

For Discussion Purposes Only

**DRAFT GUIDELINES FOR MINISTRIES ON
CONSULTATION WITH ABORIGINAL PEOPLES
RELATED TO
ABORIGINAL RIGHTS AND TREATY RIGHTS**

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This information is for general guidance only and is not a substitute for seeking legal advice. Ministry staff should always consult their Legal Services Branch to obtain advice on how the Crown's obligations to consult Aboriginal peoples may apply in particular circumstances.

ONTARIO'S VISION

A New Relationship with Aboriginal Peoples

Ontario is charting a new course in its relationship with Aboriginal peoples. We are committed to establishing constructive, co-operative relationships that are based on mutual respect and which lead to improved opportunities for all Aboriginal peoples.

We are working with Aboriginal peoples on shared priorities in a number of areas, including education, health and youth, among others. Initiatives are being undertaken with a goal of closing the socio-economic gap between Aboriginal peoples and other residents of Ontario.

Aboriginal rights stem from practices, customs or traditions which are integral to the distinctive culture of the Aboriginal community claiming the right. Treaty rights stem from the signing of treaties by Aboriginal peoples with the Crown. Aboriginal rights and treaty rights are protected by section 35 of the *Constitution Act, 1982*.

Consistent with its respect for Aboriginal rights and treaty rights, and its commitment to meeting the province's constitutional obligations to consult Aboriginal peoples, Ontario is working to develop effective consultation processes. Ontario believes that better processes will mean clearer communication, better decisions and lasting outcomes that benefit both Ontario and Aboriginal peoples.

Our priorities include developing more effective consultation processes. One way to advance this goal is to provide better guidance to Ontario ministries on how to fulfill their consultation obligations.

The principles that will influence the development of our final consultation guidelines are:

- Respect for all Aboriginal peoples living in Ontario
- A commitment to meeting Ontario's constitutional obligations to consult Aboriginal peoples.
- The development of effective and efficient consultation processes
- Aboriginal participation in the process of developing the final consultation guidelines

"In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)."

Chief Justice
McLachlin, *Taku River*
decision (2004,
Supreme Court of
Canada), para. 24

Ontario has heard and is listening to Aboriginal leaders and recognizes that their communities face many challenges. Appropriate and meaningful consultations with Aboriginal peoples are key to promoting strong partnerships, enabling the development of Ontario's rich natural resources, protecting the environment, and enhancing Aboriginal participation in the benefits of natural resources development. We will seek the input of our Aboriginal partners on the draft guidelines to ensure the guidelines provide effective guidance on fulfilment of the Crown's obligations.

Ontario recognizes that achieving effective guidelines will take cooperation, determination, understanding and commitment by all parties. We are committed to acting in a spirit of mutual respect and fairness, and to achieving an effective approach to consultation that will move Ontario and Aboriginal peoples toward a new era of cooperation and partnership.

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INTRODUCTION

Aboriginal peoples in Ontario have identified, as a priority, the need for consultation processes that meet the Crown's obligations to consult with Aboriginal peoples and which respect Aboriginal rights and treaty rights. Aboriginal rights and treaty rights are protected under section 35 of the *Constitution Act, 1982*.

In recent years, the Courts have addressed the nature and scope of the Crown's duty to consult Aboriginal peoples on matters affecting Aboriginal rights and treaty rights.

Consistent with its respect for Aboriginal rights and treaty rights, and its commitment to meeting the province's constitutional obligations to consult Aboriginal peoples, Ontario is working to develop effective consultation processes. Ontario believes that better processes will mean clearer communication, better decisions and lasting outcomes that benefit both Ontario and Aboriginal peoples.

We also recognize that industry is looking for clarity on the consultation process and wants to ensure it can move ahead with its initiatives in a timely way.

In developing more effective consultation processes, Ontario has prepared draft consultation guidelines to assist ministries in fulfilling consultation obligations related to Aboriginal rights and treaty rights. The draft guidelines contain an overview of the nature and scope of the Crown's duty to consult Aboriginal peoples, as well as practical advice on fulfilling the duty.

Ministries should use the guidelines when developing specific consultation processes within their mandates. The guidelines are to be used in conjunction with ministries' statutory or regulatory requirements and any processes agreed upon between an Aboriginal community and a ministry.

In addition to developing consultation guidelines, which deal with consultation related to Aboriginal rights and treaty rights, the government is also working to develop effective engagement practices for involving Aboriginal peoples in other initiatives that directly affect Aboriginal communities.

THE CROWN'S DUTY TO CONSULT AND ACCOMMODATE

The following section provides an overview of the nature and scope of the Crown's duty to consult Aboriginal peoples. It also explains the concept of accommodation of Aboriginal or treaty rights, which may be required in some instances.

Why does the Crown have a duty to consult Aboriginal peoples?

The Crown's duty to consult has its source in the honour of the Crown and the constitutional protection accorded Aboriginal rights and treaty rights under section 35 of the *Constitution Act, 1982*.

When does the Crown have a duty to consult Aboriginal peoples?

The Crown has a duty to consult with Aboriginal peoples when the following conditions occur:

- The Crown has knowledge, real or constructive, of the existence, or potential existence, of an Aboriginal right or treaty right
- and***
- The Crown contemplates conduct that might adversely affect the right in question.

"...the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between Aboriginal and non-Aboriginal peoples."

Justice Binnie, Mikisew Cree decision (2005, Supreme Court of Canada), para. 3

What is an Aboriginal right?

Aboriginal rights are collective rights. For an activity to be an Aboriginal right, it must be an element of a practice, custom or tradition which is integral to the distinctive culture of the Aboriginal community claiming the right.

- For First Nations and Inuit communities, the activity must have existed at the time of first contact with Europeans.
- For Métis communities, the activity must have existed prior to the time of effective European control.

In both instances, the current practice, custom or tradition must have continuity with the historic practice, custom or tradition, and it must remain integral to the community's culture. Present-day activities may be the modern form of a historical practice, custom or tradition.

Aboriginal title is a particular type of Aboriginal right. For Aboriginal title to be established, an Aboriginal community must have occupied the lands prior to the Crown asserting sovereignty over the lands, there must be continuity between present and pre-sovereignty occupation, and the occupation must have been exclusive at the time the Crown asserted sovereignty over those lands.

Aboriginal rights or title may be modified or surrendered through treaties. The impact of a treaty on Aboriginal rights or title will depend on the interpretation of the particular treaty.

Existing Aboriginal rights are protected under section 35 of the *Constitution Act, 1982*.

What is a treaty right?

Treaty rights are the specific rights of Aboriginal peoples embodied in the treaties they entered into with Crown governments. Crown governments were initially France or Britain, and, after Confederation, Canada.

Historic treaties were often set out in writing. However, the courts have found that oral promises can also form part of a treaty and give rise to treaty rights.

Matters that treaty rights often relate to include but are not limited to:

- The creation of reserves
- The payment of money
- The right of Aboriginal communities to hunt, fish and trap subject to the terms of the treaty.

Provincial laws or activities can affect treaty rights, such as treaty rights to hunt, fish and trap.

Existing treaty rights are protected under section 35 of the *Constitution Act, 1982*.

What is an established Aboriginal or treaty right?

An established Aboriginal or treaty right is an Aboriginal right or treaty right that has been recognized expressly through treaties or the courts.

What is an asserted Aboriginal or treaty right?

An asserted Aboriginal or treaty right is an Aboriginal right or treaty right that has been asserted by an Aboriginal community, but has not been proven in court or included expressly in a treaty.

What determines the extent of consultation required?

The nature, scope and content of the Crown's duty to consult can vary widely, depending on the particular circumstances.

Factors that can influence the extent of the Crown's consultation obligations include:

- The nature and scope of the established or asserted Aboriginal or treaty right
- The strength of the claim to an asserted Aboriginal or treaty right
- The seriousness of the potential impacts of a government proposed action or decision on the right
- The need to respond to unforeseen or urgent circumstances.

"Consultation must be meaningful."

Chief Justice McLachlin, *Haida* decision (2004, Supreme Court of Canada), para. 10

What must the Crown do to fulfill the duty to consult?

The duty to consult generally has both information and response components.

The level and extent of a ministry's consultation with an Aboriginal community will depend on the particular circumstances; the consultation activities to be undertaken and how they are approached will vary.

Some of the activities the consultation process may include are:

- Providing information on the proposed project or government decision to the Aboriginal community
- Obtaining information on potentially affected rights
- Listening to any concerns raised by the Aboriginal community
- Attempting to minimize adverse impacts on Aboriginal and treaty rights.

The level and extent of the consultation may change as the process unfolds and new information comes to light.

In all cases requiring consultation, the Crown must act in good faith to provide meaningful consultation appropriate to the circumstances.

When does the Ontario government need to take steps to accommodate an Aboriginal right or treaty right?

The Crown may be required to take steps to accommodate an established or asserted Aboriginal or treaty right in cases where the following conditions occur:

- A proposed government action or decision will adversely impact an established Aboriginal or treaty right;
- or**
- A strong case exists for an asserted Aboriginal or treaty right, and a proposed government action or decision may adversely affect this right in a significant way.

What is meant by accommodation?

Accommodation involves a process of balancing of interests. Responsiveness is a key requirement. Accommodation, where required, may involve a ministry taking steps to avoid irreparable harm or to minimize the adverse effects of a proposed government action or decision on Aboriginal or treaty rights.

The process does not generally provide the affected Aboriginal community with a veto over a proposed decision or action. But in some limited circumstances — for example, involving serious infringements of Aboriginal title — an Aboriginal community’s consent may be required.

Does the duty to consult and accommodate apply when the Crown has a right to take up lands under a treaty?

Under some Ontario treaties, the treaty rights of Aboriginal communities to hunt, fish or trap are subject to the Crown’s right to take up lands for various purposes. The courts have interpreted similar provisions in treaties in other provinces as giving rise to a duty to consult and, if appropriate, accommodate when taking up lands in some circumstances.

“A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.”

Chief Justice McLachlin, *Haida* decision (2004, Supreme Court of Canada), para. 49

What is the role of Aboriginal communities in the consultation process?

As Aboriginal rights and treaty rights are collective rights, ministries must undertake consultations with Aboriginal communities. The communities in question must possess or assert constitutionally protected Aboriginal rights or treaty rights which may be adversely affected by the government's proposed actions or decisions.

All parties are expected to participate in the consultation process in good faith. The Courts have stated that there is an onus on Aboriginal communities to:

- Make their concerns known to ministries
- Respond to ministries' attempts to meet their concerns and suggestions; and
- Attempt to reach some mutually satisfactory solution.

Where an Aboriginal community has asserted an Aboriginal or treaty right, Aboriginal communities are expected to outline their claims with clarity, focusing on the scope and nature of the rights they assert and on the nature of the alleged infringements.

What is the role of third parties in the consultation process?

The Crown may delegate procedural aspects of consultation to a third party — for example, industry proponents seeking approval of a development proposal. But the ultimate legal responsibility for fulfilling the Crown's duty to consult Aboriginal peoples rests with the Crown.

DETERMINING WHETHER CONSULTATION IS REQUIRED

Guided by the obligations and principles described above, government decision-makers must always assess particular circumstances to determine whether their ministry has an obligation to consult Aboriginal peoples.

If the ministry does have a duty to consult, then it must determine the level and extent of consultation required, and how the consultation should be undertaken. This involves assessing how the government's proposed decisions and actions may affect Aboriginal peoples, as well as the nature and strength of any rights that Aboriginal communities have claimed or asserted.

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Identifying the Potential Impacts on Aboriginal Communities

The following questions will help ministries to identify the impacts of a proposed government decision or action on Aboriginal peoples and determine whether these impacts relate to Aboriginal and treaty rights. They will also help ministries to identify the nature and extent of the rights in question, including any limits that are placed on treaty rights.

- Will the government's proposed action or decision affect the interests of Aboriginal peoples?
→ If yes, how?
- If the government's proposed action or decision affects an Aboriginal interest, is the interest in question the subject of an established or asserted Aboriginal or treaty right?
- What are the terms of any relevant treaties? Are there any internal limits on the rights set out in the treaty?
- If an Aboriginal interest relates to an asserted Aboriginal or treaty right, what is the basis of the assertion? What information has been provided to support the existence of the asserted right?
- Have Aboriginal communities or organizations been consulted on similar matters in the past, or expressed a desire to be consulted?
- Are any agreements or protocols in place with Aboriginal communities that require the provincial government to consult with the communities or provide them with notice?

Where the issues relate to the use of lands and resources, other questions to consider include:

- Will the government's proposed action or decision affect lands or resources?
 - If yes, how?
- Where are the lands located in relation to established Aboriginal communities that possess or assert Aboriginal rights or treaty rights?
- Are the lands Crown lands or private lands?
- How are the lands currently being used?
- Are the lands in an area subject to a land claim or litigation brought by Aboriginal peoples?
- Has an Aboriginal community previously expressed an interest in relation to the lands, or uses of the lands?
- Will the government's proposed action or decision affect lands or resources that Aboriginal peoples have traditionally relied on for hunting, fishing or trapping?
 - If yes:
 - How significant will the impacts be?
 - Will the impacts be permanent or temporary?
- What treaty area do the lands and resources fall within?
- Does the treaty provide for the modification or surrender of Aboriginal rights or title?
- If the treaty preserves the right to hunt, fish or trap, does the treaty place any limits on the scope of such rights? For example:
 - Geographic limits?
 - Specific form of government regulation?
 - A Crown right to take up lands under the treaty?

Gathering Relevant Information

In determining whether the Crown has a duty to consult, ministries should consider potentially relevant sources of information at their disposal.

Potentially relevant sources of information can include:

- Maps showing Aboriginal community locations
- Relevant treaties and other agreements
- Land claims
- Ongoing litigation
- Crown resource allocation maps.

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DEVELOPING A CONSULTATION APPROACH

Assessing the Level of Consultation Required

If a ministry has determined that it has an obligation to consult, then the next step is to determine the extent of this obligation.

In making its determination ministries must consider:

- The nature and scope of the established or asserted Aboriginal or treaty right
- The strength of the claim to an asserted Aboriginal or treaty right
- The seriousness of the potential impacts of a government proposed action or decision on the right
- The need to respond to unforeseen or urgent circumstances.

The law requires the ministry to undertake a process of meaningful consultation which should occur in a timely manner and at a point in the government's process where the information provided and obtained can be meaningfully considered.

Ministries need to approach the consultation process flexibly. The level or extent of consultation may change as the process unfolds and new information comes to light.

Developing a Consultation Approach

There is no single template for how ministries should conduct consultations with Aboriginal communities. Ministries must assess each situation on its particular circumstances.

Approaches should be flexible and adaptable, taking into account that information obtained during consultations may alter the Crown's assessment of the extent of its consultation obligations.

There are a number of questions that ministries should consider when developing their consultation approaches. These questions include:

- Which Aboriginal communities should be consulted?
- Where are these Aboriginal communities located?
- Who are the appropriate representatives of the Aboriginal communities for the purposes of the consultation?
- What information does the ministry need to obtain through the consultation?
- What information does the ministry need to provide affected Aboriginal communities?
- How will this information be shared with affected Aboriginal communities?
- How will concerns raised in the consultation process be addressed?
- What are the timeframes for the consultation? Are they adequate to provide meaningful opportunities to respond and provide input?
- Will additional resources be needed to facilitate the consultation?
- Have any consultations with affected Aboriginal communities already been undertaken or attempted, by a project proponent or other third party?
- What role will proponents or third parties have with respect to the ministry's consultation process with affected Aboriginal communities?
- What role will other ministries and agencies have in the consultation process?
- Are other government processes under way or planned related to the proposed decision, action or project in question?

In some instances, other governments (e.g., Canada) may also have legal obligations to consult Aboriginal peoples. In such circumstances, ministries should consider the relationship of those obligations to the fulfillment of the province's obligations.

Involving Aboriginal Communities

In developing its consultation approach, a ministry should carefully consider the perspectives of the Aboriginal community or communities to be consulted.

In some instances, ministries may need to have discussions with the affected Aboriginal community or communities, to determine what processes or approaches should be used to consult with the communities. This will frequently be the case with larger projects that have the potential for broader impacts on Aboriginal rights or treaty rights.

Involving Proponents or Licensees

Ministries will also need to consider whether or how third parties, such as proponents or licensees, should be involved in the consultation process. In many circumstances, involving third parties in the consultation will benefit both the ministry and the Aboriginal communities.

Requests for Resources

In some instances, particularly with larger projects, Aboriginal communities may request resources to facilitate their involvement in the consultation process. Such requests would need to be considered on a case-by-case basis.

Government Co-ordination

If multiple government approvals are required, there should be a coordinated approach to the government's consultation with Aboriginal communities. Often, such coordination is required across ministries at various levels — for example, senior management, policy, operations, legal services and communications.

IMPLEMENTING THE CONSULTATION APPROACH

Informing the Aboriginal Community of the Project

Ministries undertaking consultations with Aboriginal communities should provide the communities with relevant and reasonably available information regarding the subject of the consultations in a timely manner. Ministries should also ensure that consultations involve the appropriate representatives of the affected Aboriginal communities.

Further Identifying Rights and Impacts

A consultation process may involve seeking further information from Aboriginal communities on the nature of established or asserted Aboriginal or treaty rights, or on how the government's proposed decisions or actions may adversely affect or interfere with the community's established or asserted rights.

In these circumstances, ministries should request information from the Aboriginal communities about the scope and nature of any community activities or interests that may potentially be affected by the government's proposed actions or decisions, and on how they relate to established or asserted Aboriginal rights or treaty rights. The Aboriginal communities should also be asked for their views on the potential impact of the proposed actions or decisions on their rights.

Ministries should gather relevant information from other ministries as well. Information collected should be organized, documented, and sources identified, for future reference.

Addressing Concerns/Accommodating Aboriginal or Treaty Rights

Where Aboriginal communities have raised concerns or identified impacts that would give rise to a duty to accommodate as outlined earlier in the guidelines, ministries need to consider the steps they can take to address these concerns.

At this stage, the government should consider the scope and extent of the concerns raised. The ministry should seek to identify, through discussions with the affected Aboriginal communities and, if applicable, third parties (e.g., project proponent), what measures can be put in place to limit possible adverse impacts on the community's established or asserted Aboriginal or treaty rights.

Circumstances may arise where a duty to accommodate exists, but a ministry and an Aboriginal community cannot agree on how to accommodate the community's established or asserted Aboriginal or treaty rights. In such cases, government decision-makers should consider whether they have made good faith efforts to address the concerns raised by the Aboriginal community. Some questions include:

- Have sufficient steps been taken to avoid irreparable harm?
- Have adequate attempts been made to minimize the adverse impact of the proposed government action or decision?
- Does the proposed approach reflect an appropriate balancing of interests?

In some circumstances, consideration will need to be given to whether proceeding could result in an infringement of an Aboriginal or treaty right and whether the infringement would be justifiable. In such circumstances, legal advice should be sought on the factors the courts will consider in determining whether an infringement is justified and on their application to the proposed action or decision.

Advising Aboriginal Communities of Decisions

Where consultation has been undertaken with an Aboriginal community and the ministry has made a decision on how it will proceed, it should communicate the decision to the affected Aboriginal community in a timely manner.

This information is for general guidance only and is not a substitute for seeking legal advice. Ministry staff should always consult their Legal Services Branch to obtain advice on how the Crown's obligations to consult Aboriginal peoples may apply in particular circumstances.