



# Updated Procedures

For  
Meeting Legal Obligations When  
Consulting First Nations

## Interim



These procedures are based on existing case law as of April 2010 and are intended to reflect the legal requirements established by the courts.

These procedures are not intended to replace or supersede the development of relationships, shared decision making arrangements, other process agreements or treaties between the Province of British Columbia and First Nations.

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# Introduction

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 court decisions and is consistent with the Province's commitment to building a new relationship with First Nations.

This document describes the Province's approach to consulting and accommodating First Nations where a proposed decision or activity by the Province may affect claimed or proven aboriginal rights (including title) or treaty rights. This document is consistent with case law and legal advice as of April 2010 and reflects, in a practical manner, the requirements established by the courts. As case law evolves, this document will be updated to remain consistent with legal advice.

The described approach is not intended to replace or supersede the development of relationships, process agreements or treaties between the Province and First Nations. The goal of this document is to facilitate the Province's compliance with case law while fulfilling the vision of a new relationship.

## Scope

This procedure applies to all provincial agencies that have authority to make decisions about provincial land or resource use that trigger a duty to consult.

This procedure addresses those aboriginal peoples of Canada who may have proven or claimed aboriginal rights (including title) or treaty rights in British Columbia.

## Responsibilities

Provincial decision-makers with authority to make decisions about provincial land or resources are responsible for ensuring appropriate and sufficient consultation and accommodations.

Proponents (any party, including industry, local governments, federal agencies and Crown Corporations, seeking decisions from the Province in support of activities related to land or resource development) are encouraged to engage First Nations as early as possible when seeking a decision. In some cases, the Province may delegate certain procedural aspects of consultation to proponents. Proponents are often in a better position compared to the Province, to exchange information about their decision requests and directly modify plans to mitigate any concerns.

Costs – each party is responsible for their own participation costs. The courts have yet to rule on assigning costs for consultation. In limited circumstances, such as the environmental assessment process, the province will provide limited financial support directly to First Nations to help off-set consultation participation costs.

This document supersedes the 2002 *Provincial Policy for Consultation with First Nations*.

**This document is to be used in conjunction with associated operational guides and tools.**

*"There is a reciprocal duty on First Nations to express their interests and concerns once they have had an opportunity to consider the information provided by government, and to consult in good faith by whatever means available to them."*

Halfway River note 103 at para. 161  
Tommy note 83 at para. 109

## Policy Context

In 1995, the Province developed its first aboriginal rights policy in response to emerging aboriginal case law requiring the Province to avoid or justify infringements of aboriginal rights, where such rights were determined. The evolution of aboriginal law necessitated several amendments to the policy with the last amendment in 2002. Significant developments in case law, most notably the 2004 Supreme Court of Canada decision in *Haida*, have since expanded the Province's duties to consult regarding claimed but not yet proven rights and where appropriate accommodate those.

### *New relationship between First Nation peoples and the Province*

*"The future will be forged in partnership with First Nations — not in denial of their history, heritage and culture. It will be won in recognition of First Nations' constitutional rights and title — not lost for another generation because we failed to act."*  
Speech from the Throne, 11 February 2003

While First Nations and the Province may have different perspectives on the specific extent and location of aboriginal rights and title within British Columbia, such perspectives inform the challenges of achieving various forms of reconciliation. In 2005, representatives from the Province, the Union of British Columbia Indian Chiefs, the First Nations Summit and the British Columbia Region Assembly of First Nations set out to pursue a new relationship among First Nation peoples and the Province based on a vision involving principles of respect, recognition and reconciliation. Guided by this vision, the Province and First Nations are achieving new agreements that strengthen relationships, provide frameworks for reconciling aboriginal rights (including title) and treaty rights with those of the Crown, and provide means for building sustainable economies.

In addition to negotiated reconciliation processes between First Nations and the Province, legal consultation and, where appropriate, accommodation obligations need to be fulfilled by the Province in a manner consistent with the "honour of the Crown". To this end, the Province has updated its procedures to establish effective practices for consulting and accommodating. The Province intends to apply these procedures to assist with a more consistent approach to, and fulfillment of, legal obligations by provincial decision-makers.

**This procedure will be reviewed following one year of implementation in a process to be determined.**

## Legal Context

### Legal recognition of aboriginal and treaty rights

This information is for general guidance only and is not a substitute for seeking legal advice. For further information please review the *Aboriginal Law Update: Consultation and Accommodation* prepared by the Ministry of Attorney General.

In 1982, existing aboriginal and treaty rights were recognized and affirmed in Section 35(1) of the *Constitution Act, 1982* (“Section 35 rights”) The courts continue to clarify the nature of existing aboriginal and treaty rights and, as a consequence, define the legal relationship between the Province and First Nations. Provincial decision-makers have legal obligations to consider and potentially accommodate claimed aboriginal rights and title which might be impacted by decisions. Moreover, decision-makers are required to consult where decisions or actions could potentially infringe proven aboriginal rights (including title) or treaty rights. No infringements can be justified without consultation occurring. In short, government is legally required to consult with First Nations and seek to address their concerns before impacting claimed or proven aboriginal rights (including title) or treaty rights.

#### *Aboriginal rights*

“*Aboriginal rights*” are practices, customs or traditions integral to the distinctive culture of the First Nation claiming the right. A practice undertaken for survival purposes can be considered integral to a First Nation’s culture. Some examples of aboriginal rights are hunting, fishing, and gathering plants for traditional medicines and spiritual ceremonies. Aboriginal rights may be connected to a particular piece of land, and are generally not exclusive.

#### *Aboriginal title*

“*Aboriginal title*” is a subcategory of aboriginal rights that has its own test for proof. It is a unique interest in land that encompasses a right to exclusive use and occupation of the land for a variety of purposes. Those uses must not be inconsistent with the nature of First Nation’s historical attachment to the land. A claimant must prove exclusive occupation of land prior to sovereignty.

#### *Treaty rights*

“*Treaty rights*” are rights held by a First Nation in accordance with the terms of a historic or modern treaty agreement with the Crown. Treaties may also identify obligations held by a First Nation and the Crown.

#### *Aboriginal Interests*

Where practical throughout the remainder of this document, the term “Aboriginal Interests” will be used generally to refer to claimed or proven aboriginal rights (including title) and treaty rights that require consultation. Where required, the specific right will be referenced.

#### *The duty to consult*

Consulting with First Nations serves three purposes:

- it satisfies the duty of the Crown to consult with and, where appropriate, accommodate First Nations;
- it advances the process of reconciliation; and,
- it informs the Province about the nature and scope of claimed and proven aboriginal rights (including title), and treaty rights.

The duty to consult is readily triggered - consultation is required where claimed or proven rights (including title) or treaty rights may be impacted by a potential Crown decision or activity. The extent (or level) of the Crown’s obligation to consult will vary with the circumstances, and the nature and scope of the Aboriginal Interests impacted.

In the case of proven rights or treaty rights, the extent of consultation is

influenced by the nature of the rights and the possibility they may be infringed. In the case of claimed aboriginal rights (including title), the extent of consultation is determined by the strength of the case supporting the claim, and the seriousness of potential impacts upon the claimed rights.

Consultation must be meaningful with the intention of reasonably addressing the claimed or proven aboriginal rights (including title) or treaty rights, and should be carried out through a timely, reasonable, transparent and proactive process. When regulating a matter related to rights, it will be necessary to ensure an appropriate priority for proven rights, including treaty rights. When developing regulations, it is important to ensure that proven rights, including treaty rights are taken into account.

### ***The duty to accommodate***

The courts have also stated that consultation may reveal a duty to accommodate in certain circumstances. Where there is a strong *prima facie* claim of an aboriginal right which may be significantly impacted by a proposed decision, government may be required to take steps to avoid irreparable harm or minimize the effects of infringement.

The courts have not been clear on whether economic or financial accommodations are legally required before aboriginal rights or title are proven. The Province has been found to have fulfilled its duty to accommodate in the absence of providing such financial or economic benefits. In certain situations, however, it may be reasonable to offer financial or economic benefits to accommodate Aboriginal Interests. For further guidance please see *Accommodation Guidance*.

Consultation may not always lead to accommodation and accommodation may not always result in agreement.

Accommodation means addressing concerns and adapting or reconciling interests. It may require avoiding or mitigating impacts on claimed and proven aboriginal rights (including title) and treaty rights. It involves a process of seeking compromise in an attempt to harmonize conflicting interests; however, a commitment to the process does not require a duty to agree – it requires good faith efforts to understand and address each other's concerns. Balance and compromise are important - the Crown must balance concerns regarding potential impact of the decision on the Aboriginal Interest with other societal interests.

## Best Practices

*"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)"*  
SCC Taku, para 24

- The Province must act with honour and integrity when dealing with First Nations.
- Consultation must be in good faith, and with the intention of substantially addressing the concerns of First Nations peoples whose Aboriginal Interests may be affected by government decisions.
- Consultation in its least technical definition is talking together for mutual understanding.
- Consultation is to enable the Province to gain a proper understanding of Aboriginal Interests and if required, to seek ways to accommodate them appropriately.
- Consultation is not intended as a means to prove or disprove claimed aboriginal rights or title. Aboriginal rights or title can only be declared by the courts or agreed to in a government-to-government document like a treaty.
- Consultation is most effective if clear and reasonable timelines for participation and information sharing are established and reciprocated.
- Where multiple Provincial agencies have consultation obligations, efforts will be made to coordinate consultation.

## Objectives

Through these procedures, the Province wishes to realize:

### 1. Respect for aboriginal and treaty rights.

The Province wishes to ensure that the claimed or proven aboriginal rights (including title) and the treaty rights of its First Nations citizens are respected. Through the process of consultation, the Province is seeking a better understanding of aboriginal and treaty rights, and how its decision making processes may be influenced by them.

### 2. Improved relationship between the Province and First Nations

Through the process of consultation, the Province is seeking to improve its relationship with First Nations.

### 3. Predictable and transparent process

The Province wishes to engage First Nations in a predictable and transparent way.

### 4. Reconciliation of rights and interests

The Province wishes to reconcile the respective Aboriginal Interests of First Nation communities and government's other objectives.



# The Consultation Process

Consultation is always required when the following two conditions exist together:

- the Province has knowledge, or should have knowledge of a claimed or proven aboriginal right (including title) or treaty right (i.e. an Aboriginal Interest); and,
- a proposed government decision may impact that claimed or proven aboriginal right or treaty right.

The duty to consult is triggered for most government decisions respecting Crown land and resources because aboriginal rights or title claims are geographically extensive in British Columbia.

Depending on the circumstances, consulting with First Nations may involve up to four phases. The phases and steps help identify the key elements of the consultation process; however, consulting is an iterative process that may entail going back and forth between phases as circumstances dictate. Consultation is not mechanical or inflexible.

## **Phase One: Preparation**

Undertake basic research and analysis to prepare for appropriate consultation.

## **Phase Two: Engagement**

Engage with First Nation(s) to inform them of the proposed decision and seek to understand their interests and concerns.

## **Phase Three: Accommodation**

Where required, steps will be taken to reconcile government's objectives with Aboriginal Interests brought forward by First Nations.

## **Phase Four: Decision & Follow-Up**

After a full consideration of Aboriginal Interests and any accommodations offered, the decision-maker will make a decision and inform the First Nation. Follow-up will be required to ensure any accommodations have been implemented.

*"...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."*

SCC Mikisew Cree para.3

# Phase One: Preparation

## 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

The Province entered into the *Métis Nation Relationship Accord* with the Métis Nation of B.C. to work towards improving the quality of life of Métis people in BC. It is important to note, that the Province does not recognize a legal obligation to consult with Métis people as the Province is of the view that no Métis community is capable of successfully asserting site specific Section 35 rights in B.C.

## 1. Identify First Nations

Identify all First Nations that have Aboriginal Interests within the area of proposed government activity. The Aboriginal Interests may be found in: treaties; publicly known assertions; litigation files; court decisions; “statement of intent” areas in the BC treaty process; traditional use studies; and, information or correspondence previously provided to government.

The preferred groups for consultation purposes may be bands or larger community groups or nations that share a common language, traditions, customs and historical experiences. Whether a band, tribal council or more than one group should be involved in the consultation will depend on the history of the particular First Nation groups, what they have previously told government about their preferred consultation relationships, and whether any agreements exist on the matter.

## 2. Identify treaties or process agreement(s)

In some situations, the Province and First Nations have a treaty or have contractually agreed to a process for consulting. Where this is the case, the applicable provincial entities are required to follow processes set out in the treaty or agreement, as well as ensure consistency with this document. Agreements including treaties may address a range of topics including reconciliation, strategic engagements, specific sector matters and consultation protocols.

### Examples:

Consulting the Nisga’a Nation

Consulting the Tsawwassen Nation

Nanwakolas / British Columbia Framework Agreement

Tsilhqot’in Framework Agreement

## 3. Review readily available information

Reviewing information at this stage is useful when staff consider it likely that the proposed decision could result in impacts to the land or resources. Reasonably available information may be gathered and reviewed to gain a general understanding of:

- a) the nature of known Aboriginal Interests;
- b) the potential impacts the proposed decision may have on Aboriginal Interests; and, the
- c) scope of project or decisions.

A general or initial understanding of these subjects can facilitate a more meaningful consultation process and can form the basis for suggesting a level of consultation. It also provides a starting point for conducting a preliminary assessment in Phase Two, Step 2.

### a) Nature of known Aboriginal Interests

Review information to gain a general understanding of the Aboriginal Interest(s) that may be impacted by the proposed decision including:

- nature (title, right to harvest a particular resource, etc.);

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- possible geographic extent;
- location; and,
- legal status (claimed or proven aboriginal right or title or treaty right).

The strength of the case supporting the claim is an important variable in determining the extent of consultation required for claimed rights. The understanding of potentially impacted Aboriginal Interests provides insight to the potential strength of the case supporting claimed aboriginal rights (including title).

Information may be gathered from the following:

- court declarations or comments on specific Aboriginal Interests;
- information previously provided by the First Nation; and,
- internal government sources.

If the impacts or the nature and scope of the proposed decision are likely significant, further research may be required.

Where the courts have made a declaration or commented on specific Aboriginal Interests, this information must inform subsequent engagements with the First Nation and the extent of consultation required.

***b) Potential for impacts upon Aboriginal Interests***

The potential for impacts is the other important variable in determining the extent of consultation required. Information could be gathered about the nature and scope of the proposed decision to initially consider the potential for impacts upon Aboriginal Interests.

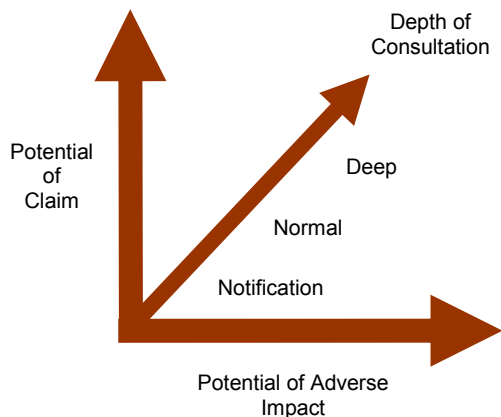
Factors that influence the degree of impact on Aboriginal Interests include:

- the permanence of impact on the land or resources;
- the geographic extent of impact on the land or resources;
- the potential for interfering with a known sensitive area or place with specific values;
- the potential for interfering with First Nation uses or activities on the land in a manner that would lead to undue hardship for that First Nation in being able to carry on those uses or activities;
- the degree to which the First Nation will continue to have the ability to use the affected land or resources in their preferred manner;
- the extent of existing development in the area;
- the extent of impacts on fish and wildlife and their habitat; and,
- the nature of the decision – administrative or operational.

***c) Scope of project or decisions***

Consider the scope of the project and or decisions to determine if a co-ordinated approach to consultation is appropriate.

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*Consultation Levels*

## 4. Consider consultation levels

Information gathered in the previous step (review information) can facilitate a more efficient and meaningful consultation process and help suggest an appropriate level for consultation.

The extent (or level) of consultation anticipated is proportionate to the:

- strength of the case for the claimed aboriginal rights (including title) that may be affected; and,
- the potential for impacts on Aboriginal Interests.

The extent or levels of consultation are on a spectrum from notification to deep: the stronger the case for supporting a claimed right (or if there is a proven right) and the greater the potential for impacting those, the deeper the consultation that may be required. The level of consultation anticipated can inform the engagement activities and, generally, the amount of time that may be required to engage. For example, major projects requiring multiple permits require a more extensive and intensive process.

The nature and extent of consultation will vary with the circumstances. In the end, the information obtained through engaging with First Nations, in addition to the information gathered in Phase One, Step 3 (review information), will inform how the required level of consultation ( ie. in Phase Two, Step 3) is determined.

### **Notification**

Where an aboriginal claim is weak or limited, or the potential for infringement of an Aboriginal Interest is minor, the legal duty may be to give notice of the pending decision or activity, disclose information, and provide an opportunity to discuss any issues raised in response to the notice. The Province will be required to address what it knows of the Aboriginal Interests and anticipated impacts.

### **Normal**

Where there is a likely impact on a reasonable claim or a reasonable probability of an infringement of a proven aboriginal right or title, or treaty right, consultation and accommodation in the normal range will be required. Situations must be approached individually and with flexibility as the level of consultation may change as the process goes on and new information comes to light. The Province must be prepared to make changes, intend to substantially address concerns, and to implement a level of reconciliation between the interests of First Nations and the Crown. Attempts must be made to minimize impacts. If the decision is regulatory in nature, an appropriate priority may need to be accorded to the proven right or treaty right.

### **Deep**

Where there is a strong aboriginal rights claim (including title), the potential for negative impacts on the claimed aboriginal right or title and the potential infringement of a proven aboriginal right or title or treaty right is high, and there is a risk of non-compensable damage, the duty is to engage in a deep consultation process. Consultation is aimed at finding

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a satisfactory interim solution<sup>1</sup> and may require further information. The consultation required here may involve: the opportunity for the First Nation to make submissions for consideration by the Province; First Nation participation in the decision-making process; and, the provision of written reasons to show that First Nations' concerns respecting their Aboriginal Interests were considered and influenced the decision that is made. In the case of an obvious infringement of proven rights, the question of whether compensation is relevant in the circumstances should also be considered.

## 5. Decide who will engage First Nations

Determining who will be engaging with the First Nation(s) will depend on the scope of the proposed activity and the governing legislation. The *procedural* aspects of consulting may be undertaken by:

- the ministry or agency proposing to make a decision;
- an interagency consultation team; or,
- the proponent.

In all instances, the decision-maker is responsible for ensuring that the consultation and accommodation record is complete and that consultation and accommodation is appropriate for the circumstances.

Clear explanations of the roles of staff, proponents, and the decision-makers should be provided to the First Nation(s).

### ***Coordinated consultation***

Where projects require approvals from multiple ministries/agencies, the preferred approach is to coordinate consultation through a "virtual single agency" approach. Coordinated consultation will facilitate a project-based approach to consultation, instead of a series of consultations about individual permits. The objective for coordinating consultation is to provide a transparent and predictable process while clarifying the nature and scope of the proposed decisions.

### ***Where the proponent is engaging in consultation***

In some circumstances, it may be appropriate for the Province to delegate certain *procedural* aspects of consultation to applicants. In such cases, the Province may consider:

- advising the First Nations that the applicant will be undertaking certain procedural aspects of consultation;
- identifying which First Nations to consult;
- providing to the proponent any non-confidential information that government has readily available about potentially affected First Nations;
- the level of consultation that may be required; and,
- assessing the adequacy and appropriateness of consultation and

<sup>1</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC73 ("*Haida*"), para 44

The solution is interim to the resolution of the rights question at large. Final resolution can only be achieved through the negotiation and agreement of a treaty agreement or a declaration by a court.

accommodations.

Provincial staff are responsible for keeping informed about proponent and First Nation engagements.

If certain Aboriginal Interest information has been treated as confidential or sensitive, policy or legal advice should be sought on how this may be handled in relation to proponents.

***Environmental Assessment Office***

The Environmental Assessment Office (EAO) will discharge the duty of the Crown to consult and accommodate (where required) on the decision of whether or not government should issue an environmental assessment certificate under the Environmental Assessment Act. EAO's "First Nations Consultation Report" provides useful information to statutory decision-makers as they discharge (post environmental assessment) subsequent consultation and accommodation duties.

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

## Phase Two: Engagement

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  3. Ensure implementation of accommodations

*"The first step in the consultation process is to discuss the process itself"*  
Gitksan 2004 para. 8

### 1. Provide information and seek input

After reviewing available information and considering an anticipated level of consultation, an introductory letter is sent to and/or a meeting is scheduled with the First Nation. The content of the letter and/or meeting will:

- include information about the proposed decision or activity and, where feasible, provide maps indicating where the activity may be, and identify who the provincial decision-makers are likely to be;
- generally indicate what information the Province already has about known Aboriginal Interests and potential impacts and if appropriate suggest an anticipated level of consultation;
- seek clarification and input regarding the information provided;
- where appropriate, invite the First Nations to meet to further discuss respective interests and possible solutions to any concerns;
- identify reasonable timeline goals for responses and the overall consultation process; and,
- identify who will be leading engagements with First Nations.

Notice of the proposed activity should be provided as early as possible in the planning stage. In some instances, the proponent may have already initiated engagement with First Nations regarding the proposed activity. Where staff is aware of this, they should reference the activity.

#### ***Existing treaties or process agreements with First Nations***

Where a treaty or process agreement (between a First Nation and the Province) is in place, the Province will follow the process set out in the agreement. Note that not all agreements will apply to all ministries or agencies. Engagement should be consistent with the agreement. Disputes may be governed by the dispute resolution process agreed upon in the treaty or process agreement.

### 2. Engage First Nation(s)

The purpose of engaging First Nations is to substantially address and accommodate their interests where required. At this point, First Nations may accept invitations to meet as part of the consultation process. Provincial staff (or proponent if delegated) should engage with the First Nation in a manner consistent with the anticipated level of consultation considered as a result of reviewing information in the Preparation phase. Discussions with the First Nation may provide an opportunity to better understand the First Nation's views and perspectives as well as options for resolving any issues.

Discussions should include general information about the nature of Aboriginal Interests in the area, including the potential strength of any claimed aboriginal rights (including title), potential for impacts and the level of consultation the Province considers appropriate.

Where First Nations require further information or clarification of the

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proposed decision or activity and want to provide their views on potential impacts on their Aboriginal Interests, steps should be taken to fulfill the requests including making requests to proponents.

The amount of further information required and the timeframes for exchanging information will depend on the level of consultation that is appropriate for the circumstance.

The suggested or anticipated level of consultation may change as new information about the First Nation's claimed or proven aboriginal rights (including title) or treaty rights, or about the potential impacts, emerges through the consultation process.

Where the proponent has been delegated to engage the First Nation, the Province should provide the proponent whatever non-confidential information it has about the First Nation(s) and the level of suggested consultation. Provincial staff are required to keep themselves informed of consultation engagements between the proponent and First Nation.

***No response from First Nation***

Where First Nations do not respond to requests to discuss the proposed decision and or their Aboriginal Interests, a follow-up letter or other communications may be required to confirm the First Nations' response.

***Preliminary assessments***

Once the engagement process has commenced and First Nations have been given an opportunity to engage, it is necessary to review the consultation (including any engagement by the proponent) carried out to this point and any information provided by the First Nation to determine:

- whether the level of proposed consultation is appropriate; and,
- whether accommodation may be necessary.

To make this decision, preliminary assessments of certain factors are required. Preliminary assessments combine the information gathered in the Preparation phase (Step 3) with what has been learned from the First Nation in the early stages of the engagement process to reach an opinion regarding:

- the strength of claimed aboriginal rights or title;
- the seriousness of impact; and
- the appropriate level of consultation (see Phase One, Step 4) and whether any accommodations will likely be required.

Where a court has made a declaration regarding specific aboriginal rights or title, or where treaty rights exist, a preliminary assessment of strength of claims is not necessary and the focus is on making a preliminary assessment of the seriousness of impact on the proven aboriginal rights or title, or treaty right.

Conclusions reached in the preliminary assessments provide the standard against which to assess the appropriateness of the level consultation and



- 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

whether accommodation may be required.

### 3. Complete consultation at appropriate level

If the proposed level of consultation is considered sufficient and appropriate, advise First Nation(s) of the preliminary assessments and complete the consultation at that level.

Consultation activities will vary depending on the level of consultation considered appropriate. Discussions should focus on eliciting pertinent information about the nature, extent and potential impacts of proposed decision on Aboriginal Interests. Opportunities to resolve disputes and to accommodate may emerge from these discussions.

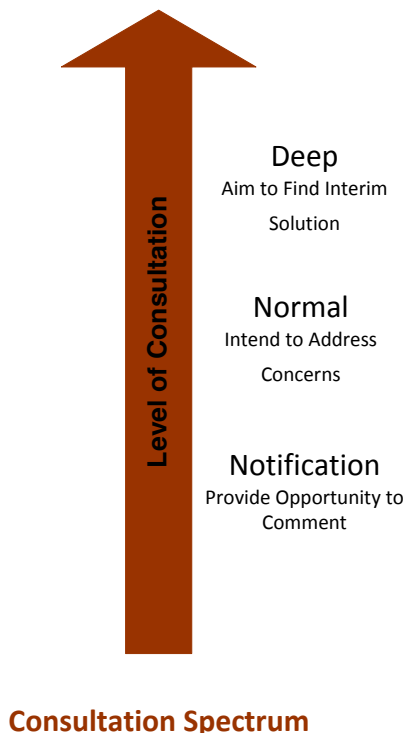
If the proposed level of consultation is not appropriate, re-engage with First Nation(s) at the appropriate level, and propose potential accommodation measures (where required) as discussed below.

If there is likely to be an infringement of a proven right or treaty right, further legal advice should be sought respecting appropriate potential accommodation measures and justification.

#### **No response from First Nation**

Where the First Nation does not provide further information, proceed to Phase Four, Decision and Follow-up. Before proceeding, consider the information gathered in the Preparation phase. If it appears likely that there will be significant impacts on known Aboriginal Interests, further consider whether opportunities exist to mitigate or accommodate that possible impact in the context of the proposed decision. It is important to proceed to the decision as soon as possible once the consultation process has been completed.

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



## Phase Three: Accommodation

- 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

### 1. Assess consultation and need to accommodate

The Province may be required to take steps to accommodate where:

- a proposed activity will adversely impact an Aboriginal Interest; or,
- there is likely an infringement of a proven aboriginal right or title or treaty right.

Whether accommodation is necessary and what form it will take is dependent on the outcome of the consultation process. This includes:

- any information gathered in Phase One;
- information learned during the consultation process;
- the nature of Aboriginal Interests including any preliminary assessment of the strength of the case supporting the asserted aboriginal rights and title;
- the preliminary assessment of impacts on Aboriginal Interests and any further information on impacts gained from consultation;
- broader societal interests and valid objectives of the Crown; and,
- any other accommodations that have been employed by government and/or the proponent relating to the proposed activity.

Accommodation primarily means avoiding or mitigating impacts on Aboriginal Interests, but can also include measures aimed at promoting the broader interests of First Nations groups. It involves attempting to seek a compromise while attempting to harmonize conflicting interests. Accommodation(s) can be fixed in the terms of a decision or set out in an agreement.

#### ***Accommodations where there is an agreement***

Where accommodation may be required and there is an agreement, it is important to recognize the purpose and function of the agreement and to determine whether accommodation issues are covered by the agreement. It is important to determine whether following the requirements of an agreement is sufficient to fulfill the duty in question or whether additional accommodation efforts are needed before a decision is made.

### 2. Identify accommodation option(s)

Upon concluding that accommodation is required, accommodation options should be identified based on an understanding of:

- the kind and/or strength of the Aboriginal Interests being impacted; and,
- the degree of impact on the Aboriginal Interests.

An appropriate or reasonable accommodation will address First Nation concerns that are reasonably linked to the nature of the Aboriginal Interests including: any preliminary assessment of strength of any claim to aboriginal rights or title; and, the preliminary assessment of seriousness of impacts of the proposed activity on the Aboriginal Interests in question.

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

Practical accommodation measures include:

- mitigation;
- avoidance;
- proposal modification;
- commitments to take other action;
- a spectrum of land protection measures; and,
- impact monitoring.

Proponents may be encouraged to revise their plans or mitigate impacts. Proponents may be in a better position to provide solutions (eg. modify plans or proposed activities) than the government.

In certain situations, economic or financial accommodations may be considered where mitigative measures are insufficient and there is a reasonable probability of permanent or ongoing infringement of a strong rights claim involving title or an economic component.

Higher level provincial authority may be required in order to proceed with certain accommodations, particularly economic or financial accommodations. See *Accommodation Guidance* for further assistance.

### 3. Propose accommodation measure and attempt to reach agreement

Advise the First Nation(s) of the Province's preliminary assessments of:

- strength of any claimed aboriginal rights or title;
- seriousness of impact on the Aboriginal Interests at stake; and,
- appropriate level of consultation and accommodation for the circumstances; and then,

offer the accommodation to the First Nation(s) for consideration.

The accommodation measure proposal will include:

- a description of the information considered in assessing the need for and level of accommodation;
- reasons for supporting the appropriateness of the proposed measure.

The proposal must provide a reasonable opportunity for the First Nation to respond.

After hearing the First Nation's response or, if no response is forthcoming after a reasonable time, consider whether changes or additional measures should be pursued. Attempt to reach agreement.

If agreement is reached, document the agreement including how the accommodation measure links with concerns over potential impacts on the Aboriginal Interests.

If agreement is not reached, document sufficiency of consultation, attempts to reach agreement, and willingness to undertake proposed accommodation measures.

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

# Phase Four: Decision and Follow-Up

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

## 1. Assess consultation and accommodation record

Prior to making a decision respecting the authorization request at hand, the decision-maker should review the consultation and accommodation record to assess:

- the level of consultation based on the nature of the Aboriginal Interest(s) including the strength of any claimed aboriginal rights or title, and the seriousness of impact on the Aboriginal Interest(s) in question; and,
- the appropriateness and adequacy of consultation and accommodation.

If analysis of the consultation and accommodation record suggests that further consultation or accommodation may be appropriate, the Province should continue consultation, and/ or accommodation discussions.

If analysis suggests that the consultation and accommodation effort has been sufficient, proceed with making a decision on the authorization request.

## 2. Provide decision to First Nation

Maintain a record of the decision, along with consultation considerations or analysis which led to the decision. Provide the decision to First Nation.

For middle to deep consultation processes, consider articulating the reasons for decision, including what accommodation, if any, has been deemed appropriate.

Where a treaty or process agreement informs the consultation and accommodation process, the decision-maker must ensure that steps taken and decisions are consistent with the agreement.

## 3. Ensure implementation of accommodations

The decision-maker is responsible for ensuring any accommodations are implemented. Where accommodations are to be implemented after a decision has been made, it may be necessary to follow up with the appropriate parties to ensure that any accommodation-related conditions of authorization are fulfilled.

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

*“Consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.”*

SCC Mikisew para 63



**Table  
Operating Guides and Tools**

Process	Operating Guides	Tools
<b>Phase 1: Preparation</b>		
1. Identify First Nation		<ul style="list-style-type: none"> <li>• Consultation Area Database (CAD)</li> <li>• First Nations Quick Queries (FNQ2)</li> <li>• Consultation Summary: Template and Reference Guide (Consultation Summary)</li> </ul>
2. Identify treaties and process agreements		<ul style="list-style-type: none"> <li>• Aboriginal Engagement and Corporate Information System (AECIS)</li> <li>• CAD</li> <li>• FNQ2</li> </ul>
3. Review readily available information	<ul style="list-style-type: none"> <li>• Provincial Preliminary Assessment Guideline</li> <li>• Coordinated Consultation Toolkit</li> </ul>	<ul style="list-style-type: none"> <li>• Remote Access to Archaeological Database</li> <li>• Historical and ethnographic research prepared by the Ministry of Attorney General, Aboriginal Research Unit</li> <li>• AECIS</li> <li>• CAD</li> <li>• FNQ2</li> <li>• Consultation Summary</li> </ul>
4. Consider a level of consultation		<ul style="list-style-type: none"> <li>• Consultation Summary</li> </ul>
5. Decide who will engage First Nation(s)	<ul style="list-style-type: none"> <li>• Operational Guidance on the Role of Proponents in First Nations Consultation</li> <li>• EAO Service and Fairness Code</li> <li>• EAO 2009 User Guide</li> <li>• Coordinated Consultation Toolkit</li> </ul>	<ul style="list-style-type: none"> <li>• Consultation Summary</li> </ul>
<b>Phase 2: Engagement</b>		
1. Provide information and seek input	<ul style="list-style-type: none"> <li>• Referral Letter Content Guides</li> </ul>	<ul style="list-style-type: none"> <li>• Consultation Summary</li> </ul>
2. Engage First Nation(s)	<ul style="list-style-type: none"> <li>• Operational Guidance on the Role of Proponents in First Nations Consultation</li> <li>• Provincial Preliminary Assessment Guideline</li> </ul>	<ul style="list-style-type: none"> <li>• Consultation summary</li> </ul>
3. Complete consultation at appropriate level		<ul style="list-style-type: none"> <li>• Consultation summary</li> </ul>
<b>Phase 3: Accommodation</b>		
1. Review consultation and need to accommodate	<ul style="list-style-type: none"> <li>• Accommodation Guidance</li> </ul>	
2. Identify accommodation options	<ul style="list-style-type: none"> <li>• Accommodation Guidance</li> </ul>	
3. Propose accommodation and attempt to reach agreement	<ul style="list-style-type: none"> <li>• Referral Letter Content Guides</li> </ul>	
<b>Phase 4: Decision and Follow-up</b>		
1. Assess consultation and accommodation record		<ul style="list-style-type: none"> <li>• Consultation summary</li> </ul>
2. Provide decision to First Nation	<ul style="list-style-type: none"> <li>• Referral Letter Content Guides</li> </ul>	<ul style="list-style-type: none"> <li>• Consultation summary</li> </ul>
3. Ensure implementation of accommodations		<ul style="list-style-type: none"> <li>• Consultation summary</li> </ul>

# Definitions

## **Aboriginal people**

All indigenous people of Canada, including Indians (status and non-status), Métis, and Inuit people.

## **Band**

An organizational structure defined in the *Indian Act* which represents a particular body of Indians as defined in the *Indian Act*.

## **Band council**

A body elected according to provisions of the *Indian Act*, charged with the responsibility for "the good government of the band" and delegated the authority to pass by-laws on Indian reserve lands.

## **Common law/case law**

In general, a body of law that develops through court decisions (as distinguished from legislative enactments) which may interpret, create or define the law as it exists in legislation or previous case law.

## **Crown**

Refers to the provincial or federal government generally, and in this document refers to the provincial government including departments, ministries and Crown agencies and includes all government employees that are doing the work of the B.C. government.

## **First Nation**

A term that came into common usage in the 1970's to replace the word "Indian" (an *Indian Act* term) which some people found offensive. Although the term "First Nation" is widely used, no legal definition of it exists. Among its uses, the term "First Nations peoples" refers to the Indian peoples of Canada, status and non-status. Some Indian bands have also adopted the term "First Nation" to replace the word "band" in the name of their community.

## **Métis**

For purposes of section 35 rights, the term Métis refers to distinctive peoples who, in addition to their mixed Indian/Inuit and European ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community for the purposes of section 35 rights is a group of Métis with distinctive collective identity, living together in the same geographic area and sharing a common way of life.

**Preliminary Assessment**

Preliminary assessment considers the sum of information gathered in the Preparation phase and that learned from the consultation process to reach an opinion regarding:

- nature of the Aboriginal Interests including strength of the case supporting the claimed aboriginal rights or title (also referred to as strength of claim);
- seriousness of impact; and
- the level of consultation and any accommodations required.

**Treaty**

A solemn agreement between government and a First Nation that defines the rights of aboriginal peoples with respect to lands and resources over a specified area, and may also define the self-government authority of a First Nation. Treaties may be historic agreements dating from the mid-1800's in B.C. or modern "final agreements" which have been ratified by Canada, B.C. and the First Nation(s).

**Treaty rights**

Those rights held by a First Nation in accordance with the terms of a historic or modern treaty agreement with the Crown.

**Tribal Council**

A self-identified entity which represents aboriginal people or a group of bands.



