The Duty to Consult: Consent and Consultation

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Canada

Context

- Canada has signaled the value it is placing on building relationships with Indigenous peoples – First Nations, Inuit and Métis
- Every Minister's mandate letter from the Prime Minister contains the following statement:

  "No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."
- The focus on renewing a nation-to-nation rapport with Indigenous peoples is in keeping with the commitment to advance reconciliation and to respect the rights of Indigenous peoples

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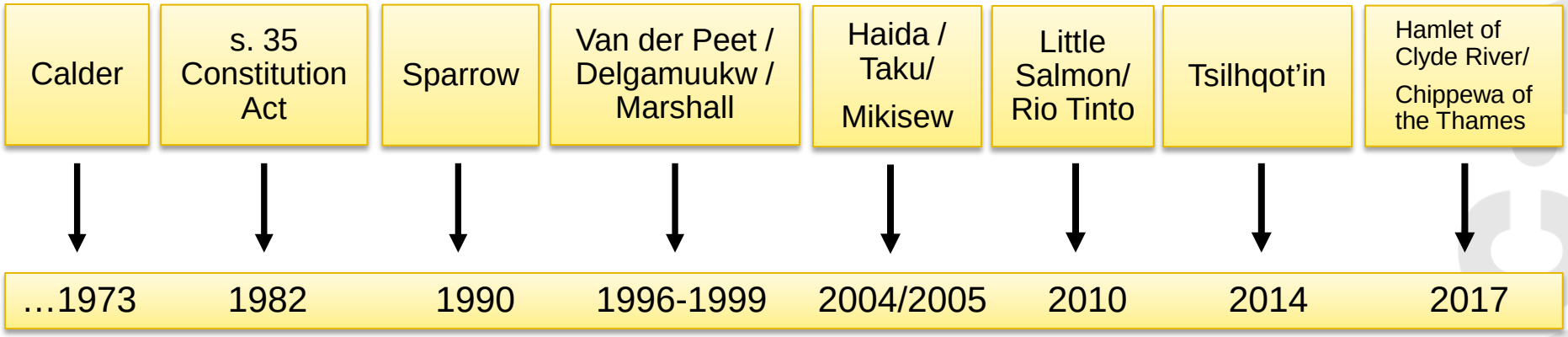
What is the Duty to Consult?

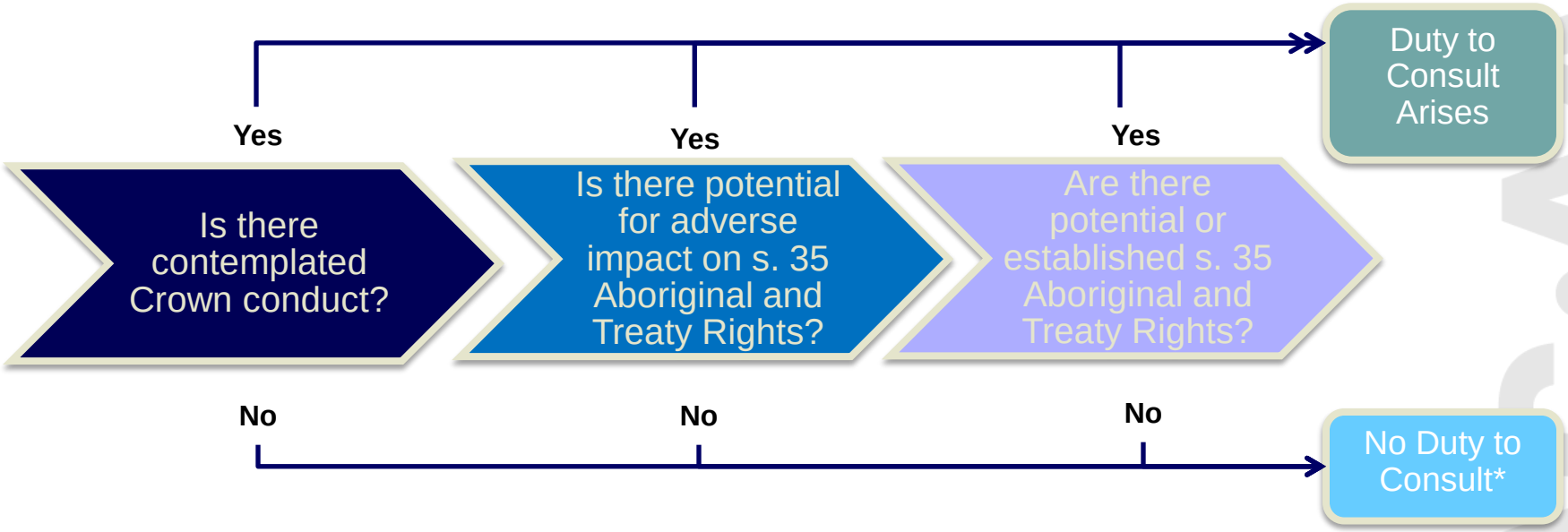
The duty to consult is enshrined in Canada's Constitution – As such, the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights.

- Through a number of court decisions, the courts have defined how and when the duty to consult applies and what is required for meaningful consultation



- Where the duty arises, the Crown will be required to:
  - Carry out a fair and reasonable process for consultations; and,
  - Demonstrate reasonable efforts to respond and/accommodate

When is the duty to consult triggered?



Note: The duty is triggered at a **low threshold**: all that is required is *contemplated* Crown conduct resulting in a *potential* adverse impact to a *credible claim*.

Accommodation

- Meaningful consultation always includes the consideration of accommodation
- *Types of accommodation measures:*
  - Avoidance of adverse impacts
  - Mitigation or reduction of adverse impacts
  - Offset (to provide a benefit or improvement elsewhere)
  - Compensation (can include financial and non-financial)
- *Various forms of accommodation could include a range of possibilities, such as:*
  - Adjusting a proposed activity, policy or process, or abandoning such
  - Placing terms or conditions on any permits, licenses, approvals or authorizations
  - Compensation
  - Creating monitoring and evaluation programs
  - Other relevant accommodation measures specific to the file
- Where accommodation is appropriate, departments and agencies should work with the Indigenous group to identify solutions that balance the interests of the group with the societal interests of all Canadians

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The Duty to Consult in a Modern Treaty Context

- Modern Treaties are a blueprint for reconciliation and nation-to-nation relationships:
  - They are mechanisms for joint/collaborative decision making
  - They include consultation provisions and have clearly defined rights, providing a strong basis for consultation
- The duty to consult applies in a modern treaty context.

- Many modern treaties include consultation provisions in relation to Crown activities and officials must consult in accordance with the consultation terms of those treaties.

- Federal officials must first determine whether there are relevant consultation provisions within the treaty itself. Provisions identify situations where consultation must occur, as well as agreed upon processes for consultation.

- The duty to consult operates in law independently from the terms of a treaty. Where there are no specific consultation clauses, the legal duty to consult applies where Crown actions have the potential to adversely impact rights set out in a modern treaty.

- It can therefore apply where Crown actions have the potential to adversely impact treaty rights provided for under a treaty or modern land claim agreement (Little Salmon/Carmacks).

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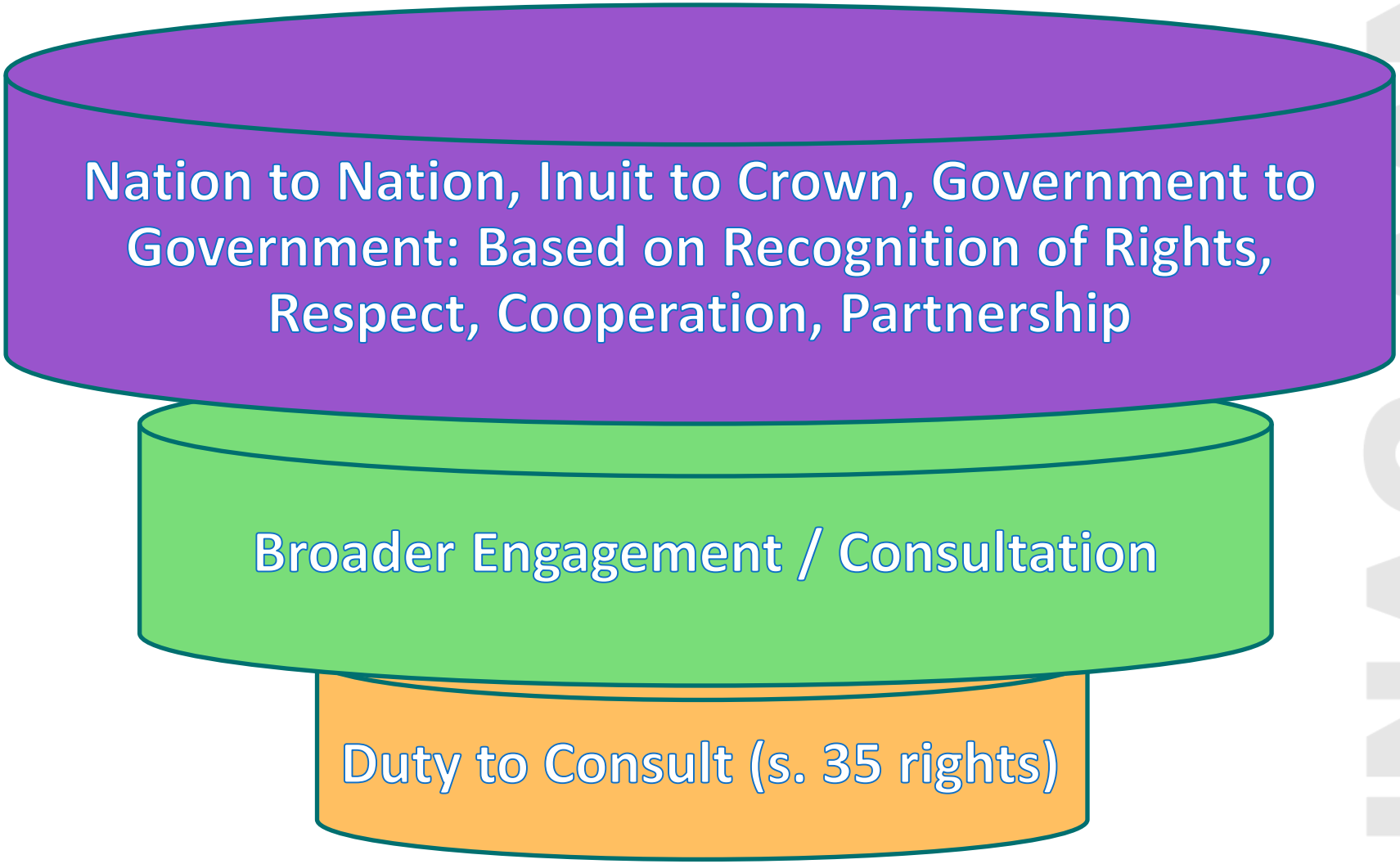
Going Beyond the Duty to Consult



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Government Priorities

A number of government priorities are influencing Canada's approach to consultation:

- Review of Laws, Policies and Operational Practices
- Truth and Reconciliation Commission Calls to Action
- The concept of Free, Prior and Informed Consent as found in the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*
- Ministerial Special Representative report *Building Relationships and Advancing Reconciliation Through Meaningful Consultation (2016)*
- Environmental Assessment and Regulatory Review process
- Departmental transition
- Recognition of Indigenous Rights and Self-determination Tables
- Recognition of Rights Framework

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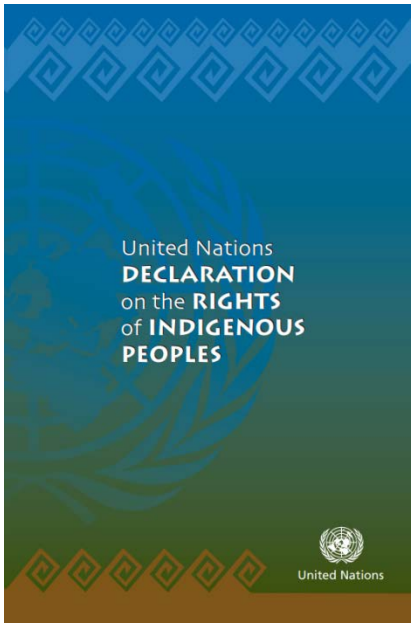
Free, Prior and Informed Consent and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

- Canada will implement the United Nations Declaration through the work of the Working Group of Ministers on the Review of Laws and Policies Relating to Indigenous Peoples

- In July 2017, Principles respecting the Government of Canada's relationship with Indigenous Peoples were announced - a list of 10 principles aimed at achieving reconciliation with Indigenous peoples based on "recognition of rights, respect, co-operation, and partnership" as the foundation for transformative change

- Principle 6 refers to the concept of Free, Prior and Informed Consent – *"The Government of Canada recognizes that meaningful engagement with Indigenous peoples* ***aims to to secure*** their free, prior and informed consent when Canada proposes to take actions which impact their rights, including their land, territories and resources."



Considerations

- Providing meaningful tools and guidance while navigating an ever-changing policy environment
- Strong desire to see things done differently
- Supporting coordination and capacity to minimalize consultation fatigue
- Recognition that this transformational change agenda for whole-of-government takes time
- Recognition that there is no perfect model - need to have a consultation process which is adaptable, flexible, respectful, responsive and integrated into existing processes where possible
- Importance of balancing interests
- Role of industry in building long-term relationships

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