



Ontario Power Authority

**Consulting with First Nation and Métis
Communities: Best Practices, Good Business**

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INTRODUCTION

The Crown has a legal duty to consult with First Nation and Métis communities when it has knowledge, real or constructive, of established or asserted Aboriginal or treaty rights and contemplates conduct that might adversely affect these rights. The duty is grounded in the principle of the honour of the Crown, thus requiring the Crown's honourable dealings with Aboriginal people. In addition, the Crown and industry have statutory and policy-based obligations to consult Aboriginal people.

With the objective of ensuring that the duty to consult is fulfilled, on August 27th, 2007, the Minister of Energy directed the Ontario Power Authority ("OPA") to "develop guidelines and processes to ensure that appropriate consultation with First Nation and Métis people takes place." In this directive, the Minister stated his view that First Nation and Métis people should be consulted "early in the planning and development stages for the new renewable energy projects" procured under the directive.

This document has been developed in a collaborative effort with the Ministry of Energy and Infrastructure and with the advice of the Métis Nation of Ontario and the First Nations Energy Alliance. It is meant to provide guidance and clarity on the Crown's consultation expectations as set out in the OPA's recent Draft Request for Proposals ("RFP") for Renewable Energy Supply III ("RES III").

The OPA prepared this document to assist proponents of projects when consulting with Aboriginal communities during the planning and development stages of an energy project. It provides an overview of the potential nature and scope of consultation and the jurisprudence that informs the Crown's duty to consult Aboriginal communities. This document outlines and clarifies the respective roles of the OPA, the Crown, prospective energy proponents, and Aboriginal communities and provides practical advice for building good consultation practices.

Consulting First Nation and Métis communities at the project planning and development stage enables energy proponents to identify any concerns and issues and offers an opportunity to address them in a meaningful way. Such consultation can assist in addressing situations where the Crown may have a duty to consult with First Nation and Métis people because of a potential adverse impact of the project on Aboriginal or treaty rights. It can also fulfill requirements of the Environmental Screening Process in O. Reg. 116/01 of the *Environmental Assessment Act* and other provincial regulatory approvals.

This document is for general guidance purposes only. It is not intended to be a comprehensive or detailed statement concerning the matters addressed, or to provide legal advice. This is an evolving area of law, and readers should seek

appropriate, qualified legal or other professional advice before acting or omitting to act, based on any information provided here.

JURISPRUDENCE

Section 35 of the Canadian constitution recognizes, affirms and protects existing Aboriginal and treaty rights (“section 35 rights”). Aboriginal and treaty rights have primarily focused on traditional uses of the land such as hunting, fishing, trapping, and the harvesting and gathering of plants. Aboriginal communities also have interests in their ancestors’ burial grounds and other culturally relevant archaeological sites.

Recent case law has provided direction to the Crown and other parties in fulfilling the constitutional duty to consult Aboriginal communities. In *Haida* (2004) and *Taku River* (2004), the Supreme Court of Canada ruled that the Crown has a legal duty to consult as well as duty to accommodate, where appropriate, First Nation, Métis or Inuit communities when the Crown has knowledge, real or constructive, of an established or asserted Aboriginal right and contemplates conduct that might adversely affect it. In *Mikisew Cree* (2005), the Court recognized a similar obligation to consult when the Crown proposes to “take up” treaty lands for specific purposes. In *R. v. Powley* (2003), the Supreme Court of Canada confirmed the constitutional protection for the Aboriginal food harvesting rights of the Métis. These cases provide the legal basis and guidance for undertaking consultation with Aboriginal communities.

While the legal duty to consult rests with the Crown, energy proponents play an important role in the consultation process. The Crown may delegate the procedural aspects of consultation to proponents, including day-to-day consultation activities. The Crown will carefully scrutinize these activities and their outcomes to ensure that any impacts of the project on established or asserted Aboriginal or treaty rights are appropriately addressed, mitigated and/or accommodated. The honour of the Crown is always at stake, and proponents are expected to undertake their consultation activities with the intent of addressing the impacts on rights.

Some provincial regulatory approvals require a proponent to address the concerns of interested parties. Aboriginal communities may fit into the category of an interested party even when an Aboriginal or treaty right is not affected by the project. It is important for proponents to recognize this distinction.

Properly consulting with Aboriginal communities can decrease the risk of legal and regulatory obstacles to an energy project. A failure to fulfill consultation obligations can cause project delays and increase costs. Consultation with Aboriginal communities simply makes good business sense. The potential benefits of consultation can include community support for the proposed project,

access to a growing First Nation and Métis labour force, partnerships on future projects, and an ongoing relationship with local communities.

THE CONSULTATION PROCESS

Aboriginal communities whose existing or asserted Aboriginal or treaty rights may be adversely affected by a potential project have different rights from stakeholders or interested parties. The consultation process that is undertaken should reflect the unique constitutionally protected rights and interests of the First Nation or Métis community.

The Crown's duty to consult can be triggered by a federal or provincial approval, license, permit or any other activity that could potentially adversely affect Aboriginal and treaty rights, regardless of the size of the project. Each project may have more than one Crown approval or decision, thus it is preferable to coordinate consultation efforts to create an effective and efficient process and avoid duplication of effort.

The scope of the Crown's duty to consult is proportionate to a preliminary assessment of the legal strength of the Aboriginal or treaty rights asserted, and the potential for adverse impact of the project on these rights. For example, if there is little impact on an asserted or established Aboriginal or treaty right, the level of consultation required may be a duty to give notice, disclose and share information and discuss important decisions to be taken in relation to the project. Where the adverse impact on rights is potentially greater, the consultation requirements would be more substantial. In this case, the duty may require a more extensive consultation effort, mitigation and accommodation. It is recommended that project proponents work closely with the affected Aboriginal communities to share information, to address concerns and to mitigate and/or accommodate any impacts of the project.

The OPA recognizes the important role that procurement processes will have on determining feasible projects for future development. There is the potential that these projects may adversely affect Aboriginal or treaty rights and as such, the OPA has included the following Aboriginal consultation process in section 4.11 of the draft RES III RFP:

- the proponent will contact the Ministry of Energy and Infrastructure by letter ("Consultation Information Request") after the award, but before the signing of the RES III contract, to request that the Crown determine whether the proponent will be required to enter into an agreement with the Crown in relation to consultation on the project; and to request the Crown's identification of Aboriginal communities to consult in respect of the project;
- within 45 days of entering into the RES III contract, the Proponent must provide the OPA with the Crown letter responding to the Consultation

Information Request. The Crown letter will be in the form of either Form A or B; and,

- if the proponent receives Crown Letter B, indicating a need to enter into an Aboriginal consultation agreement with the Crown, the proponent must enter into the agreement and provide a copy of the agreement to the OPA within 90 days of entering into the RES III contract.

Although the proponent is required to provide the Crown with a Consultation Information Request on or before the date of signing the RES III contract, the OPA expects that proponents will engage with Aboriginal people during the preparation and planning of their proposal.

Some of the activities that proponents should consider are:

- providing information to the Aboriginal community on the proposed project;
- obtaining information on potentially affected interests or rights;
- listening to any concerns raised by the Aboriginal community; and,
- identifying ways to minimize adverse effects on Aboriginal and treaty rights.

Roles and Responsibilities

A. The Role of the Proponents of Energy Projects

Proponents of energy projects are responsible for consulting potentially interested Aboriginal communities as required by the Environmental Screening Process in O. Reg. 116/01 under the *Environmental Assessment Act*, among other regulatory approvals. The proponent will also be responsible for procedural aspects of consultation that have been delegated to it by the Crown.

If a successful bidder is advised by the Ministry of Energy and Infrastructure that it is necessary to enter into a consultation agreement with the Crown, the proponent will also prepare a plan for consultation with Aboriginal communities. The plan will be included as a schedule to the Agreement after review by the Ministry of Energy and Infrastructure. The plan will describe the manner in which the proponent will carry out its procedural consultation responsibilities and will include the identification of all significant steps, including a timetable for their completion. Proponents are encouraged to develop the consultation plan in conjunction with the relevant Aboriginal communities. As the consultation process continues and new information comes to light, it may be necessary to make adjustments to the plan and its timelines. Consultation plans should be flexible to adapt to unforeseen situations.

Proponents' obligations in fulfilling the Crown's duty to consult may include:

- giving notice to Aboriginal communities of the project;
- informing Aboriginal communities about the project;

- informing Aboriginal communities of the regulatory and approval processes that apply to the project;
- providing appropriate financial assistance to Aboriginal communities to participate in the consultation process and to assess various studies and reports in respect of the project;
- meeting with Aboriginal communities to discuss the project;
- considering comments regarding the potential adverse impacts of the project on a community's Aboriginal or treaty rights, other asserted rights or general concerns regarding the project;
- where appropriate, discussing with Aboriginal communities potential accommodation, including mitigation of potential adverse effects on their Aboriginal or treaty rights or asserted rights, and presenting the results to the Ministry of Energy and Infrastructure prior to implementing such measures; and,
- reporting to the Ministry of Energy and Infrastructure on these aspects of consultation.

B. The Role of the Crown

The Crown's responsibilities will include:

- determining the Aboriginal communities to be consulted;
- the preliminary and ongoing assessment of the depth of consultation required with the Aboriginal communities identified;
- delegating procedural aspects of consultation to project proponents;
- oversight of the proponent's consultation with Aboriginal communities; and,
- deciding what, if any, appropriate accommodation is necessary to mitigate adverse impacts on Aboriginal and treaty rights.

Various Crown ministries and agencies have regulatory roles relating to energy projects. These respective roles may trigger their own consultation obligations and they will take appropriate steps to coordinate with the Ministry of Energy and Infrastructure to satisfy themselves of the fulfillment of those obligations before granting any approvals, permits or authorizations. Although not a decision-making body, the Ministry of Energy and Infrastructure will act on behalf of the Crown in most interactions with the proponent regarding consultation with Aboriginal communities. This relationship is outlined in the agreement between the proponent and the Crown, as represented by the Minister of Energy and Infrastructure. This relationship does not preclude the involvement or interaction of other Crown ministries or decision-makers in ensuring that the obligation is fulfilled.

Prior to bids being submitted to the OPA, the Ministry of Energy and Infrastructure will not interact formally with the bidders.

Upon request by the proponent and/or Aboriginal community, representatives of the Ministry of Energy and Infrastructure may attend consultation meetings between the parties and include other provincial ministries and agencies as appropriate.

C. The Role of Aboriginal Communities

Depending on the project and its potential to adversely impact their Aboriginal and treaty rights, the involvement of Aboriginal communities in consultation on the project will vary. Aboriginal communities have different histories, cultures, demographics, interests and leadership that can influence their role in consultation.

Like proponents and the Crown, Aboriginal communities are expected to engage in section 35 consultation in good faith and should not frustrate the consultation process. Aboriginal communities are required to inform proponents about their rights, possible impacts on these rights by the projects, and potential mitigation.

D. The Role of the Ontario Power Authority

The Ontario Power Authority will be the counter-party to any contract for electricity generation. As such, the OPA will require regular progress reports from the proponent during the design and construction phase of the project in accordance with the OPA's contract with the proponent.

As the counter-party to the contract for electricity generation, the OPA requires that the proponent perform the duties set out in the contract with regard to Aboriginal consultation, including, where applicable, the signing of an agreement between the proponent and the Crown delegating aspects of consultation with Aboriginal communities.

OPPORTUNITIES FOR SUCCESSFUL CONSULTATION

There are many resources available to proponents beginning a consultation process with an Aboriginal community on an energy project. A proponent may wish to utilize the expertise of other proponents that have had positive experiences working with Aboriginal communities.

As well, the Ontario Government has produced draft guidelines on the Crown's legal duty to consult with Aboriginal people: *The Draft Guidelines for Ministries on Consultation with Aboriginal Peoples related to Aboriginal and Treaty Rights* <http://www.aboriginalaffairs.gov.on.ca/english/news/DraftConsultJune2006.pdf>.

Canada and other provinces have worked to clarify roles and ensure that their consultation obligations are met. Proponents may wish to refer to some of the draft or interim consultation guidelines available, for example:

- Indian and Northern Affairs Canada:
<http://www.ainc-inac.gc.ca/nr/iss/acp/intgui-eng.pdf>;
- Government of Alberta: <http://www.international.gov.ab.ca/571.cfm>; and,
- Government of Saskatchewan:
<http://www.fnmr.gov.sk.ca/adx/asp/adxGetMedia.aspx?DocID=1620,1486,94,88,Documents&MediaID=550&Filename=InterimGuide%2cJan2008.pdf>.

Many First Nation and Métis groups and communities have produced their own consultation protocols or resources. While the Crown does not necessarily endorse all interpretations or assertions of rights made by Aboriginal communities, it is good practice to begin consultation aware of the community's expectations with regard to consultation. Often these protocols can be found on community websites.

Establishing an effective consultation process with Aboriginal communities can assist proponents in their project and help proponents to establish support from Aboriginal communities. The following is a list of suggestions to guide proponents in better consultation practices:

1. Establishing an Effective and Efficient Consultation Process

Successful Aboriginal consultation is of benefit to proponents, Aboriginal communities and ultimately the Ontario electricity consumer. A number of major developers have established dedicated units responsible for interacting with Aboriginal communities.

Establishing the consultation process:

- ask Aboriginal communities what they would like to know;
- be open-minded, flexible, and expect many rounds of discussion;
- principles and messaging should remain consistent;
- be aware that translation services may be necessary; and,
- identify and address the proponent's and Aboriginal community's gaps in capacity or knowledge.

2. Begin the Process Early

Before beginning any project, whether it is large or small, speak directly with the potentially affected Aboriginal community. Consulting early in the process provides Aboriginal communities the opportunity to have their concerns identified up front and can inform the direction that subsequent consultation will take. This can include input by Aboriginal communities into the consultation plan. Any disputes should be addressed as early as possible to avoid lasting conflict. Adequate lead time will build trust and allow time for a relationship to develop. Discussions with affected Aboriginal communities do not have to await the

awarding of an OPA contract or the signing of an agreement with the Ministry of Energy and Infrastructure.

3. Understand the Community

It is important for a proponent to learn as much as it can about the community being consulted, as there is a wide diversity of culture and history among Aboriginal communities in Ontario. For some community members, English or French may not be their first language, or may not be spoken at all. Many Aboriginal communities and provincial territorial organizations have their own websites where information on their communities can be found. Information on First Nation and Métis communities and Ontario's Aboriginal policy can be found on the Ministry of Aboriginal Affairs website:

<http://www.aboriginalaffairs.gov.on.ca/english/onas.htm>. As well, Indian and Northern Affairs Canada operates an Aboriginal Canada Portal that provides basic information on Aboriginal communities and other resources: <http://www.aboriginalcanada.gc.ca/>. Additionally, a proponent would be well advised to learn about the community's past and current experiences with natural resource or other project developers.

Understanding the governance structures, approaches and aspirations of individual Aboriginal communities will be helpful for proponents in seeking a successful relationship.

As well, the correct use of vocabulary is important to demonstrate the proponent's respect and understanding of the community. For example, section 35 of the *Constitution Act, 1982* recognizes three distinct Aboriginal people of Canada: Indians, Inuit and Métis. The term "Aboriginal" refers to all three distinct groups. The term "First Nation" is commonly used, rather than "Indian". Note that in Ontario there are recognized First Nation and Métis communities.

4. Talk to All the Right People

Whether it is a First Nation or Métis community, communicate with both the formal leadership as well as others who broadly represent the interests of that community. For example, within a First Nation community, the Band Council is the elected governing body that acts on behalf of its membership. Elders play a key role as well. In some communities, clan mothers may have a more prominent role and there are often traditional chiefs based on heritage rather than election. Lastly, as most Band Councils are elected every two years, it is reasonable to gain an understanding of when the next election is scheduled and who may be contesting it. Sometimes it may be appropriate or necessary discuss the project with the whole community.

For Métis communities, the Métis Nation of Ontario (“MNO”) can play an effective role in putting industry in touch with Métis leadership at the regional and local levels.

5. Collaborate with Aboriginal Communities

It is important to keep in mind that consultation is a two-way street. Governments and project proponents need to be willing to address concerns and proposals from Aboriginal communities that may be affected by a project. Aboriginal communities need to express to proponents any concerns regarding the potential impact of the project. Together, the parties can attempt to come to a mutually beneficial solution. A collaborative approach can assist in saving time, resources and money.

6. Use Aboriginal Communication Tools

Communicate directly with community members through Aboriginal-run newspapers, radio, websites or other communications tools. National and provincial Aboriginal organizations such as the Assembly of First Nations, Chiefs of Ontario, Métis National Council and the Métis Nation of Ontario maintain websites for access by their membership and the general public. As well, many First Nation communities, regional and issue-specific organizations have their own individual websites. Newspapers are also a potential method for reaching the community; for example, The Anishinabek Nation has a community newspaper called *The Anishinabek News* that reaches 42 communities, and the Métis Nation of Ontario publishes the *Métis Voyageur*.

7. View Engagement and Consultation as an Ongoing and Long-Term Relationship

Experience has shown that proponents who view consultation as part of a long-term relationship-building exercise have had the most success. Long term, multi-year capacity agreements help to build partnerships and ensure the continued success of the project. As well, effective consultation builds the foundation for future partnerships. The benefits of successful consultation extend beyond the project itself.

CONCLUSION

Good business is about building and maintaining relationships. Consultation can be the key to a more practical and productive relationship with Aboriginal communities.

The Crown has a legal duty to consult First Nation and Métis communities, based on judicial interpretation of its obligations relating to asserted and established Aboriginal and treaty rights. An energy project can face delays if the Crown’s

legal duty has not been fulfilled. While the legal duty of the Crown does not fall on proponents, it is expected by the Crown that proponents of energy projects will carry out the procedural aspects of the section 35 duty that have been delegated by the Crown. Consultation is also required by some provincial approvals such as those in the Environmental Screening Process. In addition, Aboriginal people have identified, as a priority, the need for consultation processes that respect Aboriginal rights and treaty rights. Regardless of legal drivers, it is simply good business to involve Aboriginal communities which may be affected by a proposed project.

All parties are expected to participate in the consultation process in good faith. Proponents should know when the requirement for consultation will arise, what is required of them, and how to address the various outcomes. Aboriginal communities must make their concerns known, respond to attempts to meet their concerns and suggestions, and attempt to reach a mutually satisfactory solution.