



**Supporting Inclusive Resource Development (SIRD)  
East Africa  
TRAINING PROGRAM  
2019**



THE CANADIAN  
BAR ASSOCIATION



Global Affairs  
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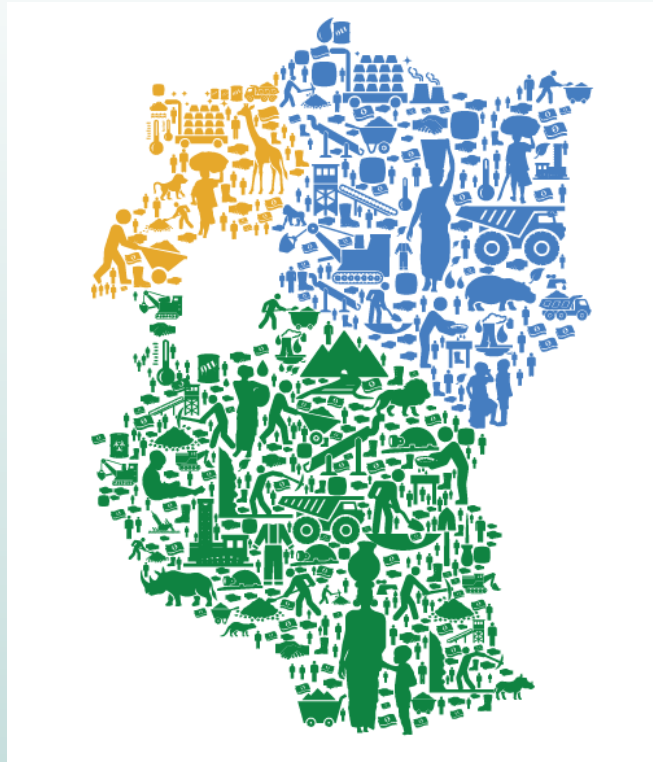
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## Community Engagement for Sustainable and Beneficial Extractive Operations

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# What you'll learn...

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## **In the context of resource extraction:**

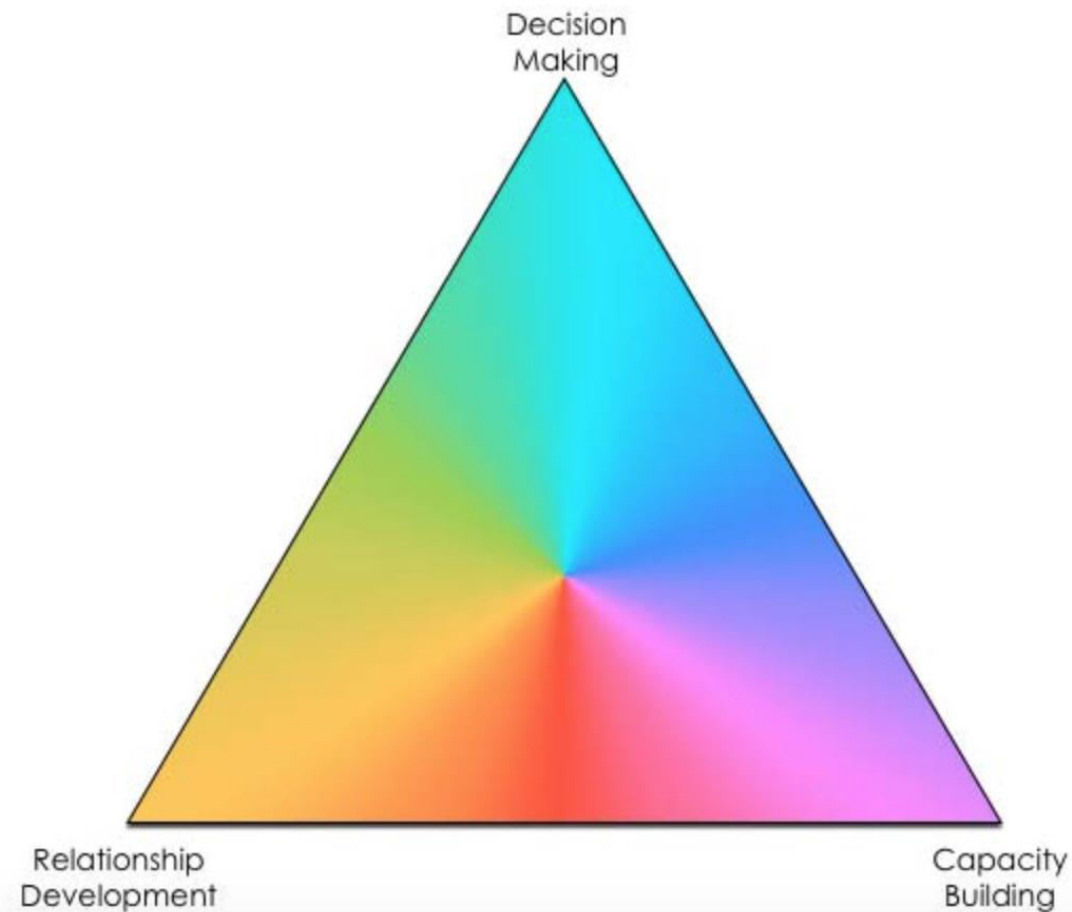
- What is community engagement?
- What is “consultation/engagement” in Canada?
- How do you determine how extensive consultation/engagement needs to be, who does it or if it even needs to happen?
- How do you determine who needs to be consulted/engaged and at what stage?



# What is community engagement?

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Community engagement is about (1) decision making, (2) relationship development, or (3) capacity building



# Guiding principles for community engagement

## COMMUNITY ENGAGEMENT



# Community Engagement Spectrum



## INFORM

Provide residents with info and assist in understanding problems, alternatives, and solutions.

## CONSULT

Obtain public feedback on analysis, alternatives, and decisions.

## INVOLVE

Work directly with residents and consistently consider their concerns and aspirations.

## COLLABORATE

Partner with residents in decision-making, including in identification of solutions.

## EMPOWER

Residents are making decisions and leading solution-based efforts.

\*Based on the IAP2 Public Participation Spectrum, developed by the International Association for Public Participation, 2014  
[http://c.ymcdn.com/sites/www.iap2.org/resource/resmgr/foundations\\_course/IAP2\\_P2\\_Spectrum\\_FINAL.pdf](http://c.ymcdn.com/sites/www.iap2.org/resource/resmgr/foundations_course/IAP2_P2_Spectrum_FINAL.pdf)



# What is meant by consultation/engagement in Canada?

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**Two types of consultation in Canada - often referred to as “Little c” and “Big C” consultation**

**“Little C” consultation** (akin to community engagement):

- When a government is considering a policy and wants public input
- As matter of good governance - making sure decision-makers are informed of what public concerns are around an initiative being considered
- No legal requirements to consult





# What is meant by consultation/engagement in Canada? (cont.)

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## “Big C” consultation

- Government’s duty to consult with Indigenous peoples on any development or decision that could interfere with its aboriginal or treaty rights
- The duty applies before the government makes a final decision or performs an action

It’s estimated that the Duty is triggered approximately 100,000 x/year with provinces and over 5,000/year at the federal level





# Consultation in Canada (cont.)

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- Required under:
  - Section 35 of the Canadian Constitution
  - Certain modern land claims
- Requires direct engagement with potentially affected aboriginal rights holders
- Could be subject to review by the courts
- Depth of consultation that is legally required depends on several factors



# Why do we have the Duty to Consult?

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Need to protect community interests while land and resource claims are ongoing or when the proposed action may infringe on an Aboriginal right

- Without this duty, Aboriginal groups seeking to protect their interests pending a final settlement would need to commence litigation and seek interlocutory injunctions



# Constantly Evolving Area of Law

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Two Supreme Court cases in 2004 first created a “duty to consult” for land and resource development:

- *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511
- *Taku Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550
  - Duty belongs to the government
  - Government can't offload the duty to industry (they can only delegate some of the procedural functions)
  - A duty is also placed on Indigenous peoples to engage in good faith dialogue with the government

In 2014 alone, there were over 20 court cases dealing with the Duty to Consult



# Principles which Guide the Duty

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Meaningful consultation, accommodation and consent:

- Objective of substantially resolving concerns of Aboriginal groups
- Scope/extent is determined by potential for impact to aboriginal and treaty rights
- The level of consultation can range from notification to consent



# Adverse impacts and strength of claim

Figure 1

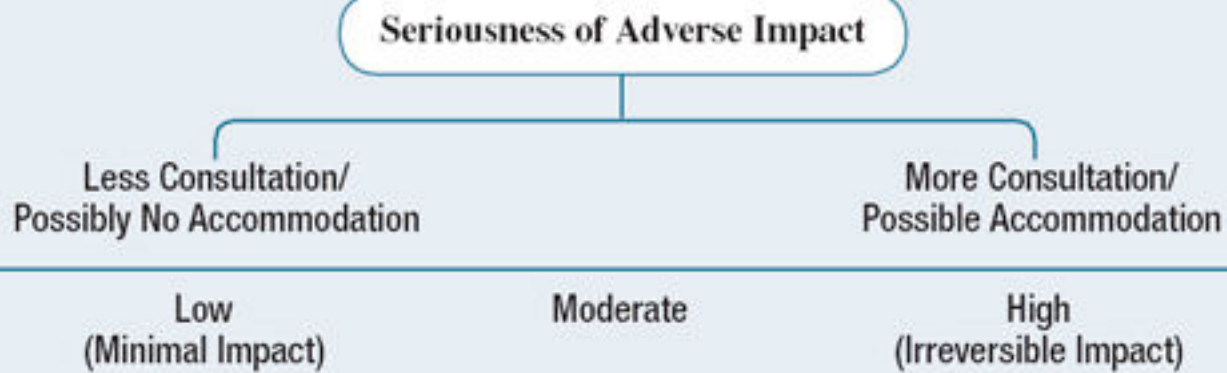
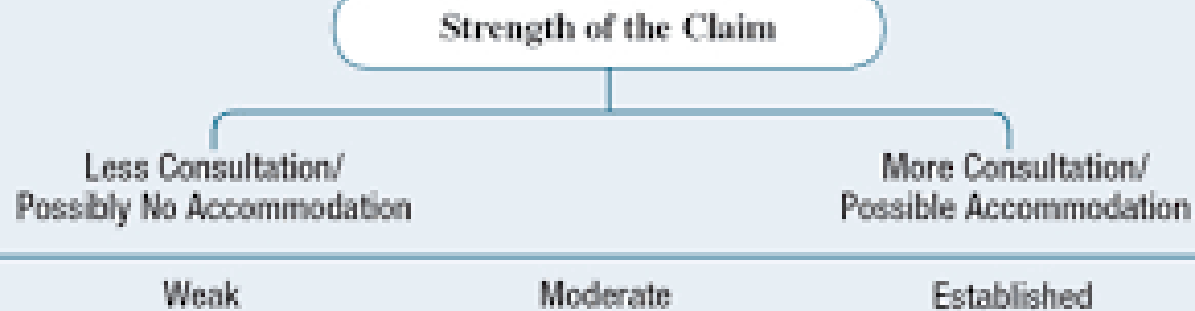


Figure 2



# Spectrum of Duty to consult

Figure 3

## Consultation Spectrum

### Weak Claim – No Serious Impact

- ❖ Provide adequate notice
- ❖ Disclose relevant information
- ❖ Discuss issues raised in response to notice

### Strong Claim – Serious Adverse Impact

- ❖ Exchange of Information
- ❖ Correspondence
- ❖ Meetings
- ❖ Visiting Site
- ❖ Researching
- ❖ Studies
- ❖ Opportunity to make submissions to the decision-maker
- ❖ Providing written reasons
- ❖ Determining accommodation, where appropriate: seek to adjust project, develop mitigating measures, consider changing proposed activity, attach terms and conditions to permit or authorization, financial compensation, consider rejecting a project, etc.

FREE, PRIOR AND INFORMED CONSENT



# Legislation and guidelines - consultation with Indigenous communities

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## Examples of acts/regulations requiring consultation:

- Ontario Mining Act
- Quartz Mining Act (Yukon)
- CEAA 2012 (filing requirement for EA)
- NEB Act (filing requirement for project application)

## Examples of Guidelines/Frameworks for Government Departments/Employees:

- “Interim Provincial Policy For Crown Consultations with First Nations, Métis Communities and Other Aboriginal Communities” – MB
- “The Government of Alberta’s Guidelines on Consultation with First Nations on Land and Natural Resource Management” - AB



# Common challenges government experiences when consulting

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## **Lack of capacity**

- Communities often have limited resources (ex: money, staff, experts, etc.) to meet and do a informed/meaningful evaluation of project impacts

## **“Consultation fatigue”**

- Often communities are being consulted by several levels of government on multiple projects at the same time

## **Differing Interpretations**

- In certain cases government officials and community representatives have differing interpretations on level of consultation required, whether consent is required, regarding obligations contained in agreement, etc.

## **Historical grievances**

- Communities want past wrongs addressed before other discussions/projects/agreements can move ahead



# What is industry's role in all of this?

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Even if Industry has no duty to consult, it may not want to take the chance that consultation will be found inadequate

Companies should:

- Engage early and throughout project life cycle
- Provide funding for: capacity building, hiring of experts for independent analysis/evaluation of project information, etc.
- Provide comprehensive project information at all stages
  - Tailor information to community needs
- Provide many opportunities for community feedback
  - And respond to issues/concerns in meaningful way
- Continuously revisit consultation plan/approach, adjust as needed



# What can happen if consultation requirements are not fulfilled?

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- Court challenges
- Project approvals can be delayed, withheld or reversed
- Consultations may need to be redone = increasing delays and project costs
- Companies may decide to “abandon” projects



# Discussion

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# 10 Principles: Government of Canada's Relationship with Indigenous Peoples

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1. The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.
2. The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*.
3. The Government of Canada recognizes that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.
4. The Government of Canada recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.
5. The Government of Canada recognizes that treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.



# 10 Principles: Government of Canada's Relationship with Indigenous Peoples (cont.)

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6. The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

7. The Government of Canada recognizes that respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.

8. The Government of Canada recognizes that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.

9. The Government of Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.

10. The Government of Canada recognizes that a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

