

# Consulting with the Crown:



## A GUIDE FOR FIRST NATIONS



CENTRE FOR INDIGENOUS ENVIRONMENTAL RESOURCES

*Many people assisted us in preparing this guide. Foremost are the people of Hupacasath First Nation (BC) who invited us into their community and shared with us from their experience.*

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## **Consulting with the Crown: A Guide for First Nations**

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First Nation-directed environmental non-profit organisation.  
Our mission is to assist First Nations with environmental  
issues and environmental capacity development. Through our programs,  
we take action on climate change, build sustainable communities,  
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# A Guide to Consulting with the Crown

*The objectives of this Consultation Guide are simple:*

- 1. To simplify and explain the meaning of “consultation”; and*
- 2. To provide a tool to assist your First Nation in effectively engaging in consultation with Canadian provincial and federal governments—referred to collectively here as ‘the Crown’.*

*This guide will discuss the legal definition of consultation and the obligations on the Crown to approach your First Nation when it is making a decision that may impact your rights. In addition, this guide explores what involvement in consultation processes might mean for your community and how this might affect what you expect from consultation.*

*This guide sets out a six-step process that focuses heavily on the planning and education that takes place before consultation, and provides a means by which your First Nation can design a suitable consultation approach for your specific circumstances. It has been developed by CIER, a First Nation environmental organisation, with the interests of First Nations foremost in mind; the focus is on making suggestions as to how First Nations can engage in consultation towards protecting their rights and interests.*

When using this guide, it is important to keep the following in mind:

- Consultation, if done well, is a continuous process; there are many issues and times where you can enter the consultation process, but wherever that is, your First Nation should always be carefully informed about the issues involved and the obligations on both yourself and the Crown.
- Consultation should take place within a continuing and long-term relationship between Aboriginal peoples and the Crown; the objective of consultation is to reconcile their historic relationship.
- Consultation is an extremely important *legal duty* of the Crown; the obligation arises out of the highest law in Canada, our constitution, and statements made by our highest court, the Supreme Court of Canada. The Crown, including all its representatives, shares the responsibility to fulfil this duty.
- Consultation is talking about your Aboriginal, treaty and land title rights, and traditional use activities, how they may be impacted, and how they may be accommodated by whatever decision is being proposed by the Crown.

Finally, this guide is not intended to take the place of qualified legal advice. We have tried to present a comprehensive ‘plain language’ interpretation of the current state of the law and practice surrounding consultation. However, the law may be interpreted or applied in different ways, given your circumstances, and we encourage the use of this guide as a tool to educate and inform your First Nation. It may also be used as an aid in helping you work with your legal counsel. Participation in consultation, however, should involve qualified legal advice, in addition to the other expert advice you retain.



# What is Consultation?

The Supreme Court of Canada has defined consultation as a constitutional duty of the Crown stemming from s. 35(1) of the Constitution Act, 1982 which states:

*The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed*

At its most fundamental level, the Crown's duty to consult requires two things: a meaningful, fair process to have discussions and a substantive discussion that addresses, or accommodates, First Nation concerns. Consultation is required with Aboriginal peoples whose existing or potential rights may be impacted by a decision the provincial and/or federal governments are wishing to make.

The courts have not provided a set of step-by-step activities required to properly consult; most of their statements have been of a general nature, in the form of principles. Often the courts have explained what consultation *isn't*, rather than what it *is*. There have been numerous government reactions to court decisions, and a number of provinces have issued their own consultation guidelines.

To define consultation, we'll first look at the main principles of the legal definition, then we'll turn to how other First Nations have sought to define and practice consultation in order to get a better idea of what the Crown's duty to consult ought to include. The picture of the legal duty to consult will become clearer as we move through our proposed step-by-step process. For now, a brief summary of some main principles and key cases are useful for your future reference.

[A list of important cases and further useful reading is available. SEE APPENDIX \(A\)](#)

## The Legal Definition

The Supreme Court of Canada has set out the clearest definition of the Crown's duty to consult in three cases. They are listed here for your reference:

### **Haida Nation v. British Columbia (Minister of Forests), 2004**

For full text, go to:

<http://scc.lexum.umontreal.ca/en/2004/2004scc73/2004scc73.html>

### **Taku River v. British Columbia (Project Assessment Director), 2004**

For full text, go to:

<http://scc.lexum.umontreal.ca/en/2004/2004scc74/2004scc74.html>

### **Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005**

For full text, go to:

<http://scc.lexum.umontreal.ca/en/2005/2005scc69/2005scc69.html>

Even before these three cases, the Supreme Court of Canada had discussed the Crown's duty to consult. In *R v. Sparrow*, the Court talked about how the Crown should treat rights of Aboriginal peoples, including the following general process governments must be able to prove they genuinely implemented in order to justify any infringements of those rights:

1. Determine the existence of Aboriginal or treaty rights
2. Determine if the proposed Crown decision might interfere with the right
3. If it might, determine whether the interference is justified through ensuring the following:
  - a) That there has been consultation with all the potentially affected Aboriginal peoples, including demonstrated accommodation of Aboriginal views and concerns;
    - i) There is a valid objective to the interference
    - ii) Aboriginal and treaty rights are given priority over competing interests
    - iii) There is as little infringement of the rights as possible

In *Delgamuukw v. British Columbia*, the Court said that at a minimum, the Crown must approach consultation with Aboriginal peoples in good faith and with intention of substantially addressing these concerns. Later sections of this guide provide more information regarding these requirements.

The three cases mentioned in the beginning of this section provide extensive detail as to the source of the duty to consult. They also make clear that the duty arises not only when First Nations have *proven* rights (for example, through a court case) but also when they have *potential* rights (rights that they implement and assert, but that have not been proven to exist by a court of law) that may be impacted.



# What is Consultation?

What is clear from these cases is that the Crown must create a meaningful opportunity for consultation; in other words, for First Nations to properly represent and voice their interests and concerns and for the Crown to address those interests and concerns.

*“Put simply, Canada’s Aboriginal peoples were here when the Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others... have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.”*

**HAIDA NATION V. BRITISH COLUMBIA, 2004**

This is necessary whenever the provincial or federal government is seeking to make a decision that may impact your rights. The threshold for triggering the duty to consult is very low. In the various cases dealing with consultation, ‘decisions’ have included:

- granting a logging license in an area where First Nations exercise their rights
- transferring Crown land to private property
- changing regulations governing land claimed or used by a First Nation
- approval of an environmental assessment enabling a project to be developed in an area where First Nations exercise their rights.

The courts have not given a list of the types of decisions that may ‘trigger’ the duty to consult. So far, governments have tended to view the matter very narrowly, asserting that only decisions directly relating to the use of lands or waters are relevant. However, many other types of decisions, including planning and policy-type decisions can set in motion events that result in clear impacts on Aboriginal rights and title (for example, planning decisions that designate an area generally available for mining exploration). Although the actual decision granting an exploration permit to a specific mining company is when the licensing decision occurs, in reality, the decision

with the biggest impact on rights occurred much earlier. The *Haida* case mentioned above supports a broad interpretation regarding the scope of what is included in ‘decisions’.

*In the court case **Haida Nation v. British Columbia**, the Supreme Court found that the province had a duty to consult when issuing or renewing tree farming licenses: “The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal rights and title... [T]he strength of the case for both Haida title and the Haida right to harvest cedar, coupled with the serious impact of incremental decisions on those interests, suggest the honour of the Crown may well require significant accommodation.” (paragraphs 76-77)*

The duty to consult does not force all participants to come to an agreement. Also, consultation does not mean that you are guaranteed to arrive at the outcome you want. Consultation should however, be a forum where your First Nation’s concerns are heard and accommodated by the Crown, meaning, that the Crown changes their decision to avoid or lessen the impacts of their proposed decision on your rights. In general, the extent to which your First Nation can influence the Crown’s final decision is dependent upon how strong your rights and/or land claims are. More about how this might look in practice is discussed in the step-by-step process we outline in the following chapters.

## The Role of a Third-Party in Consultation and Accommodation

The purpose of accommodation is to address the substantive concerns of the First Nation regarding the proposed Crown decision. Sometimes the ‘decision’ being made by the Crown is regarding an initiative they are undertaking, such as the development of legislation. Other times, the ‘decision’ being considered by the Crown is regarding a request to approve something, such as an economic development activity, being proposed by an outside entity, such as a mining or forestry company. A third party cannot satisfy the duty to accommodate, as the third party has no legal duty or obligation towards the First Nation, nor do they have a Crown-like “decision” to make. However, the third party can be a very important source of information, as they best understand the nature and scope of their proposed project. It is acceptable for the Crown to ask the third party, if there is one, to assist. Further, some of the mitigation measures that may be needed to minimise the impacts on First Nation rights will actually be implemented by the company requesting the Crown decision (e.g. the license or permit) so they may have important insights into the feasibility and effectiveness of possible mitigation measures.



# What is Consultation?

If your First Nation has a treaty, the Crown still has the same consultation duties. Even in the presence of an already-negotiated historical treaty, the duty to consult is not necessarily fulfilled. The Crown must consult with First Nations before *each new decision* that could possibly impact treaty rights and attempt to mitigate those impacts. The main decision that provides more information regarding treaty rights and consultation is *Mikisew Cree First Nation v. Canada, 2005*.

The duty to consult, and its obligations on the Crown and on First Nations, is detailed throughout the step-by-step process outlined in this guidebook. For now, it will suffice to summarise some of the main principles:

## What?

- The Crown must create a demonstrated meaningful opportunity for consultation with Aboriginal peoples, even if the parties do not come to an agreement.
- Consultation is an ongoing obligation on the Crown.
- The level of consultation required is related to the strength of the First Nation's rights and land claims. Even at the lowest end, consultation requires good faith on the part of the Crown to substantially address the concerns of First Nations.

## When?

- There is a low trigger for the duty to consult.
- Consultation must take place before any decision is made by provincial and federal governments and before there is an impact on Aboriginal peoples' rights.
- Consultation is required regarding the Crown's strategic planning decisions.
- Consultation is required even if a First Nation hasn't legally proven the existence of their right, as long as they can show reasonable evidence in support of the existence of the right.

## How?

- The Crown must address both substantive (your concerns) and procedural (timing, information, etc.) aspects of good consultation.
- The Crown must reasonably ensure that First Nations have all the necessary information so they can properly express their interests and concerns about the proposed decision.
- The Crown must provide information about its proposed decision, what the Crown knows First Nations' interests to be and what the Crown thinks the impacts will be to First Nations' interests.

- Knowledge of the Crown about what First Nations' rights and interests are will be imputed—it will be assumed that they know about them—if the Crown should have known about the impacts.
- The Crown cannot engage in 'sharp dealing' or hard negotiations.
- Aboriginal peoples should not frustrate the good faith attempts of the Crown to consult.

## Who?

- Aboriginal, treaty and land title rights are collective in nature—held by the community, and exercised by individuals.
- The Crown must pay due attention to consulting with all those who will be affected by its proposed decision, in other words, all members of a potentially impacted First Nation.

## Why?

- To reconcile the relationship and history between Aboriginal peoples and the Crown
- To accommodate, that is substantially address, the concerns and interests of First Nations

### `taaq̓s̓ciik: "Going the right way"

The following comments are perspectives on the duty to consult given by members of Hupacasath First Nation in a workshop on consultation with CIER:

- Consultation is ensuring all the information is on the table, not withholding anything. It is informed dialogue.
- There needs to be a process and there shouldn't be set time frames, it is over when it feels right.
- Consultation has a history, there needs to be healing and recovery from the old Department of Indian Affairs type methods. It is now about us taking care of ourselves. We want to be involved, informed and want to integrate our cultural ways.
- We need to find our own way to do things.
- The whole community should be involved in developing guide lines and processes; a process is needed so the people can know what to expect
- Consultation is teamwork – even when trying to do good for your First Nation you need to communicate and consult with the people, establish trust.
- Consultation is a very serious issue for the Hupacasath First Nation. When government is involved they may only take the information that supports their case. They also come with stacked agendas, slide important agenda items in to an agenda without warning or the opportunity for preparation. The process needs to be constructive. People need to remember to speak on behalf of the ancestors, their information was recorded, it needs to be drawn from and restated. This information needs to be used as part of consultations.
- Government just talks to First Nations elected officials, it doesn't trickle down to the membership, but it should.

For more perspectives and definitions on consultation, SEE APPENDIX (B)



## Consultation Timeline

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Before beginning to go through the step-by-step guide, it is important to clarify the difference between “information collection and dissemination”, and “consultation”. This consultation guide sets out six main steps that First Nations can take towards the objective of protecting their interests and rights when engaging in consultation with the Crown. These steps are divided into two stages: preparatory steps and consultation. As shown below, four of the steps are focussed purely on preparation for the consultation process, while only two steps are the actual consultation.

Many government consultation policies include the information-gathering stage as part of the formal consultation. Often, the activities surrounding the generation of adequate information can take an extensive amount of time, particularly if new information is required. In this situation, it can seem

that the ‘the consultation’ is taking a long time, when in fact, it has yet to begin because there is still insufficient information to begin to understand potential impacts of the decision. This distinction is extremely important in order to ensure that whichever party is requesting additional information is not seen as ‘frustrating the consultation process’. Adequacy of information is critical, and the consultation should formally begin when the information required is available and present. Otherwise, First Nation rights may be jeopardized because of discussions that have occurred without adequate and full information. This emphasises the importance of preparation by your First Nation before agreeing to engage in consultation with the Crown about your rights.



# Consultation Timeline

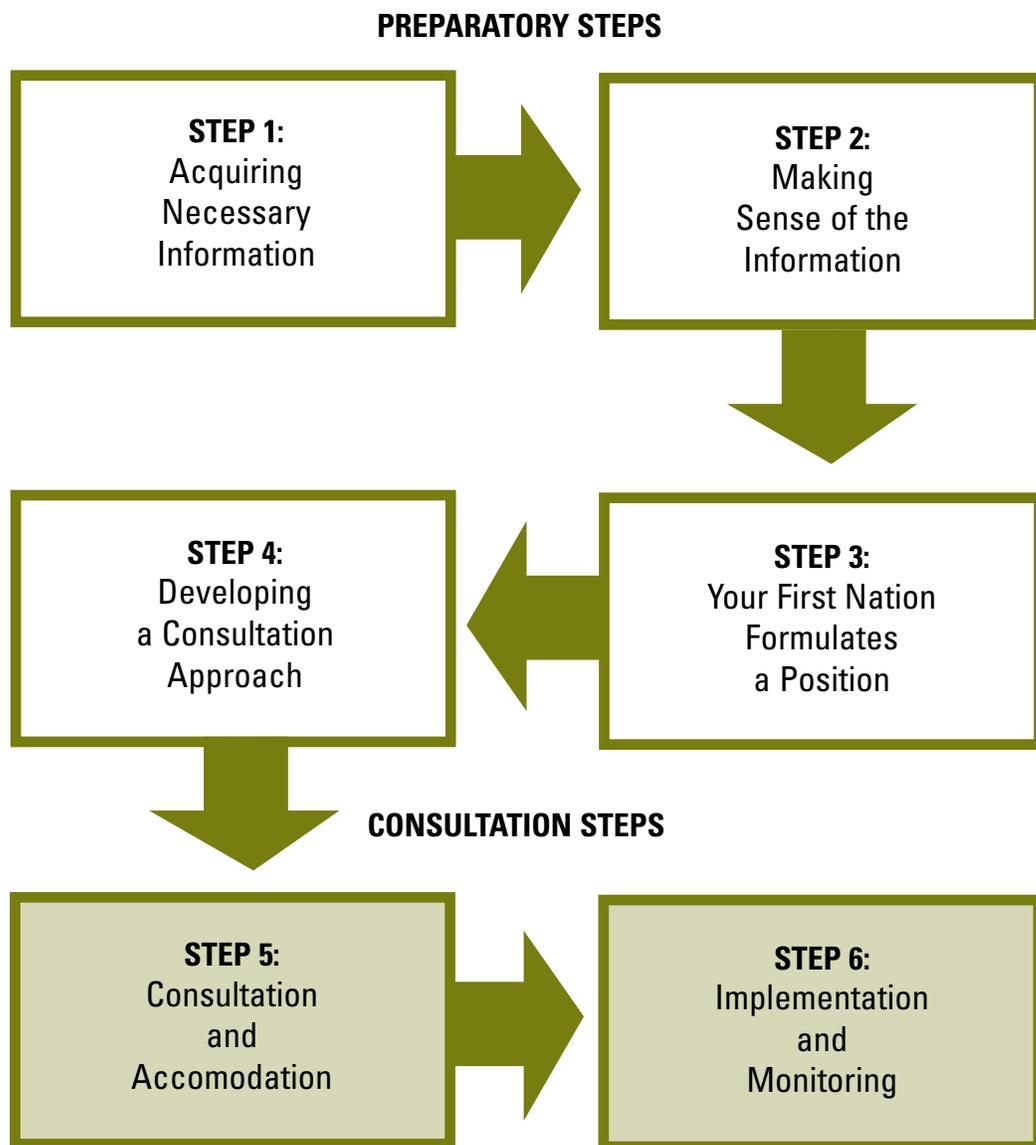
Table 1: Preparatory and Consultation Steps

## PREPARATORY STEPS

- Initial contact with the Crown
- Collection and exchange of information about the proposed decisions
- Developing a consultation approach and agreement

## CONSULTATION

- Parties have agreed to be in a consultation process
- The Crown and First Nation engage in consultation discussions towards accomodation, and a final solution





# Step 1: Acquiring Necessary Information

The first step of ‘Acquiring Necessary Information’ is a very broad one. What we will review is what should happen or might happen when the government is proposing a project or any other decision that may affect your rights, use of your lands or any of your other interests.

The government is responsible for a number of things at this point; they may fulfill those duties or they may not. For you, this means that you may have to find a way to make sure that

### Recall...

The threshold for consultation is low – what may impact your rights includes any decisions the government makes about lands and resources that your First Nation uses. Also, remember the Supreme Court has defined your First Nation’s interests as including **existing or potential** rights. What this means is that if it is reasonably likely that the government’s proposed decision will interfere with traditional practices, day-to-day uses of lands and resources, or any other activities or relationships that could be defined as an Aboriginal, treaty or land title right, your First Nation should be consulted. We will talk more about identifying and knowing your rights below.

you get the information you need to protect your interests.

The government is not the only source of information or decision-making that may impact your First Nations’ interests. You may also have to consider the role of third parties, such as industry actors. For instance, mining companies, forestry companies or others that may have previously been granted an interest in your lands and resources by a government. Establishing communication and a way to exchange information with them may be beneficial to your First Nation.

In short, what you can expect in this step is a discussion of the following:

- The duty of provincial and federal governments
- What is ‘necessary information’?
- Establishing contact
- What to do if the government does or does not contact you
- Where does industry / private sector fit in?



# The Duty of Federal and Provincial Governments

*The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns...*

Halfway River First Nation v. British Columbia (Ministry of Forests), [1999] 4 C.N.L.R. 1 at paragraph 160.

Both the provincial and the federal governments are responsible for consulting with First Nations about possible project or other decisions that may impact First Nations. The above quote emphasises that the Crown's legal obligation includes the responsibility to "reasonably ensure" First Nations have all necessary information required to formulate any concerns, opinions or interests they have in response to the government's action, prior to the government making a decision on how it will proceed.

## Government Decisions

Further information is provided in Section 3.2 below. For now keep in mind that what is important about the government's decision is the affect it has on your rights – it does not matter how "big" the decision is or whether the decision is being made in relation to a new development or if it is in relation to a routine function of government. Any decision the government makes that has the potential to impact your rights requires consultation. The range of government decisions that could require consultation include:

- Project level decisions e.g. approving an environmental assessment, issuing a permit, granting a timber license or establishing a commercial fishing quota;
- Policy decisions e.g. enacting new legislation such as the *Species At Risk Act* (SARA)
- Planning decisions e.g. approving land use, species recovery or other management plans

In the *Halfway River* case referred to above, the Ministry of Forests in British Columbia issued a timber harvesting licence to a private company on Crown lands in an area where members of the Halfway River First Nation exercised a treaty right to hunt, and also where they had a land claim against the federal government. The First Nation was successful in having that decision to issue the harvesting license quashed by the court, which made note that the First Nation has the right to be heard by the government *before* any of their proposed decisions or plans are put into place. The court also said

there is a obligation on the Crown to make sure the First Nation has *all necessary information in order to respond effectively*, and the government must ensure that the First Nation's opinions are *seriously considered* and *demonstrably integrated* in the proposed plan or decision. More information on this the interpretation of 'demonstrably integrated' is provided in Section 5 of this Guide.

While this may be the law, that the provincial government and the federal government have to consult with you and provide you with all the necessary information, it may not always be what the government does. For example, the Mikisew Cree First Nation in Northern Alberta was in court with the Minister of Canadian Heritage in 2005 because they were excluded from a decision-making process about building a winter road near their territory. The Minister had sent the Mikisew Cree letters of notice, but hadn't provided sufficient information to the First Nation explaining the likely impacts of the winter road and also, hadn't given enough opportunity for the Mikisew Cree to express their concerns and opinions about the project. The Supreme Court of Canada stated that this was the government's duty, despite the existing treaty (Treaty 8), whenever they sought to use the land in a way that might impact the First Nation.

What would have been enough information for the First Nations in these situations? This is what we look at in the next section, defining 'necessary information'.



## What is Necessary Information?

'Necessary information' includes all information that is relevant or related to the Crown's decision. If that decision may impact your First Nation and how you exercise your treaty or Aboriginal rights or use your lands or your resources, then any information the Crown has about that proposed decision qualifies as information necessary for your First Nation to form your opinions about the Crown's decision. Think about what kind of information you would like to have if the government was proposing to create a national park, for instance, near your reserve or traditional territory. You might want to know:

### **Why does the government want to create a national park in this area?**

Before the government, provincial or federal, makes a decision, they typically engage in significant information collection, which could result in a number of reports justifying or providing the reason prompting the proposed decision. The Crown has probably already collected scientific, social and other data. You should review this background information, and determine if there are any alternative or conflicting sources of information that might give another perspective on the need for the proposed decision. It is important to remember that in the *Sparrow* decision the Supreme Court of Canada stated that there must be a valid objective directing the Crown's decision.

### **What areas will this include? How will the lands and resources be affected?**

In any decision, it is important to find out what territories will be impacted by the proposed project. For a national park, you would want to know what areas are planned to be included in the proposed park because your First Nation and your membership may use those areas. You will also want to know how the lands and resources your First Nation may use in this area will be impacted. This could include questions about plants and wildlife in the area, the presence of other people in the area, sites of cultural, ceremonial or historical significance and the types of regulation of lands and resources that will be part of the proposed park management plan.

### **How will the First Nation's access to the territory be impacted?**

If the area identified is used, for instance, as a traditional campsite by your First Nation and its members or for the exercise of your rights, will that access still be allowed? Is that sufficient for the exercise of your rights? To answer these questions, you will need information about the particular plans of the government, so they should be kept in mind when seeking that information. It will also be useful to consider the experiences of other First Nations in exercising their rights within National Parks and possible issues or complications arising from public opinion and for example hunting in a park.

These may be questions for the Crown about the decision they want to make, but there are many other sources of information. You will probably also need to collect relevant information from your own First Nation, relating to the following:

- How members of the First Nation use the land that will be impacted
- How members of the First Nation exercise their rights:
  - Which rights will be affected? Is this acceptable?
- Indigenous knowledge or other information about the land or resources that may be affected by this government decision?
- Does this information agree with or conflict with the government's information?

The Supreme Court of Canada has stated that the government should provide information regarding what it anticipates the impacts of the proposed decision may be on your rights. It is not solely up to you to ascertain the scope of the impact; the Crown must also give you information in this regard.

More information is provided in Step 2: Making Sense of the Information and the associated textbox on "Funding for you First Nation to Participate".



# What is Necessary Information?

## Quality of Information

It is important to consider the quality of data supplied to you by the Crown and to consider how the quality may have affected their analysis. For example, in an environmental assessment scientific data is typically used to identify the “valued ecosystem components” which can include Species At Risk (i.e. endangered or threatened species), migratory birds, fish and wildlife species that are economically valued (i.e. for commercial or recreational purposes), and areas identified as being of natural, historic or scientific interest. This process of identifying interests, using the ‘valued ecosystem component’ method, may not consider those species or areas important to your First Nation such as ceremonial or spiritual sites; areas used for the harvest of food, medicines or non-timber forest products; species important to your traditional diet or lifestyle e.g. berries, a particular seaweed, or a fish like the eulachon, eel or smelt. You may want to advise the Crown of these data deficiencies and press them to conduct further studies, to provide resources for your First Nation to conduct further studies, or include your “valued ecosystem components” in their analysis.

When assessing the data used by the Crown also consider the comprehensiveness, age and original purpose of the data. If scientific studies are being used, it is important to consider whether the study was published in a peer-reviewed journal and if there is conflicting data or studies. In the case of social impact assessment, often government census data is used. However, census data on First Nations may be incomplete or non-existent. You may also have information, including Indigenous Knowledge, that conflict with the information the Crown has provided. Advise the Crown of any concerns with the quality of their data or their analysis.

Finally, although the process of collecting the data may be according to accepted methods – how the data is then used can be greatly influenced by values. For example, consider who should decide how a project would impact on the quality of life or well being of a First Nation community. Can an outside researcher, even with the best available data, accurately predict those kinds of effects without the involvement of your community? In this case it may be important to identify the need for further study or analysis from your First Nations perspective or according to your own methods such as through an Indigenous Knowledge Study.

Another possible source of information is from other parties that are involved in the proposed decision. For instance, if the government is thinking about granting permission to a mining company to begin exploration near your First Nation’s territory, that company may have important and relevant information that is necessary for members of your First Nation to form an opinion and position on the issue. Industry could answer the following questions:

- What will be the impact of the project on the surrounding areas?
- Where else does the company have similar operations? Can they provide any information about how other communities have been impacted?

This will be discussed further later on in this step. For now, it is important to note that industry can also be a useful source for necessary information.

### About the DUTY TO CONSULT:

The Supreme Court of Canada has stated knowledge will be **imputed** to the Crown. This means that if they should have known that their decision would have impacted a First Nation, the law assumes that **they did know and therefore the Crown must consult. If they haven’t done so, then their decision will be invalid.**



# Establishing Contact: Getting Information from the Crown

Recall what was stated earlier: the provincial and federal governments have a duty to provide all necessary information as part of their duty to consult, but they do not always do so properly. In that case, there could be two possible situations your First Nation may have to deal with:

## **Scenario #1: The Crown notifies your First Nation about the proposed decision**

This scenario assumes the Crown fulfills the first step of its duty to consult when it is making a decision, like approving a project or implementing a law, that could possibly impact your First Nation.

At this stage, this means that the Crown has approached your First Nation and will make available all the relevant information about the proposed decision.

- Is it obvious from the information already accessed how the decision will affect your First Nation? Is that taking into account your cultural values and any concerns voiced by community members regarding sustainability?
- Do you need more information to determine what the impacts will be, and if so, what specific information do you need? Keep in mind, how long you think it will take your community to consider and come to a consensus on what information is needed and what questions everyone wants answered.

From the information provided to you, can you identify specific rights and interests in lands and resources that may be affected by the proposed decision? Is it clear how they will be affected? Use the checklist or list of information you identified above when you are approached by the federal or provincial governments about a decision they wish to make or when

they provide you with any information regarding that decision. It is also important to make sure that your final checklist incorporates all the opinions, concern, questions and perspectives of your First Nation's members. It may take some time to construct a comprehensive checklist and identify all the information that is needed.

**SOME IMPORTANT NOTES**

**Relevant Information**

'Relevant Information' also means accessible information.

[SEE APPENDIX \(C\)](#)

**Approaching your First Nation**

'Approaching your First Nation' means that the crown has brought issues to the attention of your First Nation, discussed consultation and accepts responsibility for contact with all community members accessible information.

[SEE APPENDIX \(D\)](#)

**Knowing Your Rights:**  
 What are your Aboriginal Rights?  
 What are your Treaty Rights?  
 What are your Land Title Rights?  
[SEE APPENDIX \(E\)](#)

For your part, it is important to ensure that what the Crown has provided – or is willing to provide – includes all the information you need. It might be a good idea to create a checklist or list of all the information your First Nation and your members think should be included. In addition to the examples provided above, think about including the following questions:

- What is the nature of the proposed decision? Does it have environmental, economic, social, or health-related dimensions?

Make sure that consultation with the Crown does not begin until this step is completed. This could be achieved through establishing a preliminary agreement with the Crown that consultation will not move forward until each party is satisfied with the completion of each step. For this step, there can be an agreed upon 'Question Period'. For example, you could agree with the Crown not to move forward for a certain amount of time – the appropriate amount should be determined in discussions both with Crown officials and community members – until there is an opportunity to formulate and answer any questions that may arise from the community. This will help to ensure all necessary information has been acquired.



# Establishing Contact: Getting Information from the Crown

## **Scenario #2: The First Nation finds out about the Crown's proposed decision**

Here, we address what your First Nation might do if the Crown does not act according to its legal obligation to notify potentially impacted First Nations and provide them with information about their proposed decision.

If you find out about a decision, for instance, the government is approving a project near your traditional territory – officials may be conducting an environmental assessment, there may be industry workers in the area, or you may have been provided notice that a project will be occurring in the area – but they have not approached your First Nation to consult, you will have to assert your right to consultation.

## **Contacting the Crown to Invoke the Right to be Consulted**

If the Crown does not contact your First Nation, or just provides a letter or newspaper advertisement, for instance, notifying you either of the proposed decision or after they have already made the decision the Crown has violated its legal duty. Providing you with a notice of a decision they have or will make does not qualify as the Crown approaching you for consultation.

What can you do in this situation? Many of the court cases about consultation deal with this very scenario, but before heading off to court – which can be an expensive and lengthy process – it is probably more useful to contact the government and give notice of your rights to consultation. The best way to do this is by sending a letter, so that you can clearly state your legal rights and also have a written record of your interaction and request to engage in consultation. Any letter you send should include the following:

- An outline of your right to consultation
- What that should entail on the part of the Crown
- A reminder that no decision should be made prior to consultation
- Why your First Nation should be consulted

- A request for all relevant information that the Crown possesses
- Your expectation of response (for instance, when you expect to hear back)

[SEE APPENDIX \(F\) FOR A SAMPLE LETTER](#)

### **Who is the Crown? Who do I send my Letter to?**

The Crown is both the federal and provincial governments; any person that works for these governments, or any department, is an 'agent of the Crown'.

You should send your letter to the authority that is responsible for the decision being made. What this means is that there are specific departments within the federal and provincial governments that deal with specific decisions. For instance, approval for a mining project could fall within a provincial ministry dealing with natural resources.

[SEE APPENDIX \(G\) FOR MORE INFORMATION](#)

## **Follow-up with a Request Specifically about Acquiring the Necessary Information**

If the Crown does not respond to your first letter, you should send a second letter to follow-up upon your request to commence consultation by the Crown giving you all the relevant information. See above for questions to keep in mind and issues to think about when requesting such information.

[SEE APPENDIX \(H\) FOR A SAMPLE FOLLOW-UP LETTER](#)



## First Nation Examples

The Supreme Court of Canada stated that Aboriginal peoples have an obligation to assert their claims clearly, and to avoid frustrating the Crown's consultation process

*(Haida Nation v. British Columbia)*

If the Crown is still reluctant to engage in any contact with your First Nation or provide any information, you may want to be more persistent. Here is what other First Nations did:

### **Hupacasath First Nation (British Columbia)**

*If we are going to change our history then we need to be equal participants in consultation.*

Hugh Watts, Elder, Hupacasath First Nation

In its consultation with the provincial government of British Columbia, the Hupacasath First Nation has undertaken extensive actions towards clearly setting out its claims – particularly by developing a Land Use Plan that encompasses their entire traditional territory. [SEE APPENDIX \(I\) For more information on Hupacasath First Nation and Land Use Planning.](#)

### **St'át'imc Nation (British Columbia)**

In an effort to protect their territory and assert ownership of their land against provincial authorities of British Columbia – particularly B.C. Hydro and other third parties allocated lands and resources in their territory by the province – the St'át'imc Nation developed a Tribal Code setting out who and how others can use lands and resources on their territory. It is directed to the First Nation's members on how to protect their land and territory, and is also available to the public at [www.statimc.net](http://www.statimc.net). From this Code, the St'át'imc Nation has also created a Land Use Plan, and a Land and Resource Authority. [SEE APPENDIX \(J\) For more information on what St'át'imc First Nation has done.](#)

### **Membertou First Nation (Nova Scotia)**

Membertou First Nation is one of five First Nations located on Cape Breton Island, Nova Scotia and one of a total of 13 Nova Scotia Mi'kmaq First Nations. During the 1990s, the Nova Scotia and Cape Breton Mi'kmaq were involved in two precedent setting court challenges related to consultation (the "Middle Shoal Case" dealing with the Little Narrows Gypsum project, and the Maritimes Northeast Pipeline, a component of the Sable Gas Project). Both decisions were in favour of the Mi'kmaq and provided significant motivation to both the provincial and federal

governments to enter into negotiations with the Mi'kmaq about their rights and their land title through the three-tier process known as the [Mi'kmaq Rights Initiative](#).

[SEE APPENDIX \(K\) For more information on what Membertou First Nation and the Nova Scotia Mi'kmaq have done.](#)

### **Sliammon First Nation (British Columbia)**

The Sliammon First Nation established their Crown Land and Resources Referrals Department in 1995 in response to provincial government referrals. To support this function of their government the Sliammon First Nation completed a Traditional Use Study and corresponding database, which serve as a baseline of information to meaningfully respond to Crown referrals. To finance this work Sliammon adopted a two-pronged approach. First, they negotiated financing from the provincial Ministry of Forests and they adopted a user-pay system. Under the user-pay system, proponents of development on Sliammon traditional territory pay \$650 per day administration costs as well as \$375 sr./\$150 jr. fieldworker fees to conduct field reconnaissance. According to Maynard Harry, the Manager of the Sliammon Crown Land and Resources Referrals Department, "[W]e need to move out of survival mode and the process of merely reacting to referrals – we are now looking at developing creative solutions that are mutually beneficial as defined by the *Delgamuukw* decision". More information on Sliammon First Nation's referral process is available at [www.nativemaps.org/referrals/case\\_studies/case\\_sli.html](http://www.nativemaps.org/referrals/case_studies/case_sli.html).

### **The Innu Nation (Labrador)**

The Innu Nation has been involved in extensive land use planning processes within their traditional territories incorporating ecosystem-based planning, public participation, and indigenous knowledge. The Innu Nation created a Forest Guardian Program in 2001 to ensure that Ecosystem-Based Forestry is applied on the ground, instead of simply voicing concern after environmental degradation has taken place. More information is available on their website [www.innu.ca](http://www.innu.ca).

The Innu Nation has been featured as an environmental governance success story in a jointly produced film by the developers of this guide and the National Centre for First Nations Governance. Please view CIER's website at [www.cier.ca](http://www.cier.ca) for more information on this documentary video.



## Step 2: Making Sense of the Information

After completing the first step, acquiring all the necessary and relevant information, it is important to ensure you have enough time, resources, and support to be certain that your First Nation and its members have a thorough understanding of the information. In this step, we will discuss how the opportunity to examine and make sense of the supplied information is related to the First Nation's level of participation in the actual consultation and decision-making process.

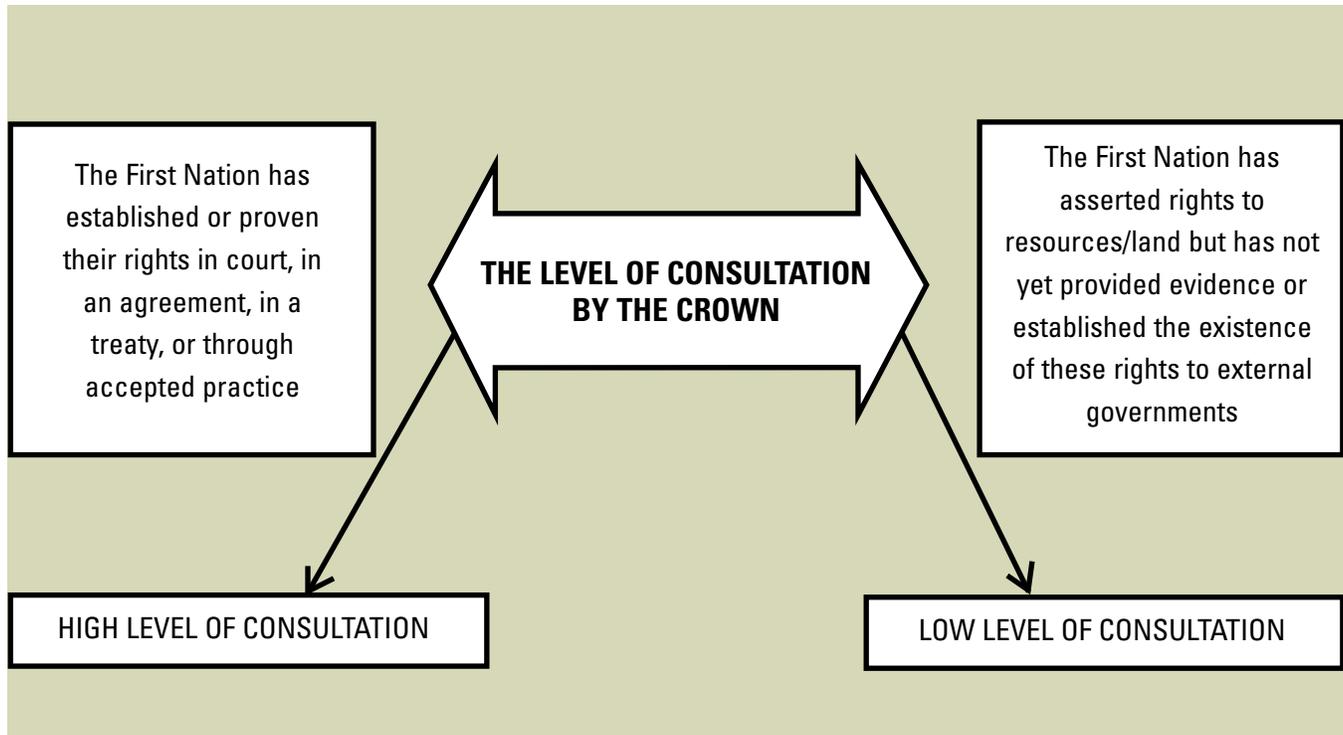
Within the discussion of this step, we will include information on:

- Determining the appropriate level of consultation required
- When the Crown should approach you for consultation
- The level of participation to which your First Nation is entitled
- How this relates to ensuring enough time and resources are provided for making sense of the supplied information



## Determining the Scope of Consultation

The scope of Crown's duty to consult with your First Nation will vary in relation to how strong your Aboriginal, treaty or land rights are. What this means can be better illustrated in the following graphic:



Even at the lowest level of consultation, the Supreme Court has said in *Delgamuukw v. British Columbia* that the Crown must approach consultation in good faith with the intention of **substantially addressing** the First Nation's concerns. While the courts have not been specific on the actual content of the duty to consult, it is clear that the Crown must provide a meaningful opportunity to consult, which includes substantially addressing First Nation's concerns, and thus, at a minimum providing a forum for First Nations' to properly voice their concerns and views. At the other end of the spectrum, consultation will most likely require some form of agreement or consent as its end product between the First Nation and the government to allow the project or decision to proceed. So, at the very least, the Crown should consult with the intention of substantially addressing your concerns and interests about your rights. This means that they must demonstrate that they have balanced the interests of your First Nation with their own goals.

### **Substantially Addressing your First Nation's Concerns:**

The courts have not been specific in explaining exactly what 'substantially addressing' means or includes. It seems to be satisfied when the major issues and priorities of your First Nation have been considered, discussed, and addressed through consultation and accommodation, if appropriate. Courts will consider how strong your First Nation's claims to the rights in question are in determining what 'substantially addresses' means in the circumstances. On the other hand, considerations of other public policy issues—such as protection of endangered species—are also weighed in defining what it means to 'substantially address' your First Nation's concerns. You should be careful that your concerns are not bypassed in favour of general societal wants such as increasing economic interests. A good understanding of what it is to 'substantially address' your First Nation's concern should include, at a minimum, requiring the Crown to demonstrate how your interests have been taken into account through a detailed decision-making process, as well as defining how your First Nation's interests have been balanced against any other consideration.



## Determining the Scope of Consultation

While you are not required to prove the existence of your rights in order to trigger the Crown's duty to consult, the more evidence you have demonstrating the scope of your rights and their importance to your community, the greater the Crown's obligation to you will be. The following are questions that may assist you in determining whether the Crown is providing you with a full enough opportunity to consult given the scope of your rights and the scope of the potential impacts of their proposed decision:

- To what extent is the Crown's proposed decision or approval of a project going to affect your day-to-day practices and the resources and land that your members use?
- Do you have a Treaty, modern or historical, with the Crown detailing what rights your First Nation has and how they are exercised?
- Has your First Nation government, or any member of your First Nation, ever been to a Canadian court to assert an Aboriginal or treaty right under s. 35(1)? Was that court case successful in proving the existence of that Aboriginal right?
- Does your First Nation have an established land claim, i.e. an agreement with the government regarding ownership of your territory beyond the reserve, or has your First Nation asserted a land claim?
- Do you regularly use certain land and territory outside of the boundaries of your reserve(s)?
- Have you asserted the existence of your rights in other forums, in the media, or regarding other proposed developments in the past?
- Do you have any written or oral recorded documentation of your traditional and current uses of your lands and waters?



## When the Crown Should Consult

The Crown must consult whenever it is making a decision, issuing approval for a project or development, or conducting any other action that may impact Aboriginal, treaty, and land title rights. This was discussed in the previous step, and more information is provided there regarding identifying and knowing your rights.

Again, in setting out the details of the duty to consult, the courts have not been able to hand down specific instructions on exactly when the Crown is expected to consult. Instead, we can look at what the courts have decided in various cases to get a sense of in what circumstances the Crown will be required to consult with First Nations:

- There is a duty to consult when the government decides to issue logging permits that may impact a First Nation's asserted rights to land (*Haida Nation*)
- There is a duty to consult when the Crown is taking up land for its use in an area covered by a treaty if the Crown's actions can impact the way that First Nations exercise their rights (*Mikisew Cree*)

- There is a duty to consult when the government is making a decision to transfer control under a tree farming licence (*Gitanyow First Nation v. BC*)
- There is a duty to consult when the government decides to lease land that is subject to a land claim (*Musqueam*)
- There is a duty to consult when the government decides to make changes to how private land is regulated (*Hupacasath First Nation*)

While all of these above examples illustrate very specific experiences and interests of the First Nations affected, they each make one important point: the duty to consult has a very **low threshold**. In other words small, incremental decisions by the government require consultation.

Why is this important? All of this is strong evidence for the conclusion that consultation requires a high level of participation by First Nations who may be affected by these decisions. This in turn means First Nations should be substantially included from the beginning of the Crown's decision-making process, since strategic planning choices that impact First Nations' rights are also subject to the obligation to consult.



# Translating Concepts of Consultation into Levels of Participation

Given the nature of the duty to consult described above, the level of First Nations' participation must be high. The following graphic illustrates one way to think about participation:

The concepts presented in this table can be applied to First Nation consultation. The levels of participation and scope of the duty to consult however must be viewed as operating only within the blue ranges of participation described above. The upper range of the blue box where citizens have increasing degrees of power and control would be First Nations that have

established or proven their rights in court, in an agreement, in a treaty, or through accepted practice. The lower range of consultation would be more applicable where First Nations have not provided any evidence that the rights they assert are likely to exist. Under no circumstances, however, would consultation be sufficient through activities under the 'degrees of tokenism' or 'non-participation' ranges because in both of these ranges, First Nations would be involved without their concerns being substantially addressed. **Instead, it will require extensive discussion between your First Nation and the government as to what is appropriate and will likely incorporate elements from each of these described levels of participation.**

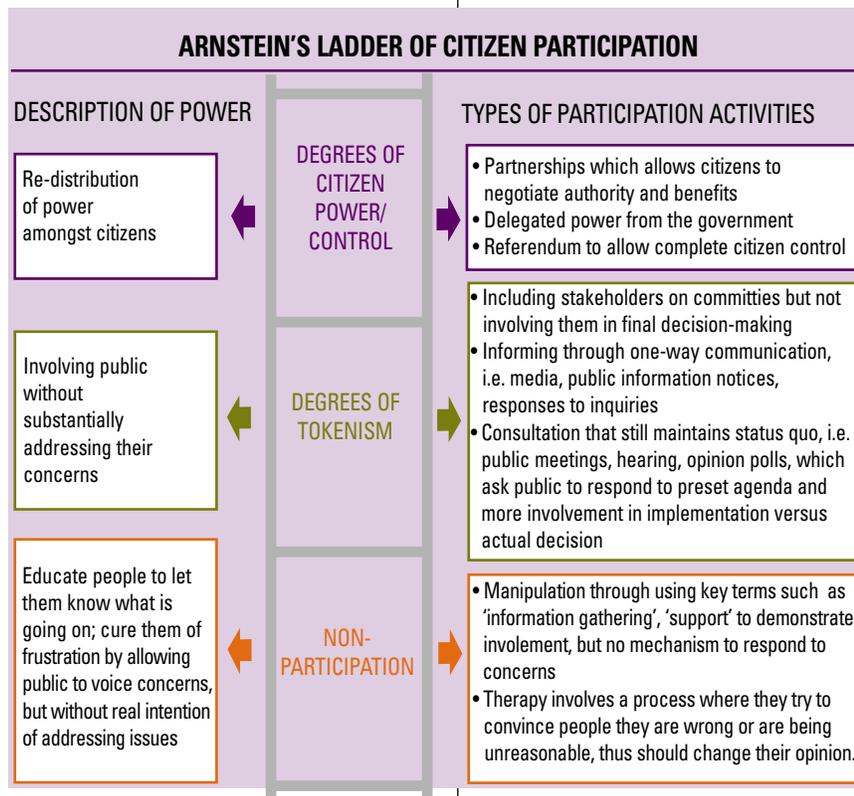
It is worthwhile to examine the demands that the general public are making in relation to public participation in decision-making. This demand, some call a 'public right', has resulted in a number of notable changes in how governments do business. For example, in the Province of Ontario, legislation was passed in 1994 that gives every resident formal rights

to play a more effective role in environmental protection through the *Environmental Bill of Rights (EBR) Act*. The EBR establishes a formal framework for notifying the public and seeking their

input about proposed legislation, policies, regulations and other decisions of government. In essence, this Act established a new, minimum level of public notice and consultation; it is recognition of the public's right to participate in all significant environmental decisions made in Ontario. The minimum standard established by the EBR is the right to notice, the right to comment, and the right to appeal environmental decisions of government. Certainly, Crown actions that

threaten constitutionally protected rights require even greater levels of First Nation consultation.

Further to examples like the Ontario Environmental Bill of Rights, many pieces of government legislation have formal requirements for public participation. Typically, such legislation is similar to the minimum standard established by the EBR: the right to notice, comment, and appeal. It is important to keep the public participation requirements distinct from the duty to consult and to understand that most government agencies are familiar with and typically operate at this 'notice, comment and appeal' level of public participation when dealing with all "external stakeholders", including First Nations. To be dealt with on this level or according to this approach does not constitute meaningful consultation. Interestingly, from the public's perspective this minimum also often does not constitute good public participation. [SEE APPENDIX \(L\) for More Information on Public Participation and Designing a Participatory Process.](#)





## How this Relates to 'Making Sense of the Information'

The discussion of the level of the Crown's duty to consult and when the Crown should consult is directly related to your First Nation being able to make sense of the information available to you through consultation. Making sense of the information is central to clearly asserting your opinions and concerns, which must be considered by the Crown even at the lowest end of the spectrum of the duty to consult and in all decisions impacting your First Nation's asserted and existing rights.

The main activity in this step is to decide what you need to make sense of the information in order to assert your opinions and concerns, and how to obtain what you need. Here are some important questions to keep in mind when completing this step:

- How long will it take your First Nation to sufficiently gather and understand all relevant information?
  - When discussing the timeline for this step with the government, consider how long it took the government to collect, understand and analyse all the information before proposing the decision... often their internal process has taken years.
  - You should also consider and account for time that will be necessary for your First Nation's [internal consultation](#) process and to ensure the information is comprehensible for all community members.
- What form is the information in currently? Is it an environmental assessment, a scientific report, a planning document, a media report? Each gives different types and depth of information.

- What kind of technical support will you need to ensure your First Nation can understand this information in relation to your particular interests and concerns? Often First Nations require a range of scientific, economic, engineering, and legal expertise to interpret the available information and define the scope of other required information.

### Types of Effects

- **Direct or primary effects** are those caused by a decision or project such as clearing land for a new development such as a mine.
- **Secondary effects** are those that result from direct effects such as socio-economic effects e.g. job losses caused by a direct change in the environment e.g. the loss of fish habitat.
- **Cumulative effects** are those that result from the decision or project combining with the effects from other existing or planned decisions or developments.
- **Indirect effects** can also result from secondary activities such as sourcing the gravel to build a road for the project; or linked activities such as developments stimulated by the decision/project under consideration e.g. construction of a new subdivision or a bar in a local town due to opening of a new mine.

Keep in mind that effects can be temporary, short-term, permanent, long-term, or accidental.



## How this Relates to 'Making Sense of the Information'

- What are the gaps in the information you have been provided from the Crown or from other sources? How can you fill these gaps?
  - Your First Nation must determine how to fill these gaps in information since the Crown, for a number of reasons, may be reluctant to produce further information than what has already been approved. It is likely that you will need to clearly identify your reasons for needing further information in order to convince the Crown, refer to the textbox on [Quality of Information](#) and [How to Fill Gaps in your Information](#) for more information to support your position. Being able to answer the following questions may assist you in being able to clearly articulate the need for more information:
    - Who are you producing the information for? What kind of questions may they pose to you? Do you have a clear sense of the cost to produce the information you require?

### Severity of Impacts

The severity of negative effect, that is, the impact, of the decision on your rights must also be determined. It may be of large or small impact, significant or insignificant, etc. Understanding the severity of impact is critical to assessing whether the proposed Crown decision is justifiable.

- What other sources can you use to supplement the information you already have, e.g. Indigenous knowledge studies?
- Do you have conflicting information? How do you deal with these conflicts?
- You also should consider that not all impacts can be defined or predicted – for instance there may not be enough information or there may be uncertainty concerning cumulative or indirect impacts. Keep note of this likelihood during the consultation negotiations, determining appropriate accommodation, and when designing follow-up monitoring programs.

### Funding for your First Nation to Participate

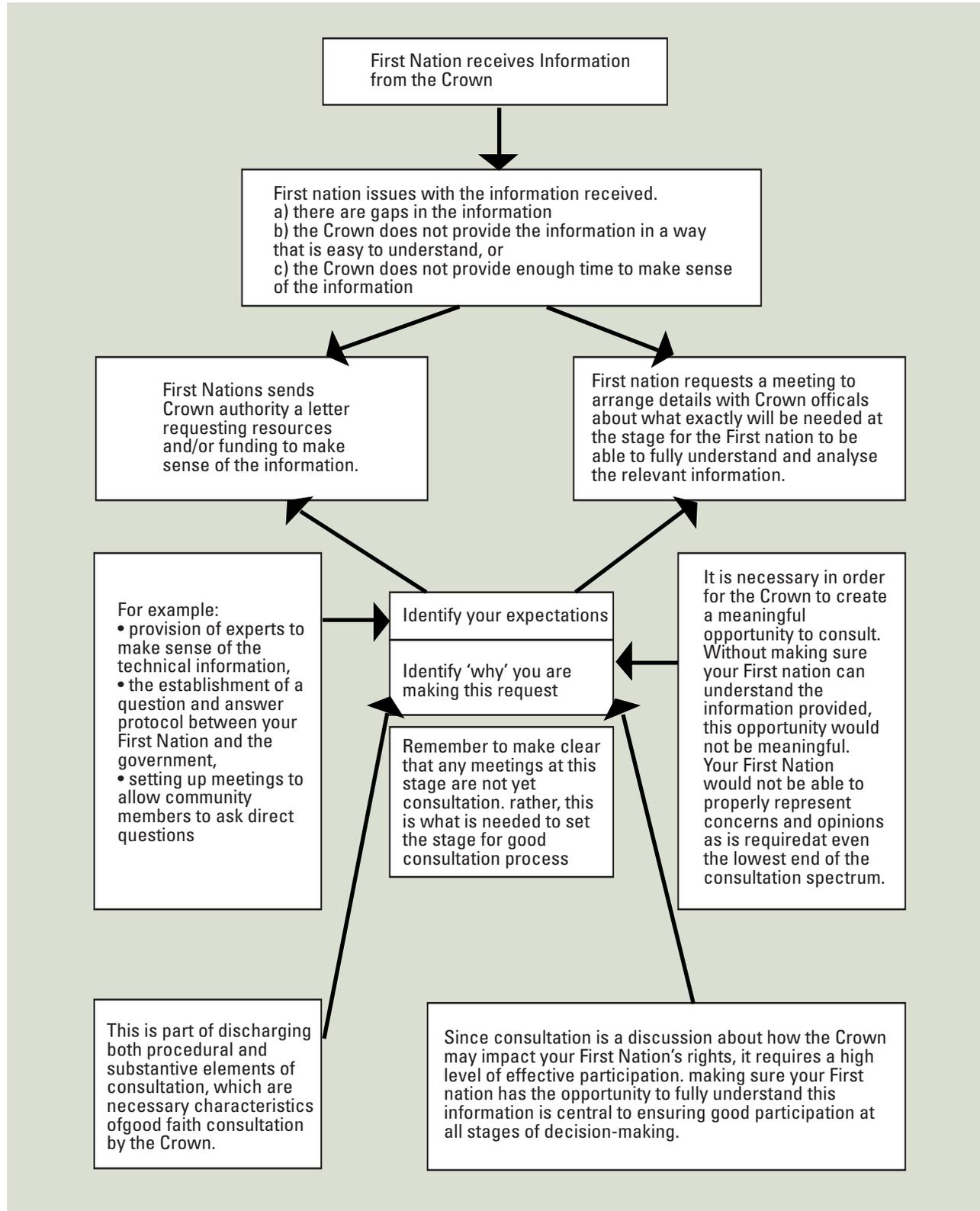
As the Courts have established, the duty to consult rests with the Crown. Funding may be required to enable your First Nation to be meaningfully involved in the consultation and the Crown should be prepared to provide you with the necessary resources. Based on recent court cases related to consultation, such as *Gitanyow First Nation v. B.C. (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, it is implied that provision of funding for a First Nation's meaningful participation is necessary.

In practice where the Crown is making a decision related to a third-party development or interest, the Crown may ask the third-party to provide the resources to support your First Nation's involvement in this process or the third-party may deal with your First Nation directly to support your involvement. In the case where the decision results from a Crown proposal they will need to directly support your First Nation's involvement. Alternatively, your First Nation may be able to access funding from a government department or already identified fund to support your involvement in a consultation process. Ultimately, however the responsibility rests with the Crown.

In the case of Namgis First Nation, their involvement in an development project and related environmental assessment occurring within their traditional territory went further than the typical provision of funding to support additional studies and independent review. In this case the developer ensured the First Nation was involved in the environmental assessment process including the drafting of the Terms of Reference, incorporating Indigenous Knowledge, and the having a say in the selection of consultants including hiring a local biologist chosen by the First Nation for components of the assessment.



# How to Approach the Crown for more Information





## Step 3: Your First Nation Formulates a Position

While developing a consensus position within your First Nation about the nature of the possible impacts on your rights is optimal, it may be difficult. Although your First Nation likely has a process to consult its members, previous steps within this guide provided you with information regarding possible approaches to engaging in [community consultation](#). As well, information regarding the collective nature of [First Nations' rights](#) was provided. Recall that it is of central importance to involve all community members because consultation with the Crown is one key step you must take to ensure that your First Nations rights are protected to the greatest extent possible. Since those rights are held collectively by your First Nation, and exercised individually by members, you must be able to involve community members in the process of defining likely impacts and ensuring substantial accommodation of all concerns.

In this step, the focus is on how to account for all the opinions and concerns expressed by your First Nation's community members before you engage in consultation with the Crown. Presumably, by this point, your First Nation has been able to acquire all the necessary and relevant information about the Crown's proposed decision, and you have also made significant progress in making sense of the information, answering community members' questions about the information, and filling the gaps in the information. Having done that, it is time to start documenting and recording your First Nation's concerns, opinions and positions about the Crown's proposed decision. We will discuss two main themes in this step:

- How to Document Community Interests and Opinions
- 'Not Frustrating' the Crown's Consultation Process



# How to Document Community Interests and Opinions

At this point, the interests and opinions presented by your First Nation will not only be about the Crown's proposed decision, but also about the consultation process itself. The purpose is to:

- Document community members' perspectives on how consultation should take place
  - What would your First Nation's members like to see included in a consultation agreement with the Crown?
  - How would they like to receive communication about the consultation process?
  - Are members satisfied with having representatives of your First Nation speak for them to the Crown?
  - Would they like an opportunity to select additional or alternate representatives?
  - Would they like direct access to Crown officials?
- Establish the scope for what should be included in a Consultation Agreement with the Crown (see Step 4)
  - In addition to the above questions, are there any other specific requests and provisions that community members would like to see in place?

Establishing a scope for what should be included in the consultation agreement is very important to encourage good participation. Make sure your community plays a role in defining what consultation is.

## Community Engagement Tools: Interactive Displays

"Interactive Displays" are an interesting way to inform people on the issues and get them to add to the debate. The advantage of this method is that people can participate on their own and in a relaxed way by making additions or alterations to exhibits.

Displays can range from blank sheets with simple one-line questions to drawings or models of complex development proposals. As people add their comments to the displays over time, discussions and debates can emerge. The display design requires some thought to ensure that information is presented simply and clearly, and to ensure that people's responses are recorded in such a way that they can be used afterwards.

A simple example of this type of display is a Post-it board with sticky notes that can be used to add comments in response to a question such as "How Healthy is the River". You can also use maps to ask questions about what areas community members use or what would be a good location for a development. Finally, you could present community members with a number of options and ask them to identify their preference with an area to add their comments.

For More on Community Engagement refer to the [APPENDIX \(A\)](#)



# How to Document Community Interests and Opinions

## Hupacasath First Nation Community Members' Perspectives

*Consultation is about informed dialogue, ensuring all the information is on the table, nothing withheld. There needs to be a process, it is not over in 3 weeks or 3 months, it is over when it feels right.*

*- Hupacasath First Nation Community Member*

Hupacasath First Nation members were canvassed about consultation by the authors of this report. In their responses, it was very clear that consultation was an important issue for their community and that although Chief and Council represent their interests, they want to be involved in formulating the First Nation's position on consultation issues.

When it comes to determining what rights will be affected by a project or decision, the response was almost unanimous: that kind of decision can only be made by the Hupacasath First Nation membership.

Finally when it comes to determining if an impact on their rights is acceptable or what compensation is owed to Hupacasath First Nation, those surveyed again were clear that it should be the membership making this decision.

*Hupacasath First Nation is not a business but some people think it is. In the business world it is easier to respond, you can make decisions alone. Collaboration takes time but for Hupacasath First Nation it is important.*

*- Hupacasath First Nation Community Member*

We'll discuss the particulars of establishing a consultation agreement in the next step.

For now, let's focus on other issues to think about and techniques to use when trying to represent your First Nation's, and your members', points of view in consultation with the government.



## Create an Elected/Accepted Delegation Group

As an alternative to having all communication with the elected leadership represented by your Band Council, another option may be to create a specialized group of delegates for consultation with the government, or—if there is the need and resources—to create a consultation committee with the mandate of dealing with consultation issues as they arise for your First Nation.

Whichever option is appropriate for your First Nation, the goal is to ensure your community members are at ease in relation to:

- Who is representing them?
  - Did your First Nations' members choose that person for that specific purpose?
  - How were they chosen? Is that acceptable to your community?
- Is there an element of trust between your First Nation's community members and the people chosen to be responsible for consultation?
- How are their concerns being represented?
  - Are they bringing your questions and concerns directly to the discussion table?
  - Are any concessions or agreements being entered into without the consent of your community's members?

### **Involving Other Interested Parties and/or Representative Organizations**

Understanding and representing your First Nation's opinions and perspectives on the consultation issue may go beyond just speaking on behalf of your community members. You may want to think about other parties or organizations that may contribute to this understanding.

For instance, members of your community may be affiliated with community or regional organizations that they feel are representative or supportive of their interests. This could range from local community groups, i.e. women's groups, youth groups, to tribal councils, treaty organizations and other regional organizations. Your First Nation's members may feel as though these organizations represent or can substantially support their interests and might then want them involved in discussions regarding the consultation issue. This does not mean they have to be involved in every stage of the consultation process between your First Nation and the government, but it is a good idea at this stage to involve them in preliminary discussions about formulating your First Nation's position on the issue in order to document a wide range of opinions and perspectives. They may also be a good source for further information and political or other support in some cases.

Also, it may be useful to talk to other First Nations in the area that could be similarly impacted by the decision. These First Nations may or may not have been contacted by the Crown regarding consultation, depending upon the approach taken by government. Either way, they may have strong perspectives and opinions about the consultation issue and about how it may affect their rights—opinions, perspectives and thoughts that may incite discussion in your own community. It is also important to consider whether your First Nation would like to cooperate with other First Nations towards creating a united front if your interests and opinions on the issue are similar.

In sum, keep the following in mind when drafting your First Nation's position on the issue:

- How can you adequately represent your members?
- How can you represent all of the different points of view present in your First Nation?
- What methods will your First Nation be satisfied with in terms of expressing their points of view and have those expressions represented to the government?



## ‘Frustrating’ the Crown’s Consultation Process

Canadian courts have not provided much guidance for the role of Aboriginal peoples in the duty to consult, except for two points:

1. First Nations must respond to the Crown’s good attempts at meaningful consultation by asserting their claims clearly
2. First Nations should not frustrate the Crown’s consultation process by taking an unreasonable position during negotiations

What you can do regarding the first point was addressed earlier when we discussed creating consultation policies or land use plans in order to inform the government about what land you use, what you expect from them and what your interests are in relation to the decision, project or development being proposed.

The second point is directly related to what we have been discussing in this step. But, what constitutes ‘frustrating the Crown’s consultation process’? This is not very clear from what the Supreme Court of Canada has stated in the cases it has considered. Looking at judgements from other courts helps:

- In British Columbia, a court ruled that the failure of Kitkatla First Nation to engage in consultation with the provincial government regarding a salmon aquaculture project—because the First Nation was completely opposed to this type of industrial fishing on the basis that they considered it harmful and unsustainable—frustrated the Crown’s consultation process
- In Ontario, a court ruled that Kitchenuhmaykoosib Inninuwug First Nation did not frustrate the process, but rather, asserted its position clearly, when it called and announced a moratorium on mining development in their traditional territory

However, as mentioned above, there is no exact definition or line between what is considered by the courts to be asserting your claims clearly and what is considered by them to be frustrating the Crown’s process. In general, it is a good idea to respond to the Crown’s good faith attempts to consult with your First Nation about their proposed decision, project or development. Likely, if your First Nation takes a position of refusal to consider the proposed decision, this will be seen as ‘frustrating the Crown’s consultation process’ because, in essence, the First Nation is refusing to discuss the decision being considered. There are instances where it is acceptable to consider alternatives or not proceeding with the project at all (most notably consideration of alternatives is a requirement with the federal environmental assessment process), but the discussion must occur in order for those alternatives to be reviewed.

You should not cooperate at the cost of not properly representing your First Nation’s interests and concerns, but do remember that in the course of negotiations and in attempting to protect your rights, your First Nation may have to make some concessions. This will be discussed in later steps. What is key to remember is that before making concessions, your First Nation’s members must be informed, involved and in agreement.



## Step 4: Developing a Consultation process

We're ready to discuss some of the important administrative details of the consultation process. This is the final step in the preparatory stage before actually engaging in consultation discussions with the Crown. So, now is the time to set out in writing all the particular concerns your First Nation may have about the consultation process itself. Let's start with reviewing some necessary components that need to be considered in creating a consultation agreement:

### 1. INFORMATION, ISSUES AND CONCERNS

Given the internal discussion your First Nation has already engaged in during the previous steps, you should transfer the resolution of these concerns about the consultation process that have arisen during those talks into a written agreement.

### 2. A REVIEW OF CONSULTATION PRINCIPLES

Good consultation is usually done in the context of a long-term relationship, and requires substantial commitment from all parties involved. Consider the following:

- Consultation should take place even at the Crown's stage of incremental planning; even small or preliminary decisions that may affect your First Nation should be the subject of consultation.
- Consultation is an ongoing duty. The Crown's duty to consult is not diminished or waived because there is a treaty between the First Nation and the Crown or a previous agreement allowing the Crown to use land and resources for its purposes. Instead, every time the Crown makes a decision that may impact your First Nation's rights, consultation must take place.
- The source of the duty to consult is in the "Honour of the Crown". This means the Crown must act towards reconciling the historical relationship between the Crown and Aboriginal peoples. [SEE APPENDIX \(O\) for more information on the Honour of the Crown.](#)

None of these principles imply a short-term relationship or a one-time discussion to properly discharge the duty to consult. This should be accounted for in developing a consultation agreement with the Crown.

### 3. COURT STATEMENTS REGARDING CREATING CONSULTATION AGREEMENTS

The Crown and your First Nation should work together to develop a consultation agreement. Otherwise, courts have indicated that they will look very closely and critically at the negotiating positions of the parties: the Crown and your First Nation (*Gitanyow First Nation v. B.C. (Minister of Forests)*, 2004 BCSC 1734). Thinking about the negotiating positions between the Crown and your First Nation is also important to keep in mind when drafting a consultation agreement, to make sure you include ways to remedy any power imbalance issues. This could include:

- Including a set of principles that you all agree will form the basis of the consultation, and the way participants will engage with one another;
- Creating a mechanism for conflict resolution where you bring in a neutral third party to mediate between the participants that would be triggered when your First Nation or the Crown feels as though the other party is acting unfairly; including what is expected from each party throughout the negotiations;
- Setting out detailed parameters drafting the agreement,
- Including a provision stating that no decision will be made until each party is satisfied they have been heard and addressed through the consultation process regarding their concerns; in other words, detailing how your First Nation and how the Crown define 'substantially addressing' concerns presented throughout consultation and coming to an agreement at the beginning about this definition and about how parties will treat each other in trying to reach this goal;



## Step 4: Developing a Consultation Process

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- Including a statement that the consultation process will occur while recognising that each party may later choose to resolve the matters at hand through the court system;
- Including a provision that ensures that no other processes, in particular, land claim or self-government processes will be impacted by the consultation discussions.

Courts have directed that the Crown should not engage in 'hard dealing' during consultation; the Crown's failure to make reasonable concessions is a sign that they are not consulting in good faith with a willingness to accommodate First Nations' interests. So, it is clear that the Crown should not take advantage of a situation where they may seem to have 'the upper hand'. The government authorities that you are dealing with may have more resources, information, and power; proper consultation requires that they should not use this to their advantage. That would be a violation of their honour and their fiduciary role. Drafting a consultation agreement should be used as an opportunity to 'level the playing field'.



## Writing the Agreement

Based on the previous pages recap, here are some elements you might want to include in your consultation agreement with the Crown:

- Statement of goals and objectives of the consultation
  - What does your First Nation want to achieve through the consultation?
- Expected timelines for completion of specific goals
  - How flexible do you need these timelines to be? What will you need to meet these deadlines? Be sure to include these details
- Guiding principles of consultation
  - Include the legal sources of consultation that we reviewed at the beginning of the guide, as well as any other definitions and principles of consultation that your First Nation identifies as important to keep in mind throughout the process
- Guidelines for how to implement consultation
  - How often will your First Nation be in touch with the Crown?
  - How often do you expect the Crown to be in touch with you?
- What is your main way of communicating (i.e. letters, phone calls, in-person meetings)?
  - Under what circumstances should the Crown be contacting your First Nation? For instance, if the Crown receives new information, they should contact your First Nation and provide copies of this information; how will this new information be disseminated? Include here any conclusions your community has come regarding how they would like to receive new information and updates (i.e. community sessions, periodic question periods with the Crown)
- Who will be representing your First Nation in the consultation?
  - Will there be a consultation committee or just one contact person? Detail what your First Nation and its membership have agreed on and how reporting to your First Nation's membership will take place
- Confidentiality Agreement between your First Nation and the Crown
  - Will you be sharing your Indigenous Knowledge throughout the consultation? Does this need to be protected with a confidentiality agreement? Think about including where the information will be stored after the process and also detailing how that information can be used, and who owns it
- Reporting and documentation mechanisms
  - How will the consultation process be documented? Who will have access to it?
- Protections
  - Processes, outcomes, issues the consultation will neither affect nor influence

[SEE APPENDIX \(P\) FOR A SAMPLE CONSULTATION AGREEMENT](#)



## Step 5: Consultation and Accommodation

In this step, we move from the preparation stage to the first step in the formal consultation process. All of the steps up to this point are aimed at ensuring that your First Nation is sufficiently prepared to consult with the Crown. Remember, consultation with the Crown is how you ensure that your First Nations rights are protected to the greatest extent possible. The Crown is required to engage in consultation in order to justify any infringement on your rights. So, it is very important to make sure your First Nation is ready—equipped with information, understood and agreed-upon parameters—to talk to the Crown about your rights.

The information provided in this step is divided into four parts:

- Implementing the Consultation Agreement developed in Step 4
- Defining and negotiating ‘accommodation’ of your First Nation’s interests and rights
- What to do if your First Nation believes the Crown has failed to consult and accommodate your rights and interests
- Documenting the Consultation Process from beginning to end



# Implementing the Consultation Agreement

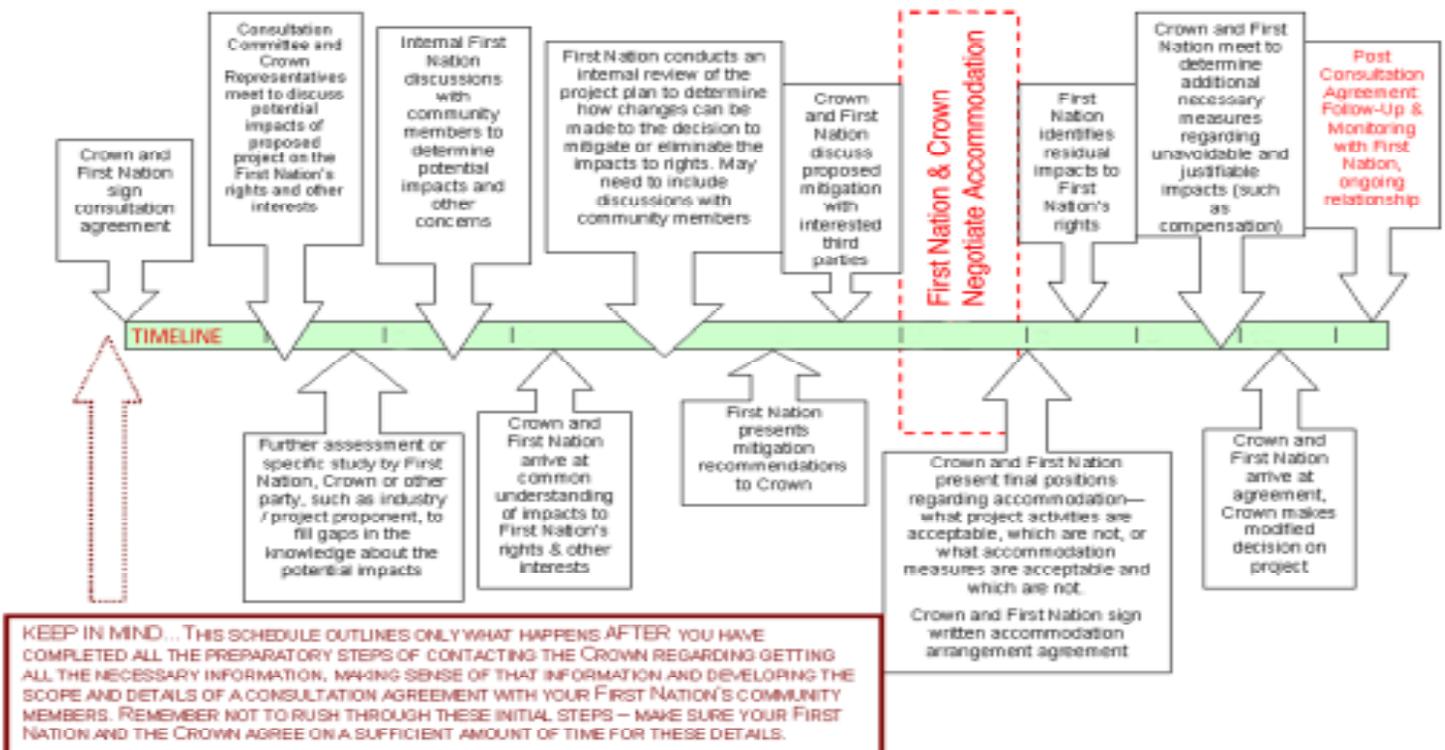
The Consultation Agreement, signed by your First Nation government and representatives from either or both levels of the Crown, is a good place to start. Those agreed-upon parameters regarding the issues subject to consultation, and set out in the agreement, should lead the discussion.

**Timelines:** What does the Consultation Agreement say about timelines for the process? Usually, an agreement of this type will set out general principles regarding a commitment to engage in timely consultations but will not specify exact time commitments. In cooperation with your government counterparts in the consultation, look at the general timelines agreed upon in the Agreement and work out a detailed schedule of what is being addressed, when, and who will be involved. Keep in mind that it is best to build in a sufficient amount of flexibility in designing the schedule and agreeing on timelines, to allow for the need to fill unexpected information needs and the discussion of unexpected issues as they arise throughout the consultation process. **Below is an example of the consultation process,**

**Keeping in touch with the Community:** What does the Consultation Agreement say about communicating with community members? As your First Nation's representatives or consultation committee begin their meetings with the government, it is very important to respect what has been agreed upon including how often you will report to your First Nation's members, how their questions will be answered, and how their concerns will be voiced.

**Making final decisions:** What does the Consultation Agreement say about when, how, and by whom all final decisions are made? Remember that the Crown should not move forward with its proposed project or make any decision until consultation is **complete**. What does the Consultation Agreement say about what 'completion' means? It is important to establish at the beginning of the consultation process what the end objective is; in other words, what will constitute completion of the consultation between your First Nation and the government. You should ensure at the onset of consultation that this will be respected and no decision will be taken before the process is complete.

## Detailed Consultation Process





## Defining and Negotiating Accommodation

Once it has been established that the Crown's proposed decision will impact your Aboriginal, treaty or land title rights, then accommodation of your First Nations' interests and rights becomes necessary. Accommodation is just one part of the consultation process that falls within the Crown's sphere of obligations to First Nations. The need for accommodation can be further justified by considering the following:

- **Aboriginal peoples as involuntary participants:**

When consultation is required, Aboriginal peoples are essentially forced into participating in a process that they didn't create. The need to consult results because government wishes to make a decision based upon a goal or need that is usually not shared by First Nations. Because First Nation must participate in consultation in order to protect their rights, government is required to strive toward an even higher standard to ensure that the views and concerns of these communities are given the utmost consideration. This is why the courts have been so clear that discussions between the Crown and First Nations must be conducted in good faith, and the Crown must show that it has accommodated the issues and concerns of First Nations about potential impacts on their rights.

- **The Precautionary Principle:**

The application of the precautionary principle, which has been adopted by governments as a principle in various pieces of legislation can provide ethical guidance. In essence, use of the precautionary principle means that when faced with uncertainty regarding the impacts of a decision then caution should be exercised, and a lack of information or evidence to prove the impact of a decision should not be used as a justification for proceeding with the decision or not making a decision. This is an important concept when faced for example with scientific uncertainty about the possible effects of using a new chemical – in this case you don't have to "prove" that it can be harmful to regulate its use, rather you would regulate its use until you were more certain it is safe. Caution, then, should also guide the Crown's action when certain information about impacts on Aboriginal and treaty rights is not readily available.

Caution might then call for modifying the proposed decision to minimise any possible impact on your First Nation's rights.

The requirement for accommodation requires the Crown to:

- Listen to the concerns and views of your First Nation;
- Explore with your First Nation options to resolve the concerns (especially options presented by the First Nation);
- Modify its proposed decision to try to resolve the concerns and seek a compromise to harmonize conflicting interests;
- Indicate to your First Nation that it has modified its decision in response to your First Nation's expressed concerns;
- Be able to demonstrate that it has impacted your First Nation's right as minimally as possible (see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999; and
- Move down the path of reconciliation (see *Haida Nation v. British Columbia*, 2004

### **Rights Infringement:**

Consultation is required when a proposed Crown decision *may* impact First Nation rights. Engaging in consultation does not mean you are giving the Crown permission to impact your rights; it is the opportunity to have your concerns considered by the Crown, and in a proper consultation, for you to work with the Crown to create solutions to your concerns. The 'best-case scenario' would be that the Crown is able to achieve its goal, by implementing the decision it proposed (or some modified version) while ensuring that your rights are not impacted. This is the goal of consultation.

In some situations, the process may not result in an optimal solution; there may be a short-term or long-term limitation on how you implement your rights. While engaging in consultation is one of the ways to implement and protect your rights, it is important to recall that the Supreme Court of Canada has advised in numerous Aboriginal rights cases that a better route to addressing First Nation rights issues is through negotiation. Through negotiation, there is a much better opportunity to create workable solutions and to accommodate First Nation interests.



## Defining and Negotiating Accommodation

No clear test has been articulated by the Supreme Court of Canada to determine activities that would meet a standard of “reasonable accommodation”. In general, accommodation is evidenced through changes the Crown has made to their decision based on First Nation input. These changes must not be arbitrary, but made in direct response to concerns raised by your First Nation during the consultation process.

**The central objective in negotiating accommodation is to reduce or eliminate the negative impact on your First Nation’s Aboriginal, treaty, land title, or traditional use rights.**

### *The Path of Reconciliation*

*‘The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.’*

*Haida Nation v. British Columbia, 2004*

There is a clear distinction between accommodation, mitigation measures, compensation, and the provision of consultation support. A proposed decision creates impacts that may be accommodated through a number of mechanisms, but all of them involve some form of **change to the proposed Crown decision**.

### **Mitigation Measures**

In order to develop effective mitigation measures, there needs to be a clear understanding of how the proposal will impact on your rights:

- Is the likely impact short or long term? If the development includes creation of a temporary structure in an area where wildlife dens in winter, project plans could be modified to ensure that these structures are erected only during the summer months. This will ensure that these animals are not disturbed. In this way, the short-term impact is fully mitigated.
- Is the development able to be relocated or is it dependent upon a certain location (such as a mining activity)? Some activities can be moved, like the location of roads and transmission lines.

Experts from your First Nation and from the scientific, health, and social scientific fields will usually be necessary to assist you in developing and deciding upon the effectiveness of mitigation options.

For instance, the proposed project may be approved, but the project implementation plan, including timing or location, may be altered in order to mitigate the negative impact on your First Nation. To figure out what might work to accommodate your First Nation, more information may be needed.

Impacts that persist and cannot be accommodated (that is, the decision cannot be modified, or the parties are reluctant to modify the decision, to address the impact on your First Nation’s rights) are referred to as “**residual impacts**”. They may be minor or significant in scope. If the residual impacts are significant, your First Nation may require compensation in some form or amount from the Crown, and this could end up being a significant part of your discussions with them. Agreements setting out the scope, use, and legal effect of compensation will be necessary.

### **Economic Benefits vs. Compensation: Is There a Difference?**

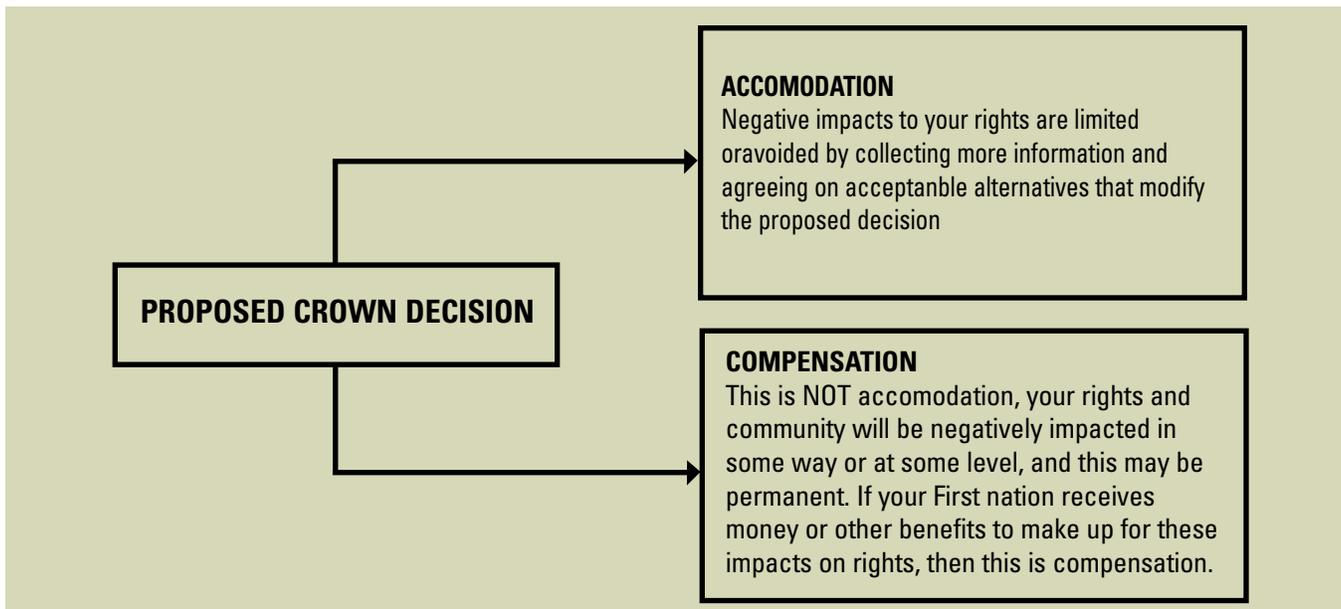
Often, developers, such as mining or forestry companies offer economic benefits to First Nations as part of negotiating to receive approval for their proposed development. Such offers of jobs, training etc. should not be considered “compensation”. Only the Crown can compensate you for impacts they have created or allowed because of their decisions. They have the obligation to compensate for the negative effects of their decision.

The opportunity to benefit from economic development occurring in your traditional territories should be viewed as a standard business practice. This is, or should be, basic to any definition of what is sustainable or simply good business. It should not be offered in exchange for impacts on First Nation rights.

This means, therefore, that even if a proposed Crown decision to approve a development in First Nation traditional territories is unlikely to impact First Nation rights, First Nations should still have the opportunity to benefit from the development.



## Defining and Negotiating Accommodation



The main point to keep in mind is that accommodation of your First Nation's interests and concerns may involve numerous approaches and may require significant discussion.

Things to keep in mind about accommodation:

- How will you involve all of your First Nations' members in discussions concerning accommodation?
  - It is important to discuss this with all affected community members because they must have a say in how their rights will be ultimately impacted and those impacts are accommodated.
- What is acceptable accommodation of your rights according to your First Nation?
  - You need to examine those rights that will be impacted and, considering how they will be impacted, decide how this impact can be diminished or eliminated. For example, if an area of land that your members use frequently for trapping is being proposed to be leased to a third-party for an industrial development, can an arrangement be made to ensure members can still access the land for the purpose of trapping. Would this be an acceptable accommodation for your First Nation?
- Would compensation be an acceptable alternative to accommodation?
  - If so, determining how to put a value on the limitation or infringement of the practice of your rights is critical and can be very challenging. For some First Nations that have faced this choice in the past, they have stated that certain

### ACCOMMODATION

Negative impacts to your rights are limited or avoided by collecting more information and agreeing on acceptable alternatives that modify the proposed decision

### COMPENSATION

This is NOT accommodation, your rights and community will be negatively impacted in some way or at some level, and this may be permanent. If your First nation receives money or other benefits to make up for these impacts on rights, then this is compensation.

impacts cannot be compensated because, in essence, the First Nation does not have the right to give up that right or agree to the impact. This would be the case for example, regarding destruction to sacred sites or fishing spawning sites.

### Accommodation:

There are a number of ways that the Crown could accommodate your concerns and still make the decision they were intending to make at the outset of the consultation. For example, if the decision is in relation to a development project, the timing of construction could be changed to avoid the sensitive times such as when animals are breeding, nesting or spawning; or to avoid the time when people are on the land. Other possible accommodation measures include changing the location to an area that the First Nation considers to be less sensitive to disturbance or utilizing better technology to reduce pollutant release to the environment. In other instances, industrial practices could be altered to lessen the impacts. For example, First Nations could propose more stringent forestry standards such as increasing the riparian protection zone or employing different cutting methods. Ultimately, this is similar to a federal environmental assessment where ideally mitigation measures are proposed to eliminate or at least reduce environmental impacts to those that are no longer "significant". In an ideal situation both the Crown and industry should be able to meet this challenge although, as with environmental assessment, there are often other factors such as greed and misconceptions about what constitutes progress that take precedence.



## What if the Crown Fails to Consult and Accommodate Properly

Recall that the duty to consult does not require the Crown to come to an agreement with your First Nation, so long as the government approached consultation in good faith and with the intent to substantively address your First Nation's concerns. What this means is that if the consultation process is completed according to the principles elaborated above—including substantively addressing your concerns—then your First Nation cannot seek action against the Crown for the sole reason that your community did not agree with the outcome. For instance, your First Nation may voice certain concerns, and the government may respond in the consultation with suggestions to accommodate those concerns. The consultation process must afford your First Nation the opportunity to make your concerns known to the Crown, and the Crown must take active steps to address those concerns through modifying its decision. The fact that a decision still moves forward without your First Nation's full approval is not enough to say that consultation was inadequate or did not take place properly.

What is addressed here is if the Crown fails to discharge the process in good faith or fails to address your First Nation's concerns. Despite having a Consultation Agreement, your First Nation may feel that during the consultation process, the government is not engaging in the consultation process as it is obliged and as it has agreed to do. What recourse does your First Nation have at this point in the process?

### **Trigger a Conflict-Resolution Mechanism:**

Does your Consultation Agreement include a mechanism for resolving conflicts that one party can invoke at any time during the consultation process? Such a mechanism might include bringing in a neutral pre-agreed upon third-party to mediate between your First Nation and the government. It is a good idea to have this type of mechanism within your agreement as it can serve to equalize the power imbalance that exists between your First Nation and the government if this becomes an issue in the consultation process.

### **Alternative Dispute Resolution:**

Consideration should be given to designing a process that works for your First Nation and is in keeping with your cultural norms.

### **An Example of Third Party Monitoring:**

The Gitanyow First Nation was engaged in consultation with the British Columbia provincial government. In the face of serious disagreement, the court intervened and continued to monitor the process according to the directions laid out by the judge.

### **Commencing Legal Action Against the Crown:**

Has the government proceeded to make a decision without properly completing the consultation with your First Nation? Are there any other serious problems with the consultation process that pose a threat to your Aboriginal, treaty, or land title rights? If your First Nation's interests are compromised in this fashion, and you have attempted to seek resolution through other means and have been unsuccessful, it may be time to seek legal advice. Remember, the objective is to properly protect your First Nation's rights; when that is severely compromised, stronger action may be appropriate.



## Documentation of the Consultation Process

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All of the interactions between your First Nation and the Crown during the consultation process should be well documented. This has been emphasised earlier in the guide—recall the importance of sending letters in order to keep a record of your correspondence—and it is again important to re-emphasise that all elements of discussions throughout the entirety of the consultation must be recorded.

There are various options for documenting the process:

- Video-recording
- Written minutes
- Production of periodic reports

You should also think about the following questions:

- Where will the documented process be stored?
- Who will have access to this information? Does this include confidential information?
- Will all the information be available to be used in court, should the process result in court action?
- How will the final resolution be documented?



## Step 6: Implementation and Monitoring

This final step is about what happens after the formal consultation process is over. Throughout the steps set out in this guide, it has been discussed that consultation should take place with the Crown in the context of a long-term relationship. Here, we will talk more about how this long-term relationship can further benefit your First Nation.

First, we have to look at how to ensure that the joint resolution reached through consultation is honoured and implemented by all involved parties. Second, we will look at how your First Nation may want to be involved in implementation and monitoring of the resolution. Finally, we will talk about how consultation can lead to certain value-added components including:

- Improving your First Nation's general relationship with the Crown
- Enabling your First Nation to become more involved in land and resource management
- Using consultation as a means to asserting your First Nation's traditions, values and laws

### **Agreeing to Abide by the Joint Resolution**

While your Consultation Agreement details the protocols and procedures expected by all parties during consultation discussions, it is also important to draft another agreement when—and if—you are able to reach a joint resolution on the issues.

This could take a form of a final report summarising the consultation proceedings, the positions of the parties involved—your First Nation's position on the issue and the Crown's position on the issue—and finally, detailed documentation of the joint resolution.

When recording the joint resolution, make sure to be specific and include:

- Timelines of agreed future action
- What is expected of each party, their role and responsibilities in the joint resolution
- The objective of the joint resolution and a detailed plan as to how to achieve it
- Any other expectations or conditions necessary to the joint resolution, such as monitoring, compliance and enforcement measures

All parties to this consultation resolution, that is the Crown and the First Nation, should sign a binding legal agreement to ensure they uphold their responsibilities.



# Implementation and Monitoring

## Implementation and Monitoring

When a joint resolution is reached, documented and recorded in detail, you should take time to re-evaluate your First Nation's role and expectations. You may consider the following questions:

- How will your First Nation be involved in the implementation of the joint resolution?
- Does the accommodation of your First Nation's interests agreed to during the consultation require active participation of your First Nation's members?
- If the decision involves impacting your First Nation's rights, albeit to an acceptable extent, how will your First Nation adapt to that impact? Is it necessary to discuss these details further with your community members? How will you go about doing that? Think about using some of the internal consultation techniques discussed earlier in the Guide.
- How will your First Nation monitor the impacts on rights and practices?
- What will your First Nation do if there are unexpected negative impacts not addressed during consultation?

The last two questions speak specifically to the issue of monitoring the implementation of the joint resolution. Often, impacts may arise that were not contemplated in consultation. You should think about how your First Nation may deal with these circumstances should they arise.

For instance, if at the end of the consultation process, your First Nation has agreed with the government that a project can be approved if certain accommodations are made for the impacts on your First Nation's rights, but in the implementation of that project the safeguards agreed to aren't able to mitigate other unexpected negative impacts on your First Nation. In this event it would be useful to have a mechanism already established with the Crown to address this possibility.

One option may be to build a 'Monitoring and Re-Evaluation Clause' into the joint resolution before it is signed, which could include:

- Insertion of a mechanism that allows for ongoing assessment of impacts post consultation agreement. This is in line with the principle that consultation is an ongoing process and it is not satisfied by a previous consultation (if new impacts arise).
- Commitment by all parties to address new, unexpected issues that may arise related to the proposed decision but that were not specifically predicted or addressed by the consultation.
- Inclusion of a commitment to engage in a similar process of consultation should it become necessary in the implementation of the joint resolution or at the request of either of the parties.
- Inclusion of a provision to ensure the ongoing distribution and discussion of information relevant to the consultation, and the negotiated accommodation, to the First Nation and the Crown (i.e monitoring reports, etc.).

## Monitoring and Follow-Up:

There are actually four distinct stages that should be part of a monitoring and follow-up program:

1. Monitoring: this includes the collection of data and comparison with standards, predictions or expectations (scientific/Indigenous Knowledge and/or technical assessment);
2. Appraisal: appraisal of the conformity with standards, predictions or expectations (scientific/Indigenous Knowledge and/or policy analysis);
3. Management: making decisions in response to issues arising from monitoring and appraisal (scientific/Indigenous Knowledge, operational and/or policy related);
4. Communication: informing stakeholders about the results of follow-up.

Consider that a follow-up program related to a development project should extend throughout the life of the project and involve a process of adaptive management or the ability to respond to unexpected outcomes during implementation.

In general, follow-up should include an evaluation of the consultation process itself to inform future consultations and to demonstrate to all parties the advantages of using such an approach. Done well, follow-up can build trust and credibility between the parties and should help to build a more positive relationship.



## Value-Added Components

There are additional benefits to your First Nation of engaging in consultation, particularly if the process is part of a longer-term commitment to building a sustainable relationship and reconciling the ongoing issues originating from the past. Consultation can provide the opportunity for more than just protecting your rights.

### **Relationship to the Crown**

As stated throughout this Guide, consultation is meant to take place in the context of a long-term relationship with the objective of reconciliation between the Crown and Aboriginal peoples. Therefore, it may be an opportunity for your First Nation to develop a better relationship with government authorities.

For instance, in consulting with this particular government authority throughout this process, other issues may be identified by your First Nation that require resolution and the attention of other government authorities. Your new government contacts may be able to assist your First Nation and put you into contact with other departments to address those issues.

Also, by following these steps, your First Nation has likely been able to identify a consultation process that meets both your community's needs and the needs of government. This process can be implemented in other contexts with different government actors. In other words, your First Nation now has an idea of how to work with the Crown and this can be repeated in the future, in different circumstances and adapted to different demands.

### **Involvement in Land and Resource Management**

Consultation could result in increased involvement for your First Nation in land and resource management within your territory. This possibility should be kept in mind when thinking about the kind of accommodation and mitigation your community would like to negotiate with the Crown. Part of that accommodation could be your First Nation's increased role in management of local resources that will be impacted by the Crown's decision.

Your First Nation is likely best placed to assess local needs and make decisions accordingly in order to minimise future impacts on their rights and their land use practices. As such, it seems to be a logical corollary for consultation to provide an increased role for your community in local decision-making in relation to related issues that may arise.

### **A Means to Assert your Traditions, Values and Laws**

The logical sequence of steps leads from how consultation can be used to augment your First Nation's decision-making powers to how it can be used to assert your First Nation's traditions, values and laws.

Throughout this step-by-step guide, there has been mention of involving your community in formulating your First Nation's position in relation to the specific consultation issue, in relation to consultation as process, and in relation to supplementing the information provided to you with your own information including your First Nation's Indigenous Knowledge. In sum this equates to the formulating and asserting the policies, procedures, and ultimately laws of your First Nation in response to the consultation issue.



## Next Steps for Your First Nation to Consider

The following are a series of next steps that your First Nation may wish to consider to ensure that subsequent consultations are effective:

- Production of consultation guidelines detailing policies and procedures expected by government and third parties proposing decisions and projects in territories used by your community members.
- Publication of tools created through this process, such as land use maps and plans, that assert your First Nation's territoriality and jurisdiction

[SEE APPENDIX \(I\) for what Hupacasath First Nation has done](#)

[SEE APPENDIX \(M\) to Review More Information Gathering Methods](#)

- Elaboration of a land use code, which includes your First Nation's values, traditions and laws to be respected in the use of lands and resources within your territory
- Creation of permanent bodies—such as a consultation committee, or a land use authority—to continue to work on these issues and develop new ideas and mechanisms to assert your First Nation's laws, traditions and values through consultation

[SEE APPENDIX \(J\) to Review what St'át'imc Nation has done](#)

[SEE APPENDIX \(K\) to Review what the Mi'kmaq have done](#)

### Attawapiskat First Nation (Ontario)

The Attawapiskat First Nation, a Cree community on the coast of James Bay in Ontario, has drafted their own consultation guidelines, which set out minimum requirements for consultation and accommodation. Attawapiskat has extensive experience and recently concluded a lengthy consultation process with government in relation to the DeBeers Victor Project—a diamond mine currently under construction within their traditional territory.

- The Attawapiskat Consultation Guidelines identify a range of activities that require consultation including:
  - Legal and policy changes;
  - Strategic long, medium and short term planning decisions;
  - Scientific and technical decision-making;
  - Assessment of environmental impacts;
  - Approvals which may lead to the issuance of a permit, license, lease or change in land status;
  - Monitoring decisions; and
  - Any amendments to such decisions.

The consultation process detailed by Attawapiskat within their Guidelines includes the *requirement for mutually agreed-to terms of reference for consultation and accommodation negotiations*, in addition to a step-by-step process that is similar to the process—and includes similar principles—as those described in this Guide.



## Next Steps for Your First Nation to Consider

### **Walpole Island First Nation (Ontario)**

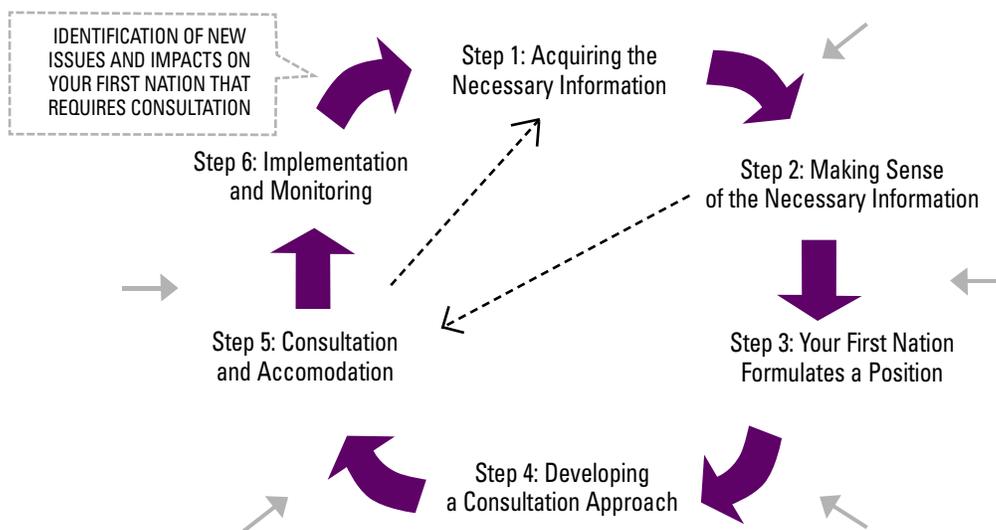
The Walpole Island First Nation has published on their website ([www.bkejwanong.com/guidelines/guidelines.html](http://www.bkejwanong.com/guidelines/guidelines.html)) guidelines for consultation in relation to developments occurring within their unceded territory. Elements and principles include:

1. Initial contact to be made with Chief and Council;
2. Consultation to occur early in the design stages of their project, in order to become aware of First Nation interests, and while critical project design decisions are still amenable to change if necessary;
3. Expectation that proponents will take steps to accommodate WIFN interests in view of their aboriginal title claims to their traditional territory;
4. Baseline ecological data including information on valued ecosystem components is available and primary issues of concern to Walpole Island First Nation have been identified;
5. Early understanding and discussion of issues of concern to the First Nation and the identification of appropriate mitigation measures, will make a positive contribution to the process; and
6. WIFN often seeks is the development of a Memorandum of Understanding (MOU) or impacts and benefits agreement (IBA) to address any identified concerns of WIFN.
7. WIFN will review the project information and determine the resources required for WIFN to effectively participate in the consultation process and review the proposed project(s).
8. The standard breadth of the WIFN review is outlined and includes consideration of the effects on the seventh generation yet to come; effects on Aboriginal rights; a scientific and technical review; a review based on WIFN traditional knowledge and values; a review of the cumulative effects assessment; and socio-cultural impacts including employment and contracting opportunities.
9. Development of a Memorandum of Understanding or Impacts and Benefits Agreement that may include requirements related to follow-up and monitoring and a dispute resolution plan.
10. The final acceptance by WIFN of any draft MOU or IBA requires that the community be consulted and decide on the acceptability of the project.

# Conclusion: A Continuous Process of Consultation

Much has been said throughout this guide about consultation as an ongoing process and a long-term commitment. It can also be described as a circular process rather than just a linear, step-by-step checklist of interaction with the Crown.

The consultation steps presented throughout this guide speak to important details and considerations regarding any process of negotiation and participative decision-making with the Crown. However, thinking about these six steps in a strictly linear fashion may not work in practice. The graphic below illustrates an alternative way to think about applying the six steps.



What the above graphic shows is that there will be situations where your First Nation may enter or re-enter the consultation process at different stages. For example, you may have proceeded through the information-gathering step in a relatively recent consultation that involved potential impacts to your water rights. As part of that consultation, you may have compiled extensive information that is relevant, up-to-date, and useful for the current new consultation. As such, consultation discussions may be able to proceed without the need to acquire new information on this issue. While it is important to modify the consultation approach to fit the circumstances you encounter, you should still go through all the considerations detailed in the guide wherever your First Nation chooses to enter the consultation process.

In addition, it is important to keep in mind that you need to consistently consider elements of each step as you move forward. Particularly when your First Nation is engaged in consultation and accommodation discussions, you may have to return to the information collection stage before making a

conclusion on what is the most appropriate and acceptable accommodation of your rights and concerns. As new information emerges, your First Nation should be careful to re-consider all of the details discussed in the preparatory stage to ensure that your First Nation and its members are sufficiently informed to discuss and protect its rights.

Finally, when your First Nation reaches the monitoring and implementation stage of the consultation process, it is useful to keep in mind that this could also be an opportunity to identify new issues for consultation that may arise. The effectiveness of the activities within Step 6 - Implementation and Monitoring, and the role your First Nation plays in this engaging in this step, may put your community in a position to quickly identify new threats to your First Nation's interests. It is then appropriate to think about the six-step guide as a continuous process that places your First Nation in a position to better identify possible impacts on your First Nation's rights that may arise when the Crown is executing its decision—which was the subject of consultation—or any corollary decisions.



## Some Final Words

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This guide has sought to provide your First Nation with the tools and information to design an effective and relevant consultation process for issues that may arise in your community, for issues arising from provincial and federal government decisions and actions, and for identifying how consultation can be used to protect your First Nation's rights.

In applying the elements and advice within this guide, your First Nation should consider:

- Applying the step-by-step process flexibly according to your First Nation's needs and interests.
- Involving members of your First Nation in every stage of consultation is key to designing and implementing a good consultation process.
- Establishing a support team with qualified advisors/contractors (legal, scientific, Elders, and others).
- Playing a proactive role in the process whereby your First Nation can monitor the decisions and actions of different levels of government ensuring that they always consider the interests and values of your First Nation.

Keep in mind external governments, often without the involvement of First Nations, continuously make incremental decisions; consultation requires the involvement of your First Nation and a discussion of the potential impacts of these decisions on your rights. Using fisheries as an example these decisions could include:

- Issuing permits to take water
- Certificates of approval to release toxic chemicals and sewage effluent
- Decisions to stock certain species, native or exotic
- Creation of fisheries regulations establishing total allowable catches and quotas
- Development of lake or stock management plans
- Legislation related to endangered species or climate change

Ultimately, the duty to consult can be viewed as a mechanism for your First Nation and others to take a seat at the decision-makers' table and work with other governments regarding decisions affecting lands, waters, and resources. In doing so, it is an opportunity for your First Nation to bring forward your values, principles, traditions and laws, and further promote the objective of reconciling the relationship between the Crown and Aboriginal peoples.



# LIST OF CASES AND FURTHER READING

## Cases

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511.

(<http://scc.lexum.umontreal.ca/en/2004/2004scc73/2004scc73.html>)

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 S.C.R. 550.

(<http://scc.lexum.umontreal.ca/en/2004/2004scc74/2004scc74.html>)

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 S.C.R. 388.

(<http://scc.lexum.umontreal.ca/en/2005/2005scc69/2005scc69.html>)

***Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.***

(<http://scc.lexum.umontreal.ca/en/1997/1997rcs31010/1997rcs3-1010.html>)

R. v. Sparrow, [1990] 1 S.C.R. 1075.

(<http://scc.lexum.umontreal.ca/en/1990/1990rcs1-1075/1990rcs1-1075.html>)

R. v. Van der Peet, [1996] 2 S.C.R. 507.

(<http://scc.lexum.umontreal.ca/en/1996/1996rcs2507/1996rcs2507.html>)

R. v. Powley, 2003 SCC 43, [2003] 2 S.C.R. 207. [see this case for test for Metis Rights]

(<http://scc.lexum.umontreal.ca/en/2003/2003scc43/2003scc43.html>)

R. v. Sappier; R. v. Gray, 2006 SCC 54. [see this case for recent ruling on Aboriginal rights]

(<http://scc.lexum.umontreal.ca/en/2006/2006scc54/2006scc54.html>)

R. v. Pamajewon, [1996] 2 S.C.R. 821. [see this case for information on self-government]

(<http://scc.lexum.umontreal.ca/en/1996/1996rcs2-821/1996rcs2-821.html>)

Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 S.C.R. 911. [see this case for information on self-government and Aboriginal rights]

(<http://scc.lexum.umontreal.ca/en/2001/2001scc33/2001scc33.html>)

R. v. Marshall, [1999] 3 S.C.R. 533. [see this case for information on treaty rights]

(<http://scc.lexum.umontreal.ca/en/1999/1999rcs3-533/1999rcs3-533.html>)

## Further Reading

Arnstein, S. 1969. "The ladder of citizen participation".

**Journal of the Institute of American Planners**, Vol. 35, No. 4.

Bopp, Michael and Judie Bopp. 2001. **Recreating the World: A Practical Guide to Building Sustainable Communities**. Four Worlds Press, Calgary, Alberta.

[Four Worlds Bookstore: Community Development Materials](#)

Hopwood, Doug. 2002. **What Lies Beneath: Responding to Forest Development Plans – A Guide for First Nations**.

EcoTrust Canada, Vancouver, BC. [http://www.ecotrust.org/publications/What\\_Lies\\_Beneath.pdf](http://www.ecotrust.org/publications/What_Lies_Beneath.pdf)

Institute on Governance. 1999. **Understanding Governance in Strong Aboriginal Communities, Phase One: Principles and Best Practices From the Literature**. Institute on Governance

[http://www.iog.ca/publications/strong\\_ab\\_gov.pdf](http://www.iog.ca/publications/strong_ab_gov.pdf).

National Environmental Justice Advisory Council Indigenous Peoples Subcommittee. 2000. **Guide on Consultation and**

**Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making**. United States Environmental Protection Agency

[http://www.epa.gov/Compliance/resources/publications/ej/ipsc\\_onsultation\\_guide.pdf](http://www.epa.gov/Compliance/resources/publications/ej/ipsc_onsultation_guide.pdf).

Wates, Nick. 2000. **The Community Planning Handbook: How People Can Shape Their Cities, Towns & Villages in Any Part of the World**. Earthscan Publications Ltd, London, UK.



# PERSPECTIVE AND DEFINITIONS OF CONSULTATION

## International Definitions and Authorities on Consultation:

### [Draft United Nations Declaration on the Rights of Indigenous Peoples](#)

“States obtain their [Indigenous Peoples] free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

### [Convention \(No. 169\) concerning Indigenous and Tribal Peoples in Independent Countries \(27 June 1989-International Labour Organisation\)](#)

Article 7 (3): Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

### [The World Bank – Policies and Procedures](#)

States—in seeking to borrow money—must take specific measures to ensure Indigenous communities participate in a free, prior and informed consultation process that informs them of their rights, the scope and nature of the project and the potential effects.

## Consultation as Good Public Participation:

Meaningful public participation is often described as a fundamental principle of environmental justice, the foundation of good governance, and a necessary element for sustainable development. The [International Association for Public Participation \(IAP2\)](#) has identified the following core values for the practice of public participation:

The public should have a say in decisions about actions that could affect their lives.

- Public participation includes the promise that the public’s contribution will influence the decision.
- Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
- Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
- Public participation seeks input from participants in designing how they participate.

- Public participation provides participants with the information they need to participate in a meaningful way.
- Public participation communicates to participants how their input affected the decision.

## Indigenous Perspectives:

Hopwood, Doug. 2002. *What Lies Beneath: Responding to Forest Development Plans – A Guide for First Nations*. EcoTrust Canada, Vancouver, BC.

A comprehensive consultation agreement should include a commitment by the Crown to: negotiate in good faith, substantially address the First Nation’s issues, and take all reasonable steps to avoid infringement.

### [The National Environmental Justice Advisory Council \(NEJAC\) Indigenous Peoples Subcommittee \(Federal advisory committee to the U.S. Environmental Protection Agency\)](#)

The goal of any tribal consultation should be consensus, or—in other words—full agreement between all of the parties involved in the consultation. They identify the optimal goal of tribal consultation to achieve consensus between tribal leaders and federal officials on how to identify, consider, and address issues or concerns. In addition, the Subcommittee recommends that meetings between agency and tribal government should be supplemented with broader public meetings to keep all tribal members informed and that tribal governments should themselves employ the same principles and processes within their own government operations.

The NEJAC Indigenous Peoples Subcommittee (IPS) advises external governments to view tribal consultation as an integral and essential element of the government-to-government relationship with tribal governments, and not simply as a procedural requirement. In other words agencies should view consultation as a non-adversarial opportunity to develop consensus solutions in partnership with tribal governments.

The IPS also differentiates between existing government public participation processes and consultation involving tribal government. From their perspective the latter should be a collaborative process between government peers that seeks to reach a consensus on how to proceed.



## PERSPECTIVE AND DEFINITIONS OF CONSULTATION

### Provincial Consultation Policies:

British Columbia Ministry of Environment Draft Guidelines for IPM Proponents Conducting Consultations with First Nations (March 27, 2006)

<http://www.env.gov.bc.ca/epd/epdpa/ipmp/index.html>

Ontario Government Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights (June 2006)

<http://www.aboriginalaffairs.osaa.gov.on.ca/english/news/draftconsult.html>

The Government of Saskatchewan Guidelines for Consultation with First Nations and Métis People: A Guide for Decision Makers (May 2006)

<http://www.publications.gov.sk.ca/details.cfm?p=12254>

The Government of Alberta's First Nations Consultation Guidelines on Land Management and Resource Development (September 1, 2006)

[http://www.aand.gov.ab.ca/AANDNonFlash/Files/Albertas\\_Consultation\\_Guidelines.pdf](http://www.aand.gov.ab.ca/AANDNonFlash/Files/Albertas_Consultation_Guidelines.pdf)

### First Nation Consultation Policies and Guides:

#### Federation of Saskatchewan Indian Nations (FSIN)

Proper consultation to include sufficient information provided to the community in a timely manner so that they may have an opportunity to consider the information and develop a position. Also, the community must have the opportunity to express its interests and concerns with serious consideration being given to these concerns.

First Nations of Quebec and Labrador Sustainable Development Institute. 2005 *Consultations Protocol of First Nations of Quebec and Labrador*. (<http://www.iddpnql.ca/fichiers/protocol2005.pdf>)

## USER-FRIENDLY MATERIALS

Providing necessary information to your First Nation also requires presenting it in an accessible way. For instance, it would be of no use to members of your First Nation in forming their own opinions and concerns about the situation to receive a 400-page technical report on forestry or fisheries. What can you do if you receive this type of information from the Crown?

1. Clearly voice your First Nation's needs for more usable comprehensive material to the Crown. Again, it is a good idea to put this in a letter as part of your recorded communication with the government.

[Insert Contact Name(s)]  
 [Insert your First Nation's Name]  
 [Insert your Address]  
 [Insert Telephone Number]

[Insert Name, Address of Government Contact]

**Re: Request for Assistance for Information Provided**

Dear [Insert Name]:

On behalf of [enter your First Nation's name], I/we would like to thank you for the information you have provided to date.

Upon our initial review of the [report, document, etc. description of the information the Crown provided], we have found that in its current form, the necessary information is not accessible to our community members.

In order for our community to be able to participate effectively in a consultation process with you—to formulate and represent our opinions, perspective and concerns—we will need further assistance to comprehend the information you have already provided, and most likely further information as we proceed. Most successful consultation processes by the Crown have included the provision of funding and technical support throughout, as evidenced by the various cases brought before Canadian courts.

What we are seeking specifically is the provision of:

- Funding for technical expertise to explain and clarify the information you have provided
- User-friendly materials for our community members to understand the information, or the resources necessary to develop our own user-friendly materials to properly impart the information to our community members
- A means to ensure that you will answer any questions that may arise as the community examines the information you have provided

I/We would appreciate your attention in this matter, as it is necessary to moving towards beginning consultation. I/We look forward to receiving your response.

Sincerely,

[Insert your name], on behalf of  
 [Insert name of your First Nation]

## USER-FRIENDLY MATERIALS

2. Negotiate with the Crown regarding provision of experts and technical support to make sense of this information. This will mainly be a discussion about funding from the Crown for experts, translation and other costs

Canadian courts have not specifically held that the Crown must provide funding for the consultation process. But, **in almost every instance where the courts have found that the Crown properly discharged its duty to consult, the Crown has provided funding** for numerous meetings, for technical expertise and for other costs. See, for instance, **Taku River v. British Columbia**, where the Supreme Court found the Crown fulfilled its duty to consult because the provincial government provided funding, created a forum for numerous meetings, and responded to the First Nation's requests and concerns.

3. Develop your own user-friendly materials from the information provided for your community. If you are successful in securing funding from the Crown or from other sources to obtain the expertise and technical support you need to understand the information, try to create ways that will make that information accessible to all you community members.

The following resources are good starting points for ideas on creating visual presentations and hosting sessions to discuss technical information with community members:

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Bopp, Michael and Judie Bopp. 2001. **Recreating the World: A Practical Guide to Building Sustainable Communities**. Four Worlds Press, Calgary, Alberta. [Four Worlds Bookstore: Community Development Materials](#) [www.fourworlds.ca]

Wates, Nick. 2000. **The Community Planning Handbook: How People Can Shape Their Cities, Towns & Villages in Any Part of the World**. Earthscan Publications Ltd, London, UK.

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4. Negotiate a set period for questions and answers before the consultation moves forward. After making sense of the information and sharing it with your First Nation and its members, there may be a lot of questions for the Crown. You can take different approaches to address this:

- a. Set up Question Periods between the Community and the Crown: you could arrange for Crown officials to come to the community to hear and answer any questions about that material. Make sure everyone understands that this is NOT yet consultation.
- b. Hold a community session where all questions and concerns are voiced, then record them in a letter to send to Crown officials, requesting specific answers and explanations.
- c. Send representatives from the community to meet with Crown officials with a list of members' questions to request responses, further clarification and more information.

5. Seek support from local organizations that may be able to provide assistance in understanding the information; for instance, your treaty organization, tribal councils, or other non-profit organizations that may have the expertise needed. They are also a good source for user-friendly materials, which may be relevant to the issue your First Nation has to deal with.

[See Examples of User-Friendly Materials from The Centre for Indigenous Environmental Resources' Web site](#)



# INTERNAL COMMUNITY CONSULTATION

Often, contact with government is limited to discussions with just a few members of your First Nation. For instance, they could only discuss the proposed decision with elected members of your Band Council, or they could invite a representative from your community to sit on a committee—that includes government officials—before a decision is made. Neither of these examples should qualify as consultation.

Consultation is a constitutional obligation that the Crown has to Aboriginal peoples. It arises out of the guarantees included in s. 35(1) of the Canadian Constitution Act, 1982.

*35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed*

When consulting about these rights, which includes First Nations' land title rights, the nature of these rights have to be taken into consideration. Aboriginal, Treaty and Land Title rights are held **collectively** by communities, and are exercised **individually**.

Because consultation is one of the steps the government has to take towards justifying an infringement on your rights, it is very important to make sure that everyone who

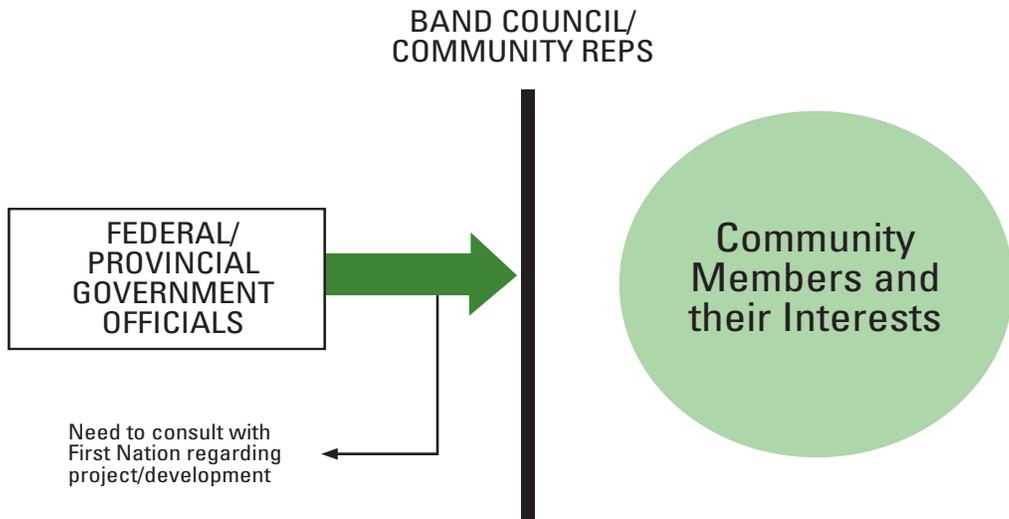
is affected—everyone who holds the rights and everyone who exercises the rights—has an opportunity to be heard.

## The SPARROW Test

In *R v. Sparrow*, the Supreme Court of Canada set out a test for how the Canadian government could reasonably and justifiably infringe upon First Nations' rights:

1. Determine the existence of Aboriginal or treaty rights
2. Determine if the proposed Crown decision might interfere with the right
3. If it does, **determine whether the interference is justified:**
  - a. **There has been consultation**, including demonstrated accommodation of Aboriginal views and concerns;
  - b. There is a valid objective to the interference;
  - c. Priority is given to Aboriginal and treaty rights
  - d. There is as little infringement as possible

After identifying whom you should include in an internal consultation process, you must think about the barriers there are to discussing the issues with everyone that needs to be consulted. The following two figures illustrate an often-typical problem in consulting with the government.

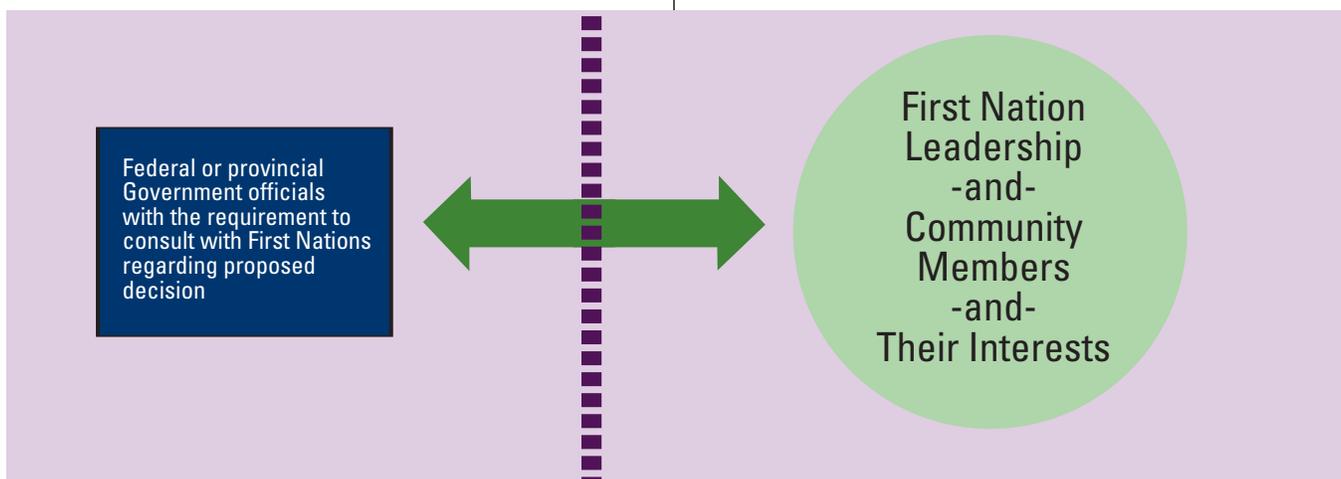


## INTERNAL COMMUNITY CONSULTATION

The figure on previous page illustrates that there is often a barrier to effectively communicating community members' interests directly to federal and provincial government authorities, even though those interests **must be taken into consideration during consultation**. Often, government's efforts to consult do not go further than discussions with Band Council or representatives from the community. While changing this is challenging, efforts must be made—by both government and also leadership in your community—to break down the barrier, as the next figure illustrates:

What you can do to better Community Participation in

- Create a community liaison person in the Band Council office, or as part of a Community Consultation Committee—created specifically for the current consultation process—to be a constant link between concerned and interested community members and those representing your First Nation in communicating with the government
  - The community liaison person can:
    - Record members' concerns and bring them to the attention of those primarily directing the consultation
    - Ensure these issues and concerns are brought to the table during consultation with the government



Consultation:

- Hold sessions in the community inviting people to ask questions throughout the consultation process
  - For example, hold a monthly dinner in the community to coincide with a discussion about the issue
  - Ask government officials to attend a few of these sessions so that community members can have direct access to federal or provincial authorities to answer their questions or express their concerns
- Deliver responses to community members regarding specific questions
- Keep community members regularly updated on the progress of the consultation process; for example, sending out a weekly notice or newsletter
- Create a questionnaire to deliver to each community member, seeking his or her opinions, concerns and perspectives about the consultation issue
- Try other ways to get community members involved in the consultation with the government.
  - Click here for more information on methods to encourage participation. [link to section on 4 Worlds, etc. in 'User-Friendly Materials']



# KNOWING YOUR RIGHTS

## Section 35

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

The Canadian Constitution affirms and protects the rights of Aboriginal peoples, including Aboriginal, Treaty, and land title and land use rights and it guarantees them to men and women equally. It is these rights that are the subject of consultation when the government is fulfilling its duty to consult regarding a specific decision that may impact the way your First Nation exercises these rights.

As such, it is important to identify the answers to the following questions:

- 1. What are your rights?
- 2. What are your interests in the land?
- 3. How do you exercise your rights?
- 4. Where do you exercise your rights?

The first step to answering these questions involves understanding which of your practices will be recognised as rights.

### Aboriginal Rights

In *R v. Van der Peet*, the Supreme Court of Canada set out the test for recognising a practice as an Aboriginal right:

- The practice must be integral to the distinctive culture of the Aboriginal group claiming the right
- The practice must be of central significance to the Aboriginal group or a defining characteristic of their culture
- The practice must have continuity with the practices, traditions and customs of the Aboriginal group prior to contact with European society

What this means is that is that any practice your First Nation considers to be an Aboriginal right must meet these requirements to be recognised as constitutionally protected. A practical application of this test might involve the fishing practices of your community. You would want to be able answer at least the following questions in determining whether you can fulfill these requirements:

What is the year or date of contact between your First Nation and Europeans?

- How long have members of your First Nation been fishing?
- Do they fish for subsistence or to sell the fish? How long have they been fishing for this purpose? If it is to sell fish, who did your First Nation sell fish to before contact with Europeans?
- Do you have ceremonies or other traditions connected to fishing?
- Is it community tradition to pass on teachings about fishing to your children?

### Treaty Rights

If your First Nation has a treaty – pre-confederation, numbered or modern – with the British Crown, or the Crown in the right of Canada, your treaty rights include those practices that were agreed upon in the treaty. This often includes specific resource use and land use; it can also include the protection of rights to sell and trade resources to maintain a livelihood. The content of these rights thus is found in the text of the treaty and it is reflective of the common practices of a community over generations.



## KNOWING YOUR RIGHTS

Canadian courts, in dealing with interpretation of treaties and identifying rights that are protected under s. 35(1) of the Constitution, have held that it is also necessary to look at 'extrinsic evidence'. What that means is that we are not limited to looking just at the text of a treaty to determine what rights are included and constitutionally protected. We should also look at the context of when the treaty was made. For instance, the relationship between the Crown and the First Nation at the time the treaty was made:

- Were there verbal promises made between the parties to the treaty?
- Were they trading resources with one another or with other parties?
- Was the First Nation relying on a specific resource or land use at the time the treaty was made? Even if it is not specifically included in the treaty, was there a continued reliance on those same resources and lands after the treaty was concluded?
- What were the underlying objectives of the Crown and the First Nation in entering into a treaty?

*If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, **the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.***

R v. Marshall, [1999] 3 S.C.R. 456 at para. 43

More specifically, in relation to the duty to consult, the Supreme Court of Canada dealt with treaty rights in *Mikisew Cree First Nation v. Minister of Canadian Heritage*. In that case, the federal government was putting in a winter road without consulting the Mikisew Cree. The government tried to rely on a clause in the treaty that said the Crown could take up the land for its purposes when it is needed. The Supreme Court held this could not take place without consulting the affected First Nation.

So, essentially, when the federal or provincial government is planning a project or a decision that may impact on your First Nation's treaty rights, they still have to consult with you. This is an existing duty despite any previous agreements made between your First Nation and the Crown, such as what is reflected in the treaty. Even though the Crown may have the power to take up land when it needs to, the Crown cannot do so unless they fulfill their duty to consult.

Aboriginal and treaty rights are protected rights, as are the activities that are incidental to those rights, such as erecting a hunting cabin along a trap line. It is important to understand that not all rights have been defined by either the courts or Aboriginal peoples. The Supreme Court has made very clear that rights evolve, and that the strictly legal definition and scope of rights will depend upon the assertions of First Nations and their ability to demonstrate the existence of the necessary elements discussed here.

### Land Title Rights

Aboriginal rights to land are also protected under s. 35(1) of the Constitution. In *Delgamuukw v. British Columbia*, the Supreme Court of Canada laid out what First Nations need to show in order to establish rights to land, and also the characteristics of Aboriginal land title.

The test for proving Aboriginal land title – a right shared collectively by a First Nation – set out by the Supreme Court requires First Nations to demonstrate:

1. occupancy of the land before British or Canadian sovereignty was asserted
2. continuity between present day and pre-sovereignty occupancy of the land
3. exclusive possession of those lands claimed

Thus, some practical questions to think about when your First Nation is determining whether you have Aboriginal land title rights:

## KNOWING YOUR RIGHTS

- How long have you been using this land? Has it been regularly used?
- Do you have evidence that your First Nation has been living on or using this land before British sovereignty was asserted? What kind of evidence?

One of the central issues in the *Delgamuukw* case was the acceptance of oral histories as evidence that the Gitksan Nation occupied the lands to which they were claiming rights and title. The Supreme Court was clear that oral histories should be accepted into evidence, and that consideration of Aboriginal perspectives should be given the same weight as Canadian legal perspectives on land title.

*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

- How did your First Nation use this land in the past? Does your First Nation still use the land in this way? Does your First Nation have the intention of continuing to use the land in this way?

Another important element of this Supreme Court judgement, is that it states that there are limits on the way that First Nations can express their interest in land: First Nations cannot use land subject to Aboriginal title in a way that is incompatible with the special connection between the people and the land. What this means is that a First Nation could not allow the development of a shopping mall, for instance, on land that a First Nation had claimed as subject to Aboriginal title on the basis that they were used as traditional hunting grounds.

## SAMPLE LETTER #1: INITIAL CONTACT

Insert Date]

[Insert Contact Name(s)]

[Insert your First Nation's Name]

[Insert your Address]

[Insert Telephone Number]

[Insert Name, Address of Government Contact]

**Re: Consultation Regarding [Insert Specific Project, Decision, Development, etc.]**

Dear [Insert Name]:

On behalf of [enter your First Nation's name], we are writing this letter to invoke our constitutional right to consultation regarding [insert specific project, decision, development, etc.]. As an Aboriginal group that may be potentially impacted by this matter, we are sure you are aware of your duty to consult with us before any final decision is made, or approval is given, by your department.

The duty to consult is an obligation of the Crown – the federal and the provincial governments of Canada – that was defined in *Haida Nation v. British Columbia*, and *Taku River v. British Columbia* by the Supreme Court of Canada. It is a positive duty on the Crown to approach First Nations when making a decision that could impact existing or asserted Aboriginal, treaty or land title rights. The Court specified that the Crown must provide a meaningful opportunity to First Nations to consult. This involves providing:

- All the necessary information so we can express our interests and concerns effectively
- Involvement in the creation of a consultation process appropriate to our First Nation and the issue at hand
- Meaningful consultation about the potential impacts on our rights before any decision is made
- A forum in which the Crown consults in good faith with the intention of substantially addressing the concerns of our First Nation
- Reasonable mitigation and accommodation of our concerns and our rights where appropriate

[If you are a treaty First Nation, insert the following:

In *Mikisew Cree First Nation v. Minister of Canadian Heritage*, the Supreme Court also made it clear that a decision that involves taking up land according to a treaty provision also requires consultation if it might impact Aboriginal peoples' treaty rights. What this means is that a concluded treaty cannot pass for consultation in relation to subsequent decisions that could impact our treaty rights.]



## SAMPLE LETTER #1: INITIAL CONTACT

Given that a preliminary review indicates that [insert decision, project, development, etc.] will impact ...

[Insert a brief description of the decision, project or development, what territory it will impact, how you think it will specifically impact your rights, and any other possible implications for your First Nation. Ensure this is a broad, inclusive list of all potentially impacted Aboriginal, treaty and land title rights, since this is just an initial survey of the situation].

Given the duty to consult and all of the accompanying obligations, we look forward to hearing from you regarding [insert decision, project, development, etc. at issue]. In order to effectively engage in a consultation process with you in the near future, and provide our input regarding your future decision before it is made, we initially require that you provide all relevant information about the issue in question. Only after this has happened can we assess the impacts on our rights and interests.

We appreciate your attention to this issue and look forward to your prompt response.

Sincerely,

[Insert your name(s)], on behalf of  
[Insert name of your First Nation]

## TO WHOM DO I SEND MY LETTER?

In order to determine where to send your letter, ask yourself the following questions:

- What is the proposed decision, project or development about?
- Does it affect public or private lands? Does it affect natural resources? Which ones?
- Have you received any notice letters or seen any notice advertisements in local newspapers from a specific government department or authority?
- Are there any industry workers in the area that are involved in the proposed decision? What are they doing? Do they have any specific contacts in the government?

The objective of answering these questions is to identify the appropriate federal or provincial authority to send your letter to. That authority will likely be someone who represents the executive branch of power of the government; that is, it is not an elected official, but someone employed by a specific department.

### Here is a list of potentially helpful government web sites:

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Government of Canada: <http://www.gc.ca>

Government of Nova Scotia: <http://www.gov.ns.ca>

Government of New Brunswick: <http://www.gnb.ca>

Government of Newfoundland and Labrador: <http://www.gov.nl.ca>

Government of Saskatchewan: <http://www.gov.sk.ca>

Government of British Columbia: <http://www.gov.bc.ca>

Government of Alberta: <http://www.gov.ab.ca>

Government of Manitoba: <http://www.gov.mb.ca>

Government of Ontario: <http://www.gov.on.ca>

Government of Quebec: <http://www.gouv.qc.ca>

Government of PEI: <http://www.gov.pe.ca>

Yukon Government: <http://www.gov.yk.ca>

Government of the NWT: <http://www.gov.nt.ca>

Government of Nunavut: <http://www.gov.nu.ca>

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# SAMPLE LETTER #2: FOLLOW-UP & REQUEST FOR INFORMATION

[Insert Date]

[Insert Contact Name(s)]  
[Insert your First Nation's Name]  
[Insert your Address]  
[Insert Telephone Number]

[Insert Name, Address of Government Contact]

**Re: Consultation & Provision of Necessary Information**

Dear [Insert Name]:

On behalf of [enter your First Nation's name], we are writing this letter regarding our right to consultation about [insert specific project, decision, development, etc.].

We previously sent a letter dated [insert date of initial letter] setting out your obligation to consult with us, since your decision may impact our rights. In that letter, we also requested provision of all relevant information in order to initiate a meaningful consultation according to the law.

Please respond to this letter and our requests for information and initiation of an opportunity to consult. We look forward to hearing from you promptly.

Sincerely,

[Insert your name(s)], on behalf of  
[Insert name of your First Nation]



# HUPACASATH FIRST NATION AND LAND USE PLANNING

*We have been dealing with so much consultation, that is why we decided to do the land use plan, so we had a base to go for consultation... we had our ideas of what we wanted but we didn't have anything comprehensive. That is why we put together the land use plan as a consultation tool and to show the world where are territory is and where we expect to be consulted.*

Chief Judith Sayers, Hupacasath First Nation

The Hupacasath First Nation ensures that consultation is used to protect their rights. One way they make sure the provincial and federal governments – as well as other third parties, such as industry – are consulting with them, is by making it **very clear** what the Hupacasath First Nation wants to be consulted on. That is, the Hupacasath First Nation has clearly expressed its interests in certain lands and resources through the development of a **Land Use Plan**.

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**Remember:** The Supreme Court of Canada decided that knowledge will be **IMPUTED** to the Crown when it comes to the duty to consult. What that means is that if the Crown **should** have known that First Nations have rights or interests in lands and resources that are the subject of the Crown's proposed decision, then, according to the law, the Crown **did know**, and therefore must consult with the First Nation.

---

By creating a land use plan, and using GIS mapping to lay out exactly where Hupacasath's land and resource interests are, this is easily accessible by the Crown or any other party making a decision that may impact those interests. When it comes to the duty to consult, this pro-active step by a First Nation is extremely effective in ensuring their rights are protected.

The Hupacasath First Nation has also developed its own consultation policy and a referral process for industry accessible through a portal on their **WEBSITE:** <http://www.hupacasath.ca/>

The Hupacasath First Nation territory is located on central Vancouver Island and includes the town of Port Alberni. Their territory covers an area of approximately 232,000 hectares plus interests in the Barkley Sound and offshore area.

The purpose of the Hupacasath Land Use Plan is to enable the Hupacasath people to exert their rightful ownership and control over the lands and resources within their territory. The Plan is being used to inform the federal, provincial and local governments, forest companies, other resource users including tourist operators and third parties as to how the Hupacasath will manage their lands and resources. Implementation of the Plan is seen as a collaborative process.

In the words of Trevor Jones, Chief Executive Officer, Hupacasath First Nation:

*By taking over and asserting your title through land use planning you force the government to come and deal with you in a way that typically they wouldn't... taking over your ownership and asserting it through a planning context really raises the bar on consultation.*

Peter Tatoosh, Councillor, Hupacasath First Nation has experienced the frustration of dealing with external governments who use consultation for their own means. From his perspective the Hupacasath First Nation Land Use Plan represents his community's "dreams", it contains their consultation position and allows them to put that position forward in their own way.

The Plan defines Hupacasath cultural and resource values and includes community land-use designation including:

- Lands to be protected from industrial/urban development;
- Areas where resource development can occur while respecting Hupacasath rights and title; and
- Special Management areas where resource development can occur but there are special cultural or environmental features that take precedent over development.



# HUPACASATH FIRST NATION AND LAND USE PLANNING

Below is map of all of the identified use areas by the Hupacasath First Nation:



Significant features of the Plan include a 10% protected areas set aside and establishment of a 30m riparian buffer for forestry operations, a standard that is more stringent than that of the Government of British Columbia.

To see and explore a fully interactive version of this map and of the Hupacasath First Nation's Land Use Plan, see <http://www.hupacasath.ca/map/index.html>



# HUPACASATH FIRST NATION AND LAND USE PLANNING

There are a number of resources available to First Nations interested in engaging in land use mapping including the following:

1. Chief Kerry's Moose: A Guidebook to Land Use and Occupancy Mapping, Research Design and Data Collection (2000) by Terry N. Tobias, a Joint Publication of the Union of BC Indian Chiefs and Ecotrust Canada. Available from [www.nativemaps.org](http://www.nativemaps.org)
2. Best Practices Handbook for Traditional Use Studies (2003) edited by Jamie Honda-McNeil and Denise Parsons, published by Government of Alberta, Aboriginal Affairs and Northern Development (ISBN# 0-7785-2243-1).
3. What Lies Beneath: Responding to Forest Development Plans – A Guide for First Nations (Feb. 2002) by Doug Hopwood, published by Ecotrust Canada, Vancouver, BC. Available from [www.nativemaps.org](http://www.nativemaps.org).
4. Guide to Conducting a Traditional Knowledge and Land Use Study (2001) by T. Garvin, S. Nelson, E. Ellehoj and B. Redmond, published by Natural Resources Canada, Canadian Forest Services, Northern Forestry Centre, Edmonton, Alberta.
5. Ecotrust Canada ([www.ecotrustcan.org](http://www.ecotrustcan.org)) began working on the west coast of Canada in 1995 by collecting and then mapping scientific data and traditional knowledge of coastal communities using Geographic Information Systems (GIS) technology. Since then Ecotrust Canada has held GIS training sessions or helped set up GIS offices in more than 22 First Nations and communities. Ecotrust works in two related areas Information Services (GIS & Mapping, Planning) and Economic Development (Business Lending, Business Consulting and Conservation Entrepreneurs). Ecotrust was instrumental in assisting Hupacasath First Nation establish their GIS system and begin the land use planning process.

6. The Aboriginal Mapping Network ([www.nativemaps.org](http://www.nativemaps.org)) was established in 1998 as joint initiative of the Gitksan and Ahousaht First Nations and Ecotrust Canada. The mandate of the AMN is to support aboriginal and indigenous peoples facing similar issues, such as land claims, treaty negotiations and resource development, with common tools, such as traditional use studies, GIS mapping and other information systems. The AMN website serves as a valuable strategic resource for practitioners of traditional knowledge mapping around the world. In addition to their website, AMN hosts an annual international GIS conference for First Nations, produces a publication series of "best practices", and organizes informal roundtable workshops in response to common themes that surface from the AMN web site and direct discussion with First Nations.

More information on Participatory Mapping and links to other resources can be found at [www.iapad.org](http://www.iapad.org) - the Integrated Approaches to Participatory Development website.



# ST'ÁT'IMC NATION

The St'át'imc Nation (British Columbia) has declared that all users of their territory will follow St'át'imc law regarding territorial lands and resources. They have developed the Nxeckmenlhkálha lti Tmícwa (St'át'imc Land Use Plan) and codified St'át'imc laws to set the standards for the conduct of land and resource activities in their territory. The approach they have taken involves working from the collective strength of the 11 St'át'imc First Nation communities to assert their title, rights and ownership of their territorial lands and resources.

The St'át'imc view the Supreme Court of Canada affirmation related to aboriginal title as providing an opportunity for the St'át'imc to exercise their rights to protect their lands and resources, including their cultural activity, for future generations. To guide them in this, the St'át'imc have developed their Land Use Plan "Nxeckmenlhkálha lti Tmícwa" ([www.statimc.net/slra/report/part1.pdf](http://www.statimc.net/slra/report/part1.pdf)). The St'át'imc Land Use Plan translates the St'át'imc Vision and Principles into concrete management direction on the ground in St'át'imc territory.

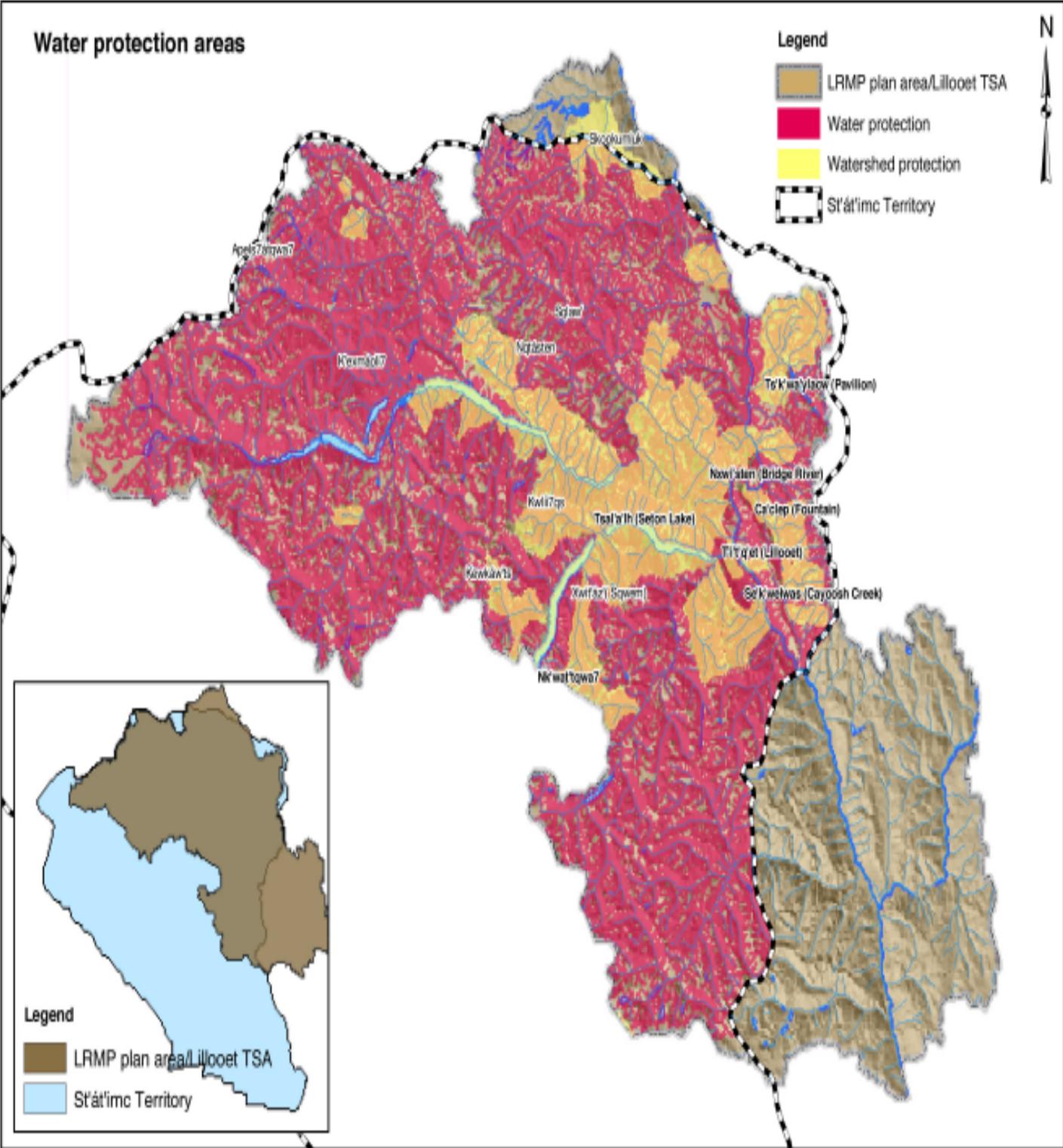
Following on this, the St'át'imc Chiefs Council have advised all government agencies and resource users in St'át'imc territory that tenures, activities and plans, including the provincial Lillooet Land and Resource Management Plan (LRMP), which do not comply with the Nxeckmenlhkálha lti Tmícwa will result in infringements of St'át'imc Title and Rights. The St'át'imc have subsequently entered into a government-to-government protocol with the provincial Crown (British Columbia) to discuss reconciliation of the Nxeckmenlhkálha lti Tmícwa and the provincial Lillooet LRMP, which they view as necessary given the government's duty to consult.

To put their land use plan and laws into force, the St'át'imc have advised third parties operating or residing in St'át'imc territory that "regardless of provincial or federal licences, permits or other approvals they may hold or be seeking, written authorization from the St'át'imc Chiefs Council or its designate is required before St'át'imc land or resources are allocated, extracted, affected or used". Such authorizations are only granted if they are consistent with the St'át'imc laws and policies including their preliminary draft land use plan.

The methodology used in the development of the land use plan was designed to give life to the St'át'imc Vision and Principles through a St'át'imc ecosystem-based planning process. In doing so the St'át'imc focused first on what to leave behind on the land to sustain ecology and culture, rather than focussing first on identifying areas for resource extraction and short-term economic benefits. The St'át'imc used a map-based planning process, integrating scientific and technical knowledge with St'át'imc knowledge to produce a set of St'át'imc land designations. These include an interlocking set of "protection areas" in which protection of the land and water for the purpose(s) identified by the designation is given top priority. This protection areas network is based on St'át'imc knowledge, but integrates conservation biology principles (e.g., focal species and coarse filter ecosystem representation analysis).

# ST'ÁT'IMC NATION

For example, the St'át'ım̓ Principles place protection of water quantity, quality and timing of flow, including watershed restoration, first and foremost, as the following map layer from their land use plan depicts:





## KWILMU'KW MAW-KLUSUAQN: MI'KMAQ RIGHTS INITIATIVE

Kwilmu'kw Maw-klusuaqn means 'we are seeking consensus', which is the goal of the Mi'kmaq Rights Initiative: to seek consensus on how to implement the Aboriginal and treaty rights for 13 Mi'kmaq First Nations in Nova Scotia now and for seven generations to come. This initiative is also defining a new relationship between the Crown and the Nova Scotia Mi'kmaq, and transforming how the federal and provincial governments consult with the First Nations.

The Mi'kmaq Rights Initiative (MRI) formally commenced June 7, 2002, after over a decade of negotiations, and is led by a team of negotiators, researchers and Mi'kmaq advisors. They work on behalf of the Chiefs and Councils from all 13 Mi'kmaq First Nations in Nova Scotia. The team does not pursue anything without the consent of the Chiefs working through the Assembly of Nova Scotia Mi'kmaq Chiefs. The aim of the initiative is to settle outstanding claims through negotiation rather than litigation. The Initiative was developed by the Mi'kmaq, for the Mi'kmaq, and it is referred to as the "Made-In-Nova Scotia Process" distinguishing it from other negotiation and settlement efforts in the country.

The anticipated end result of the negotiations is to create stable and respectful relationships and to reconcile the respective rights and interests of the Parties through a Mi'kmaq of Nova Scotia Accord. The Accord will detail how the Mi'kmaq of Nova Scotia will exercise their rights respecting land, resources and governance. Through these negotiations, the Mi'kmaq hope to finally implement their rights from the treaties signed by their ancestors in the 1700s.

Here are some of the specific topics of discussion on the agenda for the Initiative:

- Recognition of Mi'kmaq self-government
- Law-making powers of Mi'kmaq governments
- Mi'kmaq control of lands and waters
- Mi'kmaq access and harvesting of natural resources

- Mi'kmaq natural resource management principles
- Coordination of Mi'kmaq laws with the laws of the other two parties
- Environmental protection to sustain Mi'kmaq resources
- Compensation for past infringements of Mi'kmaq rights and title
- Financing of Mi'kmaq governments
- Dispute resolution mechanisms

The details of how these important issues were going to be discussed were set out in an Umbrella Agreement—suggested by the Assembly of Nova Scotia Mi'kmaq Chiefs as a way to protect the Mi'kmaq from inappropriate consultation.

Click here to see the full text of the Umbrella Agreement signed in June 2002 by the Mi'kmaq Chiefs, the federal and provincial governments [<http://www.mikmaqrights.com/resources.php>].

The Agreement is essentially a commitment by all three parties to work together in good faith to resolve mutual issues through a three-pronged approach designed to address social issues, rights issues and consultation issues through the following processes:

1. The Mi'kmaq-Nova Scotia-Canada Tripartite Forum the purpose of which is to strengthen relationships between the three parties and to resolve issues of mutual concern affecting Mi'kmaq communities in the areas of culture and heritage, education, health, justice, and economic development;
2. The Treaty & Aboriginal Rights Negotiation table the purpose of which is to consider issues of definition, recognition and implementation of the constitutionally protected rights of the Mi'kmaq of Nova Scotia; and
3. Negotiations to design a consultation process to be followed by the Crown when consulting with the Mi'kmaq of Nova Scotia.



## KWILMU'KW MAW-KLUSUAQN: MI'KMAQ RIGHTS INITIATIVE

Although the terms of reference for the consultation process have not yet been finalized, the Mi'kmaq are in the process of establishing policies and procedures, and defining specific roles and responsibilities. The Mi'kmaq Rights Initiative has been assigned a coordinating role in consultations with the Mi'kmaq. For instance, when there is a request or notice related to consultation received by a First Nation or initiated by the Crown:

1. Provincial or Federal Crown representative and/or Chief will contact MRI.
2. MRI contacts the Crown to advise them of the need to consult with the Mi'kmaq.
3. The Crown is then required to provide each First Nation in Nova Scotia with a written request to consult.
4. The First Nation can choose:
  - a. To consult and negotiate on their own behalf, or
  - b. To delegate this responsibility to MRI through Band Council Resolution.

Within this process the Assembly of Nova Scotia Mi'kmaq Chiefs, the political body representative of the Nova Scotia Mi'kmaq, appoints one of the 13 Mi'kmaq Chiefs to act as a leader in the consultation process. The Chief and MRI staff provides regular updates to the Assembly throughout the consultation and seek their direction on how to proceed. The Chiefs in turn have the responsibility to take this information back to their community, bring the community's issues and concerns forward through the Assembly, and ensure that the negotiating team is representing their community's interests. At any point in the consultation a First Nation can decide to consult and negotiate on their own behalf with notice given to MRI through Band Council Resolution.

Although there are process issues still to be resolved, especially in the area of funding to enable the community to meaningfully participate in consultations, the advantages of this approach include:

- Presenting a unified and strong Mi'kmaq position;
- Invoking a strategic approach to the many issues requiring consultation; and
- Creating the ability to network to share capacity and expertise.

According to Dan Christmas, Special Advisor, Membertou First Nation, which is one of the 13 First Nations served by the MRI, communities often don't have the time to deal with the many individual consultation requests. As such, the Mi'kmaq Rights Initiative is providing a forum for a new relationship with the federal and provincial government to be developed that will serve as a foundation for Mi'kmaq to implement their rights – and it is within this relationship that future consultations with the Mi'kmaq will take place.



# PUBLIC PARTICIPATION AND CONSULTATION POLICY

The adoption of participatory approaches is recognized as the foundation for success in a number of fields including environmental assessment, environmental management, and community development. In these fields the key element of effective public participation is providing the public with a voice that is reflected in the decision made.

*It could be argued that the distribution of power and influence within society lies at the heart of most environment and development challenges. Hence, new approaches must involve programmes of social development...to protect vulnerable groups, and to promote local participation in decision making.*

-World Commission on Sustainable Development, 1987

Adopting a participatory approach involves also taking a broader or more holistic view of the environment, and placing more value on human experience with an aim toward making environmental decision-making socially inclusive and localized.

The International Association for Public Participation (IAP2) is a professional association founded in 1990 that seeks to promote and improve the practice of public participation. IAP2 has developed “Core Values” for use in the development and implementation of public participation processes. These values are:

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
2. Public participation includes the promise that the public’s contribution will influence the decision.
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
5. Public participation seeks input from participants in designing how they participate.
6. Public participation provides participants with the information they need to participate in a meaningful way.
7. Public participation communicates to participants how their

input affected the decision.

The IAP2 website ([www.iap2.org](http://www.iap2.org)) contains useful information including a “Public Participation Toolbox” that provides a summary of a variety of techniques that can be used including surveys, different types of meetings, design charrettes, and more, with notes on what can go right and what can go wrong with these techniques. Consideration should also be given to assess techniques for their fit with the culture of your community.

When designing a participatory process for use within your community you should consider using a variety of techniques to engage as many people as possible. For instance, a survey on consultation conducted within the Hupacasath First Nation revealed that members prefer to get information on the consultation in a variety of ways, with community forums or meetings being the preferred method. Not surprisingly, getting the information from government/technical reports was not a popular option with those surveyed. When it came time for the membership to state their position or concerns on the consultation, a variety of methods were identified including public forums, internal community meetings, sharing circles, and questionnaires with the latter being the most popular method. The Hupacasath First Nation members surveyed also identified a number of barriers to their involvement in consultations, including those related to timing of meetings, needing to have plain language summary information available, and the desire to have an opportunity to have discussions with other community members.

When designing your process it will be important to consider and account for potential barriers to the involvement of community members and to consider what methods they might prefer. Canvassing your community members on consultation and their participation in general, as was done in Hupacasath First Nation, may be advisable. Their responses could then be used to prepare your First Nation’s policy on consultation. Having such a policy may also assist you when developing a consultation agreement with the Crown. An example policy on consultation can be found in the Kla-soms Kwuth Toogen Crown Land Referrals Toolbox area of the Aboriginal Mapping Network website ([www.nativemaps.org/referrals/policy/firstnations/FNrules.html](http://www.nativemaps.org/referrals/policy/firstnations/FNrules.html)).



# HOW TO FILL GAPS IN YOUR INFORMATION

## Identifying Gaps

The importance of internal consultation with your First Nation's members has already been mentioned in this guide. However you choose to approach internal consultation and discussion with your First Nation's members, this is also an important tool for identifying gaps in the information the Crown has provided to you.

- What questions do community members still have?
- Can they be answered by going back to the Crown with those questions?
- To what extent are third parties—such as industry—involved? Is the Crown planning to approve something that will allow companies and developers to have access to land and resources that are important to your community? If yes, do you have any direct contact with those parties? Do they have the information and answers you are looking for?
- Are there any other First Nations in the area that could be impacted by the Crown's proposed decision? What questions are they asking about the situation?

Before moving on to the next stage of consultation, you should be satisfied that the questions raised by your community have been answered, so that everyone involved in the consultation process is reasonably well-informed as to what is going on. You may also have to conduct your own assessments or studies to fill the information gaps and to ensure that the information provided is technically sound. Here are some suggestions to do so:

### 1. Indigenous Knowledge

Your First Nation can look to its own Indigenous Knowledge to fill the gaps and to analyze the impacts of the government's proposed decision. For instance, if the government has provided an environmental assessment report concluding what the impacts on your lands and resources may be, your community may have many questions and perhaps disagree with those conclusions based on their own experiences, values, and knowledge.

Filling in the gaps with your First Nation's Indigenous Knowledge may require that you share some aspects of that knowledge with the government. If that information is sensitive or your First Nation's members are concerned with sharing it, you should develop a Confidentiality Agreement from the outset. A sample agreement is provided on the next page. In addition, First Nations engaged in this type of work often have policies related to the collection, use and storage of Indigenous Knowledge. Such policies typically include an explicit statement that any external person or agency cannot use the information for any other purpose. Also, it is recommended that such studies be conducted by your First Nation to ensure that the data is kept confidential and the analysis does not contain cultural biases.

### 2. Social Impact Assessment

You may want to consider conducting your own assessment of the potential social, cultural, economic and/or health impacts that could result from the government's decision. This is an important component of an environmental assessment process and there is a great deal of information and guidance available on conducting these types of assessment. Once again it is important to consider conducting such studies yourself or contracting someone to do so on behalf of your First Nation. Often when government or external parties do this work they rely on dated and likely incomplete information on your community, for example census data or government health statistics related to morbidity and mortality. It is critical when conducting this type of assessment that your First Nation determines your own indicators of health, including what constitutes a healthy community, as First Nations values are often very different from that of mainstream Canadians. Also, it is difficult for external researchers and government to identify and accurately assess the potential impacts on your culture and for this reason it is best that your community control and direct these types of studies.

# HOW TO FILL GAPS IN YOUR INFORMATION

## SAMPLE INDIGENOUS KNOWLEDGE CONFIDENTIALITY AGREEMENT

### Purpose:

To ensure [Insert name of your First Nation]'s Indigenous Knowledge is protected as communal property of our community

To ensure [Insert name of your First Nation]'s Indigenous Knowledge is used only in ways that benefit the community as a whole

To ensure [Insert name of your First Nation]'s Indigenous Knowledge is treated with respect and remains within the ownership of our community throughout and after consultation with [insert name of government authorities you are consulting with] regarding [detail what the consultation is about, date consultation is starting/ending, any other information about consultation that is available]

### Why the Indigenous Knowledge is Needed:

[insert name of your First Nation] is collecting and sharing our Indigenous Knowledge solely for the purpose of [insert consultation issue]. **No further dissemination or use of this Indigenous Knowledge will be pursued without the full and complete consent of [insert name of your First Nation].**

Full and complete consent requires [insert your community's standard of consent, i.e. permission of all community members, permission from the leadership].

### How the Indigenous Knowledge will be Collected:

All Indigenous Knowledge research in [insert name of your First Nation] will be done only with the explicit consent of the Knowledge Holders. The Knowledge Holder will be provided with information about the project, the intended use of their knowledge, and its relevance to the consultation.

All Indigenous Knowledge research will be coordinated internally and led by members of [insert name of your First Nation].

### How the Indigenous Knowledge will be Stored:

[insert name of your First Nation] will have final approval of how and where their Indigenous Knowledge is stored. No other persons, except those parties to this agreement and only for the purpose of [insert consultation issue], shall have access to [insert name of your First Nation]'s Indigenous Knowledge, without the full and complete consent of our First Nation.

### Confidentiality:

All of the consultation proceedings regarding [insert consultation issue] that involve the Indigenous Knowledge of [insert name of your First Nation] will remain confidential amongst the undersigned parties.

Signature on Behalf of Government Authority \_\_\_\_\_

Signature on Behalf of [Insert name of your First Nation] \_\_\_\_\_



## HOW TO FILL GAPS IN YOUR INFORMATION

### 3. Baseline/Ecological Studies

Typically, an ecological baseline study will have been conducted to fill gaps in their knowledge and to provide a baseline from which to monitor the affects of the government's proposed decision. However, if the Crown is coming to you early enough in the process there may be an opportunity for your involvement in such studies. If so this presents an opportunity to ensure that those areas important to your First Nation are assessed. For example, there may be a particular fish or plant species important to your culture and community that you want included.

Some First Nations, such as Namgis First Nation in British Columbia, have established their own database with baseline ecological data for their traditional territory. This provides these First Nations with an advantage in consultations - being the source of baseline data for external governments and third parties helps to ensure that the First Nation is notified of decisions and projects early in the planning stages.

#### **Namgis First Nation**

([www.namgis.bc.ca/treaty/pages/planning.htm](http://www.namgis.bc.ca/treaty/pages/planning.htm))

The 'Namgis First Nation is currently working on an ambitious project to become the central planning authority for the area covering its core territory. To implement this goal three separate activities are underway:

- First, a comprehensive 'bioregional resource inventory' is being researched and represented in a series of 60+ large-format digital maps.
- Second, land use plans are being developed at the territorial, watershed, community, and special area levels.
- Third, a comprehensive monitoring process is being designed to evaluate how plans are meeting 'Namgis goals and to enable environmental base-line information to be regularly added to the bioregion resource inventory.

#### **'Namgis Bioregional Resource Atlas**

To date, over 40 bioregional maps have been researched and created. These images each tell a story about a particular aspect of 'Namgis territory and culture. Over time, the goal is to create the single most comprehensive source of information on 'Namgis territory and culture. This inventory is unique in several ways. First, the Atlas has been created entirely by the 'Namgis. Second, the maps for the first time include both scientific and traditional forms of knowledge. And finally, the Atlas will be able to be revised and updated on a continuous basis.

## HOW TO FILL GAPS IN YOUR INFORMATION

### 4. Technical Assessments

Depending on the nature of the proposed decision, there may be technical reports that need to be reviewed. For example, in an environmental assessment there will likely be some sort of proposed development and associated infrastructure. It is worthwhile to either review this information in-house if your First Nation has someone with the time and the technical expertise. Alternatively, contracting a professional to conduct a third-party review is worthwhile.

You will need to be somewhat strategic as often there are technical reports that require specific expertise in a number of fields. In the case of an environmental assessment, typically there are government agencies involved in providing a technical review. In the federal environmental assessment process various government departments or agencies will be involved as either “responsible authorities” or “expert authorities”. Each of these government departments will have their own experts review the technical reports. You should have access to this information and it can help identify which specific areas you want to concentrate on for your technical assessment. In addition, you might want to find out if any public or special interest groups are involved in the review and find out what issues they have identified. Finally, depending on the timeframes you are working within, you may want to approach a university to see if they have students who could assist as part of their course requirements.

### How to Get More Information or Support from the Crown

The bottom line is that getting the information and assessing the adequacy and accuracy of this information may not be straightforward and may require extra time and financial resources. In some cases there may be funding available from government or industry to support your First Nation in this. Unfortunately, this is not always the case – the government agency you are dealing with may not have identified this type of funding and may be reluctant to provide resources to information gathering when they believe this work to already have been completed and acceptable, or if they are concerned with the time required for additional assessment by your First Nation.

If you run into this it may help to draw the Crown’s attention to the fact that, based on an examination of court decisions related to the duty to consult, it is implied that provision of funding for a First Nation’s meaningful participation is necessary. It may also be useful here to remind them of the warning issued by the Supreme Court in the Haida Nation decision: while the Crown can engage in hard negotiations, sharp dealings must be avoided in order to maintain the honour of the Crown. Finally, it is reasonable to suggest that an argument can be made in relation to this warning to have the Crown provide the necessary financial resources to enable your First Nation to adequately review the information and where needed conduct additional studies and fill any gaps.

## SAMPLE LETTER #3: REQUEST FOR SUPPORT TO ANALYSE PROVIDED INFORMATION

[Insert Date]

[Insert Contact Name(s)]

[Insert your First Nation's Name]

[Insert your Address]

[Insert Telephone Number]

[Insert Name, Address of Government Contact]

### **Re: Provision of Support to Analyse the Information Provided Prior to Consultation**

Dear [Insert Name]:

On behalf of [enter your First Nation's name], we are writing this letter regarding our right to consultation about [insert specific project, decision, development, etc.].

Thank you for your previous provision of the information relevant and necessary to begin our consultation process. What you provided to our First Nation included:

[Insert detailed list of the information the government has provided you to date]

After discussing and sharing this information with our community members, there are a number of questions that have arisen, and also a few gaps that have been identified. As such, we feel it is necessary that those questions are answered and those gaps are filled before we proceed. Without this step, our First Nation will not be able to effectively participate in a consultation process with you regarding [insert specific project, decision, development, etc.], nor sufficiently express our concerns regarding the impact on our rights, lands and resources. We are certain that in your good faith efforts to engage in consultation with our First Nation, you are aware that completion of this step is central to fulfilling both the procedural and substantive aspects of the duty to consult, as set out by the Supreme Court of Canada.

In order to create the proper foundation for an effective and participatory consultation process, we require support and resources to answer the following questions arising from the information you have already provided:

[Insert at list of the key questions that have been identified; also list any gaps your First Nation has identified in the information provided]

[Insert what you need to make sense of the information, i.e. provision of experts, funding, more time, a meeting with Crown officials to discuss the information and conflicts it may present with your own information]

We look forward to your prompt response and to discussing this with you further before we engage in consultation regarding [insert specific project, decision, development, etc.].

Sincerely,

[Insert your name(s)], on behalf of

[Insert name of your First Nation]



# THE HONOUR OF THE CROWN: WHAT IT IS AND WHY IT IS AT STAKE

The Crown—the federal and provincial governments—is considered by the Canadian courts to be the legal owner of land, which is subject to constitutionally guaranteed and protected Aboriginal, treaty and land title rights. As such, the Crown must act honourably in making decisions about the land, which in turn may impact those rights. That is what we are talking about when we refer to the Honour of the Crown. It is the source of the Crown’s obligation to:

- Deal with all First Nations fairly and with good faith
- Substantially address First Nation’s concerns when making decisions
- Provide notice to First Nations about decisions that could impact their rights

You may have also heard the relationship between First Nations and the Crown defined as a **fiduciary relationship**. A fiduciary is someone who holds anything in trust or someone who holds a position of confidence or trust in relation to someone else. The Crown is the fiduciary, who holds the land in trust for Aboriginal peoples. As such, Canadian courts have repeatedly stated the Crown **must** act in a fiduciary capacity when it comes to dealing with First Nations and their interests.

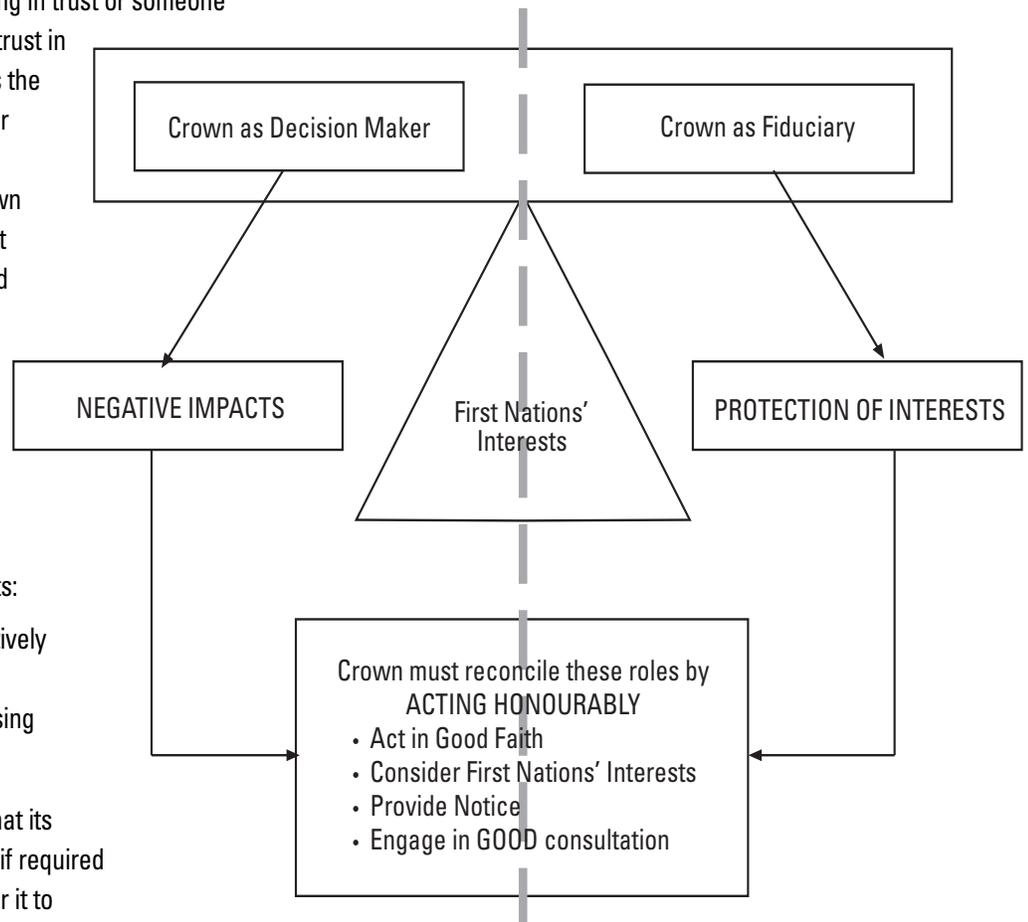
This is why the Honour of the Crown is at stake when they make decisions that could negatively impact how First Nations exercise their rights, use their lands, or live day-to-day in general. The Crown is wearing two hats:

1. The decision maker that could negatively impact your First Nation
2. The responsible fiduciary for minimising negative impact on your First Nation

The Crown must take care to ensure that its decision-making responsibilities, even if required by law, do not overshadow the need for it to discharge its responsibilities to First Nations.

It is assumed that the Crown has good intentions behind the proposed decision it must make; it is not the purpose or objective of the decision that would create a conflict of interest, or that might jeopardise the honour of the Crown. What is at issue, and what is the focus of consultation, are the methods the Crown uses to reach that objective.

The basic question to be asked is: In trying to reach its objective, how has the Crown altered its proposed decision to minimize or reduce the impact on Aboriginal and treaty rights? Engaging in a consultation that is well-documented and, in particular, involves the development of a Consultation Agreement with First Nations as partners is a key aspect of ensuring that these two Crown roles are clearly and transparently distinguished.



# SAMPLE CONSULTATION AGREEMENT

This Agreement is dated for reference [insert month day, year]

## BETWEEN

[Insert federal or provincial government  
as represented by the Minister of x]

(the "Crown in right of Canada or x province")

## AND

[Insert name] First Nations  
As represented by [Insert e.g. "its Chief and Council"]

(the "First Nation")

## PURPOSE OF THIS AGREEMENT

1. The purpose of this Agreement is to establish a clear, certain, and timely process for meaningful Consultation and any agreed upon Accommodation measures and specifically to:
  - (a) define commitments, roles and approaches for information-sharing, consultation, and accommodation with regard to the proposed decision (the 'Decision') of the Crown dealing with [insert description or name of project or decision];
  - (b) provide a meaningful opportunity for the First Nation to review all information related to the Decision including any environmental assessment to be conducted as a result of or in preparation for the Decision, to provide input and advice directly to the Crown in relation to the potential rights and interests of the First Nation which may be affected by the Decision, and to have that input and advice seriously considered and, where possible, demonstrably integrated into the Decision;
  - (c) provide an opportunity for the First Nation to identify other values, concerns and interest in relation to the Decision and communicate these to the Crown to be used by the Crown when making the Decision;
  - (d) support the First Nation's participation in the Consultation Process so as to improve the First Nation's ability to identify for the Crown any potential adverse impacts on rights and interests resulting from the Crown's Decision;
  - (e) further enable the First Nation to provide input and advice to the Crown on measures to avoid or mitigate potential impacts on the First Nation's rights and interest resulting from the Crown's Decision;
  - (f) provide funding to support the involvement of the First Nation membership in the Project, including any environmental assessment review process, according to processes customary and acceptable to the First Nation;

## SAMPLE CONSULTATION AGREEMENT

- (g) provide a forum to determine fund requirements to support the First Nation in the review of the Decision and the environmental assessment through including independent technical review and conduct of studies such as Indigenous Knowledge or Social Impact Assessment, as may be required;
- (h) provide a forum to determine the need for monitoring of any projects that may result from the Decision during construction, implementation and decommissioning including identification of the First Nation role in such monitoring and development of a follow-up program to ensure the First Nation is kept apprised of developments and involved with any project once/if approved;
- (i) discuss other issues of importance which are not addressed directly by this Agreement; and
- (j) build a positive working relationship by maintaining clear communication between the parties and by establishing an effective mechanism for dispute resolution.

### PRINCIPLES APPLICABLE TO THE CONSULTATION PROCESS

2. The Consultation Process will be conducted in keeping with the following principles:
  - (a) The relationship between the Parties is on a government to government basis;
  - (b) the Crown will work with the First Nation to determine, recognize and respect the First Nations rights and interests;
  - (c) the Crown will ensure that the First Nation is provided with all the necessary information to properly express their interests and concerns about the proposed Decision of the Crown;
  - (d) the Crown will create a meaningful opportunity for consultation with the First Nation recognizing that the First Nation membership, not just the leadership, must be involved in the consultation;
  - (e) by participating in this process, First Nations do not consent to future developments arising out of the consultation;
  - (f) the participation of the Parties is neither intended nor should be used to fulfill any other legal obligations now or in the future;
  - (g) the Crown will approach consultation in good faith and with the intention of substantially addressing First Nation concerns;
  - (h) in accordance with its legal obligations the Crown will seek to avoid or mitigate potential adverse impacts on rights and interests of the First Nation;
  - (i) the Crown will not make any decision prior to the Parties concluding the consultation;
  - (j) the First Nation will not frustrate the good faith attempts of the Crown to consult;
  - (k) consultation will include timely, efficient and effective processes and effective mechanisms to address issues that arise with the consultation process; and
  - (l) consultation will be open and transparent, and will provide for continuous improvement of both the process and the relationship between the Parties.

### CONSULTATION REPRESENTATIVES

3. The Crown will identify in writing their relevant decision-maker and representative in the consultation and any other members of their consultation team.



## SAMPLE CONSULTATION AGREEMENT

4. The First Nation will create a Consultation Team and will identify in writing the membership of their Consultation Team which will include traditional Chiefs, Chief and Council, and Elders of the First Nation and legal counsel for the First Nation.

### CONSULTATION PROCESS

5. Consultation between the Crown and First Nation shall take place in the following forms:
  - i) oral consultation with the First Nation Consultation team either with or without their counsel; or
  - ii) written consultation with the First Nation Consultation team which shall be conducted through the offices of [insert e.g. the x FN or legal counsel (name)]

No other form of contact between the Crown and First Nation will be understood to be consultation. In particular, telephone calls to Band officials and employees, faxes, and material sent to the Band office, shall not even be considered consultation.

6. There will be a Review and Response Period during which the First Nation will have access to relevant reports, studies and databases, maintained by both Canada and the proponent, so as to facilitate an assessment of the potential for adverse impact on the First Nation's rights and interests, and to identify the manner in which potential adverse impact can be avoided or mitigated.
7. During the Review and Response Period the First Nation will be responsible for consulting within the community with their membership on the potential for the Decision to impact their rights and interests.
8. Any identified gaps in the data will be identified by the First Nation in writing and discussed with the Crown to jointly determine the need for further study and to negotiate the terms of the study including an extension to allocated timeframes for the Review and Response Period.
9. The results of all technical review and/or studies conducted by the First Nation will be provided to the Crown in writing or through oral presentation if more deemed more appropriate in the specific case of Indigenous Knowledge study.
10. In the event that Indigenous Knowledge study is deemed necessary, a separate agreement will be negotiated according to First Nation policies respecting Indigenous Knowledge to ensure that this information is afforded the necessary respect demanded by the traditions of the First Nation.
11. Prior to the conclusion of the Review and Response Period, the First Nation will provide input and advice through a written response directly to Canada specifying the First Nation's views as to the manner in which the Decision represents a potential adverse effect on rights and interests, and the manner in which those impacts can be avoided or mitigated.
12. The consultation formally begins with the commencement of the Discussion Period.
13. During the Discussion Period Canada will respond to the First Nation's input and advice, and will seek to address any concerns that may have been raised by the First Nation during the Review and Response Period recognizing that this may require a series of meetings to address the range of issues identified by the First Nation according to subject.

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14. The Crown will give due consideration to the First Nation's input, advice and recommendations, and will advise the First Nation in writing of the accommodation measures the Crown agrees to and specifically how the First Nation's input, advice and recommendations have been incorporated into the Crown's proposed Decision.
15. The First Nation will be afforded the opportunity to consider the Crown's proposed accommodation and determine any residual impacts to the rights and interests of the First Nation.
16. Further discussions will be held between the Crown and First Nation to discuss the residual impacts, further mitigation and where necessary compensation owed to the First Nation for those immitigable impacts.
17. Prior to conclusion of this phase of consultation and subsequent implementation of the Crown decision, discussions will be held between the Crown and First Nation to come to an agreement on follow-up and monitoring during implementation of the Decision, including a mechanism to address previously unidentified impacts to the First Nations rights and interests resulting from the Decision.

### MEETINGS BETWEEN THE PARTIES

18. Canada will meet [insert e.g. monthly] with the First Nation Consultation Team at a location with the First Nation to review progress and to discuss community specific matters, new or revised information on the Project and/or environmental assessment, and further improvement of the effectiveness of the consultation process.

### SCHEDULE AND TIMING

19. The Parties acknowledge that it is desirable that the consultation proceeds at a pace which allows the First Nation to fully inform their membership, and particularly the Elders, in order to build a consensus position on the Project in relation to potential impacts to First Nations rights and interests. To this end, while the Parties agree that the consultation should proceed as expeditiously as possible, they also agree that this will be dependent on the quality of information and the financial resources provided to the First Nation to enable their meaningful participation in the consultation.
20. The Parties will use their best efforts to reach an agreement in relation to the Project and the Crown decision within [insert time] from the date of execution of this Agreement.

### CONFIDENTIALITY

21. These Consultation proceedings will remain confidential amongst the undersigned parties.

### FINANCIAL CONTRIBUTION

22. Canada will provide funding to the First Nation in accordance with Schedule A.
23. The Parties agree that, in addition to this Agreement, separate agreements may be entered into by and arrangements made between the First Nation and the Project proponent or other private interests related to the Project. It is recognized that such agreements represent a means for defining protocols for working relationships, for encouraging employment of First Nation contracts, for fostering training and employment opportunities, and for facilitating long-term mutually beneficial business relationships.



