

Provincial Policy for Consultation with First Nations

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PROVINCIAL POLICY FOR CONSULTATION WITH FIRST NATIONS

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I. Consultation Policy Context

A. PURPOSE

This document will describe the Provincial approach to consultation with First Nations on aboriginal rights and/or title that have been asserted but *have not* been proven through a Court process. In cases where aboriginal rights and/or title *have* been proven through a Court process, advice should be sought from the Legal Services Branch, Ministry of Attorney General on how to proceed. This document is an amendment to the Consultation Guidelines (1998) that brings the Policy into conformity with the present case law and consolidates within it the former Crown Lands Activities and Aboriginal Rights Policy Framework of January 29, 1997. This document does not deal with treaty rights, which are the subject of a separate policy.

A policy to consult with First Nations on aboriginal rights and title that are asserted but unproven.

NOTE: For the purposes of this Policy, where assertions are made by First Nations of aboriginal rights and/or title, but those asserted rights have not been proven to be existing rights through a Court process, those asserted rights are considered to be potentially existing aboriginal rights and/or title. In this Policy potentially existing aboriginal rights and/or title are defined as, and referred to as, "aboriginal interests".

Aboriginal interests are potentially existing aboriginal rights and/or title.

B. BACKGROUND

In 1982, existing aboriginal rights were recognized and affirmed in Section 35(1) of the *Constitution Act, 1982*. Court decisions have clarified the nature of existing aboriginal rights and, as a consequence, redefined the legal relationship between the Government of British Columbia and aboriginal peoples. In short, government activities cannot infringe existing aboriginal rights unless there is proper justification.

Provincial decision makers must consider aboriginal interests.

In addition, the 1997 Supreme Court of Canada decision in *Delgamuukw* discusses aboriginal title, adding new factors that must be considered during consultation with First Nations.

Until aboriginal rights and/or title are proven through a Court process, the Province has an obligation to consider aboriginal interests in decision-making processes that could lead to impacts on those interests. This obligation, fulfilled in most instances through consultation, has been enforced by the Courts to ensure that Provincial decision-makers consider aboriginal interests appropriately, before there is a Court determination that those interests amount to existing aboriginal rights and/or title.

C. ABORIGINAL RIGHTS DEFINED

The Van der Peet Decision (1996, Supreme Court of Canada)

Based on the *Van der Peet* decision, a Court will consider the following factors in determining whether an aboriginal practice is an aboriginal right:

- to constitute an aboriginal right, a practice, tradition or custom must be integral to the distinctive culture of an aboriginal society; that is, it must be a central and significant part of the society's distinctive culture. In the *Baker Lake* case, the Federal Court said "there appears to be no valid reason to demand proof of the existence of an aboriginal society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights...";
- the practice, tradition or custom must have been integral prior to contact with European society;
- aspects of aboriginal society that are true of every society such as eating to survive do not qualify as aboriginal rights, nor do activities that are incidental or occasional to the aboriginal society. However, particular sustenance activities that were integral to the aboriginal society (such as fishing for salmon by certain First Nations) will qualify; and
- the existence of an aboriginal right will depend entirely on the traditions, customs and practices of the particular aboriginal community claiming the right. The scope and content of aboriginal rights must be determined on a case-by-case basis.

Court decisions have defined aboriginal rights.

Aboriginal rights may include the right to use land to hunt and fish and for other integral social and ceremonial purposes. Trading a resource outside the aboriginal society as a "commercial" activity may also constitute an aboriginal right in some circumstances, provided that the commercial activity was integral to the aboriginal society in question prior to European contact. In *R. v. Gladstone*, the Supreme Court of Canada held that the Heiltsuk

had an aboriginal right to trade commercially in herring spawn on kelp, because that practice was found to have been integral to Heiltsuk culture prior to European contact.

The Sparrow Decision (1990, Supreme Court of Canada)

The Court provides the following framework, now generally referred to as the "*Sparrow* test", for assessing whether an action of government (such as a regulation) interferes with an aboriginal right and, if so, whether the interference is justifiable.

The Sparrow test is as follows:

1. Is there an existing aboriginal right?
2. Does the proposed government activity interfere with an existing aboriginal right because it:
 - a. is unreasonable;
 - b. imposes undue hardship; or
 - c. prevents the holder of the right the preferred means of exercising it?
3. If the right is interfered with, is the interference justified because:
 - a. there is a valid legislative objective, such as conservation;
 - b. the particular regulation, after conservation measures are taken, gives priority to First Nations;
 - c. there is as little infringement as possible;
 - d. in the case of expropriation there is fair compensation; and
 - e. there has been appropriate consultation?

Government may infringe aboriginal rights under certain circumstances.

According to *Sparrow*, government regulations that infringe aboriginal rights must be constitutionally justified. The Court

further rules:

- aboriginal rights can be exercised in a modern manner; and
- governments may infringe existing aboriginal rights only for a compelling and substantial objective such as the conservation and management of resources, among others.

The list of valid legislative objectives that would serve as part of the justification of an infringement of aboriginal rights was expanded by the *Gladstone* decision of the Supreme Court of Canada (1996) to include historical reliance on the resource by non-aboriginal people and regional economic fairness.

Under the principles set out in *Sparrow*, Provincial agencies have a duty to consult with aboriginal people, pursuant to section 35(1) of the *Constitution Act, 1982*, when the Crown by its actions will infringe aboriginal rights. The consultation required will vary with the circumstances. Where aboriginal interests (asserting unproven aboriginal rights) are at issue, Provincial agencies are required to consult and to consider those aboriginal interests. Where the application of the first part of the *Sparrow* test (see 2 above) indicates that an infringement of possible aboriginal rights is likely, it is necessary to attempt to address and/or accommodate those interests, including addressing the priority issue, prior to proceeding with an authorization/approval.

**Province must
consult before
infringing aboriginal
rights.**

D. ABORIGINAL TITLE DEFINED

In 1997, criteria for aboriginal title were set out in a decision by the Supreme Court of Canada. This decision, known as *Delgamuukw*, sets out principles with respect to aboriginal title and provides guidance to governments in considering proven aboriginal title in the context of statutory decision making processes.

The Delgamuukw Decision (1997, Supreme Court of Canada)

In *Delgamuukw*, the Court discusses legal considerations relating to aboriginal title including its source, content, proof and inherent limitations

No factual findings regarding the existence of aboriginal title in British Columbia are made. In the specific context of the Gitksan and Wet'suwet'en claim, these are left for a new trial. The result makes it clear however, that aboriginal title is not presumed to exist merely because it is asserted – a Court process (e.g. a trial) is required for its proof.

Later decisions, including the *Taku* and *Haida* decisions of the British Columbia Court of Appeal, have determined, however, that actual proof of aboriginal title is not required for the Crown to be legally obligated to consult. If a sound claim is made out, the Crown is under a legal obligation to consult in respect of possible aboriginal title and to seek to address and/or accommodate that interest. The extent to which the Crown is expected to seek to address/accommodate the interest is proportionate to the soundness of the title claim.

No First Nation has proven aboriginal title but the Crown must consult and try to accommodate the interest if the First Nation's claim seems sound.

Legal Implications

Several key points flowed from the Delgamuukw decision:

Principles respecting Aboriginal Title:

- it is a right to exclusive use and occupation of land;
- it is a proprietary interest, but it is held communally; it cannot be alienated other than to the federal government, and has certain inherent limitations to ensure its continued existence unless it is surrendered to the Federal Crown.
- it is a particular kind of aboriginal right, being a right to the exclusive use and occupation of the land itself;
- it includes the right to choose to what uses land can be put by the holders of that title (not restricted to traditional uses), and includes exploitation of mineral rights;
- it is subject to the ultimate limit that those uses cannot

The Supreme Court of Canada described aboriginal title.

destroy the ability of the land to sustain the kinds of activity which made it aboriginal title land in the first place;

- lands held pursuant to aboriginal title have an inescapable economic component; and
- aboriginal title is not absolute, but is a right to exclusively use and/or occupy land the underlying title to which is in the Crown (e.g. it is a “burden” on Crown title), which can be infringed by the Crown (e.g. put to another use) if the justification test in *Delgamuukw* is met.

Criteria to Prove Aboriginal Title:

- the onus of proof of aboriginal title lies with the First Nation that is asserting this right;
- the land must have been occupied at sovereignty (1846);
- there must be a continuity between present and pre-sovereignty occupation if present occupation is relied on as proof of pre-sovereignty occupation; and
- occupation must have been exclusive at sovereignty; although there can be shared exclusivity resulting in joint title.

The Court provided the criteria to determine aboriginal title.

Infringement of Aboriginal Title:

- both the federal and provincial governments can infringe aboriginal title in furtherance of a compelling and substantial legislative objective and if consistent with the special fiduciary relationship between the Crown and aboriginal people as set out in the *Delgamuukw* judgment;
- the Crown may justifiably infringe aboriginal title for a variety of objectives including land settlement, economic development and environmental protection provided that it can meet the justification principles established in *Delgamuukw*;
- where aboriginal title exists, compensation may be payable as part of the justification for infringement of that title;
- there is a duty to consult with aboriginal people when the

Why and how governments can infringe aboriginal title

Crown by its actions will infringe aboriginal title;

- the scope of the duty of consultation will vary with the circumstances. In most cases the duty will be significantly deeper than mere consultation, and will require the intention to substantially address the concerns of the First Nation whose use and occupation of the lands in question are at issue.

Under the principles set out in *Delgamuukw*, Provincial agencies have a duty to consult with aboriginal people, pursuant to section 35(1) of the *Constitution Act, 1982*, when the Crown by its actions will infringe aboriginal title. The consultation required will vary with the contemplated use of the land. It will range from discussions carried out in good faith to some circumstances *involving the direct regulation of aboriginal activities on the land* that may require the full consent of the First Nation (e.g. the Provincial *regulation* of aboriginal fishing and hunting on proven aboriginal title lands – a similar jurisdictional issue to that which arises in the case of attempted Provincial *regulation* of aboriginal use of Indian reserve lands).

The extent to which provincial agencies must try to address or accommodate the aboriginal interest is proportional to the soundness of the aboriginal claim.

Where aboriginal title has not yet been proven to exist but a sound claim of title has been made out, Provincial agencies are required to consult. They must consider that aboriginal interest, with a view to seeking to address and/or accommodate it in a manner proportional to its soundness. This must occur prior to issuing an approval/authorization that is likely to affect that interest.

How Does Aboriginal Title Relate to Aboriginal Rights?

The Supreme Court of Canada provided a model to illustrate how aboriginal title relates to other kinds of aboriginal rights. In this model, the Supreme Court stated that there is a spectrum of aboriginal rights. Different forms of aboriginal rights lie at different points on the spectrum, according to their degree of connection with the land.

Aboriginal title is a unique aboriginal right.

At one end of the spectrum, there are aboriginal practices and customs that are an integral part of an aboriginal culture. These are not necessarily tied to the land, but are practices which are

nonetheless protected as aboriginal rights. At the far end of the same spectrum lies another form of aboriginal right: aboriginal title. Therefore, aboriginal title is a form of an aboriginal right with the important distinction that it is a proprietary use and occupancy interest in a specific area of land. In the middle of the spectrum are rights relating to specific tracts of land, but falling short of the degree of exclusive use and occupation required to prove aboriginal title (for example, aboriginal hunting rights exercised non-exclusively).

Note: Infringement considerations are different for aboriginal rights and aboriginal title. In the case of aboriginal rights, the Sparrow test initially considers a set of factors to determine if a particular activity will actually result in an infringement of the right. Those factors (listed above in Part C) should be applied by decision-makers prior to concluding that an infringement will necessarily result from an activity and that justification is required. Because of the “exclusive” nature of aboriginal title, most Crown decisions about the use of land that is subject to aboriginal title will result in some level of infringement of that interest, and therefore the focus will be, in most cases, on whether the infringement is justifiable (in accordance with the principles set out in Delgamuukw).

While many activities on Crown land can co-exist with aboriginal rights, almost all activities on Crown land will infringe aboriginal title.

E. CONSULTATION PRACTICES FOR ABORIGINAL INTERESTS

In order to ensure that aboriginal interests are considered appropriately, Provincial organizations must consult with First Nations about those interests, unless a Pre-Consultation Assessment clearly indicates that that is not required.

Provincial ministries and agencies have operational guidelines on consulting with First Nations to gather information on aboriginal interests related to land and resource activities. While the methods of consultation often vary from agency to agency, they are all guided by the terms of this Policy that spell out essential principles of consultation with First Nations. Generally, Provincial organizations consult using a number of tools that build on working relationships between the Province and First Nations. Many agencies have drafted their own internal procedures to formalize their plans to address aboriginal interests within the context of their operations.

Methods of consultation can include:

- meetings and correspondence with First Nations;
- exchanges of information related to proposed activities;
- the development and negotiation of consultation protocols;
- site visits to explain the nature of proposed activities in relation to aboriginal interests;
- researching existing studies or carrying out new ones, if appropriate;
- participation in local advisory bodies; and
- in some cases, combinations of the above.

Consultation will ensure that aboriginal interests are considered in decision- making and efforts will be made to accommodate sound interests.

These methods serve common purposes. The first is to ensure that the consideration of aboriginal interests is incorporated in decision-making. The second is to ensure that good faith attempts have been made to address and/or accommodate concerns raised in respect of impacts of Crown decisions on aboriginal interests, to an appropriate extent, in a manner that is proportionate to the soundness of those interests.

Note: The Crown has an obligation to consider evidence of aboriginal interests that is available on reasonable enquiry, when assessing the soundness of those interests.

II. Consultation Policy

A. INTRODUCTION

The remainder of this document outlines principles related to consultation by the Province in the context of aboriginal interests, and a process for the appropriate consideration of those interests in Provincial land and resource use decision-making.

The Consultation Policy is applied, in its entirety, consistently across government.

The following policy describes how decision-makers should carry out their responsibilities for the allocation, management and development of Crown land and resources through:

(a) the Crown's obligation to consult with First Nations in respect of aboriginal interests; and

(b) considering information gathered on aboriginal interests in the decision-making process.

It is important that methods outlined below are understood and applied *in their entirety*. Applying individual components of this document outside the larger context of the Policy increases the risk of misinterpretation. ***Consistent application of this Policy across government is essential.***

B. SCOPE

This Consultation Policy is effective immediately. This document will be implemented in conjunction with agency-specific consultation approaches. This policy applies to all applicable provincial ministries, agencies, and Crown corporations.

The policy is used with each ministry's and Crown agency's operational guidelines.

This Policy does not address capacity building, interim measures, or linkage to treaty negotiations. However, it is important to note that those initiatives may offer additional important opportunities to address and/or accommodate aboriginal interests, where sound claims of aboriginal rights and/or title are made out.

C. OPERATIONAL GUIDELINES

The Province recognizes the need to streamline existing consultation processes and incorporate the consideration of aboriginal interests into Provincial land and resource use decision-making. It is essential that consultation activities are well defined and carried out efficiently, prior to approvals/authorizations being made.

Efficient and transparent consultation is needed before decisions are made.

Consultation Principles

While the nature and scope of consultation may vary, the fundamental principles of consultation are the same for all aboriginal interests contemplated by this Policy. Consultation efforts should be made diligently and meaningfully, and with the intention of fully considering aboriginal interests. Where a sound claim of aboriginal rights and/or title is made out, consultation efforts must attempt to address and/or accommodate a First Nation's concerns relating to the impact of proposed activities on the aboriginal interests that it identifies or of which the Crown is otherwise aware. ***In practical terms, this means the quality of consultation is of primary importance, and the soundness of the claim will dictate the scope and depth of required consultation.***

The principles of First Nations' consultation must be carefully followed.

The following principles apply to all consultation efforts, and should be followed throughout the entire process of consultation:

- the onus to prove aboriginal rights or title lies with the First Nation claiming the existence of those rights or title.
- through consultation, the Province must consider aboriginal interests prior to making land or resource decisions concerning Crown land activities that are likely to affect those interests and attempt to address and/or

accommodate concerns that are raised, provided that those concerns relate directly to aboriginal interests that are sound and to impacts of Crown decisions on those interests;

- consultation should be carried out as early as possible in the decision-making process;
- the Crown must ensure the adequacy of any consultation activities it undertakes or that are undertaken on its behalf;
- decision-makers should take steps to ensure consultation activities involve representatives from all potentially affected First Nations;
- consultation processes need to be effective and timely, carried out in good faith, and wherever possible meet applicable legislative timelines;
- the consultation process should inform decision-makers of the possibility that the decision(s) that they make on proposed activities may result in an infringement of aboriginal interests. The question of whether infringement appears likely and whether efforts to attempt to address and/or reach workable accommodations of aboriginal interests are likely to be adequate to justify any such infringement, should be considered by decision makers;
- consultation on activities that involve a number of agencies should be integrated wherever possible to ensure maximum clarity and efficiency;
- consultation processes should be clearly defined to the First Nations in question;
- consultation processes should illustrate how information provided by a First Nation is or is to be considered in decision making processes and planning;
- consultation processes can be carried out in a variety of ways, depending on the circumstances and nature of the proposed activity. Methods for meaningful consultation should be selected in relation to the nature of the proposed activity, the requests of the First Nation in question (where those are reasonable), the soundness of

the aboriginal interests that are at issue, and other relevant factors; and

- the consultation process will inform the First Nation(s) in question of the potential effect of a proposed activity. Information should be provided in a manageable and understandable format, with adequate time for review, wherever possible within the context of time limits imposed for the making of statutory decisions.
- all letters, meetings, telephone calls, site visits, and other efforts by the Crown to obtain information about aboriginal interests prior to making land and resource use decisions, are elements of the consultation process and records of them should be kept.

The Courts have provided direction on the specific responsibilities of both First Nations and the Crown.

What the Courts Say About Consultation

Post *Delgamuukw* decisions to date, addressing situations involving aboriginal interests, have provided further commentary on consultation, and reaffirm a number of principles from previous cases, including *Delgamuukw* itself:

- The Courts continually encourage consultation and negotiation over litigation.
- Consultation efforts must be meaningful and provide an understanding of a decision's impact on lands and resources, and demonstrate where necessary the attempt to address and/or accommodate aboriginal interests, in a manner proportionate to the soundness of those interests.
- The Courts have demonstrated a willingness to support consultation efforts that have been carried out diligently and meaningfully.
- First Nations cannot attempt to stall a project by foregoing participation in the consultation process until the final stages of consultation.
- Consultation is a "two-way street" requiring First Nations to participate in consultation processes.
- The Crown is obliged to consider evidence of aboriginal interests that is available to the Crown on reasonable enquiry, apart from that supplied by the First Nation, in those cases

where a sound claim of aboriginal rights or title is at issue.

- The major elements of a justification of an infringement need to be in place before an infringement of aboriginal interests occurs. The degree of workable accommodations provided in cases where there appears to be a sound claim for aboriginal title will be relevant to the issue of whether any further justification (e.g. compensation) will be required by the Courts if those interests are subsequently proven to be aboriginal rights or title.

D. OPERATIONAL IMPLEMENTATION

As mentioned previously, this Consultation Policy is intended to provide for the consideration of aboriginal interests in decisions taken with respect to land and resource use. This section outlines the operational aspects of this Policy in detail.

The process below consists of a number of steps that can be summarized as:

- Pre-Consultation Assessment
- Stage 1 - Initiate Consultation
- Stage 2 - Consider the impact of the decision on aboriginal interests
- Stage 3 - Consider whether any likely infringement of aboriginal interests could be justified in the event that those interests were proven subsequently to be existing aboriginal rights and/or title
- Stage 4 - Look for opportunities to accommodate aboriginal interests and/or negotiate resolution bearing in mind the potential for setting precedents that may impact other Ministries or agencies.

It is important that each of the steps below is carried out uniformly, and in direct relation to the other elements of this Policy. Decision-makers should consult with senior level personnel in their agency and where necessary Legal Services Branch, Ministry of Attorney General, when unclear on applying this Policy.

Stages in the Consultation Process

Pre-Consultation Assessment

An initial assessment should evaluate whether a particular decision or activity will require consultation. These assessments should help to ensure that consultation is carried out in a manner that is appropriate to the nature of the decision or activity and the nature of the interest being asserted.

Assessing whether an activity requires consultation with a First Nation

Where a Crown decision/authorization involves one or more of the following situations, consultation may not be required for a decision involving use of that area:

- *there is no evidence of historical aboriginal presence in the area; or*
- *those potentially affected First Nations have indicated through previous consultation that they have no particular interests with respect to the area, or their interests have been canvassed or identified in other contexts (e.g. legal proceedings, etc.) and do not relate to the area in question; or*
- *the land in the area in question is:*
 - a) *presently alienated in fee simple to third parties, and cannot be used for the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession of the land; or*
 - b) *developed in a manner, or surrounded by lands that have been developed in a manner (e.g. urban lands), that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession, or*
- *the First Nation and the Crown have negotiated an agreement or protocol that identifies certain types of decisions that do not require consultation.*

IMPORTANT

It is not likely that this assessment would result in a determination that consultation is not required, except in very specific cases. However, where this is the case, a decision or activity may not require consultation.

In situations where decision-makers are unsure whether a decision or activity warrants consultation, ALWAYS use caution and initiate the steps outlined below.

Consultation is always required wherever there is a sound claim of aboriginal interests.

Note: It is imperative that consultation occurs wherever there is a sound claim of aboriginal rights and/or title, and where it is likely that a decision by the Crown would be likely to result in an infringement of aboriginal interests if those interests were subsequently proven to be aboriginal rights or title.

Emergencies on the land

In situations of actual emergency (e.g. flooding, forest fires, earthquakes, etc.) or where public health and safety are at imminent risk, consultation in respect of aboriginal interests may not be feasible. In those cases, notification to First Nations of actions being taken is appropriate, if circumstances permit.

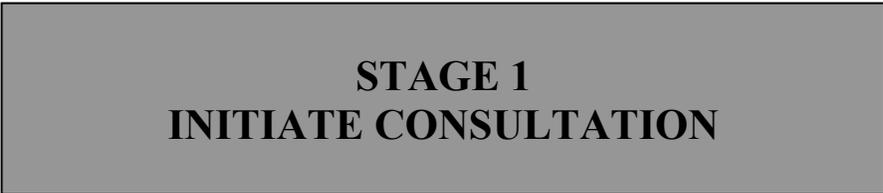
If there is evidence of historical aboriginal presence in the area in question, or previous consultation has determined that aboriginal interests may be at issue in that area, and the nature of other existing interests in the land or the level of surrounding development do not preclude the ability to exercise aboriginal rights or enjoy aboriginal title as a right of present possession, then consultation is necessary and decision-makers should ensure that the process on the following pages is carried out.

E. CONSULTATION PROCESS

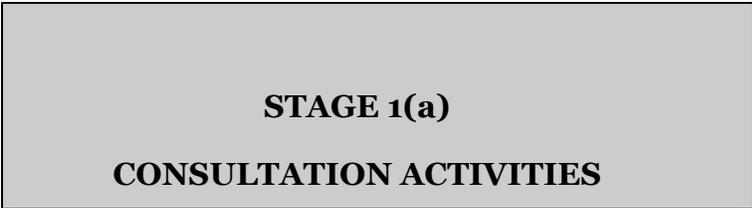
In situations where consultation with First Nations is required, the four-step process outlined in this section should be applied.

It is important for decision-makers to recognize and use a continuum of appropriate consultation mechanisms. The following steps provide the basis for selecting the appropriate consultation method, and questions appropriate for consideration during consultation. The depth of consultation and degree to which workable accommodations should be attempted will be proportional to the soundness of that interest.

There are many ways to consult within the four stages of consultation.



STAGE 1 INITIATE CONSULTATION



STAGE 1(a) CONSULTATION ACTIVITIES

Through consultation, decision-makers need initially to consider aboriginal interests identified or raised by potentially affected First Nations. *This includes considering evidence of aboriginal interests that is available to the decision-maker on reasonable enquiry.*

Work with the First Nation to determine the best way to gather information about aboriginal interests

The scope and depth of consultation required is proportional to the soundness of the aboriginal interests that are at issue.

Actual consultation methods (such as phone calls, meetings, exchanges of information) will vary from situation to situation, depending upon ways in which your agency has consulted with First Nations in the past, the preferences of the First Nation in question (where these are reasonable), the type of information needed and other specific factors. Consultation methods will also depend upon whether aboriginal interests are at issue, or whether the circumstances involve proven aboriginal rights and/or title. In the latter case, legal advice should be sought from the Legal Services Branch, Ministry of Attorney General, before proceeding.

Regardless of the method used for consultation, it is important that decision-makers select the means most appropriate for gathering information needed to consider aboriginal interests in their decision-making processes.

Where consultation does not produce adequate information to enable an evaluation of the soundness of aboriginal interests, decision-makers must rely on other sources of reasonably available information (archaeological studies, local knowledge, archival studies, existing traditional use studies, legal advice, etc.) to make an initial determination of whether aboriginal interests in the area give rise to the possibility that aboriginal rights and/or title may be proven subsequently (e.g. in evaluating the soundness of aboriginal interests).

Sources other than the First Nation may need to be used to determine whether an asserted aboriginal interest is sound.

IMPORTANT

In carrying out consultation activities, be aware that staff cannot make legal determinations of the existence of aboriginal rights or title and may need legal and/or research advice in order to properly assess the soundness of aboriginal interests

The question before decision-makers in the absence of proven aboriginal rights or title is to consider aboriginal interests, within the context of the soundness of those interests.

STAGE 1(b)
CONSIDERING ABORIGINAL INTERESTS

A number of general "indicators" can be used to assist in assessing the soundness of aboriginal interests. Decision-makers should use these indicators in conjunction with information gathered through consultation and from other sources to help assess whether or not aboriginal rights and/or title may be subsequently proven to exist.

Indicators of the Possibility that Aboriginal Interests May be Subsequently Proven to be Existing Aboriginal Rights and/or Title

A combination of the following may indicate the possibility that aboriginal interests may be subsequently proven to be existing aboriginal rights and/or title, and may indicate a need to increase the level of consultation and/or consider possible options for reaching workable accommodations or otherwise mitigating possible adverse effects.

- Title to the land has been continuously held in the name of the Crown.
- Indicators of aboriginal interests in the land that result from consultation and/or other evidence of First Nation use or occupation, such as:
 - (a) land near or adjacent to a reserve or former settlement or village sites;
 - (b) land in areas of traditional use or archaeological sites;
 - (c) land used for aboriginal activities;
 - (d) notice of an aboriginal interest/aboriginal rights and/or title from an First Nation, even where made to another Ministry or agency of the Crown; and
 - (e) land subject to a specific claim.

**More indepth
consultation is
required when a
number of these
criteria are met.**

- Undeveloped land such as parcels outside an urban area and close to known fishing, hunting, trapping, gathering or cultural sites.

If decision-makers encounter one or more of these indicators during the consultation process, they need to consider aboriginal interests in their decision. Such consideration needs to include the possibility that the decision may result in an infringement of aboriginal rights and/or title that may be proven subsequently. It also may include any workable measures for accommodating those interests or for mitigating, or ameliorating that infringement that may be available and appropriate in the circumstances, relative to the soundness of the claim.

Similarly, there are a number of indicators that may be used to infer that there is a relatively low possibility that aboriginal interests may be proven subsequently to be existing aboriginal rights and/or title.

Indicators Against the Possibility that Aboriginal Interests May be Proven Subsequently to be Existing Aboriginal Rights and/or Title

A combination of the following may reduce the possibility that aboriginal interests may be proven subsequently to be existing aboriginal rights and/or title (or may serve to indicate that the previous creation and on-going existence of other exclusive use and occupancy interests means that aboriginal rights or title cannot be exercised or enjoyed as a right of present possession), and may indicate that lower levels of consultation are appropriate in the particular circumstances:

More than one of these indicators may reduce the need for rigorous consultation.

- Little indication of historical aboriginal presence in the area (e.g. land distant from reserves or settlement areas with no known aboriginal interests).
- Land presently alienated in fee simple to third parties (length of occupation and the continuation of that interest will be important).

- Land presently alienated on a long-term lease to third parties.
- Land within an area where the aboriginal interests of the First Nation in question have been exchanged for, or modified to be, treaty rights. **Note: This does not lessen the need to consult, but will likely alter the focus of the consultation from aboriginal interests to treaty rights.**
- Land developed in a manner that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession.
- Land within an urban area, or surrounded by lands that have been developed in a manner that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession.
- No indication that a First Nation has maintained, or continued to assert, despite any interference resulting from European settlement, a substantial connection or special bond with the land since 1846.
- Land that was abandoned by the First Nation in question prior to 1846.
- In the case of claimed aboriginal title, competing or conflicting aboriginal title claims to the same area by distinct First Nations (e.g. mutually exclusive overlapping claims). Such overlapping claims may point, however to a higher possibility that aboriginal rights may be at issue in respect of those lands.

Decision-makers must now consider the following:

STAGE 1 DECISION

- ⇒ **If, on consideration of aboriginal interests in the context of the above factors, there appears to be a reasonable probability that those aboriginal interests may be proven subsequently to be existing rights and/or title (e.g. a sound claim is made out), go to Step 2.**

- ⇒ **If, on consideration of aboriginal interests in the context of the above factors, there appears to be little possibility that those aboriginal interests may be proven subsequently to be aboriginal rights and/or title or that there does not appear to have been any significant historical aboriginal presence in the area (e.g. a sound claim does not appear to have been made out), then the decision-maker may choose to conclude the consultation process.**

Go to Step 2 if aboriginal interests seem sound.

STAGE 2

CONSIDER THE IMPACT OF THE DECISION ON ABORIGINAL INTERESTS

Decision-makers must now consider the possibility that a decision may result in an infringement of possible aboriginal rights and/or title that may be proven subsequently over the lands in question (e.g. an "infringement" of aboriginal interests).

This step involves reviewing the details of the proposed activity. Decision-makers must determine whether the proposed activity is likely to result in an infringement of possible aboriginal rights and/or title that may be subsequently proven over the lands in question.

Is the proposed activity likely to infringe a sound aboriginal interest?

Considerations for this process include:

- Does the proposed activity potentially interfere with aboriginal activities on the land?
- Where aboriginal title appears to be a strong possibility, will the proposed activity provide for involvement of, or direct economic benefit to, the First Nation?
- Will the activity change or damage the nature of the land or the availability of resources (e.g. fish or wildlife), and to what extent?
- In the case of asserted aboriginal rights, if there is proposed resource extraction, is the resource renewable or non-renewable and what effect will that have on the ability to continue to exercise rights?
- Will any of the land be sold to third parties as part of this activity?
- Will long term leases or tenures be provided to third parties?
- Are the leases or tenures renewable, and does the renewal involve further changes to the land or further extraction of resources?

Note: If the identified aboriginal interest is an asserted aboriginal right, decision-makers need to consider the first part of the Sparrow test (see pages 7 and 8 of this Policy).

If the decision will not create undue hardship on those claiming the aboriginal right, deny those who claim that right their preferred means of exercising the right, and is not unreasonable in all of the circumstances, the decision is unlikely to infringe an aboriginal right and consultation in respect of infringement and justification likely will not be required.

Go to Step 3 if the results of your decision will infringe likely aboriginal interests

STAGE 2 DECISION

- ⇒ If there appears to be a likelihood that the decision may result in an infringement of those interests should they be proven subsequently to be existing aboriginal rights and/or title, go to Step 3.**

- ⇒ If there appears to be little likelihood that the decision may result in an infringement of those interests should they be proven subsequently to be existing aboriginal rights and/or title, then the decision-maker may choose to conclude the consultation process. (Note: If the presence of aboriginal title is a strong possibility, then the possibility of infringement will be significant).**

STAGE 3

CONSIDER WHETHER ANY LIKELY INFRINGEMENT OF ABORIGINAL INTERESTS COULD BE JUSTIFIED IN THE EVENT THAT THOSE INTERESTS WERE PROVEN SUBSEQUENTLY TO BE EXISTING ABORIGINAL RIGHTS AND/OR TITLE

In circumstances of infringement of aboriginal title, Courts will seek to determine whether the legislative objectives of the Crown were compelling and substantial. The Supreme Court of Canada specifically stated that, in the context of the infringement of aboriginal title, the development of agriculture, forestry, mining, hydroelectric power, the general economic development of the

Crown objectives that may justify the infringement of aboriginal title

Province, protection of environment or endangered species, the building of infrastructure, and the settlement of foreign populations are the kinds of legislative objectives that can, in principle, be compelling and substantial enough to justify infringement of aboriginal title, *provided that the fiduciary “justification” obligations of the Crown have been met.*

Crown objectives that may justify the infringement of an aboriginal right

The *Sparrow* and *Gladstone* decisions of the Supreme Court of Canada have identified conservation, public safety, historical reliance on a resource by non-aboriginal people and regional economic fairness as valid legislative objectives in the context of the infringement of aboriginal rights.

Has the Crown engaged in sufficient consultation, and attempted to address aboriginal interests and/or reach accommodations where a sound case for aboriginal rights or title has been made out?

Assessing whether consultation is adequate

The Supreme Court of Canada stated that the fiduciary relationship between the Crown and aboriginal people arising in the context of infringement of aboriginal rights and/or title may be satisfied by the involvement of aboriginal people in the decisions taken with respect to the land. The nature and scope of the duty to consult will vary with the nature of the right, the circumstances, and with the nature and extent of the infringing action. ***Aboriginal title embodies both cultural and economic aspects. Addressing both is part of the justification of infringement of aboriginal title.***

The Supreme Court was clear that, in most cases of infringement of aboriginal title, aboriginal involvement in decision making had to be greater than "mere consultation". The consultation must be in good faith and with the intention of addressing and/or accommodating the First Nations concerns regarding the infringement. However, where aboriginal rights and/or title possibly exist but have not yet been proven through a Court process, consideration of the adequacy of consultation and any attempted workable accommodations must consider:

- any statutory ability to accommodate;
- the availability of other measures providing for accommodations of aboriginal interests where a sound claim for aboriginal rights or title has been made out, such as treaty related measures, interim measures, economic measures, partnerships or cooperative arrangements with industry or proponents, land protection measures, direct award of tenure,

etc.;

- whether consultation has been carried out diligently and meaningfully in a manner that attempts to address and/or accommodate aboriginal interests, and the extent to which workable accommodations of those interests are necessary and are provided in a manner that is proportional to the soundness of the aboriginal interests at issue.

Factors to Consider:

It is recommended that decision-makers carefully analyze the details of the decision in the following context. Be sure to document and describe all of the factors weighed during consideration. This should be done for internal purposes, but may not need to be reflected in decision rationales in all cases.

- Extent of infringement: There is a range of the types of impacts that may occur on aboriginal interests (e.g., development with no chance of reclaiming land to its natural state vs. development of renewable resources). Types and levels of possible infringement may depend on the aboriginal connection to the land (e.g. an impact on aboriginal interests in relation to a historical village site or other site of historical exclusive occupation may have greater ramifications than an impact on aboriginal interests in respect of traditional hunting grounds).
- Extent to which attempts have been made to address aboriginal interests and/or attempts have been made to reach workable accommodations of aboriginal interests, and whether sufficient consultation has occurred: Has there been significant consultation and has there been a genuine effort made to attempt to address and/or reach workable accommodations of identified aboriginal interests, where a sound case for aboriginal rights or title has been made out? Efforts to minimize possible infringement are required.

Consider the extent that the activity may infringe a potential aboriginal interest

Consider the attempts to address the aboriginal interest

The decision for Step 3 follows. For anything other than possible minor infringements, decision-makers should consult with senior level ministry personnel, and where necessary, Legal Services Branch, Ministry of Attorney General.

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• **STAGE 3 DECISION**

- ⇒ If the likely infringement of aboriginal interests, should those interests be proven subsequently to be existing aboriginal rights and/or title, appears not to be justifiable, go to Step 4.
- ⇒ If the likely infringement of aboriginal interests, should those interests be proven subsequently to be existing aboriginal rights and/or title, appears to be justifiable, then the decision-maker may choose to conclude the consultation process and proceed.

Go to Step 4 if your decision will result in an unjustifiable infringement of a likely aboriginal interest

STAGE 4

ATTEMPT TO ADDRESS AND/OR REACH WORKABLE ACCOMMODATIONS OF ABORIGINAL INTERESTS, OR NEGOTIATE A RESOLUTION.

If it appears that the possible infringement examined during Stage 3 may not be justifiable, even with those attempts at accommodation that have been made at that stage, decision-makers can choose to have staff attempt to negotiate a resolution of the issue with the First Nation asserting the interest or have other Provincial agencies or individuals attempt to do so.

This step may involve the use of treaty related measures, interim measures, economic measures, programs, training, economic development opportunities, agreements or partnerships with industry or proponents, or other arrangements aimed at attempting to address and/or reach workable accommodations with respect to aboriginal interests, particularly where the scope of discretion to accommodate such interests under the statutory framework in question is limited.

Negotiating solutions in the broader government context

The range of activities that can be carried out in terms of coming to a negotiated resolution vary greatly from situation to situation, and according to agency statutory mandates, policies, programs, appropriations, and available statutory discretion.

NOTE: Ministries and agencies must be cognizant of the potential precedent-setting nature of negotiated solutions. Where any negotiated solution is likely to set precedents, the Deputy Ministers Committee on Natural Resources and the Economy must be advised.

STAGE 4 DECISION

- ⇒ **If attempted accommodation or negotiation is successful, the decision-maker may choose to proceed.**
- ⇒ **If resolution cannot be gained at this stage through negotiation, attempted accommodation or other methods, it will be advisable to re-evaluate the project or decision (assuming that there is discretion under the statutory framework to do so) and/or seek legal advice from the Legal Services Branch, Ministry of Attorney General before proceeding further.**