

# Land and Water Boards of the Mackenzie Valley



## Engagement and Consultation Policy

June 5, 2018



## Revisions Table

Reason for Revision	Year
Initial approval and distribution	2013
Updated with minor editorial revisions based on a legal review of case law (related to consultation) to date and to account for Devolution	2018

# The Mackenzie Valley



## Definitions and Acronyms

TERMS	DEFINITIONS
Aboriginal and Treaty Rights	<p>Aboriginal rights are practices, traditions, and customs integral to the distinctive culture of the Aboriginal group claiming the right that existed prior to contact with the Europeans (for Métis prior to effective European control). Generally, these rights are fact and site-specific.</p> <p>Treaty Rights are 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.</p>
Aboriginal Organization/ Government	<p>an organization representing the rights and interests of a First Nation (as defined in section 2 of the <i>Mackenzie Valley Resource Management Act</i>), Inuit community or region, a Tłı̄cho First Nation, or the Tłı̄cho Government.</p>
Affected Party	<p>a party that is predicted to be affected by a proposed Project, such as an Aboriginal organization/government, an individual occupying land for traditional purposes, a private landowner, or lease holder (e.g., for a lodge).</p>
Boards	<p>Land and Water Boards of the Mackenzie Valley, as established by the <i>Mackenzie Valley Resource Management Act</i>.</p>
Crown Consultation	<p>the Crown’s common law duty to consult regarding adverse impacts to established or asserted Aboriginal and Treaty Rights protected by section 35 of the <i>Constitution Act, 1982</i>.</p>
Engagement	<p>the communication and outreach activities a Proponent undertakes with affected parties prior to and during the operation of a Project.</p>
Engagement Record	<p>a summary and log which details the Engagement processes and outcomes between the Proponent and the affected parties.</p>
GLWB	<p>Gwich’in Land and Water Board</p>

## Definitions and Acronyms continued

Interim Measures Agreement (IMA)	an agreement that clarifies how the Government of Canada and the Government of the Northwest Territories will work with an Aboriginal group during land and resource negotiations on matters such as parks, forest management, land use permits, disposals of land, water licences, tourism, etc.
LUP	land use permit
MVLWB	Mackenzie Valley Land and Water Board
MVRMA	<i>Mackenzie Valley Resource Management Act S.C. 1998, c.25</i>
NWT	Northwest Territories
Project	any development (as defined in s.111 of the MVRMA) that requires a land use permit or water licence.
Proponent	applicant for, or holder of, a land use permit and/or water licence.
Statutory Consultation	<p>wherever in the MVRMA reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised, as set out in section 3 of the MVRMA:</p> <p>(a) By providing, to the party to be consulted:</p> <ul style="list-style-type: none"> <li>(i) notice of the matter, in sufficient form and detail to allow the party to prepare its views on the matter;</li> <li>(ii) a reasonable period for the party to prepare these views;</li> <li>(iii) an opportunity to present those views to the party having the power or duty to consult;</li> </ul> <p>(b) By considering, fully and impartially, any views so presented.</p>
SLWB	Sahtu Land and Water Board
WLWB	Wek'èezhìi Land and Water Board

## 1.0 Introduction

Under the authority of the Mackenzie Valley Resource Management Act (MVRMA), the Land and Water Boards of the Mackenzie Valley (the Boards) regulate the use of land and water, and the deposit of waste, through the issuance and management of land use permits (LUPs) and water licences (WLs). There are four Boards in the Mackenzie Valley Region that perform these functions, each in different management areas.<sup>1</sup>

The objective of the Boards is to provide for the conservation, development, and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley. (See section 101.1 of the MVRMA.)

In exercising their authorities, the Boards must ensure that, “The concerns of Aboriginal people have been taken into account” [paragraph 114(c)] and consider, “The importance of conservation to the well-being and way of life of the Aboriginal peoples of Canada to whom section 35 of the Constitution Act, 1982 applies and who use an area of the Mackenzie Valley” (section 60.1).

In meeting these objectives, the Boards work with Proponents, affected parties (including Aboriginal Organizations/Governments), and other parties (e.g., other Boards and government agencies that issue associated authorizations) to ensure that potential impacts of proposed Projects are understood and carefully considered before decisions are made with respect to the issuance of LUPs and WLs. Important processes that occur throughout the

regulatory process, which often intersect, include:

- the role of the Proponent to carry out Engagement with potentially affected parties
- the role of the Board to carry out consultation under the MVRMA, and
- the role of the Crown is to ensure that if the duty to consult has been triggered, adequate Crown Consultation and accommodation has taken place with potentially impacted Aboriginal Organizations/Governments.

The MVLWB has developed the Engagement and Consultation Policy (the Policy) in order to ensure that its obligations for meaningful consultation (as set out by the land claims and applicable legislation) with all affected parties, including Aboriginal groups in the Mackenzie Valley, are met and clearly articulated.

### 1.1 Purpose and Objectives

The Policy describes the:

- Submission requirements for applicants and holders of LUPs and WLs pertaining to pre-submission and “life-of-Project” Engagement with affected parties; and
- Administration of Board responsibilities for Statutory Consultation under the MVRMA.

The Policy is built upon, and takes direction from, the foundations established in the land claim agreements, the MVRMA and Mackenzie Valley Land Use Regulations (MVLUR), federal guidelines for Crown Consultation, consultation and Engagement best practices, and recent jurisprudence.<sup>2</sup>

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<sup>1</sup> The Gwich'in, Sahtu, and Tłı̄ch'o land claim agreements provide for the creation of Land and Water Boards. Part 3 of the MVRMA establishes the regional Land and Water Boards as Regional Panels of the Mackenzie Valley Land and Water Board which carry out responsibilities in the MVRMA in the Gwich'in, Sahtu, and Wek'èzhii management areas. Collectively, they are part of a larger integrated and coordinated system of land and water management in the Mackenzie Valley. Part 4 of the MVRMA creates the Mackenzie Valley Land and Water Board, which has authority to regulate land and water use in areas of the Mackenzie Valley that are not yet subject to settled land claim agreements and to establish, where required, consistent policies for the regulation of land and water in the Mackenzie Valley.

<sup>2</sup> See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 SCC 43, *Beckman v. Little Salmon/Carmacks First*

This Policy is supported, in part, by the Boards' Engagement Guidelines for Applicants and Holders of Water Licences and Land Use Permits (the Guidelines) which includes specific requirements and suggested best practices for pre-submission Engagement and Engagement planning for the life of a Project with affected parties. The Policy is also supported by the Board's Rules for Procedure and other policies and guidelines of the MVLWB.<sup>3</sup>

## 1.2 Authority

The Boards' authorities are granted under the MVRMA and the Waters Act and their regulations. The Boards may not issue a licence, permit, or authorization for the carrying out of a proposed development unless the requirements of Part 5 of the MVRMA have been met.<sup>4</sup> As preliminary screeners, the Boards must ensure that the concerns of Aboriginal people and the general public are taken into account, and that their decisions have regard for the protection of the social, cultural, and economic well-being of residents of the Mackenzie Valley. (See paragraphs 114(c) and 115(b) and (c) of the MVRMA.) In exercising their powers, the Boards shall consider the importance of conservation to the well-being and way of life of the Aboriginal peoples of Canada to whom section 35 of the Constitution Act, 1982 applies and who use an area of the Mackenzie Valley (See section 60.1 of the MVRMA).

## 1.3 Policy Development

The Policy was developed by the Engagement and Consultation Working Group,<sup>5</sup> and influenced by the work of the Mackenzie Valley Land and Water Board (MVLWB) and the Mackenzie Valley Environmental Impact Review Board (MVEIRB) Joint Steering Committee on Consultation, formed in 2010. It is also based on

legal and policy research, including regulatory, community-based, and industry Engagement best practices, as well as careful consideration of public comments received by the Board after the release of two draft documents in February and October 2012. The Policy was reviewed in 2018. (See Appendix A for a list of reviewed documents.)

## 1.4 Application

The Policy applies to all new applications and submissions made to a Board after its effective date. It may also apply to existing licences, depending on submissions made in relation to those licences, such as aquatic effects monitoring plans or closure and reclamation plans.

## 1.5 Guiding Principles

The following principles guide the Boards' decisions on any matter related to Engagement and consultation with affected parties occurring prior to and throughout its processes. The principles are not listed in order of priority, and they carry equal weight:

- **Shared responsibility:** Coordinated processes, which reflect the responsibilities of the Proponent, the Government of Canada, the Government of the NWT, Aboriginal governments/organizations, and the Boards to enable meaningful involvement of affected parties, is essential in our co-management system.
- **Appropriate disclosure:** All information relevant to an application is made available in a timely and understandable manner and considers the particular culture(s), language(s), and traditions of the affected

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Nation 2010 SCC 53, Ka'a'Gee Tu First Nation v. Canada (Attorney General) 2007 FC 763.

<sup>3</sup> See the MVLWB's website for all policies and guidelines.

<sup>4</sup> Part 5 describes the objectives and general process of preliminary screening, environmental assessment, and environmental impact review. The Boards are the primary screeners under the MVRMA.

<sup>5</sup> This is one of six Standard Procedures and Consistency Working Groups established by the Boards in 2008.

parties.<sup>6</sup>

- **Inclusiveness:** Those potentially affected, including youth, Elders, and women, should be given the opportunity to be heard and involved.
- **Reasonableness:** Proponents, affected parties, the Boards, and the Crown must be reasonable when setting expectations for Engagement and consultation processes and be willing to enter into these processes in the spirit of cooperation. This includes the provision of reasonable resources, where appropriate, for carrying out and participating in consultation and Engagement processes.<sup>7</sup>

## 2.0 Engagement and Consultation Policy

The Board's Engagement and consultation policy is:

1. To require Proponents to initiate dialogue and Engagement planning with affected parties, particularly affected Aboriginal Organizations/Governments, in advance of an application with the goal of:
  - explaining the Project;
  - identifying concerns and potential environmental impacts (including any potential for impacts to Aboriginal and treaty rights);
  - addressing concerns raised; and
  - ensuring appropriate levels and types of Engagement are carried out over the life of an authorization or Project.
2. To apply consultative approaches throughout a proceeding, which assists affected parties to contribute meaningfully

towards the assessment of impacts on the environment and the establishment of appropriate mitigations in order for the Boards to meet statutory responsibilities pursuant to the MVRMA and the NWT Waters Act and their regulations; and

3. To assess and rule on, if necessary, the adequacy of Crown Consultation before making a final decision or recommendation, taking into account information gathered during Proponent Engagement and through its consultative processes.

The following sections outline the Boards' policy for Engagement requirements and Statutory Consultation throughout the permitting and licensing process, including requests for rulings on adequacy of Crown Consultation. The policy is described in three parts (sections 2.1, 2.2, and 2.3).

### 2.1 Proponent Engagement

It is the expectation of the Board that a Proponent, prior to submitting an application, makes an effort to seek and understand the full nature of concerns expressed by affected parties, in order to consider opportunities to mitigate potential impacts from the Project.

A proponent, prior to submitting an application and over the life of the Project, is expected to respond to these concerns where it can do so and work with affected parties to jointly resolve such issues. The Policy is further based on the expectation that the Proponent and the affected parties will make best efforts to consider and to mutually agree upon future Engagement efforts that are reasonable in consideration of the scope, scale, and context of the Project.

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<sup>6</sup> This does not pertain to information that is protected by law, commercially confidential, or proprietary.

<sup>7</sup> All organizations will have to address capacity for consultation issues within the space of their available human and financial resources. Under the current statutory framework, there is no funding for public participation in regulatory proceedings. It is therefore important for the Crown to ensure that First Nations have capacity at the community level to respond to industry Engagement. In specific cases, a Proponent may also choose to assist with capacity in addition to the cost of Engagement.

The Boards' requirements for Engagement are outlined below and guidance to Proponents is included in the Guidelines.

### 2.1.1 Proponent Submission Requirements

For an application to be deemed complete, an **Engagement record** and an **Engagement plan** must be submitted.

The **Engagement record** includes an Engagement summary and log. The summary is a results-based report of Engagement with **each** affected party.

The log is a detailed account of all Engagement occurrences. Together they form the record of Engagement. The record must be comprehensive and provide the Board with evidence of which Engagement activities took place prior to an application, a summary of key issues, resulting changes to the proposed Project, and which issues remain unresolved.

The Engagement plan is a forward-looking document that details times and approaches to Engagement with the appropriate Affected Party over the life of the authorization or, for larger authorizations, over the life of the Project. It should reflect the scope, scale, and context of the Project.

Proponents should refer to the Guidelines for more details regarding Engagement submission requirements and recommended Engagement best practices. The Guidelines also provide suggested approaches to support the submission of Engagement documents, including:

- Step-by-step guidance for identifying affected parties;
- Initiation of dialogue and Engagement planning; and
- Recommended Engagement activities and

templates/guides for Engagement documentation and planning.

The Guidelines provide suggestions on recommended levels of Engagement and Engagement planning based on the type and circumstances of a proposed Project. (See Appendix B of the Guidelines.) Examples are also provided to guide Proponents working on smaller scale Projects that likely require just one permit and which will likely have low or negligible impacts, versus larger Projects that will require multiple permits and licences over a longer period of time and could have the potential for higher level impacts.

### 2.1.2 Assessment of Proponent Engagement

The Board will assess, upon receipt of an application, the Engagement record and the Engagement plan to determine whether they are complete. If both the record and the plan are signed by the appropriate affected parties, they will normally be considered complete. If submissions are not signed, the Board will conduct a cursory review of the Engagement record and Engagement plan using a standard set of criteria to assess:

1. Whether the appropriate parties were engaged; and
2. The timing of the Engagement activities to ensure sufficient time was provided for the affected parties to fully consider the application and provide their views to the proponent.<sup>8</sup>

At the final decision stage, in addition to considering the two criteria above, the Board will also assess:

3. The achieved results of Proponent Engagement.

More details regarding these Engagement

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<sup>8</sup> Please note that all parties will have the opportunity to provide input regarding the contents of the application, including the Engagement record and the Engagement plan, during the Board's consultation (public review) process. At the final decision stage, the Board will consider all evidence, including submissions made during the Board's consultation process.

criteria may be found in Appendix B. The Boards will consider requests from Proponents for exemptions from Engagement and requests from other parties for additional Engagement. The Boards have the discretion to make such determinations on a case-by-case basis. The Boards will maintain discretion to address Proponent Engagement with affected parties throughout the regulatory process (for example, by placing conditions in permits or licences that address ongoing Engagement).

## 2.2 Board Consultation

The following section outlines the Board's approach to statutory consultation, including the legal and policy framework, and an overview of Board procedures.

### 2.2.1 Legal and Policy Framework

The Boards have an obligation under certain circumstances to consult with specified parties under the MVRMA, including:

- Section 63 requires the Boards to provide a copy of each application to a variety of parties, including landowners (e.g. the Crown and an Aboriginal government/organization), affected communities and First Nations, appropriate departments and agencies of the federal and territorial governments, and Aboriginal governments. The Boards must allow a reasonable period of time for these parties to make representations before it.
- Section 64 requires the Board to seek and consider the advice of any affected First Nation or government and any federal or territorial agency of government respecting the presence of heritage resources or respecting the presence of wildlife and

wildlife habitat that might be affected by a use of land or waters or a deposit of waste.

- The territorial Minister responsible for Commissioner's Land, or minister of the Crown responsible for Crown Land, or the owner of the land, in the case of section 69;
- Resource management authorities, in the case of subsection 80(4); and
- The authority responsible for authorizing uses of land or waters or deposits of waste in National Parks or historic sites, as per subsections 52(3) and 97(3).

Wherever in the MVRMA reference is made, in relation to any matter, to a power or duty to consult,<sup>9</sup> that power or duty shall be exercised, as set out in section 3 of the MVRMA:

- (a) By 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 these views;
  - (iii) an opportunity to present those views to the party having the power or duty to consult; and
- (b) By considering, fully and impartially, any views so presented.

With respect to consultation with Aboriginal Organizations/Governments, Board procedures are further informed by direction provided in:

- Modern treaties;
- Interim measures agreements (IMAs) and Ministerial policy directions;<sup>10</sup>
- Framework agreements; and,
- Litigation settlement agreements and case law.

<sup>9</sup> While the term "consultation" is not directly referenced in section 63, the Boards interpret this provision of the MVRMA as a Statutory Consultation obligation to First Nations.

<sup>10</sup> In regions of the Mackenzie Valley where land claim negotiations are still underway, the MVLWB has been provided with policy direction from the Minister of Crown Indigenous Relations Northern Affairs Canada to implement IMA processes and timelines. IMAs clarify how the Governments of Canada and the Northwest Territories will work with an Aboriginal group during land and resource negotiations. See Appendix D for a summary of the IMAs and policy direction to the MVLWB.

### 2.2.2 Board Procedure

The Boards' consultation approach is focused on the following procedural elements, including:

- Distributing applications to parties for review and comment;
- Conducting preliminary screenings;
- Conducting public hearings;
- Distributing drafts of water licence conditions and land use permit conditions (when appropriate) for public review;
- Managing permits and licences after they have been issued; and
- Developing guidelines and policies.

While specific approaches to these consultation requirements may vary among the Boards, Board policies for each consultation requirement are consistent and outlined in Appendix C.

### 2.3 Ruling on Adequacy of Crown Consultation

The Boards will require early notification from the Crown about whether the Crown intends to rely on Board consultation process in each proceeding.

In most cases, the Boards will be able to rely on the robustness of existing procedures to satisfy themselves and other parties that consultation with potentially impacted Aboriginal Organizations/Governments carried out under the MVRMA and Waters Act has been adequate, particularly where land claims have been settled and land use plans are in place.

The Boards have the ability to rule on questions of law within their jurisdiction and therefore the authority, if necessary, to assess the adequacy of Crown Consultation before making a final decision or making a recommendation to the Minister of Aboriginal Affairs and Northern Development Canada (see Figure 1), and may use remedies available to them in addressing

Aboriginal consultation issues.

In the case of final decisions made by the Board, the Board may only issue a permit or licence if adequate Crown Consultation has taken place.

## 3.0 Policy Implementation

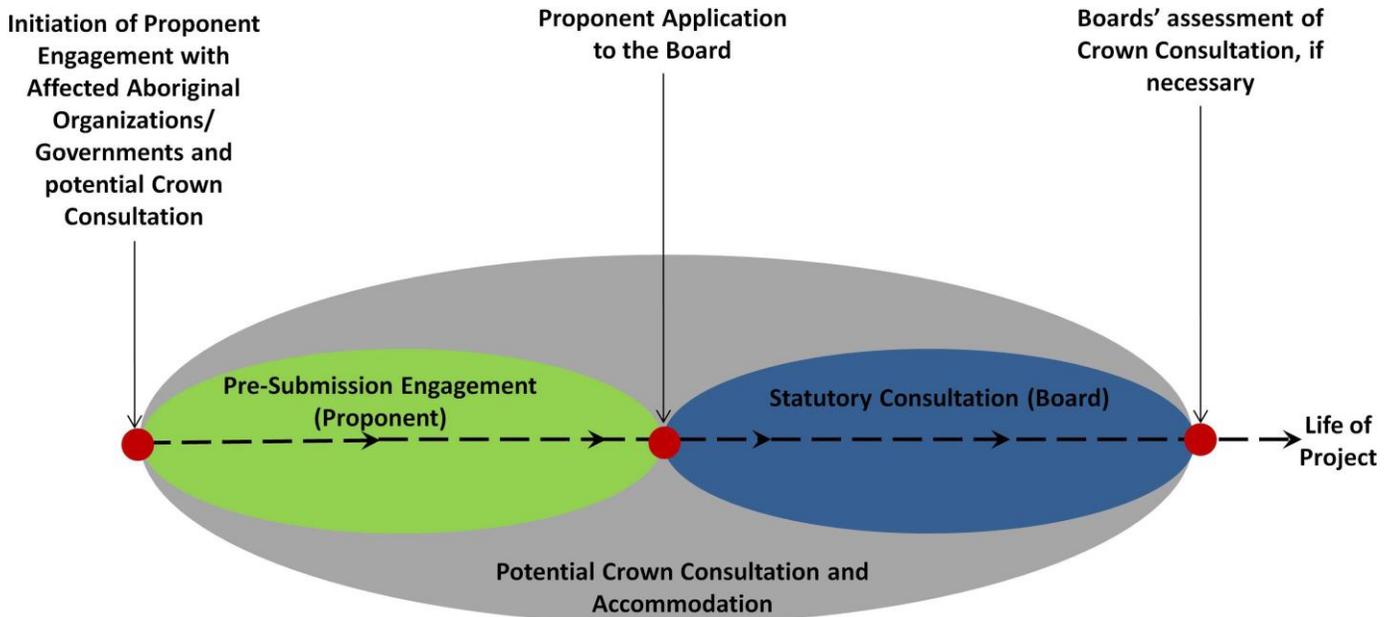
Section 106 of the MVRMA gives the MVLWB the responsibility to "Issue directions on general policy matters or on matters concerning the use of land or waters or the deposit of waste that, in the Board's opinion, require consistent application throughout the Mackenzie Valley". The Policy is issued under section 106 of the MVRMA. The MVLWB will establish the procedures necessary to ensure that the Policy is appropriately implemented and periodically reviewed. The MVLWB may establish working groups to address specific policy matters related to consultation or Engagement, including the revision of the Policy and the Guidelines.

### 3.1 Monitoring and Performance Development

Mechanisms will be required to monitor and measure performance and to evaluate the effectiveness in achieving the Policy's objectives articulated above.

In accordance with the principles of a management systems approach (i.e. plan-do-check-act), the MVLWB will develop a performance measurement framework. The Policy will be reviewed and amended as necessary within that framework. The framework will also describe how interested parties will be involved in the Policy review process.

**Figure 1.** The relationship between Proponent Engagement, the Boards' Statutory Consultation, and Crown Consultation throughout the regulatory process.



Please refer to Appendices E and F for additional information on impacts to Aboriginal rights, depth of consultation, and how the Board would rule on the adequacy of Crown Consultation.

## Appendix A - References

### **Statutory and Regulatory Guidance Documents Related to Engagement and Consultation**

Government of Canada. 1992. Gwich'in Comprehensive Land Claim Agreement. Government of Canada. 1993. Sahtu Dene and Métis Comprehensive Land Claim Agreement. Government of Canada. 1998. Mackenzie Valley Resource Management Act.

Government of Canada. 2001. Akaitcho Territory Interim Measures Agreement.

Government of Canada. 2003. NWT Métis Nation Interim Measures Agreement.

Government of Canada. 2003. Policy Direction to the MVLWB Regarding Consultation with the Manitoba Denesuline.

Government of Canada. 2003. Policy Direction to the MVLWB Regarding Consultation with the Saskatchewan Athabasca Denesuline.

Government of Canada. 2004. Dehcho Interim Measures Agreement.

Government of Canada. 2004. Policy Direction, Dehcho Interim Measures Agreement.

Government of Canada. 2004. Policy Direction to the MVLWB regarding the Akaitcho Territory Dene First Nations.

Government of Canada. 2005. Land Claim and Self-Government Agreement Among the Tłı̨cho and the Government of the Northwest Territories and the Government of Canada.

### **Crown Consultation Guidelines/Agreements**

Aboriginal Affairs and Northern Development Canada (AANDC). 2011. Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult. Government of Canada.

Aboriginal Affairs and Northern Development Canada (AANDC). 2011. NWT Land Information Related to Aboriginal Groups (map).

Canadian Northern Economic Development Agency. 2012. Memorandum of Understanding: Defining Terms and Scope of Cooperation between Federal Departments, Agencies and the Northern Projects Management Office (NPMO) for Coordination of Northern Projects.

Government of the Northwest Territories. 2012. Aboriginal Engagement Strategy.

Government of the Northwest Territories. 2007. The GNWT's Approach to Consultation with Aboriginal Governments and Organizations.

### **Community-based Guidelines/Tools Applicable to Aboriginal Consultation**

Akaitcho Dene First Nations. Mineral Exploration Guidelines in the Akaitcho Territory. Akaitcho Dene First Nations. 2008. Akaitcho Exploration Agreement.

Gwich'in Tribal Council. 2010. Land Management and Control Guidelines.

Gibson, G, Innes, L. Policy Tools for Indigenous Governments for Exploration and Mining: The Firelight Group. [www.eisourcebook.org](http://www.eisourcebook.org).

North Slave Metis Alliance. Community Engagement Policy.

### **Industry Guidance on Aboriginal and Public Engagement**

Canadian Association of Petroleum Producers (CAPP). 2006. Industry Practices: Developing Effective Working Relationships with Aboriginal Communities.

Canadian Association of Petroleum Producers (CAPP). 2003. Guide for Effective Public Involvement.

International Council on Mining and Metals (ICMM). 2010. Good Practices Guide: Indigenous Peoples and Mining.

Mining Association of Canada. 2009. Aboriginal and Community Outreach Program: Towards Sustainable Mining (TSM) Assessment Tool.

Prospectors and Developers Association of Canada (PDAC). 2009. E3Plus: A Framework for Responsible Exploration: Principles and Guidance

## Appendix B - Engagement Criteria

Engagement Criteria	Guiding Principle	The Board will assess the Engagement record and engagement plan using these questions.	At which stage will the Board apply the criteria?
Who was engaged	<ul style="list-style-type: none"> <li>• Shared responsibility</li> <li>• Inclusiveness</li> </ul>	<p>√ Were the appropriate affected Aboriginal Organizations/Governments and other affected parties contacted by the applicant?</p> <p>√ Were there reasonable responses and Engagement from the affected parties? Were phone calls/emails returned, and were there best efforts to respond to Engagement initiatives?</p>	<ul style="list-style-type: none"> <li>• Determination of whether an application is complete</li> <li>• Final decision</li> </ul>
Timing of engagement	<ul style="list-style-type: none"> <li>• Appropriate disclosure</li> <li>• Reasonableness</li> </ul>	<p>√ Did the applicant begin engagement in a timely manner? (For example, did the applicant allot sufficient time for Engagement before filing larger or complex applications such as water licences or mineral exploration applications in areas not under an approved land use plan or in known areas of cultural or heritage significance?)*</p>	<ul style="list-style-type: none"> <li>• Determination of whether an application is complete</li> <li>• Final decision</li> </ul>

Engagement Criteria	Guiding Principle	The Board will assess the Engagement record and Engagement plan using these questions	At which stage will the Board apply the criteria?
		<p>√ Did the applicant give the Affected Party sufficient time to respond to the Engagement request and the information provided?</p>	
Achieved results	<ul style="list-style-type: none"> <li>• Shared responsibility</li> <li>• Reasonableness</li> <li>• Appropriate disclosure</li> </ul>	<p>√ Were relevant documents shared with the affected communities?*</p> <p>√ Did the submitted Engagement plan reflect guidance provided by the Board?</p>	<ul style="list-style-type: none"> <li>• Final decision</li> </ul>
		<p>√ Did the applicant note the resources, if any, that were put into Engagement (such as community visits, materials, etc.)? This would include reasonable costs of running meetings and, where appropriate, of translation services, and engaging independent consultants to peer-review technical materials and assist the community to comment.</p>	
		<p>√ Where community visits were not possible or required, did the applicant use alternative means of Engagement?*</p>	
		<p>√ Were responses to the Engagement from the affected Aboriginal group(s) included?</p>	

Engagement Criteria	Guiding Principle	The Board will assess the Engagement record and Engagement plan using these questions.	At which stage will the Board apply the criteria?
		<ul style="list-style-type: none"> <li>√ Did the applicant include evidence showing management of disputes and grievances?</li> <li>√ Which modifications, if any, did the applicant make to the Project as a result of engagement?</li> <li>√ Did the applicant highlight agreements, if any, in regard to access, impact management, or socio-economic benefits?<sup>11</sup></li> </ul>	

\* See Appendix A of the Guidelines for suggested timelines and suggested best practices for information sharing.

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<sup>11</sup> While reaching agreement on accommodation would demonstrate a high commitment to working with the affected party, the absence of this criteria would not stop an application from advancing to the screening/review stage.

## Appendix C - Board Consultation Procedures

While specific procedures may vary between Boards, Board consultation policies are consistent and are outlined below. The Crown has been requested to notify parties and the Board about whether it intends to rely on the Board's regulatory process to discharge its consultation obligations in whole or in part.

### **(a) Distributing applications for review and comment**

- To ensure timely notification of each application before a Board, applications will be posted on the Public Registry. Boards will carry out consultation with parties by distributing copies of applications for land use permits and water licences for comment. The Boards use distribution lists to notify all potentially affected parties. As opposed to pre-submission Engagement carried out by the Proponent, Statutory Consultation carried out by the Boards is much broader and more comprehensive in terms of geographic scope.
- Other considerations, including downstream impacts to water, are critical to answering the question, "Who may be potentially impacted?" The Boards will rely on different tools, including those provided by the Crown, such as the geo-pdf NWT Land Information Related to Aboriginal Groups, to further assist with identifying potentially affected parties.
- Timelines for land use permit notification and review periods are set by the Board to ensure compliance with the timelines established in the Mackenzie Valley Land Use Regulations.<sup>12</sup> For water licence applications, there are no prescribed timelines. Where a Board is working

with policy direction or pursuant to an interim measures agreement, it will make best efforts to meet the consultation requirements as defined in these agreements.

- To allow all members access to all information before the Board respecting applications, all copies of applications, distribution notices, and review comment submissions received by Boards will be placed on the Public Registry.

### **(b) Preliminary screenings**

Once notification and public review periods for an application are complete, all new Project applications are subject to a preliminary screening, unless specifically exempted, to determine if they might have significant adverse environmental impacts or be a source of public concern.

If, in the course of a public review, an Affected Party raises concern regarding a potential impact on the environment or to an established Aboriginal or treaty right, the Boards will, prior to making a screening decision, need to assess the potential impact of the application in this context.

Once potential adverse impacts of the Project have been identified (including those that may impact an established or asserted right), the Boards have a number of options (remedies), including:

- Ruling to stop the process and conduct a public hearing or further investigation
- under paragraph 22(2)(b) of the Mackenzie Valley Land Use Regulations;
- Issuing a permit or licence with conditions that can adequately address (mitigate) adverse impacts to

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<sup>12</sup> The Board must decide whether to issue, refer to environmental assessment, conduct further study, or deny a land use permit application within 42 days of an application's being deemed complete.

- established or asserted rights;
- Referring the Project to environmental assessment if the development is likely to have a significant adverse impact on the environment or might be a cause for public concern (which includes concerns raised regarding impacts to rights); or
- Refusing to issue the permit or type B water licence, or not recommending the issuance of a type A water licence until appropriate accommodations are considered.

### (c) Conducting public hearings

Boards will carry out public hearings when required. The Board may consult with specific reviewers prior to public hearings by holding pre-hearing conferences or technical sessions. To ensure best practices for consultation within the public hearing process, Boards will:

- Ensure adequate notice is provided;
- Use a variety of methods to advertise public hearings to ensure all affected parties are properly notified;
- Make best efforts to hold public hearings in the community or communities that will be most affected;
- Exercise flexibility for methods of contribution made by affected parties (e.g., videotape, audio, etc.); and
- Make best efforts to ensure that translation and plain language materials are provided at the public hearing.

### (d) Drafting water licences and land use permits

- To enable the participation of parties in the development of licence conditions for major Projects (e.g., type A water licence), the Boards will consult with

parties by distributing draft water licence conditions for review and comment prior to a final decision by a Board on issuance; and

- In some cases, Boards may decide to send out draft LUP conditions to ensure they reflect the concerns raised through evidence presented to it in the course of a screening process.

### (e) Post-issuance permit and licence management

- To ensure transparency and informed participation in the ongoing management of water licences and land use permits, the Boards will consult with parties in the review of submissions required under conditions of land use permits/water licences (e.g., management plans, closure and reclamation plans, design drawings for proposed modifications of structures, etc.). For submissions addressing complex subject matters, this may include the coordination of workshops and technical sessions to ensure informed participation.
- When considering amendments to LUPs or WLs on the Boards' own motions, suspensions, or cancellations, the Boards will consult with parties to ensure their views are provided, become part of the public record, and be considered in Board decisions.
- To ensure best practices for consultation during the post-issuance and licence-management phase, the Boards will:
  - Ensure adequate notice is provided;
  - Use a variety of methods to advertise workshops and/or technical sessions to ensure all stakeholders are properly notified;

- Make best efforts to ensure that translation and plain language materials are provided if required; and
- Conduct technical sessions, workshops, and other meetings with respect to review of submissions for ongoing management and administration of WLs and LUPs (e.g., monitoring and management plans, closure and reclamation).

**(f) Guideline and policy development**

- The Boards have the authority to establish guidelines and policies in respect of licences, permits, and authorizations. When developing or revising such documents, the Boards will engage with parties by distributing draft documents for review and comment. Comments are carefully considered before the finalization of guidelines and policies.

## Appendix D - Summary of Regulatory Guidance in Policy Directions and Interim Measures Agreements

Agreement, IMA, and Policy Direction	Date	Source	Sections Relevant to the MVLWB	Subject Area	Specific Measures
<b>Akaiitcho Interim Measures Agreement (IMA) and Schedules</b>	2001		2.1 (a)(b) 3.1 (a)(b) Schedule C- Land Use Permits C.1 – Water Licences	Notification and review	<ul style="list-style-type: none"> <li>• Canada issues land use permits and water licences through the MVLWB.</li> <li>• Schedules C and C.1 set out how the Board will provide the Akaiitcho DFN with copies of the application or other information and timelines for response.</li> <li>• For LUPs and WLs, the IMA states the Board will send applications to the Akaiitcho Pre-Screening Board (APSB), within five days of the receipt of an application that is deemed complete.</li> <li>• The APSB will consider an application and respond within 21 days for type A land use permits, and five days for type B land use permits.</li> <li>• The APSB will consider an application and respond within 30 days for a WL. For WLs, the MVLWB may extend the time for the APSB to respond, to the extent permitted by the MVRMA.</li> <li>• Responses may include written submissions, oral submissions, audio-visual presentations, and/or Elders submissions (oral or written).</li> </ul>

Agreement, IMA, and Policy Direction	Date	Source	Sections Relevant to the MVLWB	Subject Area	Specific Measures
<b>Ministerial Policy Direction regarding the Akaitcho IMA</b>	2004	Sections 82 and 109 of the MVRMA	1-10	Further study re: potential impacts to rights  Mitigation measures for land and water re: exercise of resource rights and impact on heritage resources	<ul style="list-style-type: none"> <li>• Policy Direction further directs the MVLWB to consider, fully and impartially, a request by the APSB that the Board use paragraph 22(2)(b) of the MVLUR or section 16 of the NWT Waters Act so that a hearing can be held or that the applicant conduct further study or investigation respecting use by members of an ATDFN of land subject to the application or the use of water or the deposit of waste, and of adjacent land and water that may be affected by the application.</li> <li>• When establishing terms and conditions for an LUP or a WL, the Board is to consider the impact of the permit or licence on traditional resource use activities engaged in by members of the ATDFN and on heritage resources.</li> <li>• The Board is to consider fully and impartially any recommendations made by the APSB respecting the terms and conditions to be included in a permit for the use of water and whether to issue a licence for the use of water or the deposit of waste and the terms and conditions to be included in a licence.</li> <li>• For greater certainty, the Direction does not change any time period set out in the MVRMA or the NWT Waters Act or their regulations.</li> </ul>

Agreement, IMA, and Policy Direction	Date	Source	Sections Relevant to the MVLWB	Subject Area	Specific Measures
<b>Dehcho First Nations (DCFN) Interim Measures Agreement</b>			27-28	Planning	<ul style="list-style-type: none"> <li>• Following consideration of a land use plan and after consultation with the MVLWB, the Minister of Aboriginal Affairs and Northern Development Canada may, under section 109 of the MVRMA, provide written policy directions, in relation to the plan, binding on the Board with respect to the exercise of its functions.</li> <li>• No new LUPs or WLs will be issued within the Dehcho Territory except after written notice to the DCFN of an application made to the MVLWB for a permit or licence and after a reasonable period of time for the DCFN to make representations to the Board.</li> </ul>
<b>Ministerial Policy Direction regarding the DCFN IMA – withdrawn lands non-exclusive seismic</b>	2004		Sections 82 and 109 of the MVRMA  Section 43 of the IMA	Exclusion of land from non-exclusive surveys (geophysical seismic)	<ul style="list-style-type: none"> <li>• In undertaking its (Canada’s) function of identifying the location and area of lands that may be used in geophysical land-use operations involving seismic programs conducted as non-exclusive surveys, the Board is to exercise its authority consistent with Canada’s commitment in section 43 of the IMA. Accordingly, the lands identified on maps attached to the policy direction which are within the area of lands withdrawn from disposal under the Order in Council dated August 13, 2003 shall not be available for such land-use operations for the period of time the withdrawal order, or an order replacing it under the Agreement, is in effect.</li> </ul>

Agreement, IMA, Date and Policy Direction	Date	Source	Sections Relevant to the MVLWB	Subject Area	Specific Measures
<b>Northwest Territory Métis Nation Interim Measures Agreement</b>	2002		5.0 Schedule 4.1 (a) - LUPs 4.1(b) - WLs	Notification and review	<ul style="list-style-type: none"> <li>• Canada shall, at its earliest opportunity, notify the Northwest Territories Métis Nation (NWTMN) in writing when an application for a type A or type B LUP or type A or type B WL (as provided for in the MVRMA or the NWT Waters Act) is received without prejudice to the:               <ul style="list-style-type: none"> <li>• involvement of the NWTMN in the preliminary screening process provided for in the MVRMA; and,</li> <li>• involvement of the NWTMN in any other consultative process.</li> </ul> </li> <li>• Schedules 4.1(a) and 4.1(b) set out how the Board will provide the NWTMN with copies of the application or other information and timelines for response.</li> <li>• For LUPs and WLs, the IMA states the Board will deliver packages containing applications and related information to the NWTMN, within five days of the receipt of an application that is deemed complete.</li> <li>• The Board will release all new information to the NWTMN as soon as it becomes available,</li> <li>• and the Board may, upon request by the NWTMN, provide any further information necessary</li> <li>• for the NWTMN to inform itself, review, assess, and respond to the application being pre-screened.</li> </ul>

Agreement, IMA, and Policy Direction	Date	Source	Sections Relevant to the MVLWB	Subject Area	Specific Measures
					<ul style="list-style-type: none"> <li>Where the Board holds public meetings relating to the proposal, any official records of such meetings will be released to the NWT- MN as soon as they are completed.</li> <li>The NWTMN will consider an application and respond within 30 days (for all types of applications), or within such time as agreed upon between the Board and the NWTMN.</li> </ul>
<b>Transboundary IMAs</b>					
<b>Ministerial Policy Direction regarding Saskatchewan Athabasca Denesuline IMA</b>	2003		Section 82 of the MVRMA	Notification and review-paragraph (63) (2)  Consider stated potential impacts to heritage resources paragraph (64) (1)	<ul style="list-style-type: none"> <li>Notify the Saskatchewan Athabasca Denesuline of an application made to the Board for a licence or permit in relation to the area identified in Annex B of this direction and allow a reasonable period of time for them to make representations to the Board with respect to the application.</li> <li>Seek and consider the advice of the above respecting the presence of heritage resources that might be affected by a use of land or waters or a deposit of waste proposed in an application.</li> </ul>
<b>Ministerial Policy Direction regarding Manitoba Athabasca Denesuline IMA</b>	2003		Section 82 of the MVRMA	Notification and review-paragraph (63) (2)	<ul style="list-style-type: none"> <li>Notify the Manitoba Athabasca Denesuline of an application made to the Board for a WL or LUP in relation to the area identified in Annex A of this direction and allow a reasonable period of time for them to make representations to the Board with respect to the application.</li> </ul>

				Consider stated potential impacts to heritage resources paragraph (64) (1)	<ul style="list-style-type: none"><li>• Seek and consider the advice of the above respecting the presence of heritage resources that might be affected by a use of land or waters or a deposit of waste proposed in an application.</li></ul>
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## Appendix E - Guide to Identifying Impacts to Aboriginal Rights and Required Depth of Consultation

If potential for adverse impacts to Aboriginal and Treaty Rights arise in the normal course of Engagement or a statutory proceeding, the Board and the federal and territorial governments may also need to consider additional questions that are unique to an Aboriginal group's right to exercise their practices, traditions, and customs that are distinct to their cultural identity and protected under treaties or/ and under section 35 of the Constitution Act. While potential for adverse impacts to rights will differ from group to group, general examples of impacts of this nature could include, but are not limited to:<sup>13</sup>

- (a) Proximity to community sites (or traditional village sites) and reserve lands;
- (b) Closeness to commercial trapper cabins or cabins for traditional economic practice;
- (c) Traditional transportation corridors such as known trails used to access hunting and trapping areas;
- (d) Cultural meeting zones;
- (e) Sites of cultural significance – grounded in stories and oral history
- (f) Archaeological potential, which may be determined by:
  - (i) quantitative modeling;
  - (ii) culturally significant area – oral history;
  - (iii) traditional use study data;
  - (iv) village sites or known travel sites; and

(v) proximity to known archaeological sites;

- (g) The Project's potential contribution to cumulative effects;
  - Location and proximity to high use harvesting lands; and
  - Proximity to special habitat or areas frequented by important or threatened animal species.

These types of potential impacts alongside the Aboriginal Organization/Government's individual strength of claim are used to determine where the duty to consult lies along the spectrum and the depth of consultation that will be required in each particular case (see Figure 2).

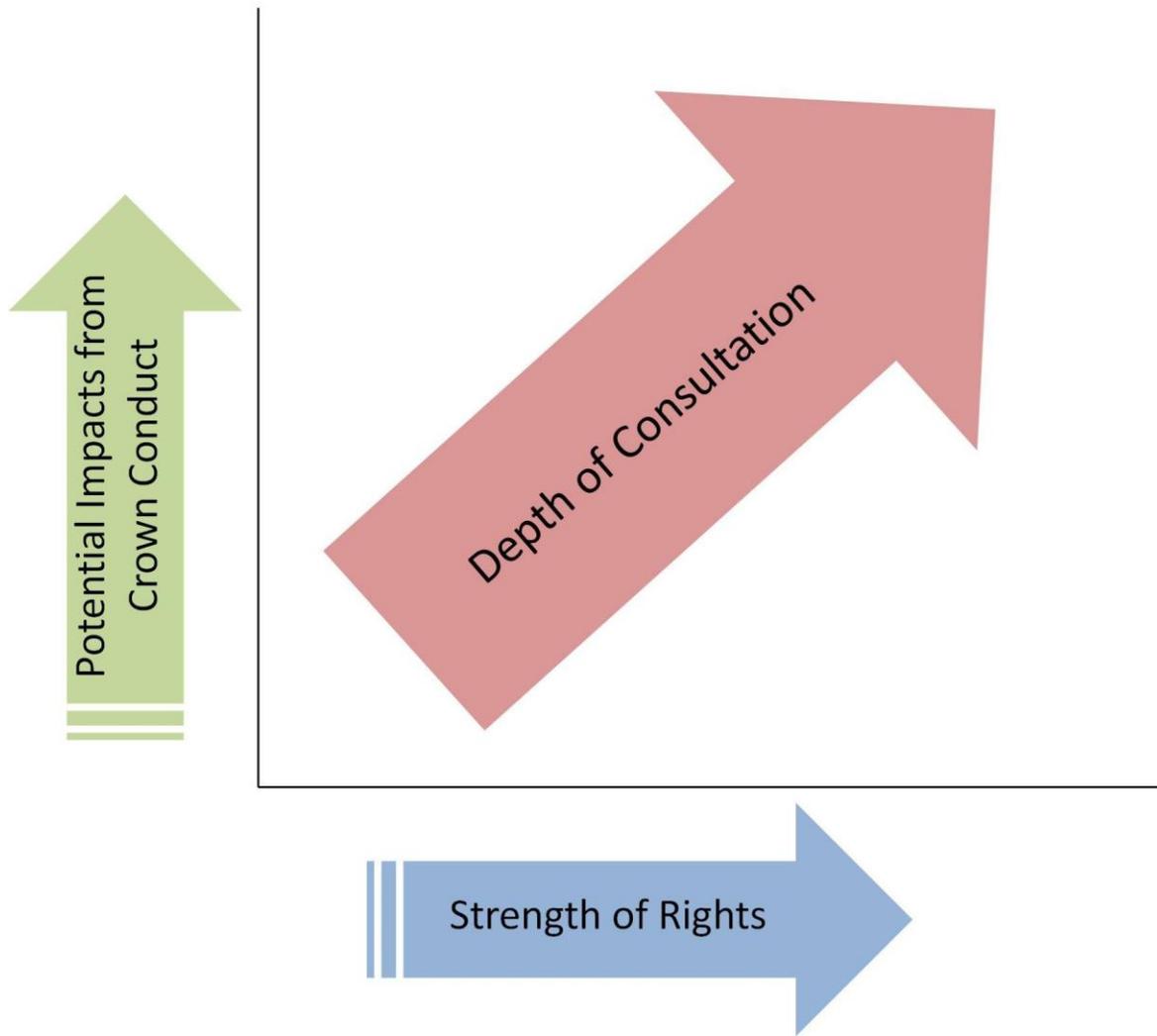
Strength of claim is an initial review of potential and established Aboriginal and Treaty Rights claims (including title and interests) and an in-depth legal assessment with supporting ethno-historical studies. The Crown (federal and territorial departments of justice and with Aboriginal Affairs and Northern Development Canada, and Aboriginal Affairs, Government of the NWT) and Aboriginal Organizations/Governments hold this knowledge and expertise and the Boards will, if required, access this information. See Appendix F for further guidance on how a Board would access this information if required.

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<sup>13</sup> Gibson, G. Innes, L. Policy Tools for Indigenous Governments for Exploration and Mining. The Firelight Group. [www.eisourcebook.org](http://www.eisourcebook.org)

When a Proponent is engaging with an affected Aboriginal organization/government, it is important to understand these types of impacts, to document any assertions raised, and to follow up with the Crown and the Board. (See Appendix A of the Guidelines for additional information.)

**Figure 2:** Depth of Consultation



## Appendix F - Procedures for Ruling on Adequacy of Crown Consultation

The following outlines general procedure for how a Board would conduct a ruling related to the adequacy of Crown Consultation. The MVLWB will continue to refine these procedures with the intent of developing additional guidance in this area at a future date.

### **Tracking issues raised by potentially impacted Aboriginal Organizations/Governments**

- In order to ensure impacts to established and/or asserted rights are considered, the Board will track and assess issues raised by potentially impacted Aboriginal Organizations/Governments.

### **Requests for rulings**

- The Boards' Rules of Procedure (2004) outline the process required for filing a motion for decision or ruling (rules 21-26).
- If a motion is filed with the Board requesting that it assess the adequacy of consultation, the Board will wait until the end of its evidentiary process to ensure that it has an adequate basis upon which to base its decision.

### **Ruling on adequacy of consultation within its own process**

- If a Board is satisfied that the request is valid, it may be required to undertake a strength of claim analysis 14 to help it determine whether the impact to an asserted or established right triggered the duty to consult—and to what extent—on the spectrum. 15 This determination would be required before the Board can satisfy itself that consultation issues can be adequately addressed through
- its own process or whether additional measures are required before approving a

permit or licence application or making a positive recommendation to the Minister of Aboriginal Affairs and Northern Development Canada for a type A water licence. Input from the Crown will be essential to the completion of a strength of claim analysis.

- If further investigation of impacts to asserted or established rights is required based on the Board's analysis, it will consider information provided by the Crown regarding its knowledge of a potential infringement and the steps it has taken to ensure it is meeting its legal obligations. The Board may use information requests to elicit information from the party filing a request to solicit information regarding:
  - the specific strength of claim to the area which the application is subject to; and
  - any additional information required to ensure the Board has an understanding as to the potential impact to the established or asserted right.
- The Board may also use section 22 of the MVRMA to secure information from the responsible government agency(or agencies) who may be in possession of relevant data (including Crown Consultation analysis, records of Crown Consultation, and accommodations) to assist in completing a strength of claim analysis in those cases where it is not clear where the duty to consult would lie on the spectrum. The Board may request that the Crown submit a consultation plan for the record. This information will be included on the record of the proceeding to the extent practical.
- If consultation issues arise, the Board may

apply section 25 of the MVRMA to subpoena information held by or representatives of government agencies who can address consultation-related matters. Affected Aboriginal governments/ organizations may be subject to similar information requests.<sup>14</sup>

- Should the record of a proceeding reveal issues which cannot be adequately dealt with through the Board’s process, the Board would have to satisfy itself that adequate consultation had otherwise occurred prior to approving a type A or B LUP or type B WL, or making its recommendation on a type A WL to the appropriate Minister.
- Should adequate information not be available, the Board may utilize remedies available to it, including denying the application or adjourning its process pending receipt of additional information necessary to ensure that adequate consultation has occurred.

**Ruling on Projects coming out of environmental assessment or environmental impact review**

- If requested to rule on the adequacy of Crown Consultation after a Project has completed an environmental assessment or environmental impact review, the Board will consider evidence on the Mackenzie Valley Environmental Impact Review Board’s Public Registry as part of its consultation record.

**Sample lines of inquiry**

- The following list of questions (see Tables 1 and 2) could be used by the Board during a proceeding to help assess the strength of claim, the whole effort of consultation against the proposed Crown conduct, and the appropriate remedy to apply in making a final decision:

**Table 1:** Sample of information requests/questions during a ruling that could clarify assertions about adequacy of consultation and accommodation.

Party	Board Lines of Inquiry
To the Aboriginal groups	<ul style="list-style-type: none"> <li>• Which specific Aboriginal rights could be impacted? Where? How? To what extent?</li> <li>• What can be done to accommodate or mitigate the specific impacts to the group’s rights and interests?</li> <li>• Has the government characterized the impacts to your Aboriginal rights and interests accurately? (This assumes an earlier submission from the Crown.)</li> </ul>
To the Crown	<ul style="list-style-type: none"> <li>• Considering the draft LUP and/or WL and the reasons for decision, does the Crown intend to conduct any additional consultation or accommodation?</li> </ul>

<sup>14</sup> See Tables 1 and 2.

**Table 2:** Sample of information requests during a ruling that could address adequacy of consultation and accommodation.

Party	Board Lines of Inquiry
To the Aboriginal groups	<ul style="list-style-type: none"><li>• Have the impacts you assert been addressed through terms and conditions?</li><li>• Which impacts are still outstanding?</li><li>• Do you have recommendations on how to address outstanding issues?</li></ul>
To the Crown	<ul style="list-style-type: none"><li>• Considering the draft LUP and/or WL and the reasons for decision, does the Crown intend to conduct any additional consultation or accommodation?</li></ul>