

**CONSULTATION PROCEDURES/STEPS**

**DEFINITION:**

Consultation procedures refer to the series of steps that need to be taken to accomplish a successful consultation,

**PURPOSE/IMPORTANCE:**

First Nations who receive requests to participate in various consultations related to territories and natural resources need a tool which sets out a step by step process to ensure that governments fulfil their duty to consult and accommodate

By explicitly defining these procedures First Nations can ensure that the consultation process to take place in a way that is compatible on Aboriginal principles and reflects the principles enunciated by the Supreme Court of Canada. Written guidance can help protect constitutional rights

The legal duty to consult and accommodate carries with it numerous obligations, including key procedural requirements. These can include providing information regarding actions or projects in a timely fashion, ensuring adequate funding of First Nations being consulted, listening to the concerns of First Nations and incorporating those concerns into the decision-making process, and ensuring that the process of consulting with First Nations is separate from other public consultations

By defining its expectations a First Nation is in a stronger position to resist general consultations mechanisms, such as environmental assessment regimes, which in most cases do not provide a process sufficient for governments to adequately discharge their duty to consult and accommodate.

**DESCRIPTION:**

Procedures set out timeframes and tasks – from a First Nation’s perspective – that clarify its understanding of comprehensive and meaningful participation both with the Crown and with project proponents.

These procedures variously address ways in which the consultation process should be initiated; the role of consultation plans; negotiations; consultation techniques; accommodation; and dispute resolution.

A variety of approaches have been implemented by different First Nations. These range from a one-window approach to multi-step procedures.

For example, the Horse Lake First Nation Industry Relations Corporation (HLFN IRC) serves as a one contact/one window approach to streamline the exchange of information, communication/interaction, and relationship-building requisite for adequate and appropriate consultation to occur with resource development companies and HLFN members' interests. The IRC will also negotiate agreements to assess and mitigate adverse impacts to HLFN Traditional Territory, to identify and accommodate HLFN members' issues, and to ensure that HLFN benefits positively from capacity building, economic development, revenue sharing, and joint venture opportunities.

In contrast, both the Simpcw First Nation and the AFNQL spell out multi-step processes.

The Walpole Island First Nation builds an IBA or an MOU into its process, as a way of addressing accommodation issues.

#### **EXAMPLES:**

##### **Example HLFN: Form and Conduct of Consultation**

HLFN will only engage in face-to-face consultation with the relevant decision maker, be that the Crown or its appointed representative, i.e. the developer of the proposed activity.

HLFN Chief & Council have authorized a singular representative to undertake consultations on its behalf, and to direct the consultation process exclusively from the HLFN Industry Relations Corporation located in Edmonton.

Consultation shall take only the following two forms: i) written consultation shall consist of correspondence via mail only to/from HLFN IRC and ii) oral consultation shall consist of face-to-face meetings scheduled at the discretion of the HLFN IRC Director.

HLFN expects that the Crown or its appointed representative will notify HLFN in writing by submitting a complete Project Notification Package, when a situation arises which requires consultation.

The Project Notification Package shall minimally contain sufficient information to allow HLFN to: i) understand the nature and scope of the proposed activity; ii) understand how the proposed activity may affect HLFN Traditional Territory ;iii) understand who will be undertaking the activity; iv) understand what documents, including applications, studies,

assessments, policies are available to be reviewed which are pertinent to the proposed activity; and v) understand any relevant deadlines or filing dates.

HLFN's comprehensive understanding and meaningful participation requires a minimum of 30 days from receipt of a complete Project Notification Package to identify issues and impacts. This could entail:

- i) research and assessment of location of proposed activity in relation to HLFN traditional use sites and areas;
- ii) research and assessment of location of proposed activity in relation to HLFN members' trap lines;
- iii) research and assessment of location of proposed activity in relation to known archaeological and historical sites;
- iv) coordination of consultation with Elders and Trappers to discuss project-related issues and concerns;
- v) coordination of HLFN members' participation in field visit to assess proposed project's impacts;
- vi) drafting the /Issues Report & Work Plan / for submission to the developer and Chief & Council;
- vii) coordination of consultation with Chief & Council to discuss mitigation or accommodation of HLFN members' issues and concerns
- viii) issuing (un)satisfactory consultation/project (non)objection correspondence to developer.

### **Example**

#### **AFNQL: Steps of the Consultation Process**

The AFNQL has developed an eleven step consultation process. These steps are:

##### **Step 1: The Process Begins**

*First Nation acknowledgment of receipt*

##### **Step 2: First Nation Determines its Interests**

*This involves an initial scoping by the First Nation*

##### **Step 3: Initial Response**

##### **Step 4: Government Provides Information and Funding**

**Step 5: First Nation Identifies its Interests**

*This involves a more in depth scoping by the First Nation*

**Step 6: Consultation Plan and Parameters**

*The consultation plans would address issues of funding, timetables, consultation parameters, expertise needed and Third Party involvement*

**Step 7: Consultative Activities**

*Decisions would be taken on what types of consultation activities were necessary. Options could involve policy meetings, town hall meetings, surveys and interviews*

**Step 8: Government Update**

*Canada and/or Quebec would present its modified action and explains how First Nation interests have been accommodated*

**Step 9: First Nation Response to the Update**

*The First Nation being consulted has a variety of options at this point, including: withdrawal from the process, rejection of action, consent, more consultations, or exercising its rights otherwise.*

**Step 10: Agreement**

**Step 11: Consultation and Accommodation Report**

The AFNQL approach also sets out the points in the process where First Nations should approach governments or resource developers to allow the First Nation to complete certain steps. This funding would be necessary to meet the costs of internal coordination, consultation and scoping, remuneration of community and other experts, research budgets, professional fees and consultant services

**Example**

**Simpchw Specific Consultation and Accommodation Steps**

**Step 1 – Initial Information about Activity**

The Crown or Third Party planning to undertake the activity will provide the Simpcw Band Council with an Information Package at the earliest possible stage, containing sufficient information for the Simpcw People to fully consider the Proposed Activity. The Information Package will include:

- the name and telephone number of the appropriate Crown or Third Party contact;

- clearly drawn or reproduced, referenced maps of the area in question (including a small-scale locator map with the relevant British Columbia Geographic System map-sheet number included and a large scale map showing land forms), as well as digital maps;
- all inventories, assessments and other background information upon which proposals are based, including any archaeological, ethnographic, traditional use, environmental or other reports, maps and map data or other information;
- a copy of any assessments and inventories in the hands of Third Parties or the Crown (eg. Ecological or cultural assessments relating to streams terrain, archaeology), and the “pre-consultation assessments” recommended in the Provincial Guidelines or the “Aboriginal Interest Assessments” required by the BC Assets and Land Corporation Guidelines;
- a complete description of the proposed Activity including a description of the land and resources involved and a description of the current and anticipated value of the proposed Activity;
- the timeframe for the commencement and completion of the Activity;
- the details of any anticipated impacts on the land itself and an initial assessment of any anticipated impacts to Simpcw Title or Rights;
- information on any anticipated economic benefits for the communities of the Simpcw People;
- other information as may be requested by the Simpcw Band Council.

## **Step 2 – Initial Community Review**

The Simpcw Band Council will review the Information Package and may request further information relating to the proposed activity such as background information referenced by the agency, site or area visits, or further studies or assessments. Upon receipt of the information and details regarding development within the Traditional Territory, and after an initial community review, the Simpcw Band Council will provide a time frame for response and indication of the financial/human capacity required to accommodate them, along with an explanation for the time frame and funding required.

### **Step 3 – Initial Community Response**

Subject to financial considerations, the Simpcw Band Council will provide a written response detailing any concerns and objections regarding the proposed Activity, and subject to capacity, recommendations as to how those concerns or objections may be met or accommodated. Where there are concerns or objections that the Simpcw Band Council believe may be resolved with further review, the Simpcw Band Council will provide the Crown or Third Party with an estimate of the time and cost of conducting the further review. If the Simpcw Band Council is unable to respond to the referral immediately, they will notify the relevant Crown or Third Party of what alternative timeframe would accommodate them.

### **Step 4 – Crown/Third Party Reconsideration**

Upon receipt of the initial community response from the Simpcw Band Council, the Crown or Third Party will reconsider the Activity consistent with these Consultation and Accommodation Guidelines for Crown and Third Parties. If the Crown or Third Party cannot fully implement the accommodation requested by the Simpcw Band Council, it will initiate a meeting with the Simpcw First Nation to address those concerns or objectives.

### **Step 5 – Consultation and Accommodation Negotiations**

Simpcw Band Council and the relevant Crown or Third Party will meet and reach agreement with respect to the Activity. The result of the meeting will be either:

- an agreement to proceed with the Activity as planned
- an agreement to proceed with the Activity with conditions and accommodations as agreed by the parties;
- an agreement to abandon or postpone the Activity, with or without an agreement to conduct a further review, or
- no agreement.

The result of the meeting will be put in writing and a copy of the document sent to the Simpcw Band Council for their review and approval.

### **Step 6 – Dispute Resolution**

Where the result of a consultation meeting is "no agreement", the parties may agree to enter into a process of dispute resolution. In the case of Crown, this must be a Crown-to-Crown resolution process, and in the case of either Crown or Third Parties, the Simpcw Band Council must have equal decision-making power within the process.

Principles that will inform the dispute resolution process are as follows:

- the parties will meet to discuss the dispute in a constructive manner, and work collaboratively to achieve consensus on the matter;
- if agreement cannot be reached, any related Activities will be held in abeyance, and the dispute will be referred to the leadership of the Simpcw First Nation, senior Crown officials and the senior management of a Third Party to attempt to reach agreement on the matter. Crown and Third Party representatives must have authority to make decisions on matters being discussed. The parties may chose to involve mutually acceptable third party(ies) in a mediation role to assist in reaching agreement;
- if agreement between the Simpcw First Nation and the Crown or Third parties cannot be reached, then a mutually acceptable third party arbitrator may be asked to recommend a final decision to the parties;
- matters that are set aside pursuant to bullet item #2 above will not reduce or fetter the obligations of the Parties to continue to deliberate in good faith and strive to achieve consensus decisions on accommodations related to other Activities;
- in the case of disputes over scientific or technical matters, the parties may each appoint an equal number of qualified members to a scientific panel which will recommend a decision on the matter;
- the costs of dispute resolution will be borne by the Crown and/or Third Parties.

### **Step 7 – Implementation and Monitoring**

Where an Activity proceeds, either as initially planned or as modified pursuant to this process, Crown or Third Party will implement accommodation measures in a timely manner. Implementation will include monitoring by Simpcw appointed monitors. Crown and/or Third Parties will cover the cost of monitoring.

#### **Example**

#### **Walpole Island First Nation Process for External Project Proponents**

##### **Initial Proponent Contact**

The primary initial point of contact for external project proponents is Chief and Council of Walpole Island First Nation. After an initial review of the proposed project, Chief and Council may request further assistance from the Heritage Centre, other departments of the WIFN Government or outside independent technical and legal expertise as the consultation process progresses.

Project proponents should be aware that the primary issues of concern to WIFN include the quality of the water, air, fauna, flora, waterbeds (particularly sediments) in our traditional territory and undisputed territory, and the effects of pollutants on the physical, emotional, and spiritual health and well-being of its members, both present and future. Issues of particular concern to the community include, among others:

1. pollution prevention,

2. pollution mitigation and emergency response,
3. compensation for damage to the ecosystem that affects our traditional territory,
4. environmental and health effects monitoring,
5. environmental research affecting our traditional territory,
6. education and training concerning environmental protection <sup>1</sup>,
7. employment and contracting opportunities.

The early understanding and discussion of issues of concern to the First Nation, and the identification of appropriate mitigation measures, will make a positive contribution to effective and timely project implementation by external proponents -- or will allow proponents to identify if the First Nation is opposed to the project, early, and before significant resources have been spent.

### **Review of Proposals**

After a preliminary review of project documents, the project team assembled by Chief and Council will identify the types of resources required for the First Nation to effectively participate in the consultation process and review the proposed project(s).

WIFN has found through experience that to thoroughly understand the implications of a project it is necessary for adequate resources to be provided to the First Nation to enable it to participate effectively in the consultation and review process.

The consultation and review process identifies areas of potential concern to the First Nation, and reviews the proposed mitigation measures related to those concerns. The following general comments are noted to assist the project proponent in understanding the perspectives WIFN will take in reviewing the project proposal.

1. The time span within which the First Nation reviews a project is on the basis of anticipating potential effects at least seven generations into the future.
2. Aboriginal rights of the First Nation include harvesting, hunting, fishing, and cultural and spiritual activities.
3. In combination with scientific-based knowledge, WIFN traditional knowledge and values will be equally considered in the project review that is completed by the First Nation.
4. The adequacy of existing baseline studies as they relate to the proposed project activities will be evaluated by WIFN.
5. How the project proposal addresses cumulative environmental effects will be evaluated, i.e., assessing the Project's predicted effects in combination with the potential effects of other existing, or planned projects and activities. Bio-accumulation issues, for example, are of particular concern to the community.
6. Effective monitoring is an important activity in assuring WIFN that the environment is being protected to a high standard and that the resources the community uses are unaffected.
7. Employment and contracting opportunities for WIFN in connection with a project will have an important influence on how WIFN views the project.



8. Meaningful consultation and exchange of information with the community does take time, as does making good decisions, and allowance should be made for this by the project proponent in planning and scheduling consultations with the First Nation.

Upon completion of the project review by WIFN's project team, the findings and the identification of any required revisions will be communicated to the proponent.

### **Negotiating an IBA**

Assuming that there is initial acceptance of the project concept, the next step in the consultation process would be the preparation of a mutually acceptable draft MOU or IBA between the First Nation and the project proponent.

### **Community Acceptance**

The final acceptance by WIFN of any draft MOU or IBA will require that the community will be consulted for its opinion and decision on the acceptability of the project

### **SOURCES:**

Consultation Protocol of First Nations of Quebec and Labrador 2005

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

Horse Lake First Nation Consultation Policy, February 1, 2007

Simpchw First Nation Consultation and Accommodation Guidelines 2006

