

Understanding the Duty to Consult and Accommodate

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Overview

1. An Overview of Aboriginal Lands in Canada
 - Historic Treaties in Canada
 - Modern Land Claim Agreements
 - Non-treaty areas
2. The Development of Aboriginal Law and Duty to Consult
 - 80% Jurisprudence
 - 18% Legislation and Policy
 - 2% Other stuff (e.g. international law)
3. Case Discussion: *Yahey v British Columbia*, 2021 BCSC 1287
4. The Role of Agreements

PART ONE

An Overview of Aboriginal Lands in Canada

or

250 years of history in 2.5 minutes or less



The Three Legal Regimes in Canada

- Historic Treaties

- between the early 1700's and the early 1900's in the regions covering southern Ontario, parts of the Maritimes and the Prairie provinces

- Modern Land Claim Agreements

- from 1975 onward and most predominantly in northern Canada (north of 60) and a few very small areas of British Columbia

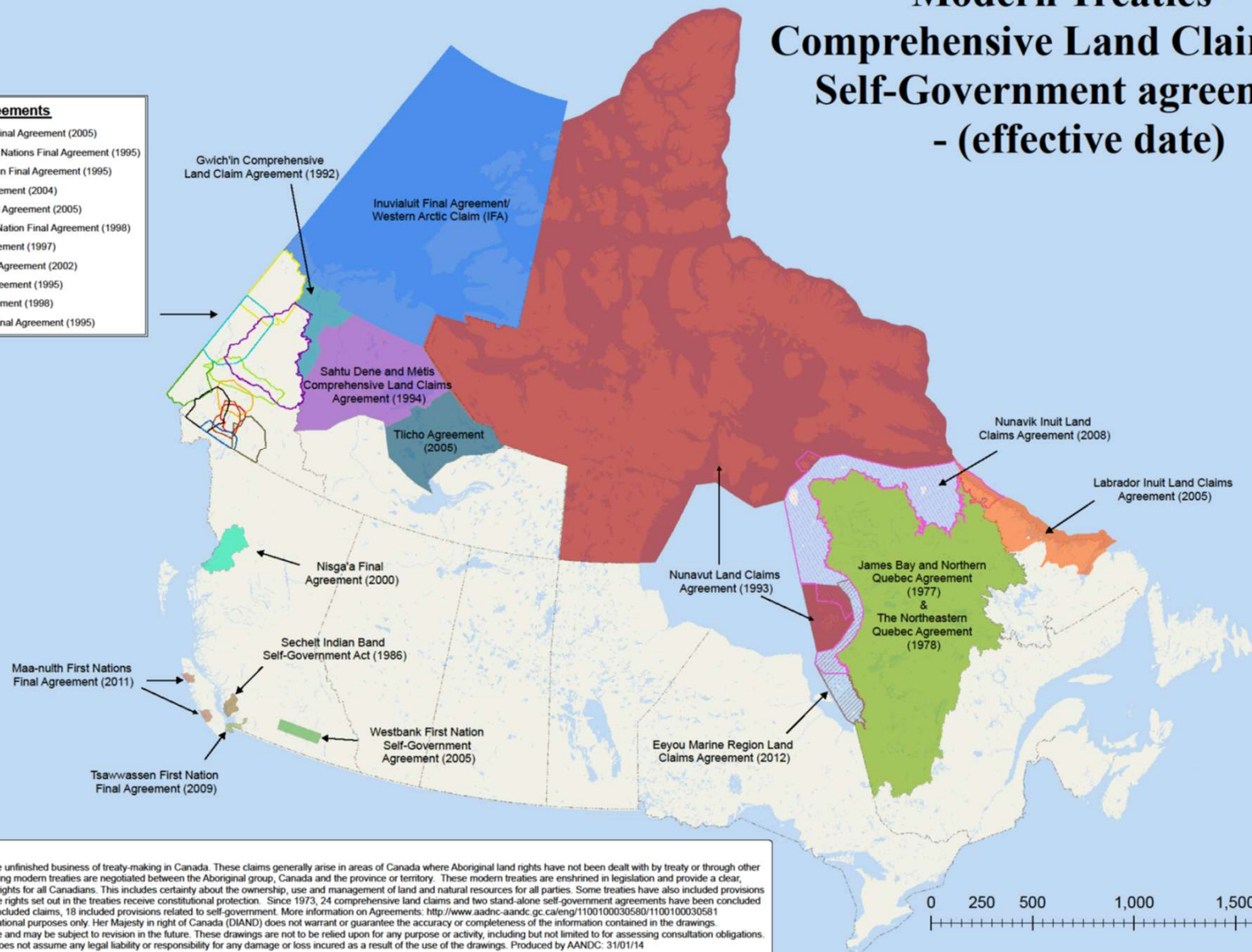
- Non-treaty areas

- predominantly in British Columbia in areas where historic or modern treaties have not been concluded



Modern Treaties - Comprehensive Land Claims and Self-Government agreements - (effective date)

- Yukon Agreements**
- Carcross/Tagish First Nation Final Agreement (2005)
 - Champagne and Aishihik First Nations Final Agreement (1995)
 - First Nation of Nacho Nyak Dun Final Agreement (1995)
 - Kluane First Nation Final Agreement (2004)
 - Kwanlin Dun First Nation Final Agreement (2005)
 - Little Salmon/Carmacks First Nation Final Agreement (1998)
 - Selkirk First Nation Final Agreement (1997)
 - Ta'an Kwach'an Council Final Agreement (2002)
 - Teslin Tlingit Council Final Agreement (1995)
 - Tr'ondek Hwëch'in Final Agreement (1998)
 - Vuntut Gwitchin First Nation Final Agreement (1995)



PART TWO

The Development of Aboriginal Law and the Duty to Consult

or

*30 years of jurisprudence
in 13 minutes or less*



Supreme Court - “Seven Year Itch”

- 1984 *Guerin v. R.* -fiduciary duty
- 1990 *R. v. Sparrow* -Aboriginal rights
- 1997 *Delgamuukw* -Aboriginal title
- 2004 *Haida/Taku* -duty to consult (1)
- 2010 *Little Salmon/RTA* -duty to consult (2)
- 2017 *Clyde River/Chippewas/
Ktunaxa/NND* -duty to consult (3)

Why the focus on Court decisions?

“This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate... As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.”

Haida Nation v. British Columbia, 2004,
SCC 73 at para. 11.

Overview: The Duty to Consult

- What is the Purpose of Consultation:
 - In historic treaty areas
- What is the Source of the Duty?
- The Trigger: When does the duty arise?
- What is Required?
 - A Spectrum - High, Medium, Low
 - Do First Nations have a “veto”?

“Taking up” lands under a # Treaty

“And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered...saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”

Aboriginal Consultation -Purpose (in Historic Treaty Areas)-

Mikisew (SCC, 2005)

“Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a process by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not).” (para. 33)

- purpose of the duty to consult was to fill any “procedural gaps” in the treaty

Aboriginal Consultation -Source-

What is the source of Aboriginal Consultation?

- “The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown.” (*Haida Nation* at para. 16)

Aboriginal Consultation -Trigger-

When is the Crown's duty to consult triggered?

- Three part test (*Rio Tinto*, para. 31):
 - Crown has knowledge of a potential Aboriginal claim or right;
 - Crown contemplates conduct; and
 - the conduct contemplated has the potential to adversely affect an Aboriginal claim or right.

Aboriginal Consultation

-Scope and Content of the Duty-

Varies with the circumstances:

- “Scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.” (*Haida Nation*, para. 39)
- Spectrum of consultation:

Aboriginal Consultation -Scope and Content-

- Low end of the consultation spectrum:
 - notice;
 - disclosure of information;
 - and discussion of any issues raised.

- High end of the consultation spectrum:
 - the opportunity to make submissions for consideration;
 - formal participation in the decision-making process;
 - written reasons to show how concerns were considered and their impacts on the decision; and
 - if necessary, accommodation of their interests.

Consultation is not a Veto

- *Non-treaty areas (Haida)*

“This process does not give Aboriginal groups a veto over what can be done with land ...Rather, what is required is a process of balancing interests, of give and take.”

- *Historic Treaties (Mikisew)*

“Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. ...will not always lead to accommodation, and accommodation may or may not result in an agreement.”

- *Modern Treaties (Little Salmon)*

“The First Nation does not have a veto over the approval process.”

UNDRIP / FPIC

- UNDRIP passed by United Nations in 2007
- Canada voted against the Declaration
- Requires states to “consult” with the indigenous peoples concerned to obtain their free, prior and informed consent prior to the approval of any project affecting their lands or territories and other resources

UNDRIP / FPIC

- endorsed by Canada in 2010

“The Declaration is an aspirational document...”

“... the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws ...”

UNDRIP / FPIC

- 2016 — Canada becomes “full supporter, without qualification”
- November 2017 -- Support for Bill C-262
- *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14

“The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.” (s. 5)

UNDRIP / FPIC

Does “free, prior and informed consent” mean a “veto”?

- Most political statements are heavily qualified — references to “consistent with Constitution” could mean “consistent with Court decisions” which do not provide for a veto
- still unclear how Canada and/or Provinces will implement UNDRIP

PART THREE

The *Yahey* Decision



Case Background: Treaty 8

- Made between the Crown and various Indigenous peoples in June 1899.
- Covers 840,000 km² across parts of northeastern British Columbia, northern Alberta, northwestern Saskatchewan, and a southern segment of the Northwest Territories.
- The Indigenous peoples who entered into Treaty 8 were repeatedly promised by Treaty Commissioners that “their rights to hunt, fish and trap would be protected and that their way of life would not be interfered with.”

Case Background: Treaty 8



Case Background: Treaty 8

- Treaty 8 provides:

...And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Case Background: Blueberry River First Nation

- BRFN's traditional territory covers some 38,000 km² in the upper Peace River Region of northeastern BC.
- Since 1900, BRFN witnessed extensive provincially authorized industrial development in its territory.

BRFN's Claim in *Yahey*

- BRFN's claim:
 - 1) The cumulative effects of provincially authorized industrial development had significant adverse impacts on the meaningful exercise of their Treaty 8 rights within their traditional territory.
 - Oil and gas, forestry, mining, hydroelectric infrastructure, agricultural clearing, and other activities.
 - 2) The Province had breached Treaty 8 and infringed those rights.

Yahey: A Novel Case

- Indigenous people had previously brought claims for infringements of their Aboriginal and treaty rights, those cases dealt with “single authorizations or specific provisions in statutes and regulations”
- Here, it was not “one single impact from one single regulation or project” that was alleged to have infringed BRFN’s rights. Rather, it was the “cumulative impacts of development” on the meaningful exercise of those rights

Did the Province breach the Treaty?

- The landscape over which BRFN was seeking to exercise its treaty rights was found to have been significantly impacted by industrial development.
- The Province breached its obligations to BRFN under the Treaty, as well as its fiduciary duty to BRFN by causing and permitted the cumulative impacts of industrial development without protecting Blueberry's treaty rights.

PART THREE

The Role of Agreements



BRFN Implementation Agreement

- The Province and BRFN entered into the Implementation Agreement, effective January 18, 2023.
- It remains in full force and effect for so long as the Province continues to authorize development activities to occur within any part of the Claim Area.
- Includes a financial component for remediation and reclamation and a framework for resource use and management going forward.
- A Cumulative Effects Management Regime.

BRFN Implementation Agreement: Forestry Management

- Forestry is dealt with in Article 6 of the Agreement
 - Timber harvesting
 - Herbicide application
 - Forest management activities (silviculture, reforestation)
 - Wildfire suppression

Impact Benefit Agreements

- Part A: The Basic Building Blocks of an Impact Benefit Agreement
 - Employment opportunities
 - Contracting opportunities
 - Financial consideration
 - Communications Committee
 - Legal certainty
- Part B: Implementation Challenges

Legal Principles: Accommodation

- When is Accommodation Required?

“When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation”

(Haida, at para 47).

- Accommodation is Not Required in Every Situation

Legal Principles: Accommodation

- Accommodation May Include:
 1. Avoidance of Specific Areas
 2. Minimizing Impacts
 3. Compensation (?)

Building Better Impact Benefit Agreements

- How?
 - Employment opportunities
 - Contracting opportunities
 - Financial consideration
 - Communications Committee
 - Legal certainty

Building Better Impact Benefit Agreements

- Why?
 - Industry: Proceed with the Project and Legal Certainty
 - Aboriginal Group: Share in the benefits and provide input on the Project
 - Both parties: Build relationships

The Bottom Line

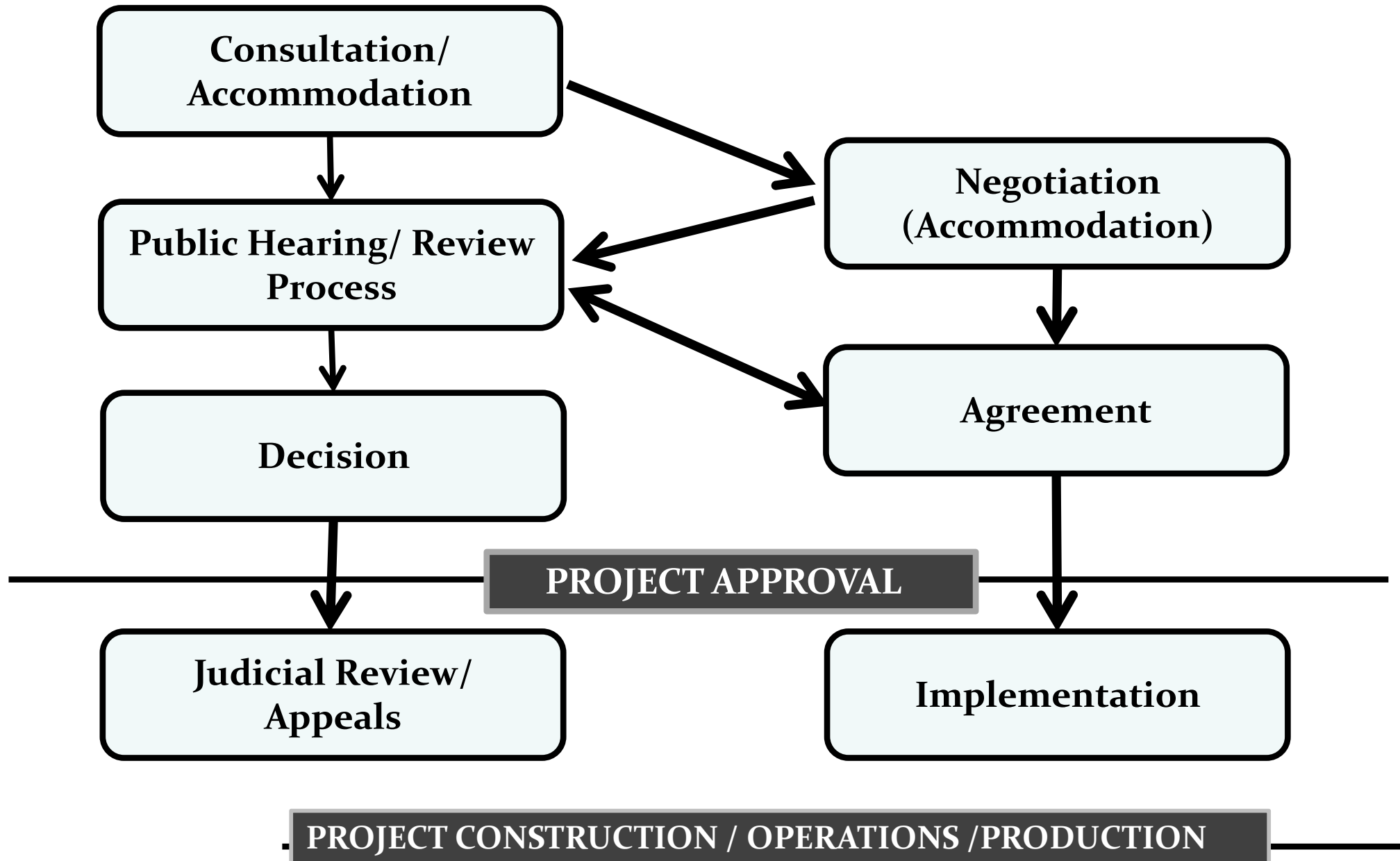
- Proponent:
 - Timely Approvals
 - Cost-effective
 - Competitive Advantage

- Aboriginal Groups
 - Better managed impacts
 - Benefits

Risk Management

- Compare your agreement to your next best alternative
 - Regulatory process
 - Court process
- Two track process
 - Consultation
 - Negotiation

Two Track Approach



Guidance for Integrated Pest Management Act

Indigenous Engagement: A Guide for Integrated Pest Management Act Proponents

- Updated September 2023 but not specific to BRFN.
- “The goal is to provide clarity about the province’s duty to consult before issuing authorizations for the use of pesticides, and the important role that proponents play in this process.”
- “[W]here proponents have applied to conduct some form of activity on the land in B.C., government may entrust the proponent with certain parts of the consultation process – this is known as delegating procedural aspects of consultation to proponents.”

Thank You!

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