

Guide To Involving Proponents When Consulting First Nations

The Province of British Columbia has a duty to consult and where required, accommodate First Nations whenever it proposes a decision or activity that could impact treaty rights or aboriginal rights (including title) – claimed or proven. The duty stems from Canadian common law as expressed in court decisions.

The *Updated Procedures for Meeting Legal Obligations When Consulting First Nations* (the Consultation Procedures) describe the Province's approach to consulting and accommodating First Nations. In the Preparation Phase, Step 5, the Province determines who will engage First Nations for consultation purposes. One option is to involve the proponent in the engagement.

While the Province is responsible for ensuring adequate and appropriate consultation and accommodation, it may delegate the procedural aspects of consultation to proponents. Proponents engaging with First Nations can facilitate effective and timely information exchange, modify plans to mitigate and avoid impacts to Aboriginal Interests, and can also contribute to some of the Province's broader objectives, including partnerships and relationship building with First Nations.

Purpose

The purpose of this document is to provide operational guidance to Provincial decision makers and staff respecting the role of proponents in consultation. It is to be used in conjunction with the *Updated Procedures for Meeting Legal Obligations When Consulting First Nations*.

Staff will work with proponents to ensure that provincial and proponent activities are coordinated.

Under the *Forest and Range Practices Act* and the *Environmental Assessment Act*, the Province can require proponents to share information about their proposed projects with First Nations. Please refer to these statutes for further guidance.

Responsibilities

Provincial decision makers with authority to make decisions about provincial land or resources are responsible for ensuring that the consultation and accommodation record is complete and that that consultation is appropriate for the circumstances.

Proponents (any party preparing for or making an application to government, including industry, local governments, federal agencies and Crown corporations) are encouraged to engage First Nations as early as possible when seeking a decision. Proponents who are involved in consultation should document their engagement activities, share their consultation record with provincial staff, and advise staff of any issues that arise.

Aboriginal Interests

"Aboriginal Interests" refers to claimed or proven aboriginal rights (including title) and treaty rights.

The Approach

Consultation Procedures	
Phase One: Preparation	
1. Identify First Nation	
2. Identify treaties or process agreement(s)	
3. Review readily available information	
4. Consider consultation levels	
5. Decide who will engage First Nation	
Phase Two: Engagement	
1. Provide information and seek input	
2. Engage First Nation(s)	
3. Complete consultation at appropriate level	
Phase Three: Accommodation	
1. Assess consultation and need to accommodate	
2. Identify accommodation options	
3. Propose accommodation measure and attempt to reach agreement	
Phase Four: Decision and Follow-Up	
1. Assess consultation and accommodation record	
2. Provide decision to First Nation	
3. Ensure implementation of accommodations	

A. Considering the role of the proponent

The following matters are to be considered when determining whether to involve the proponent in consultation:

- the nature of the proposed activity;
- the nature of Aboriginal Interests potentially involved;
- the capacity of the proponent to manage engagement activities;
- the capacity of the proponent to access information relating the details or context of the proposed activity;
- the ability of the project to provide appropriate accommodation in its design and or implementation;
- any processes required under agreement with First Nations; and,
- the willingness of First Nations to engage with proponents.

Proponents are encouraged to engage First Nations as early as possible in the planning stage of their proposed activity. Engagement early in the planning stage provides better opportunities to avoid or mitigate any concerns expressed by First Nations and increase the likelihood of successful consultation outcomes. As well, proponents are often in a better position to provide information about their proposed activity directly to First Nation.

B. Advising First Nation(s) of proponent's role

Where proponents are involved in the procedural aspects of consultation, the Province will advise the First Nation(s) that the proponent will be engaging with them respecting the proponent's proposed activity. The following will be provided to the First Nation:

- notification respecting the nature and timing of the proposed activity and required decisions;
- government contact information respecting consultation for the proposed activity and the decision maker;
- assurance that the Province retains accountability and responsibility for assessing and ensuring adequate and appropriate consultation and accommodation; and,
- notification that the proponent's engagement activities will be documented and will form part of the consultation record that will be considered by the decision maker.

Where a First Nation does not wish to engage with the proponent, seek to understand and address any concerns. To address concerns and build relationships consider:

- the Province, proponent and First Nation meeting to share information about the First Nations concerns and, the proponent's interests and proposed activities; and,
- the Province resuming all or part of the engagement components of consultation.

The Province will respect the First Nation's wishes respecting with whom they wish to engage in the consultation process.

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C. Proponent engagement activities

The following may be provided to the proponent where they are involved in the procedural aspects of consultation:

- any assistance needed to identify which First Nations to engage (information available through the Consultative Areas Database - <http://geobc.gov.bc.ca/>);
- any advice respecting where to focus engagement efforts;
- non-confidential Information about the First Nation(s) learned from the review of available information in Phase One;
- advice respecting the significance of documenting their engagement activities and outcomes so that they can be included in the consultation record and used for conducting assessments of strength of claim and seriousness of impacts of proposed activities; and,
- advice respecting the significance of documenting measures to avoid, mitigate or otherwise address any First Nation concerns.

Engagement activities may include:

- participating in meetings with government representatives and First Nations;
- participating in their own meetings with First Nations;
- providing information to First Nations about the proposed activity, how it could happen, where it could occur (maps) and what the potential impacts may be to lands and resources;
- obtaining or discussing information about specific Aboriginal Interests that may be impacted by the proposed activity, how the proposed activity may impact identified Aboriginal Interests, and where else the activity or use can be practiced; and
- discussing possible plan modifications to address Aboriginal Interests.

To facilitate the decision making process, proponents are encouraged to address concerns respecting potential impacts to Aboriginal Interests. This may occur while engaging with First Nations and or as a direct outcome of engaging. Measures to address concerns may include:

- minimizing or altering site footprint;
- avoidance;
- mitigation strategies;
- environmental monitoring; and,
- impact benefit and other agreements.

In some cases, the First Nation and proponent's discussion may lead to partnerships or benefit and revenue sharing opportunities (i.e. employment opportunities, direct awards for contract services, etc.). Although these arrangements are not legally required, such arrangements may serve to move the proponent's overall business interests forward and result in certainty and a beneficial long term relationship with the First Nation. These types of partnerships are positive and contribute to the objectives of the New Relationship.

Proponents are encouraged to document all engagements and attempts to engage, the identification by First Nations of Aboriginal Interests and

concerns, and any modifications implemented or planned to address First Nation concerns, and to provide this record to the Province. The record may include:

- descriptions of specific Aboriginal Interests and any potential impacts;
- descriptions of any modifications implemented for accommodation purposes;
- a communications log, including copies of correspondence, meeting notes, attempts to communicate etc.; and,
- summaries of engagement activities and outcomes.

The Province is responsible to remain informed of engagements between proponents and First Nations, seeking clarification and confirmation where appropriate.

The Province will maintain oversight of the proponent's progress to ensure that detailed records are kept on an on-going basis, information is provided to First Nations, emails, letters and questions are responded to, and any commitments are met.

D. Reviewing the proponent's engagement record

After First Nations have been given the opportunity to engage with the proponent, the Province will review the proponent's engagement record and verify any outcomes with First Nations, including identification of Aboriginal Interests that may be impacted, the nature of the impacts, and any proposed avoidance, mitigation or other measures to address the First Nations' concerns.

To determine what further role the proponent may have in consultation the following are some key questions:

- Have all potentially affected First Nations been sent an introductory letter respecting the project and consultation?
- Have all First Nations that responded to the introductory letter been contacted?
- Has all reasonably available, and requested, information been provided?
- Have all questions within the proponent's expertise been answered?
- Has proponent's engagement record been received? If so, is it complete?

If the proponent's engagement record appears incomplete, work with the proponent in filling any gaps. Where there are outstanding components, consider whether it is appropriate to continue to involve the proponent or for the Province to complete the outstanding components.

If the engagement record is satisfactory, the Province will proceed with conducting preliminary assessments. The information learned from the general review, the proponent's engagement record and the Province's engagement record will be considered for the preliminary assessments.

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E. Accommodating Aboriginal Interests

Proponents are encouraged to consider ways to avoid or mitigate impacts or concerns respecting Aboriginal Interests brought forward by a First Nation while engaging with the First Nation.

Proponents may be asked to consider and explore accommodation options with the Province. Such options could include:

- changing the timing of proposed activities;
- altering the footprint or location of the proposed activity;
- avoiding the Aboriginal Interest,
- environmental monitoring; and,
- other mitigation strategies.

Where proponents offer to implement avoidance or mitigation strategies relative to potential adverse effects to Aboriginal interests, the Province should attempt to link such measures into permit conditions and monitoring requirements.

Measures to address potential impacts to Aboriginal Interests do not require the approval of the proponent and may be imposed through tenure or licensing conditions.

Plans that have been modified for other purposes may not be considered as an accommodation.

To demonstrate completeness and integrity of the process, the Province will maintain detailed records documenting actions and outcomes for each step.

Suggested Best Practices for Proponents

Provide information in meaningful and understandable formats.

Recognize the significance of cultural activities and traditional practices of the First Nation.

Demonstrate a respect for First Nation knowledge and uses of land and resources.

Understand the importance of youth and elders in First Nation communities.

Act with honour, openness, transparency and respect.

Create a presence in the community.

Understand the nature of First Nation economies.

Engage before planning is completed and leave room for modifications.

Be prepared to listen and allow time for meaningful discussion.

Convey willingness to describe the project and consider any concerns.

Frequently Asked Proponent Questions

1. Why is the BC Government required to consult First Nations regarding my application?

The courts have determined that the federal and provincial governments have a legal duty to consult First Nations and seek to address their concerns before impacting claimed or proven aboriginal rights or treaty rights. This duty stems from the constitutional protection of existing aboriginal rights and the fact that the legal interests of First Nations were not adequately addressed when the first Europeans arrived and settled in present day British Columbia.

2. Why is the BC Government assigning the “procedural aspects” of consultation on to me?

Proponents are often in a better position to explain their proposals and address any First Nation concerns early in the planning stages. Early and meaningful engagement provides greater opportunities for developing plans that: avoid impacts to First Nations’ legal interests; and, are more responsive to the broader interests and values of First Nations.

3. Is it legal for the BC Government to delegate the “procedural aspects” of consultation to me?

Yes. The Supreme Court of Canada in *Haida* (2004) said that government could delegate the procedural aspects of consultation to proponents; however, government is ultimately responsible and accountable for ensuring adequate and appropriate consultation and accommodation.

4. What is meant by “procedural aspects” of consultation?

Generally, the “procedural aspects” refer to the direct engagement component of consultation that involves sharing and discussing information. More specifically, it includes:

- Providing information about proposal to First Nations early in planning process;
- Obtaining and discussing information about specific Aboriginal Interests with First Nations;
- Modifying plans to address or mitigate impacts to Aboriginal Interests; and
- Documenting engagement, specific Aboriginal Interests and any modifications to address concerns and providing this record to the Crown decision maker.

- 5. What is an Aboriginal Interest?**

Aboriginal Interests refers to claimed or proven aboriginal rights or aboriginal title and treaty rights. Aboriginal rights are practices or traditions integral to a First Nation culture at the time of contact. Examples include fishing, hunting and gathering plants. Aboriginal title is a subcategory of aboriginal rights that is a unique interest in land that encompasses the right to exclusive use and occupation of land for a variety of purposes. Treaty rights are held by a First Nation in accordance with the terms of a historic or modern treaty agreement with the Crown.
- 6. What do I do if a First Nation asks for funding?**

Proponents may choose to provide funds to First Nations for reasonable costs associated with collecting information that may be required to inform consultation and avoid potential impacts to Aboriginal Interests resulting from their application. Be sure to find out what studies have already been completed to prevent duplication.

As well, proponents may choose to provide assistance to First Nations to address First Nation costs of participating in the consultation process.
- 7. What kind of information do I give the First Nation about my application?**

Proponent information would typically include:

 - Description of the nature of the overall projects;
 - List all authorizations and their timing that will be required;
 - The location of the proposed activity; and
 - Identification of potential bio-physical impacts.
- 8. How do I determine with which First Nations to contact?**

Government developed the Consultative Areas Database (CAD) to identify First Nations interests in the land base. CAD is an online, interactive mapping tool that allows First Nations, the general public, industry and other levels of government to draw a point, line or polygon in iMapBC and generate a list of First Nations with contact information for the area queried. See <http://geobc.gov.bc.ca>
- 9. There is more than one First Nation with interests over the location of application. How do I engage with all of them?**

Contact the agency responsible for administering your application. They will be able to provide guidance on where to focus your efforts.
- 10. What do I do if the First Nation does not want to engage with me or does not respond?**

Where this happens, contact the agency responsible for administering your application for further guidance. Proponents are encouraged to indicate their willingness to talk to the First Nation about their application to ensure: that the proposed activity is understood; and, that there is a meaningful opportunity to discuss any concerns. It is valuable for proponents to build relationships before projects are proposed.
- 11. What will the BC Government do when I am undertaking the procedural aspects of consultation?**

The BC Government is ultimately responsible for ensuring appropriate and adequate consultation and accommodation.