservation of traditional languages, cultures and traditions.

**Aboriginal title:** An Aboriginal right to the exclusive use and occupation of land. Aboriginal title has many similarities to fee simple, however an Aboriginal group as a collective owns the land. The concept of Aboriginal title is judicially recognized in theory, however, no court has yet to rule that a group has Aboriginal title. The *Tsilhqot'in* 2007 decision concluded that the evidence before it proved aboriginal title over certain lands. The courts did not make a final declaration of aboriginal title because of the way the case had been pleaded in the plaintiff's statement. However, the case demonstrates the type and degree of evidence required to prove aboriginal title (*Tsilhqot'in* 2007).

**Accommodation:** *Haida* at paragraph 49 defines this. "The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ...a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9<sup>th</sup> ed. 1995) at p. 9. The accommodation that may result from pre-proof

consultation is just this – seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them."

In *Haida* paragraph 50, the Court continues: "Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decisions on the asserted right or title and with other societal interests."

**Common Law:** a) the general and ordinary law of a country or community; b) The unwritten law (esp. of England) that receives its binding force from immemorial usage and universal reception; hence, any similarly developed system of jurisprudence. p.166, *Webster's New Collegiate Dictionary*, 1959.

**Constructive knowledge:** 3. Derived from, or depending on, construction or interpretation; -- often applied in law to an act or condition assumed from other acts or conditions; as, a *constructive* fraud. p.179, *Webster's New Collegiate Dictionary*, 1959.

**The Crown:** Refers to all government departments, ministries (both federal and provincial) and Crown agencies and includes all government employees that are doing the work of the government. The duty to consult is an administrative act and it is an obligation of the government as a whole.

**Fiduciary:** 1. Holding, held, or founded, in trust ...One who holds a fiduciary relation or acts in a fiduciary capacity. p.308, *Webster's New Collegiate Dictionary*, 1959.

**Honour of the Crown:** The Crown's duty to consult is grounded in the honour of the Crown. "The honour of the Crown is always at stake in its dealings with Aboriginal peoples... It is not a mere incantation, but rather a core precept that finds its application in concrete practices." (*Haida*, para. 16) The honour of the Crown is derived from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation.

**Prima facie:** Literally on first appearance. Prima facie evidence: *Law*. Evidence sufficient to raise a presumption of fact or establish the fact in question unless rebutted. p. 670, *Webster's New Collegiate Dictionary*, 1959,

**Reconciliation:** The duty to consult and where appropriate, accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty by the Crown and continues beyond formal claims resolution through to the application and implementation of treaties. Crown efforts to consult with and accommodate the interests of Aboriginal groups whose rights may be adversely affected, should be

consistent with the overarching objective of reconciliation with Aboriginal groups. (*Haida*, para. 49, 50, 51)

**Section 35 of the *Constitution Act, 1982*:** provides constitutional protection to the aboriginal and treaty rights of Aboriginal peoples in Canada. Section 35 (1) reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. The practical implications of s. 35 have been the subject of numerous court cases and judicial reviews.

**Treaty rights:** Rights that are defined by the terms of a historic treaty, rights set out in a modern land claims agreement or certain aspects of some self government agreements. In general, treaties are agreements that set mutually binding obligations. A treaty right may be an expressed term in a treaty, an implied term or reasonably incidental to the expressed treaty right. The scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by the Supreme Court of Canada (SCC) (*R. v. Badger 1996*; *R. v. Sundown 1999*; *R. v. Marshall 1999*). Principles to treaty interpretation include: treaties should be liberally construed; ambiguities ought to be resolved in favour of the signatories in the context of historic treaties; the goal of treaty interpretation is to find the common intention and the result that best reconciles the interests of both parties at the time the treaty was signed; the integrity and honour of the Crown is presumed in such interpretations; the courts cannot alter the terms of the treaty and treaty rights cannot be interpreted in a rigid or static way as they must be updated to provide for modern exercise (*Marshall*).

## APPENDIX II

### ACRONYMS

**ACWG** Akaitcho Consultation Working Group  
**Alcan** Rio Tinto Alcan Inc.  
**BC** British Columbia  
**BCCA** British Columbia Court of Appeal  
**BCSC** British Columbia Supreme Court  
**BCTC** British Columbia Transmission Corporation  
**BC Hydro** British Columbia Hydro and Power Authority  
**BCUC** British Columbia Utility Commission  
**CIER** Centre for Indigenous Environmental Resources  
**CPCN** Certificate of Public Convenience and Necessity  
**CSTC** Carrier Sekani Tribal Council  
**CSU** Consultation Support Unit  
**CWG** Consultation Working Group  
**DCWG** Dehcho Consultation Working Group  
**DFN** Dehcho First Nation  
**EA** Environmental Assessment  
**EPA** Electrical Purchase Agreement  
**FCA** Federal Court of Appeal  
**GNWT** Government of the Northwest Territories  
**IMA** Interim Measures Agreement  
**INAC** Indian and Northern Affairs Canada  
**INAC-NT** Indian and Northern Affairs Canada – Northwest Territories  
**IRDA** Interim Resource Development Agreement  
**ISR** Inuvialuit Settlement Region  
**KTFN** Ka'a'Gee Tu First Nation  
**MV** Mackenzie Valley  
**MVEIRB** Mackenzie Valley Environmental Impact Review Board  
**MVLWB** Mackenzie Valley Land and Water Board  
**MVRMA** Mackenzie Valley Resource Management Act  
**NCFNG** National Centre for First Nations Governance  
**NCTFC** National Chiefs Task Force on Consultation and Accommodation  
**NEB** National Energy Board  
**NT** Northwest Territories  
**NWT** Northwest Territories  
**NWTMN** Northwest Territory Metis Nation  
**P** Personal Communications  
**SCC** Supreme Court of Canada

**S.C.R.** Supreme Court Review  
**TK** Traditional Knowledge  
**TNA** Tuktut Nogait Agreement  
**UCA** Utilities Commission Act  
**YKSC** Yukon Supreme Court

## APPENDIX III

### EXCERPTS FROM THE DEHCHO INTERIM MEASURES AGREEMENT

#### Definitions

“consultation” means:

(a) Providing, to the party to be consulted:

- (i) Notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter;
- (ii) A reasonable period for the party to prepare those views, and (ii) An opportunity to present those views to the party having the power or duty to consult; and

(b) Considering, fully and impartially, the views so presented (Dehcho IMA, p. 2)

....

#### Land Withdrawal

20. (a) New permits may be issued on the withdrawn lands under the *Territorial Quarrying Regulations* only:

- (i) for sources of material which had been opened prior to the dates of the withdrawal orders;
- (ii) for new sources of materials required for essential community construction purposes;
- (iii) with the consent of the Deh Cho First Nations; or
- (iv) in cases where, in the opinion of the Minister of DIAND, no alternative source of supply is reasonably available in the surrounding area and after consultation with the Deh Cho First Nations.

....

#### Land and Water Regulations

27. (a) No new permits will be issued under the *Mackenzie Valley Resource Management Act* within the Deh Cho territory except after the written notice to the Deh Cho First Nation of an application made to the Mackenzie Valley Land and Water Board for a licence and after a reasonable period of time for the Deh Cho First Nations to make representation to the Board with respect to the application.

- (b) No new water licences will be issued under the *Mackenzie Valley Resource Management Act* within the Deh Cho territory except after the written notice to the Deh Cho First Nation of an application made to the Mackenzie Valley Land and Water Board for a licence and after a reasonable period of time for the Deh Cho First Nations to make representation to the Board with respect to the application.

#### **Sales and Leases of Surface Lands**

28. Canada shall not sell Crown land in the Deh Cho territory without prior consultation with the affected Deh Cho First Nation(s).
29. Canada shall not lease or license with licenses land in the Deh Cho territory without prior consultation with the affected Deh Cho First Nation(s).

Support from affected Deh Cho First Nation(s) for issuance of any new prospecting permits:

....

#### **Mineral Development (Excluding Oil and Gas)**

39. Canada will not issue any new prospecting permits under the Canada Mining Regulations (in the Deh Cho territory without the support of the affected Deh Cho First Nation(s). The affected Deh Cho First Nation(s) will provide written confirmation of their support, or reasons for non support, to the Mining Recorder's Office by January 22 of any given year in the order for the permits to be issued by January 31 under the *Canada Mining Regulations*.

....

#### **Oil and Gas Activity**

41. Canada will not initiate any new issuance cycle for oil and gas exploration licenses under the Canada Petroleum Resources Act in the Deh Cho territory without the support of the affected Deh Cho First Nation(s). The affected Deh Cho First Nation(s) shall review any proposal for a new issuance cycle and provide written confirmation of their support, or reasons for non support, to Canada in a timely manner. Where the affected Deh Cho First Nation(s) supports rights issuances, consultations on the terms and conditions for such issuances will be carried out.

## **APPENDIX IV**

### **EXCERPT FROM DEHCHO DENE DECLARATION OF RIGHTS**

We the Dene of the Dehcho have lived on our homeland according to our own laws and system of government since time immemorial.

Our homeland is comprised of the ancestral territories and waters of the Dehcho Dene. We were put here by the Creator as keepers of our waters and lands.

The Peace Treaties of 1899 and 1921 with the non-Dene recognize the inherent political rights and powers of the Dehcho First Nation. Only sovereign peoples can make treaties with each other. Therefore our aboriginal rights and titles and oral treaties cannot be extinguished by any Euro-Canadian government.

Our laws from the Creator do not allow us to cede, release, surrender or extinguish our inherent rights. The leadership of the Dehcho upholds the teachings of the Elders as the guiding principles of Dene government now and in the future.

Today we reaffirm, assert and exercise our inherent rights and powers to govern ourselves as a nation.

We the Dene of the Dehcho stand firm behind our First Nation government.

From Dehcho First Nations Website at <http://www.dehchofirstnations.com/home.htm>