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## **Engaging First Nations in Effective Project Based Consultation**

Presentation at the 24<sup>th</sup> Annual Conference for the  
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# The Challenge

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- Meeting legal/policy obligations to consult while adhering to project priorities, timelines and budgets
- Establishing positive working relationships with First Nations involved in project review, design and development



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# Background

## - First Nation Context -

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- Why consult?
- Direction from the courts
- Provincial policy response
- What are First Nations interests in relation to the consultation process?



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# Consultation in an EA Context

- Project development = potential impact  
= potential infringement
- Obligation on Crown/proponent to inform  
their decision making process w/r/t any  
potential infringements
- Consultation as a key mechanism to inform  
decision making and/or justify  
infringements



# FN Consultation Under CEAA

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- No specific statutory requirements to consult
- Must assess “environmental effects on current use of lands and resources for traditional purposes by aboriginal persons”
- Discretionary approach – based on RA’s assessment regarding potential for impact on use of lands and resources..... (traditional activities)



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# FN Consultation Under BCEAA

- First Nations consultation programs tailored to each project (within broader context of provincial consultation policy)
- Provides for greater flexibility to negotiate with First Nations the manner in which they wish to be consulted



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# The Duty to Consult Summary of the Law

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- Must consult with and seek to accommodate the interests of First Nations who have a good *prima facie* case of an aboriginal right or title **before** it is proven in court
- The strength of the obligation to seek an accommodation is proportional to the soundness of the claim of aboriginal title or rights



# Soundness of Claim

(A Double Edged Sword)

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- Allows for a flexible approach to consultation based on determination of specific First Nation interests
- Requires a potentially significant investment of resources to investigate and/or validate soundness of claim arguments
- Can potentially detract from focusing efforts on interest based negotiations





# Consultation Methods

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- Meetings / correspondence / info. exchange
- Site visits / tours
- Involvement in review of existing studies or carrying out new ones, as appropriate
- Participation in advisory bodies
- Consultation Protocols / MOU's



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# Consultation Best Practices

- Early Involvement
- Comprehensive approach
- Flexibility
- Provision / protection of information
- Follow-up / ongoing consultation
- Clearly defined outcomes



# Consultation Protocols and MOU's

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- Considerations
  - Advantages - certainty and predictability
  - Disadvantages – can require significant resources
- When to use
  - Projects or activities where a longer term relationship is important



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# Protocols / MOU's -Key Elements-

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- Purpose
- Schedule / Timing / Term of Agreement
- Substantive Issues
- Process Issues
- Communication / Information Sharing
- Funding / Capacity



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# Summary and Conclusions

- There is a legal obligation to consult in respect of possible aboriginal rights and/or title and to seek to address and/or accommodate that interest
- The formalization of consultation “best practices” through Protocols or MOU’s can be an effective means of meeting current legal and policy requirements