
**Working Papers on
Meaningful Aboriginal Consultation in Canada:
Overview**

October 16, 2009

CAID

Preface

Working Papers on Meaningful Aboriginal Consultation in Canada: Overview was written to provide functional overview for the process of Meaningful Consultation. KEEP IN MIND, this working paper is a fluid, adaptable guide to Meaningful Consultation. As such, it is assumed that this guide will constantly change to adapt to the specific Aboriginal right and nation under consultation. The background and general model for the Meaningful Consultation process can be found in *Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation* (2009)¹. 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,

Honourable Chuck Strahl, Minister of Indian Affairs and Federal Interlocutor for Métis and Non-Status Indians.

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Working Papers on Meaningful Aboriginal Consultation in Canada: Overview

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1. Introduction

Meaningful Consultation is an Aboriginal right in Canada guaranteed by Section 35 of the *Constitution Act* (1982)^{2 3 4 5 6}. The goal of Meaningful Consultation is the reconciliation of the pre-existence of Aboriginal societies, Aboriginal rights, with the sovereignty of the Crown^{7 8}.

The Crown is under a fiduciary obligation to reverse the colonial imbalance in its relationship with Aboriginal Peoples and restore its relationship to a true partnership⁹. The imbalance finds its root at the level of Aboriginal versus non-Aboriginal rights and its origin in Canada's policy of assimilation¹. The process of Meaningful Consultation is the protocol to resolve this imbalance of rights in Canada.

The process of Meaningful Consultation that fulfills requirements in Aboriginal law, non-Aboriginal common law, and recommendations made by the United Nations has four basic steps¹. These are:

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

2. Nation Consultation

The Nation Consultation step is a consultation within an Aboriginal Nation and is defined by Elders¹⁰. The need for a Nation Consultation step is a direct consequence of the destruction of culture-based Aboriginal infrastructures by the policy of forced assimilation. It has two functionally separate consultations:

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. The 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.
2. **National Consultation:** Consultation of the Aboriginal Nation or urban population on a specific right using the Elder-defined consultation procedure. The Nation Consultation will have several components at different levels of the Aboriginal Nation or urban population starting with Elders. The cultural database for the Aboriginal right under consultation and the definition for cultural laws, regulations and services will be obtained from this component. The final results of the national consultation will need to be ratified by the national governance.

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There are three basic goals to Nation Consultation.

1. To obtain a definition for the culturally-sensitive procedure for the national consultation component of the Nation Consultation;
2. To define the framework of infrastructure (law, regulation and services) for an Aboriginal right: This framework can then be used in the reconciliation of Aboriginal rights with non-Aboriginal rights; and,
3. To acquire a database on Aboriginal culture: This database can then be drawn on by non-Aboriginal institutions as a base to their understanding and respect of Aboriginal culture, law, regulations, and rights.

Aboriginal groups involved in the Nation Consultation:

1. Elders;
2. Communities; and,
3. Councils;.

Needs of the Nation Consultation:

1. Unconditional funding; and,
2. Unencumbered expert technical support.

Given the magnitude of data acquisition and processing, plus the number of Aboriginal Nation consultations that need to be undertaken across the country, a consultation infrastructure will be put in place using a non-governmental organization (NGO).

The Nation Consultation is a pre-requisite step to all aspects of the Meaningful Consultation process. However, it is simply a facilitated process to acquire a detailed database on Aboriginal culture. Because of this, it is the only part of the four-step process that can be separated and initiated on its own without triggering a full Meaningful Consultation process with an Aboriginal Nation.

3. Nation-to-Nation Consultation

The Nation-to-Nation Consultation step can only occur after the Nation Consultation has finished. As its name suggests, it is a dialogue between the Aboriginal Nation and the Crown. The Nation-to-Nation Consultation step produces defined parameters that need accommodation and has two distinct steps:

1. **Initiation:** The national governing council of the Aboriginal Nation is contacted by the Crown agency requesting consultation. The council in turn seeks guidance from Elders and the nation's infrastructure framework concerning the necessary procedure and depth for the consultation.

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2. **Consultation:** Political leaders of the Aboriginal Nation, with technical support from their infrastructure framework and the results of a Nation Consultation (see earlier), define what:
 - a. Aboriginal laws, regulations, services or roles must be respected in the right under consultation;
 - b. Roles and partnerships the Aboriginal Nation will have in the devolution of services for the right under consultation; and,
 - c. Aspect of the right under consultation the Aboriginal Nation will own, share or be compensated for.

The goal of Nation-to-Nation Consultation is to produce three lists that can be used to accommodate the Aboriginal Nation, and right, under consultation. These lists are the:

1. **Infrastructure List:** This list will contain the Aboriginal Nation's laws, regulations, services and roles that are affected by the issue under consultation. This list will be used in the accommodation component's Harmonization step;
2. **Roles list:** This list will contain the role(s) the Aboriginal Nation will have in services within the reconciled infrastructure for the issue under consultation. This list will be used to define respectful partnerships between the Aboriginal Nation and the consulting government in the accommodation component's Restoration step;
3. **Programs List:** This list will contain the part(s) of the reconciled infrastructure and its dividends the Aboriginal Nation will have built within their nation. This list defines the destroyed culture-based Aboriginal infrastructure that will be rebuilt in the accommodation component's Restoration step. It also provides the Aboriginal Nation's Impact and Benefit Assessment for issues requiring compensation to the nation.

The Nation-to-Nation Consultation will need:

1. A dedicated office within the consulting government;
2. A pre-requisite Nation Consultation to provide guidance and define missing parts for the culture-based Aboriginal infrastructure framework;
3. Unencumbered technical support since most Aboriginal Nations' current infrastructures do not have the level of technical expertise required to support the decision making process of the nation's political leaders; and,
4. Unconditional Funding.

Given the number of Nation-to-Nation Consultations that must occur and the overt lack of professional technical expertise currently available within Aboriginal Nations, a technical expertise infrastructure will be put in place using an NGO unfettered by conflict of interest to facilitate Aboriginal leaders.

Negotiations are not part of the Meaningful Consultation process since in truly meaningful consultation both Aboriginal and non-Aboriginal rights have equal weight. However, equal-weighted, bilateral compromise may be needed to reconcile some of the items on the three lists. If so, that discussion and agreement to compromise would occur at this level by adding a third

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“**Arbitration**” step to the Nation-to-Nation Consultation based on infrastructure, roles and programs lists.

4. Harmonization

The need for a Harmonization step arises from the 1867 exclusion of Aboriginal rights from the *Constitution Act*. The goal of Harmonization is the removal of embedded forced assimilation barriers (EFABs)¹¹ that prevent the expression of Aboriginal rights. The infrastructure list produced in the Nation-to-Nation Consultation is used in the Harmonization step. Any, and all, legislation, regulation, services or roles in non-Aboriginal infrastructure that prevent the expression of Aboriginal laws, regulations, services or roles found on the infrastructure list are identified and removed.

The Harmonization step needs unconditional government funding and is performed with two groups:

1. **The consulting federal, provincial or territorial government.** One dedicated government office should be responsible for screening legislation and regulation to identify EFABs. The same office should oversee EFAB removal but individual departments, ministries and agencies should be responsible for removing EFABs found in their respective jurisdictions. and,
2. **One or more national Aboriginal organizations (NAOs):** These groups will provide legal and technical support to ensure transparency and consistency. These groups include the Assembly of First Nations, Congress of Aboriginal Peoples, Inuit Tapiriit Kanatami and Métis National Council. Other national Aboriginal organizations (eg. Native Woman’s Association of Canada) have roles working in a special advisory capacity through these primary NAOs. All NAOs are subject to mandate from their Aboriginal Nation and urban population grass-roots.

5. Restoration

The goal of the Restoration step is the reconciliation of the Aboriginal right under consultation to the sovereignty of the Crown. Restoration has two steps:

1. **Legislative:** The roles list acquired in the Nation-to-Nation Consultation is realized through the introduction and enactment of legislation by the consulting government. Aboriginal roles are created within reconciled infrastructure services and function in partnership with non-Aboriginal roles.
2. **Operative:** The programs list formulated in the Nation-to-Nation Consultation is used to build the Aboriginal component of the reconciled infrastructure. Aboriginal roles are enabled by establishing the Aboriginal infrastructure service and its related programs. This step may include Impact and Benefit Assessment compensation.

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The Legislative step needs unconditional funding and is performed by the same two groups used in the Harmonization step.

1. A dedicated government office, and,
2. National Aboriginal Organizations.

The Operative step needs unconditional government funding and is a coordinated effort between the:

1. Dedicated government office; and,
2. The Aboriginal Nation under consultation.

Reconciliation will be achieved when the paper, legislative, step in Restoration becomes functional, operative¹¹.

6. Clear Measures of Success

The Meaningful Consultation process has distinct steps each with clear goals. Each goal's attainment is a clear measure of success. Goals are:

1. **Nation Consultation:**
 - a. To define the cultural process for Nation Consultation;
 - b. To define the framework of infrastructure for an Aboriginal right;
 - c. To acquire a database on Aboriginal culture..
2. **Nation-to-Nation Consultation:**
 - a. To define the depth of consultation required;
 - b. To identify Aboriginal rights, laws, regulations, services and roles that need to be harmonized with non-Aboriginal infrastructure;
 - c. To identify role(s) the Aboriginal Nation will have in services within reconciled infrastructure; and,
 - d. To identify services and their programs that will be built to provide Aboriginal components of reconciled infrastructure.
3. **Harmonization:**
 - a. To remove EFABs in non-Aboriginal legislation and regulation that prevent the expression of Aboriginal infrastructure.
4. **Restoration:**
 - a. To create legislation that facilitates partnered Aboriginal roles; and,

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- b. To create the Aboriginal service and programs components of reconciled infrastructure.

7.0 Transparency and Accountability

Meaningful Consultation needs six groups to move forward:

1. The consulting government;
2. The Aboriginal Nation;
3. An NGO to facilitate the Nation Consultation and generate the Aboriginal culture database in Meaningful Consultation step 1;
4. An NGO for Aboriginal Nation technical support in Meaningful Consultation step 2;
5. A dedicated government office for Meaningful Consultation steps 2, 3 and 4; and
6. National Aboriginal Organizations (NAOs) for Meaningful Consultation steps 3 and 4.

Each consulting government will need a dedicated department, ministry or agency for Meaningful Consultation. That office will need a mandate to:

1. Engage Aboriginal Nations in Nation-to-Nation Consultation of behalf of the government;
2. Screen existing and proposed legislation and regulation for EFABs;
3. Coordinate legislative and regulatory cleansing of EFABs;
4. Create new legislation for partnered Aboriginal roles; and,
5. Create reconciled services and programs for Aboriginal Nations.

Common Law in Canada has identified the requirement of federal, provincial and territorial governments to provide technical assistance and funding to Aboriginal Peoples during consultation¹². The United Nations has also called for ways to provide Indigenous Peoples with access to technical and financial resources¹³ to effectively participate in consultation, including through NGOs¹⁴. In the Meaningful Consultation process presented here, NGOs are used to facilitate Aboriginal Nations both to create a culture database, and, to provide professional technical support for Aboriginal leaders and nations. NGOs are used since they:

- Are not guided or limited by EFABs in the quality of work they can do for Aboriginal Nations;
- Can not profit from the results of their work;
- Are not controlled politically by Aboriginal leaders or the consulting government;

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- 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 consulting governments; and,
- Can be accountable to both Aboriginal Nations and consulting governments.

NAOs are involved separately from non-partizan NGOs that facilitate the Nation and Nation-to-Nation consultation. These NAOs have the expertise, grass-root support and existing infrastructure to protect Aboriginal interests during the accommodation steps of Harmonization and Restoration.

With a dedicated government office, unconditional government funding and the combination of non-partizan NGOs and NAOs, the Meaningful Consultation process will remain transparent and accountable.

A follow-up to this work, entitled *Working Papers on Meaningful Aboriginal Consultation in Canada: Step 1 - Nation Consultation*, is available¹⁵.

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16. 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