

## **CONSULTATION PRINCIPLES**

### **DEFINITION:**

Consultation principles define the rules or codes of conduct under which the consultation process should take place.

### **PURPOSE:**

Consultation is required when a proposed Crown decision *may* impact First Nation rights. Consultation is an extremely important *legal duty* of the Crown. In order to fulfill that duty, the Crown must create a meaningful opportunity for First Nations to properly represent and voice their interests and concerns and for the Crown to address those interests and concerns.

A statement of principles enables a First Nation to identify and highlight exactly those rules by which it considers meaningful consultation must take place.

### **DESCRIPTION:**

A growing number of First Nations have adopted consultation policies. Examples from across Canada include the Mi'kmaq –Nova Scotia-Canada Consultation Process, the Consultation Protocol of First Nations of Quebec and Labrador, the Bkejwanong Territory (WFN) Environmental Policies from Ontario, the FSIN Consultation Policy from Saskatchewan, the Horse Lake First Nation Consultation Policy from Alberta, and the Hupacasath First Nation Territory Land Use Plan and Simpcw First Nation Consultation and Accommodation Guidelines, both from BC.

Some of these First Nation policies contain a specific section on principles. However, not all policies make the principles explicit. Sometimes certain principles are contained in the preamble; in other cases they may be intertwined with guidance on consultation procedures

Common themes in these statements of principles usually reflect the guidance of the Crown. They include:

- Consultation must be conducted in good faith.
- Consultation will occur before decisions are made.

- Consultations must be meaningful such that the First Nation must have an opportunity to express their concerns and proposed and these concerns and proposed alternatives must be addressed and accommodated.
- The process of consulting with First Nations must be separate from other consultations with interest groups

There is also a strong First Nation consensus for the principle that:

- Adequate and sufficient resources must be made available for consultation to occur.

In addition, more and more First Nations are stressing that:

- All alternative options must be on the table including a “no-activity” option.

**EXAMPLES:**

Two examples of First Nation consultation principles are the Simpcw Principles and the Federation of Saskatchewan Indian Nation (FSIN) Guiding Principles

**Example  
Simpcw Principles**

- 5.1 The Crown is required to consult with and accommodate the Simpcw Signatories with respect to proposed Activities in Simpcwul’ecw, and to follow these guidelines in doing so.
- 5.2 At the discretion of the Simpcw Signatories and the Crown, Third parties may be required to participate in consultation at the operational level and to accommodate the Simpcw people, but decision-making/approval authority remains at the government-to-government level.
- 5.3 The process of consulting with and accommodating the Simpcw Signatories must be separate from other consultations by the Crown and Third Parties with interest groups.
- 5.4 The Crown and Third Parties must come to the table with the willingness and mandate to be flexible.
- 5.5 The Simpcw Signatories must have an opportunity to express their concerns and proposed alternatives in relation to a proposed Activity, and these concerns and proposed alternatives must be addressed and accommodated by Crown and Third Parties

- 5.6 Negotiations must be in good faith, and all alternative options must be on the table including a “no-activity” option if this is the approach to accommodating Simpcw Title and Rights required by the Simpcw Signatories.
- 5.7 Consultation must occur at all stages in relation to Activities that potentially infringe on Simpcw Title or Rights. The Simpcw Signatories must be involved in: legal and policy changes; strategic long, medium and short term planning, scientific and technical decision-making; assessment of environmental impacts; operational plans/processes; approvals which may lead to the issuance of a permit, license, lease, or change in land status; monitoring; and any amendments to such decisions.
- 5.7.1 Decisions about Activities shall be made on a government-to-government basis with the formal involvement of the Simpcw Signatories. The norm shall be that the Crown does not make decisions about Activities or undertake any Activities without the full participation and approval of the Simpcw Band Council, and that the agreement is reached on legal, policy and strategic level decisions (ie land use plans, allowable cuts, tenuring before operational or site level proposals are considered).
- 5.7.2 Legal, policy and strategic level decisions, including decisions about tenuring, allowable annual cut and land use planning will be made first on a government-to-government basis and will bind Third Parties.

**Example  
FSIN Guiding Principles**

- 6.1. The following principles will guide the FSIN in all its public Consultations:
- 6.1.1 Consultation must be conducted in good faith;
- 6.1.2 Consultation will occur before decisions are made;
- 6.1.3 Consultation will be given adequate time to consider the questions presented for Consultation, within the timelines it has been given to fulfill its research mandate on particular topics;
- 6.1.4 Adequate and sufficient resources shall be made available for consultation to occur;
- 6.1.5 The objectives and scope of Consultations will be clearly communicated before Consultation begins. The steps in the Consultation process and the role of the Consultation in the FSIN’s overall approach to the issues involved will be explained to participants at the outset;

- 6.1.6 The FSIN shall communicate to participants the feedback it has received and how it has used that feedback;
- 6.1.7 The FSIN seeks to conduct its Consultations in a climate of mutual respect. The methods used will be adapted to the intended participants, the purpose of Consultation, and the available resources;
- 6.1.8 The FSIN will attempt to remove barriers to participation in Consultations by providing common background information to all participants, using plain language in its documents, and choosing locations that are accessible and appropriate to the participants. It will also, where appropriate, use alternative formats and media, provide some financial support, make information available in requested languages, and attempt to offer interpreters and simultaneous translation;
- 6.1.9 The FSIN will attempt to ensure that in selecting methods of Consultation these costs will be weighed against the intended purpose and outcomes of the Consultation.

**SOURCES:**

Consultation Protocol of First Nations of Quebec and Labrador 2005

Bkejwanong Territory Environmental Policies, Guidelines and Information for External Project Proponents, February 2006

FSIN Consultation Policy

Horse Lake First Nation Consultation Policy, February 1, 2007

Hupacasath First Nation TERRITORY LAND USE PLAN – PHASE 2, 2004

Mi'kmaq –Nova Scotia-Canada Consultation Process 2007

Simpew First Nation Consultation and Accommodation Guidelines 2006