

CRITICAL REFORMS: MINING IN MANITOBA INDIGENOUS RIGHTS AND THE DUTY TO CONSULT IN MINING AND MINERAL DEVELOPMENT

Key Takeaway: Indigenous rights must be considered before governments authorize mining activities that may affect them. Meaningful consultation requires more than notification: governments must share information, listen to Indigenous Nations, address their concerns and consider appropriate accommodation. The process must reflect the seriousness of potential impacts, including the cumulative effects of past and ongoing development.

INDIGENOUS PEOPLES HAVE RIGHTS, LAWS, AND RESPONSIBILITIES

Indigenous Nations have their own legal systems, laws, traditions and ways of knowing. These guide their relationships and responsibilities to the land, water, wildlife and all living beings.

First Nations, Inuit and Métis peoples have rights connected to their traditional territories. These include rights to hunt, fish, trap, gather and harvest resources, as well as inherent Indigenous and Treaty rights protected by the Canadian Constitution.

Mining and mineral development can affect these rights by changing access to traditional territories, damaging wildlife habitats, reducing the availability of resources or affecting the ability to exercise rights and carry out traditional practices.

WHAT IS THE DUTY TO CONSULT AND ACCOMMODATE?

Section 35 of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and Treaty rights. It also protects the constitutional relationship between Indigenous peoples and the Crown.

The governments of Canada and Manitoba have a constitutional duty to consult Indigenous peoples when government decisions may adversely affect their asserted or established Indigenous or Treaty rights. Where appropriate, the Crown must also accommodate those rights.

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This fact sheet provides general information, not legal advice. The specific obligations of governments and the rights of affected Indigenous Nations depend on the facts and applicable law.

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WHAT IS THE DUTY TO CONSULT? (CONTINUED)

The duty to consult:

- Applies to decisions about mining exploration, development, permits, licences and project approvals that may affect Indigenous or Treaty rights.
- Can arise even when a right has been asserted but not yet legally established.
- Must be fulfilled before the Crown makes a decision that could adversely affect those rights.
- Continues throughout the life of a project when new government decisions may affect those rights, including licence renewals.

The purpose of consultation is to advance reconciliation and prevent the Crown from making unilateral decisions that undermine Indigenous rights.

WHAT DOES MEANINGFUL CONSULTATION REQUIRE?

Consultation must be conducted in good faith and must meaningfully address the concerns of the affected Indigenous Nation. It is more than simply notifying a Nation about a proposed project. Depending on the potential seriousness of the impacts, meaningful consultation may require the Crown to:

- **Provide notice:** Inform the affected Nation about the proposed mining activities and the decisions being considered.
- **Share information:** Disclose relevant information about the project and its potential impacts.
- **Listen and engage:** Provide a genuine opportunity for dialogue and an exchange of information.
- **Address concerns:** Substantively consider the Nation's concerns about impacts of mining project on its rights and traditional practices.
- **Consider accommodation:** Identify and consider changes or measures to avoid, prevent or minimize adverse impacts.
- **Explain decisions:** Where proposed measures are not adopted, provide meaningful reasons for rejecting them.
- **Remain open to change:** Be willing to modify a proposed plan or decision in response to information received through consultation.

The deeper the potential impact on Indigenous or Treaty rights, the more extensive the consultation process may need to be. In some circumstances, consultation may require formal participation in decision-making and substantial changes to a proposed project.

The legal requirements depend on the circumstances.

Consultation does not automatically give every Indigenous Nation a veto over a project, but the Crown must fulfill its constitutional obligations before proceeding.

WANT TO LEARN MORE?

For more info, use this QR code to visit the [Project page](#) on the Manitoba Eco-Network website.



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WHY DOES THE HISTORY OF DEVELOPMENT MATTER?

Mining projects do not occur in isolation. Mineral exploration may introduce industrial development into a territory for the first time. In other areas, a proposed mine may add to the effects of decades of development.

The cumulative effects of past and ongoing development can be essential to understanding the impact of a new project on Indigenous rights.

For example, mining and related infrastructure may affect:

- Access to hunting, fishing, trapping and gathering areas.
- Wildlife populations, fish habitats and the availability of traditional food.
- The ability to exercise Indigenous and Treaty rights in traditional territories.
- The land, water and resources that sustain cultural practices and community well-being.
- The ability to pass on cultural practices and ways of life to future generations.

Where previous development has already harmed the exercise of Indigenous or Treaty rights, governments may need to consider the broader historical context to understand the seriousness of the additional impacts.

WHAT IS THE HONOUR OF THE CROWN?

The honour of the Crown is a constitutional principle that governs the Crown's dealings with Indigenous peoples. It requires the Crown to act honourably in its relationships with Indigenous Nations, including in relation to Indigenous rights, Treaty commitments and reconciliation.

The Supreme Court of Canada has emphasized that the honour of the Crown is not simply a statement of principle. It must be reflected in concrete actions and enforceable legal obligations.

In the context of mining, this means governments must take their consultation obligations seriously, address Indigenous concerns substantively and consider appropriate measures to protect Indigenous and Treaty rights.

WHAT ROLE DOES UNDRIP PLAY?

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) sets out the right of Indigenous people to free, prior and informed consent (FPIC). UNDRIP serves as an interpretive legal and political tool that guides how domestic laws, constitutional duties, and state actions are understood in relation to Indigenous rights.

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WHAT ROLE DOES UNDRIP PLAY? (CONTINUED)

Manitoba has committed to advancing reconciliation through *The Path to Reconciliation Act*. Canada has enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

The Act requires Canada, in consultation and cooperation with Indigenous peoples, to:

- take all measures necessary to ensure the laws of Canada are consistent with the Declaration;
- prepare and implement an action plan to achieve the Declaration's objectives; and
- table an annual report on progress to align the laws of Canada and on the action plan.

UNDRIP informs the broader legal and policy framework for relations between governments and Indigenous peoples. Its application to a particular mining project depends on the relevant legal obligations and circumstances.

WHAT HAPPENS IF GOVERNMENTS FAIL TO CONSULT?

If the Crown fails to meet its constitutional duty to consult and, where appropriate, accommodate, its decision may be challenged in court. Depending on the circumstances, a court may set aside or quash a project approval or other authorization and require the Crown to fulfill its obligations before making a new decision.

Disputes may also arise between Indigenous Nations and mining companies over access to traditional territories and the effects of mining operations.

Indigenous peoples considering protests or other actions that restrict access to a mining site should obtain legal advice, as courts may order that access restrictions or blockades be removed.

GOVERNMENT'S COMMITMENTS TO WORKING WITH INDIGENOUS PEOPLES

In its *Securing our Critical Mineral future: Responsible Mining Opportunity Ready Report* (2024), Manitoba has acknowledged:

- it has a duty to consult with Indigenous Nations when action or decisions may adversely impact the exercise of Indigenous or Treaty rights;
- it has been working faster to notify Indigenous nations earlier in the mineral development process;
- it will establish a Mining Advisory Council with broad Indigenous representation to guide the implementation of the critical minerals strategy and support the review of Manitoba's regulatory process; and
- it will develop a provincial revenue sharing model for mining in collaboration with Indigenous Nations.

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