
**Working Papers on
Meaningful Aboriginal Consultation in Canada:
Step 1 - Nation Consultation**

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CAID

Preface

Working Papers on Meaningful Aboriginal Consultation in Canada: Step 1 - Nation Consultation was written to provide functional detail for the first step of the process of Meaningful Consultation, Nation Consultation. This working paper is a dynamic, adaptable guide to Nation Consultation. As such, it is assumed that this guide will change to adapt to each Aboriginal Nation's culturally-specific Nation consultation. The background and basic model for the Meaningful Consultation process can be found in *Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation* (2009)¹. A quick reference of the Meaningful Consultation process can be found in *Working Papers on Meaningful Aboriginal Consultation: Overview* (2009)². The terminology used in this working paper may be offensive to some Aboriginal people, we apologize.

The final details for Meaningful Consultation of a particular Aboriginal Nation must be defined by that nation. This guide can be adapted to First Nation, Innu, Inuit and Métis. It can also be adapted to consult urban or land-based Aboriginal populations whether status or non-status.

Shared with:

Assembly of First Nations;
Congress of Aboriginal Peoples;
Inuit Tapiriit Kanatami;
Métis National Council;
Native Woman's Association of Canada; and,
Aboriginal Peoples of Canada.

Submitted to:

Honourable Chuck Strahl, Minister of Indian Affairs and Federal Interlocutor for Métis and Non-Status Indians; January 28, 2010

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Working Papers on Meaningful Aboriginal Consultation in Canada: Step 1 - Nation Consultation
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1. Introduction

Supreme Court of Canada rulings have defined Meaningful Consultation as having two components³:

1. Consultation; and,
2. Accommodation.

It has been shown that because of the policy of forced assimilation, these two components are not enough to fulfill Meaningful Consultation's goal to reconcile the pre-existence of Aboriginal societies with the sovereignty of the Crown. To augment the process, each of the two components must themselves be separated into two parts¹. The resulting four steps of a Meaningful Consultation process are:

1. Nation Consultation;
2. Nation-to-Nation Consultation;
3. Harmonization; and,
4. Restoration.

This four step Meaningful Consultation process is capable of honouring Aboriginal law, Canadian legislation, common law and international recommendations on meaningful Aboriginal consultation.

Meaningful Consultation of Aboriginal rights is about functionally including those rights in Canada's national infrastructure framework. To do this Aboriginal and non-Aboriginal national infrastructures must weave together to create a mosaic of local, regional and central services that together function as Canada's national infrastructure, respecting both Aboriginal and non-Aboriginal rights. Unfortunately, most Aboriginal infrastructure was destroyed by Canada's policy of forced assimilation making it impossible to start Meaningful Consultation on an equal nation-to-nation footing. Consultation of Aboriginal Elders and Aboriginal Nations before commencing nation-to-nation consultation provides a database for the knowledge and understanding of Aboriginal infrastructure needed by both Aboriginal and consulting governments to generate working definitions for culture-based Aboriginal infrastructure. This "pre-requisite" intra-nation consultation is referred to as the Nation Consultation and it is the first step in Meaningful Consultation.

The information obtained from the Nation Consultation not only provides guidance to Aboriginal leaders and a definition of Aboriginal infrastructure for Canada to respect, it also provides a cultural database through which all non-Aboriginal institutions and citizens can understand and respect Aboriginal culture, law and regulation, and rights. If Canada had not forced the assimilation of Aboriginal Peoples, the Nation Consultation step would not be necessary.

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The Nation Consultation is a pre-requisite step to all aspects of the Meaningful Consultation process. It is a facilitated process to acquire a detailed database on Aboriginal culture. Nation Consultation is the only part of the four-step Meaningful Consultation process that can be separated and initiated on its own without triggering a full process based on the Aboriginal right to consultation.

In 1996, the *Report of the Royal Commission on Aboriginal Peoples* recommended Canada fund the creation of a database on Aboriginal history and culture that reflected the diversity of Aboriginal Nations in Canada⁴. That database was never created.

2. General Guidelines

The Nation Consultation step is a consultation defined and guided by Elders⁵. It will need to occur with urban and land-based Aboriginal populations and nations. It has two distinct components:

1. **Elder Seeking:** Consultation of Elders for definition of the cultural process for Nation Consultation. The cultural process would become the culturally-sensitive procedure used for the consultation of the Aboriginal Nation or urban population.
 - a. **Land-Based:** A request to consult Elders is presented to the nation's governing council. The format for the seeking will be set by the governance council. The resultant Elder-defined consultation process will need to be ratified by the national governance. The cultural process will vary for different nations and may vary within each nation depending on the right under consultation.
 - b. **Urban-Based:** Urban-based communities can be defined using the influence radius of existing Aboriginal community centres (eg. United Native Friendship Centres and Metis Community Centres), by regional divisions of national Aboriginal organizations (Assembly of First Nations, Congress of Aboriginal Peoples, Inuit Tapiriit Kanatami and Métis National Council) or, a working combination of Aboriginal community centres and national Aboriginal organizations. A request will be made to the national, regional or local office or governance to consult Elders or the council/group that has been created to provide Elder-based guidance. The defined consultation process will need to be ratified by the office or governance to whom the request was initially made.
2. **National Consultation:** Consultation of the Aboriginal Nation on a specific right using the Elder-defined consultation procedure. The Nation Consultation has several components starting with Elders. The final results of the national consultation will need to be ratified by the national governance. The following are very basic examples of national consultation for discussion purposes only.
 - a. **Land-based:**
 - i. **Elder Consultation:** Has two components;

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- (1) **Base:** Elders speak on the right under consultation to provide definition, history and a deep cultural understanding of the right; and,
 - (2) **Bridge:** Elders respond to specific questions on the right under consultation which focusses answers to provide a bridge (link) between Aboriginal and non-Aboriginal societies; between cultural knowledge and existing community, regional and global infrastructure for the expression of the right.
 - ii. **Community Consultation:** Results of the Elder consultation are presented in each community. Community comments and concerns will identify and define cultural community roles, citizen needs and, services and programs needed to express the right under consultation;
 - iii. **Special Council Consultation:** Comments and concerns from special councils on results of the Elder consultation will identify cultural special council roles and target group-specific service and program needs based on the expression of the right under consultation (eg. Women's and Youth Councils);
 - iv. **Regional Resource Council Consultation:** Results of the Elder, community and special council consultations are presented to regional resource councils. Their comments and concerns on practical application of results from the Elder consultation will identify cultural regional resource council roles and needed infrastructure services to provide programs identified in community and special council consultations; and,
 - v. **Governing Council Consultation:** Results of the Elder, community, special council and regional resource council consultations are presented to the nation's governing council. Comments and concerns will identify cultural governing council roles and legislative issues needed to realize the expression of the right under consultation.
- b. **Urban Based:** The hierarchical structure of the urban-based consultation may be very different then presented in this example. The primary reason for this is the utilization of community centres under the jurisdiction of different national, provincial, territorial or regional Aboriginal organizations which we will refer to collectively as the Aboriginal Centre Under Consultation (ACUC). Where Elders, special councils and governing bodies are located within these ACUCs will dramatically influence the format of the national consultation.
- i. **Elder Consultation:** Has the same two components as in the land-based national consultation;
 - (1) **Base:** See earlier.
 - (2) **Bridge:** See earlier.
 - ii. **Community Consultation:** The community will be defined using the influence radius of the local community centre of the ACUC through which the consultation is occurring. The result of the Elder consultation is presented. Community comments and concerns will identify and

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define cultural community roles, citizen needs and, services and programs needed to express the right under consultation;

- iii. **Special Council Consultation:** Comments and concerns from special councils associated with the ACUC on results obtained with the Elder consultation will identify cultural special council roles and target group-specific service and program needs based on the expression of the right under consultation (eg. Women's and Youth Councils); and,
- iv. **ACUC Consultation:** Results of the Elder, community and special council consultations are presented to the ACUC. Comments and concerns will identify cultural ACUC roles and legislative issues needed to realize the expression of the right under consultation.

3. Clear Measures of Success

The first step in Meaningful Consultation, Nation Consultation, has clear goals. Goal attainment is a clear measure of success. The first goal in Nation Consultation is the successful completion of Elder seeking; or,

- To obtain a definition for the culturally-sensitive procedure for the national consultation component of the Nation Consultation.

The second, and primary, goal in Nation Consultation is the completion of the national consultation; or,

- To obtain a database on Aboriginal culture.

The success of the database will be measured by its ability to:

1. Be drawn on by institutions for research and as a base for non-Aboriginal understanding and respect for Aboriginal culture, tradition, customs and rights; and,
2. Be researched to specifically identify:
 - a. Aboriginal citizens' needs that can be met by the expression of Aboriginal culture and rights;
 - b. Frameworks of Aboriginal societal infrastructure (authority, law, regulation and services) that will allow the expression of Aboriginal culture and rights; and,
 - c. Programs that will allow for Aboriginal needs to be met through the expression of Aboriginal culture and rights.

A Nation Consultation that meets the above goals and measures of success will be able to provide the database for the respect and reconciliation of Aboriginal rights with non-Aboriginal rights.

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4. Requirements

The Nation Consultation has five basic requirements:

1. **Aboriginal Nations to be consulted:** Included are:
 - a. Elders;
 - b. Citizens;
 - c. Communities;
 - d. Urban Community Centres;
 - e. Special Councils;
 - f. ACUCs;
 - g. Resource Councils; and,
 - h. Governing Councils.
2. **Dedicated technical support:** Due to the magnitude of data acquisition and processing, the number of Nation Consultations that need to be undertaken across the country, and the need for consistent, accountable data collection, a consultation infrastructure must be put in place using a non-partizan, non-governmental organization (NGO) to facilitate Nation Consultations.
3. **Data handling system for:**
 - a. Acquisition;
 - b. Nation monitoring during acquisition;
 - c. Security and Transportation;
 - d. Processing; and,
 - e. Public Access.
4. **Public Education Institution:** to receive, house, provide access to, and maintain the hard and electronic copies of the database upon completion. Copies are also given to the Aboriginal Nation.
5. **Funding:** The *Report of the Royal Commission on Aboriginal Peoples* recommends the federal government fund the creation of consultation-based database⁴; common law identified the requirement of federal, provincial and territorial governments to provide technical assistance and funding during Aboriginal consultation⁶; and the United Nations called for ways to provide Indigenous Peoples with access to technical and financial resources to participate in consultation⁷. Costs will be incurred by the Aboriginal nation and the NGO. Funding is needed for:
 - a. Consultation;
 - b. Database Creation; and
 - c. Database Maintenance.

5. Transparency and Accountability

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Video and audio recorded during the Nation Consultations will be:

- Monitored live by the Nation;
- Unaltered data will be polished, translated and transcribed to text for use in the database; and,
- The database and summary reports of the database will be ratified by the Aboriginal Nation.

A dedicated non-partizan NGO will be used to provide technical expertise to create the cultural database. A non-partizan NGO is used since it:

- Will not be guided or limited in the quality of work it can do for Aboriginal Nations by a hidden policy;
- Can not profit from the results of its work;
- Is not controlled politically by Aboriginal leaders or the Canadian government;
- Will provide consistent professional facilitation and support to Aboriginal Nations;
- Will provide consistent data collection and processing for Aboriginal Nations;
- Can be transparent for both Aboriginal Nations and the Canadian government; and,
- Can be accountable to both Aboriginal Nations and the Canadian government.

The combination of live monitoring, polished but unaltered data, nation ratification and the use of a non-partizan NGO will keep the Nation Consultation transparent and accountable.

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 2. (2009) Herbert, R. G., Working Papers on Meaningful Aboriginal Consultation: Overview. <http://caid.ca/MeaConOve101609.pdf>
 3. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, **at para 60, 61, 62 and 63**. <http://caid.ca/HaidaDec010208.pdf>
 4. (1996) Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward Looking Back. Part Three: Building the Foundation of a Renewed Relationship. Appendix E Summary of Recommendation in Volume 1. **Recommendations 1.7.1 and 1.7.2** . Canada Communication Group — Publishing, Ottawa, Ontario K1A 0S9. <http://caid.ca/RRCAP1.E.pdf>
 5. (2008) Herbert, R. G., A Model to Establish a New Framework for Aboriginal Economic Development in Canada: A Proposal in Response to the Federal Government of Canada Objective to Establish a New Framework for Aboriginal Economic Development in Canada. <http://caid.ca/Model031108.pdf>.
 6. *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, **at para. 134**. <http://caid.ca/DeneThaDec2006.pdf>
 7. (2009) United Nations Human Rights Council. Promotion and Protection of all Human Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People James Anaya. A/HRC/12/34, **at para. 71**. <http://caid.ca/UNHRC2009.pdf>
 8. CAID is a not-for-profit, charitable non-governmental organization (NGO) whose overall objective is to develop a knowledge base on indigenous culture through Meaningful Consultation, share this knowledge to develop model frameworks for missing traditional Aboriginal infrastructure, work with Indigenous Peoples to harmonize missing traditional infrastructure with other outside jurisdictions, and to help develop the support necessary for harmonized traditional infrastructures to be realized. www.caid.ca