

First Nations Consultation for Forestry in Alberta

How practitioners can go beyond the Duty to Consult

This guide will be helpful if you:

- Are a practitioner representing a forestry company ("proponent") that holds a tenure on Crown land
- Consult with First Nations (this excludes Métis, as the consultation process differs)
- Want to exceed minimum requirements to improve your relationship with First Nations

Note: This is not a replacement to the Alberta guidelines and the tests below are simplified for general understanding specific to the delegated consultation duty for forestry proponents on Alberta Crown land.

How to fully meet the Duty

Who is responsible for meeting the Duty obligations?

The 'Crown' is responsible for meeting the Duty to Consult and Accommodate Indigenous peoples (the "Duty") where Aboriginal rights may be impacted. Alberta is the 'Crown' for forestry activities on Provincial Crown land, but procedures can be delegated to project proponents.

What does the Duty entail?

If the Duty to Consult and Accommodate is **triggered**, consultation duties arise that have specific **content** requirements depending on the strength of right and severity of impact.

1: Trigger

1. Does Alberta have knowledge of the claim or right?

- Includes all credible claims
- Knowledge can be actual (like treaties) or constructive

2. Is the proposed activity related to Alberta's conduct?

- Includes all approvals for Crown land activities, even strategic higher level plans (like Forest Management Plans) and licence or tenure transfers

3. Does the conduct cause an adverse effect to the claim/right?

- This must be informed by the Indigenous perspective (not your own)
- Effects are limited to new project impacts, not impacts from previous approvals

No Duty

NO

YES
to all

2: Content

Where does the claimed right's **strength** and **impact severity** fit on a spectrum?

Lowest End

Factors:

- Minor impacts that can be addressed
- Alberta Crown lands (surrendered by treaty, "taking up" lands)

Likely Minimum Duties: Give notice, direct information and disclosure, respond to concerns

Highest End

Factors:

- Serious impacts to rights
- Damage that can't be compensated
- Impacts to reserves or modern claims

Likely Minimum Duties: Formal participation, written decision reasons, participation funding, obtain consent

Are proponents expected to accommodate Indigenous concerns?

Accommodation is typically only required at the higher end of the strength and impact spectrum. Since Alberta Crown lands have been 'surrendered' in treaties, most forestry activities (like road construction and forest harvesting) will be on the lower end of the spectrum.

Caveat: Consultation would be meaningless if accommodation is unavailable from the outset.

Result: A duty to accommodate may arise during the consultation process, even if it initially seemed unavailable.

Note: These are the minimum requirements. The Crown can insist that proponents engage in more robust consultation.

What are the responsibilities and liabilities of a proponent?

Proponents are responsible for meeting the requirements set by Alberta in their consultation guidelines and policies. Proponents must also:

- Consult in good faith, without unethical conduct
- Abide by any conditions on Alberta approvals or meet preconditions prior to approval
- Respond to specific requests from the Alberta Consultation Office
- Supply consultation information in a format that is accessible to the First Nation

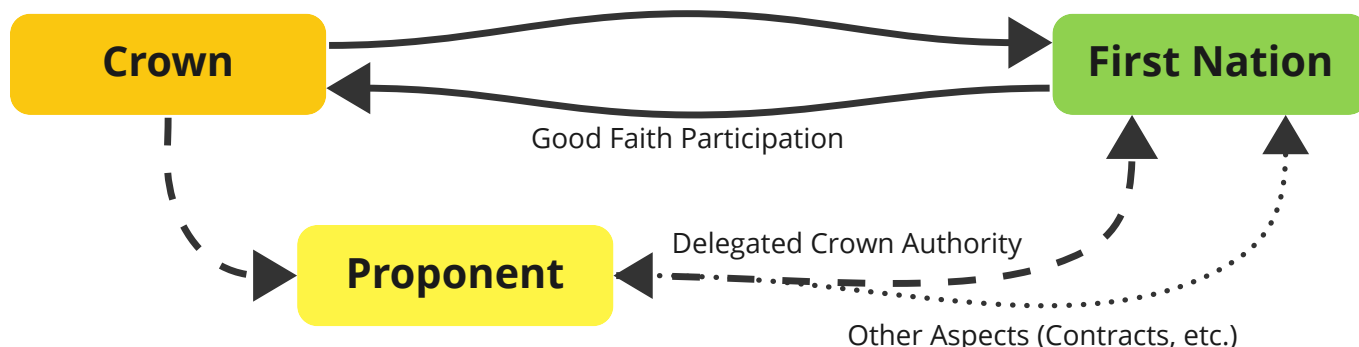
Even though the Crown is ultimately responsible for consultation, proponents can still be liable to the First Nation through other legal avenues.* Proponents should:

- Ensure that they meet contractual obligations with First Nations and there are no special impacts to First Nations beyond the general public
- Address past wrongs, as there recourse options beyond the duty
- Aim for a mutually-beneficial relationship (although proponents may seek an injunction for protests or blockades, there will likely still be economic harms that cannot be claimed)

* Other legal avenues include contract violations and tort law claims (e.g., negligence, nuisance)

Relationship Overview

Duty to Consult & Accommodate



What if a proponent fails to take adequate steps?

Since Alberta is ultimately responsible for achieving the Crown Duty, they are expected to step in if the proponent does not consult adequately. Actions Alberta could take include:

- Intervening in a specific instance (e.g., reconsidering decisions, postponing approvals, etc.)
- Making system-wide changes by updating the policy or enacting legislation

Going beyond the Duty by applying UNDRIP concepts

The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") was fully endorsed by Canada in 2016. The federal government introduced legislation in 2021 to implement UNDRIP on the federal level. Alberta has not done the same at the provincial level.

What is Alberta's position?

Alberta is willing to explore implementing UNDRIP in ways that are consistent with Alberta law and the Canadian Constitution, but is not currently considering a full endorsement.

Why should proponents go beyond the minimum requirements?

UNDRIP advocates for a nation-to-nation approach that sees Indigenous groups as equal, not inferior, to the provinces and Canada. Although implementation requires negotiation between governments, proponents can apply UNDRIP concepts to improve the current process.

Proponents may see numerous benefits from a process that sees First Nations as equal governance partners to the Crown, including:

- Meeting environmental, social and governance goals to increase investment attractiveness.
- Creating mutually-beneficial relationships that create greater certainty in fibre supply.
- More robust forest management plans that reflect First Nations land management.
- Ultimately doing the right thing and following federal direction. The federal government recognizes UNDRIP as the minimum standard for protecting Indigenous interests.

What does meeting UNDRIP entail during the consultation process?

A core tenet of UNDRIP is for states to obtain the **free, prior** and **informed consent** ("FPIC") before approving a project that affects their lands or resources.

Free: Must be given voluntarily, without coercion, intimidation or manipulation, in a process directed by the First Nation

Prior: Must be obtained well in advance of approval or commencement, with enough time to be fully considered and following a timeline controlled by the First Nation

Informed: Information must be provided in a format appropriate to the First Nation that is accessible, clear, transparent and provided on an ongoing basis

Consent: Must be sought, granted, or withheld in a process chosen by the First Nation. Approval can be denied, have conditions, and change if the activities evolve or new information emerges.

How do these requirements go beyond the Duty?

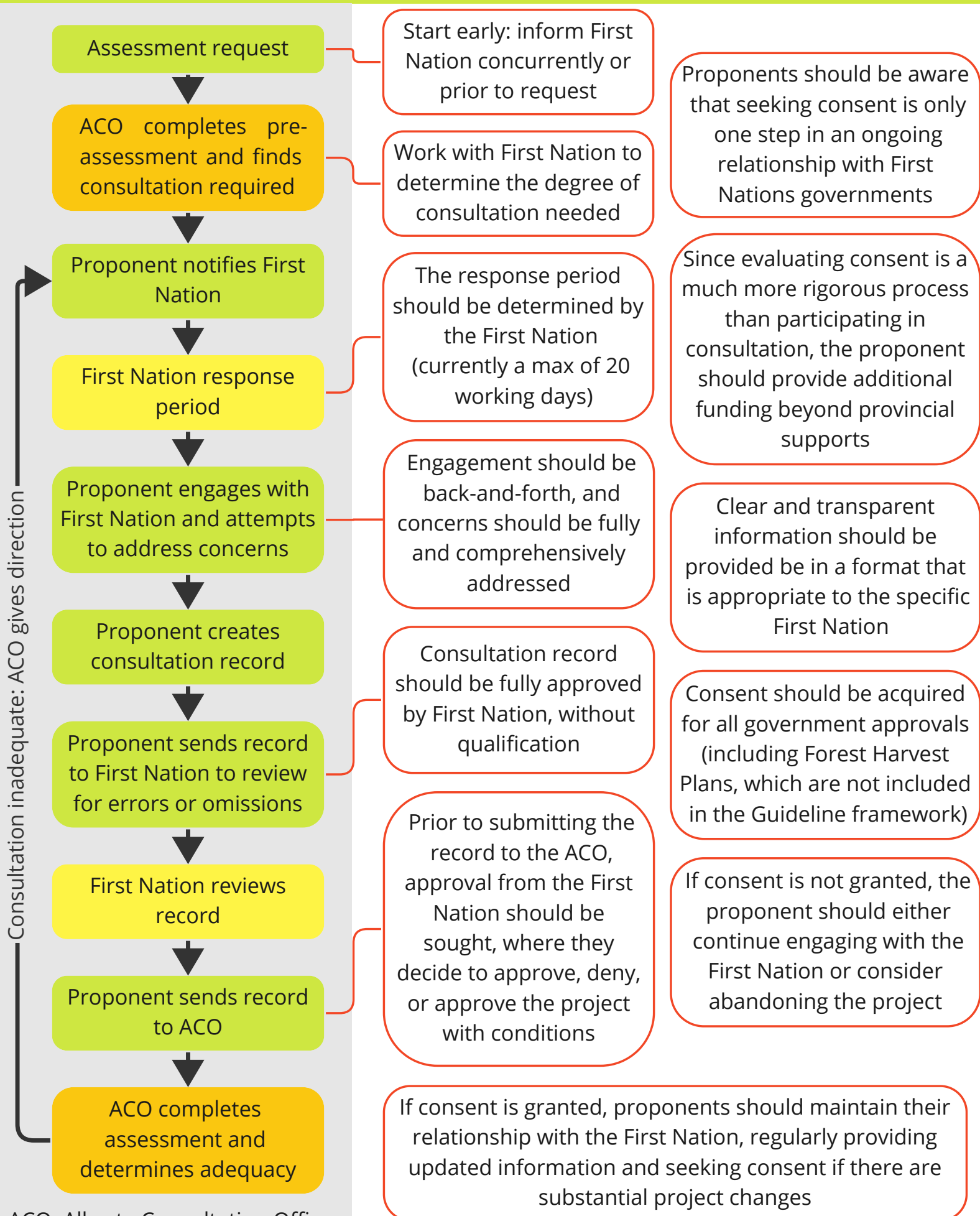
These consent-based requirements are much more robust and fundamentally different than the Duty to Consult. A few specific areas where UNDRIP goes beyond the Duty include:

- Consent is required wherever a First Nation's rights are impacted, not only at the very highest end of the spectrum, and the consent requirements are more robust
- Direct First Nations involvement that follows a process suited to the group instead of Alberta having unilateral control
- Encourages an ongoing relationship, not a structured process with defined limits

Suggestions for applying FPIC concepts to the Alberta consultation guidelines



Application to Alberta's Consultation Policy & Guidelines



ACO: Alberta Consultation Office

Further Reading

Disclaimer: The tests for the trigger and content of the Duty to Consult and Accommodate, UNDRIP overview, and Alberta consultation guidelines were simplified for ease of understanding. For a more comprehensive overview of each, review the information below.

Alberta First Nations Consultation

Indigenous Consultations in Alberta: <https://www.alberta.ca/indigenous-consultations-in-alberta.aspx>

The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013 (Updated 2020): <https://open.alberta.ca/dataset/801cf837-4364-4ff2-b2f9-a37bd949bd83/resource/8fa6a92a-3523-457a-b3b0-1e72f3cb79b8/download/ir-policy-consultation-first-nations-land-resources-2013-amended-2020.pdf>

The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (2014): <https://open.alberta.ca/dataset/f1eb5282-5784-45f7-a35a-f03bf206de0e/resource/263300f3-5ca9-4477-98d4-d30d505aa694/download/3775118-2014-guidelines-consultation-first-nations-land-natural-resource-management.pdf>

Alberta First Nation Consultation Guidelines Amendment (2019):

<https://open.alberta.ca/dataset/f1eb5282-5784-45f7-a35a-f03bf206de0e/resource/dfb8d88a-197c-4bd7-bdb9-3784e205488b/download/ir-goa-guidelines-consultation-with-first-nations-2014-amendment-2019.pdf>

UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples:

https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Free, Prior and Informed Consent Manual for Project Practitioners by the Food and Agriculture Organization of the United Nations: <https://www.fao.org/3/i6190e/i6190e.pdf>

Alberta's action relating to UNDRIP: <https://www.alberta.ca/united-nations-declaration-on-the-rights-of-indigenous-peoples.aspx>

Forestry Impacts: Understanding the United Nations Declaration on the Rights of Indigenous Peoples, by Ian McNeill, Truck Logger BC (Fall 2017): https://www.tla.ca/wp-content/uploads/2019/09/2017fall_truckloggerbc_forestryimpactsun_macneill.pdf

United Nations Declaration on the Rights of Indigenous Peoples Act Backgrounder by the Government of Canada: <https://www.justice.gc.ca/eng/declaration/about-afpos.html>