

**MINISTRY OF ADVANCED EDUCATION,
INNOVATION AND TECHNOLOGY**

**Guide
To
Involving
Post Secondary
Institutions
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 Province's 2010 *Updated Procedures for Meeting Legal Obligations When Consulting First Nations* 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. The Province may ask Post Secondary Institutions (Institutions) to be involved with engaging First Nations for consultation purposes.

While the Province is responsible for ensuring adequate and appropriate consultation and accommodation, it may assign certain procedural aspects of consultation to Institutions. Institutions 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 and Institution staff with respect to their roles in First Nations consultation. It is to be used in conjunction with the *Updated Procedures for Meeting Legal Obligations When Consulting First Nations*.

Responsibilities

The Province will work with Institutions to ensure that provincial and Institution activities are coordinated.

The Province has the authority to make decisions on dispositions of land owned by Institutions, and is responsible for ensuring that the consultation and accommodation record is complete and that that consultation is appropriate for the circumstances.

Institutions, working with the Province, are encouraged to engage First Nations as early as possible when seeking statutory decisions to dispose of their land. Institutions 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.

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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 Institution

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

- the nature of the proposed disposition;
- the nature of Aboriginal Interests potentially involved;
- the capacity of the Institution to manage engagement activities;
- the capacity of the Institution to access information relating the details or context of the proposed activity; and
- any processes required under agreement with First Nations.

Institutions, working with the Province, 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, Institutions are often in a better position to provide information about their proposed activity directly to First Nation.

B. Advising First Nation(s) of the Institution's Role

Institutions should provide the following to the First Nation:

- notification respecting the proposed disposition;
- notification that the Institution's engagement activities will be documented and will form part of the consultation record that will be considered by the Province;
- confirmation that the Province retains accountability and responsibility for assessing and ensuring adequate and appropriate consultation and accommodation; and
- contact information respecting the initial stages of consultation for the proposed activity and the Provincial decision maker.

C. Institution's Engagement Activities

Where they are involved in the procedural aspects of consultation, Institutions will seek the following from the Province:

- any assistance needed to identify which First Nations to engage;
- 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 regarding the significance of documenting their engagement activities and outcomes, which will be included in the consultation record and used in assessments of strength of claim and seriousness of impacts of the proposed activities; and
- advice respecting the significance of documenting measures to avoid, mitigate or otherwise address any First Nation concerns.

Engagement activities by Institutions may include:

- participating in meetings with government representatives and

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Engagement Activities

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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 affected First Nation can practice the activity or use; and
- discussing possible plan modifications to address Aboriginal Interests.

To facilitate the decision making process, Institutions 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 engagement. Measures to address concerns may include:

- avoidance;
- mitigation strategies; and
- other agreements.

In some cases, discussions between the First Nation and the Institution may lead to partnerships or other relationship building opportunities. Although these arrangements are not legally required, such arrangements may strengthen the long term relationship with the First Nation. These types of partnerships are positive and further the objectives of the New Relationship (a vision for improved government-to-government relations with First Nations).

Consultation Record

Institutions are encouraged to document all efforts to engage First Nations, the identification of Aboriginal Interests and concerns by First Nations, and any modifications implemented or planned to address First Nation concerns. Institutions will 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 for remaining informed of engagement efforts between Institutions and First Nations, seeking clarification and confirmation where appropriate.

The Province will oversee the Institution'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.

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D. Reviewing the Institution's Engagement Record

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After First Nations have been given the opportunity to engage with an Institution, the Province will review the Institution'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 Institution 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 Institution's expertise been answered?
- Has the Institution's engagement record been received? If so, is it complete?

If the engagement record appears incomplete, the Province will work with the Institution to fill any gaps. Where there are outstanding components, the Province will consider whether it is appropriate to continue to involve the Institution.

If the engagement record is satisfactory, the Province will conduct a preliminary assessment. The information learned from the general review, the engagement record and received from First Nations during consultation will be considered by the Province.

E. Accommodating Aboriginal Interests

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Institutions are encouraged to consider changes to their proposal to address potential impacts to Aboriginal interests and 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.

Institutions are asked to consider and explore accommodation options with the Province

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 Institutions

- ✓ *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.*
- ✓ *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 proposed decision and consider any concerns.*

Frequently Asked Questions

1. Why is the BC Government required to consult First Nations regarding the proposed statutory decision?

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?

Institutions 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?

Yes. The Supreme Court of Canada in *Haida* (2004) said that government could delegate the procedural aspects of consultation to third parties; 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 proposals 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.

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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, customs or traditions integral to a First Nation culture. 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 are appropriate types of accommodations?

Accommodations are typically changes to development plans in order to avoid or minimize potential impacts to aboriginal title or rights. For example, development plans might avoid areas where Culturally Modified Trees are found. Similarly, native species of plants could be used for landscaping, rather than non-native, to prevent the introduction of plants that are potentially harmful to local populations.

Forms of accommodations that are not directly linked to the nature of the impact, such as employment opportunities and partnerships, can be implemented through agreements.

7. What do I do if a First Nation asks for funding?

Institutions 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, Institutions may choose to provide assistance to First Nations to address First Nation costs of participating in the consultation process.

8. What kind of information do I give the First Nation about my application?

Information provided by Institutions would typically include:

- Description of the nature of the overall proposed decision or action;
- List of all authorizations required and their timing;
- The location of the proposed activity; and
- Identification of any potential bio-physical impacts.

9. How do I determine with which First Nations to contact?

The Province 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>.

Institutions should also contact the Province to discuss the proposed decision and for help identifying the appropriate First Nations that should be contacted during consultation.

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- 10. There is more than one First Nation with interests over the location of application. How do I engage with all of them?** Contact the Province representative responsible for your proposed decision. They will be able to provide guidance on where to focus your efforts.
- 11. What do I do if the First Nation does not want to engage with me or does not respond?** Where this happens, contact the Provincial representative responsible for administering your proposed decision for further guidance. Institutions 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 Institutions to build relationships before statutory approvals are requested.
- 12. What will the Ministry of Advanced Education, Innovation and Technology do when I carry out the procedural aspects of consultation?** The Province is ultimately responsible for ensuring appropriate and adequate consultation and accommodation.