

**HILL SLOAN ASSOCIATES INC.
Economics Consultants**

FIRST NATION CONSULTATION FRAMEWORK

**PROJECT REPORT
TO
THE NATIONAL CENTRE FOR FIRST NATIONS GOVERNANCE**

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1. INTRODUCTION

1.1 OBJECTIVES OF THE PROJECT

The purpose of this project is to compile information on consultation frameworks that could be used by First Nations in Canada.

To this end, this Report:

- Provides background information, including an overview of the legal framework for First Nations consultation.
- Identifies aboriginal consultation policies and practices in place among governments, First Nations and corporations in Canada.
- Identifies elements of effective consultation practices and frameworks involving First Nations in Canada and, where relevant, indigenous peoples internationally.
- Identifies essential elements for a “practical guide” on effective consultation approaches involving First Nations in Canada.

1.2 APPROACH AND SCOPE

This project involved extensive research into and analysis of the role that meaningful consultation can play in First Nation development in Canada. A key element was to develop insights into the importance of consultation in helping First Nations achieve greater self governance.

The Consultant reviewed the significance of legal interpretations of the Crown’s duty to consult, the impact of the Court’s guidance on meaningful consultation and accommodation, as well as the implications of the right of indigenous peoples to free, prior and informed consent.

The recent guidance of the Court has provided the basis of new guidelines on consultation by provincial governments and First Nations and underpins new perspectives on consultation by Canadian business. Examples of provincial and First Nation guidelines from across Canada were identified and analyzed. This provided important insights into the key elements of effective consultation protocols that could be adopted by First Nations.

Another significant component of the research program was to identify and analyze existing guides on consultation and examine their applicability for First Nation users.

The findings have been distilled in the Project Report, along with a number of Fact Sheets. These are designed to provide users in First Nations with insights into the key components of consultation protocols that could be adopted by First Nation's to ensure that the Crown's duty to consult and accommodate becomes a source of leverage and strength for First Nation communities.

2. KEY FINDINGS

2.1 CONSULTATION AND FIRST NATIONS

2.1.1 Importance of Consultation for First Nations

Consultation is a critical issue for First Nations. This reflects the following considerations:

- Consultation signals respect for Aboriginal rights.
- Consultation provides the opportunity for Aboriginal Peoples to protect their rights.
- Consultation gives the opportunity for First Nations to exercise their jurisdiction over, and their social and economic interest in, lands and natural resources.
- Engaging in consultation can result in a longer term commitment to build a sustainable relationship and reconcile the ongoing issues originating from the past.
- Consultation could result in increased involvement by the First Nation in revenue sharing and land and resource management within its territory as a result of accommodation and mitigation decisions.
- Consultation activities can create mutually beneficial relationships with governments and third parties
- Consultation will provide an increased role for the community to participate in decision-making.

At the same time, consultation results in important benefits both for the Crown and Third parties, such as corporations. These factors are set out in the following exhibit.

Exhibit
Importance of Consultation

For Aboriginal People

- Consultation signals respect for Aboriginal rights.
- Consultation provides the opportunity for Aboriginal People to protect their rights.

For the Crown

- Consultation provides the opportunity to uphold the “honor of the Crown”
- Engaging in consultation can result in a longer term commitment to build a sustainable relationship and reconcile the ongoing issues originating from the past.

For Third Parties

- Consultation improves commercial certainty, predictability and timeliness of decisions
- Consultation activities can create mutually beneficial relationships with First Nations

2.1.2 Historical and Legal Context for Consultation

Aboriginal rights are the rights that Aboriginal peoples have because they inhabited Canada before the arrival of Europeans. They include the right to engage in activities stemming from practices, customs and traditions that were integral to their distinctive cultures at the time when they first came into contact with Europeans

The existing rights of the Aboriginal people, whether Aboriginal or treaty rights, are recognized under section 35 of the Constitution Act, 1982. Hence, they benefit from constitutional protection. However, these rights, including Aboriginal title, are not absolute. The Courts have recognized that the Crown can infringe these rights insofar as it can justify its action. Basically, such a justification is made when the Crown succeeds in showing that it acted in such a way as to truly take into account the existence of Aboriginal rights. Consultation may therefore serve as proof of justification.

In the *Haida* and *Taku River* rulings handed down on November 18, 2004, the Supreme Court of Canada made, whether explicitly or implicitly, the following findings:

- the classic recourses of the Aboriginal people before the Courts to obtain recognition of their rights are long and costly;
- the injunction route is virtually impossible for the Aboriginal people due to the balance of convenience which generally tips in favour of the Crown;
- comprehensive territorial negotiations are, by definition, a long process; and

- the agreements on temporary measures are insufficient or unfeasible, such that the territory continues to be developed despite the existence of legal recourses or negotiations pertaining to the claims of the Aboriginal people.

The court ruling in Haida and Taku River cases sets out that the Crown henceforth had the duty to consult the Aboriginal communities and to address their concerns even before the Aboriginal communities had established the existence of their title on lands as well as their Aboriginal rights.

2.2 CURRENT APPROACHES TO CONSULTATION WITH FIRST NATIONS

2.2.1 Canadian Court Guidance on Consultation

Consultation is required with Aboriginal peoples whose existing or potential rights may be impacted by a decision the provincial or federal governments propose to make.

The duty of the Crown to consult with the First Nations and Métis is grounded in the concept of the “honour of the Crown”. This means that the Government must act with honour and integrity in its dealing with First Nations. This, in turn, implies a duty to consult and, if appropriate, accommodate if the actions contemplated by the Government could adversely affect First Nation rights. The Crown’s duty to consult requires a meaningful, fair process to have discussions and a substantive discussion that addresses, or accommodates, First Nation concerns.

The Supreme Court of Canada has set out the clearest definition of the Crown’s duty to consult in three cases. They are:

- *Haida Nation v. British Columbia (Minister of Forests)*, 2004
- *Taku River v. British Columbia (Project Assessment Director)*, 2004
- *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005

These three cases provide extensive detail as to the source of the duty to consult. They also make clear that the duty arises not only when First Nations have *proven* rights (for example, through a court case) but also when they have *potential* rights (rights that they implement and assert, but that have not been proven to exist by a court of law) that may be impacted.

The Court has provided guidance on the following issues:

- The Duty of the Crown
- Consultation Principles
- Procedural Issues
- Accommodation
- Aboriginal Obligations
- Third Party Obligations

- Role of Project Developers

Appendix B-1 presents summary information on Canadian Court guidance with respect to these issues.

2.2.2 Meaningful Consultation

The nature of the Crown's duty to ensure that meaningful and fair consultation takes place has been clarified both in modern treaties and in Court guidance on numbered treaties.

Modern Treaties specifically addresses the extent and nature, as well as the limits, of consultation obligations in relation to land and resource projects on Crown land, in circumstances where those projects may have an impact on First Nation residents, lands or interests. They define the requirements of meaningful consultation to include:

- notice of a matter to be decided;
- sufficient information in respect of the matter to permit the party to prepare its views on the matter,
- a reasonable period of time to permit the party to prepare its views on the matter,
- an opportunity for the party to present its views on the matter, and
- a full and fair consideration of any views on the matter presented by the Party.

The Court's interpretation, as evidenced in its ruling in *Halfway River*, is bringing significant convergent on the issue of meaningful consultation in both modern and numbered treaties. It is clear from the ruling in *Halfway River* that meaningful consultation now must involve a process that:

“...ensure that aboriginal peoples are **provided with all necessary information** in a **timely way** so that they have an **opportunity to express their interests** and concerns, and to **ensure that their representations are seriously considered** and, whenever, possible, **demonstrably integrated into the proposed plan** of action.” (emphasis added)

2.2.3 International Guidance on Consultation

Indigenous Peoples are recognized by international law and institutions as distinct, self-determining peoples with inherent collective rights. They claim special rights, which include the right to free, prior and informed consent (FPIC) and the right of self-determination. These rights and principles are reflected in international human rights law and in the laws of some states.

Both the United Nations and the World Bank have addressed the issue of consultation with indigenous peoples and have provided different perspectives in FPIC.

The *UN Declaration on the Rights of Indigenous Peoples* makes clear that Indigenous peoples have *the right to participate in decision making* and that States must obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them.

The World Bank has adopted a policy that World Bank funded projects will need a process of *free, prior and informed consultation* with indigenous peoples, at each stage of the project, to identify their views and *to ascertain whether there is broad community support for the project*.

Appendix B-3 presents additional information the perspective of international law and international institutions.

2.2.4 Provincial Guidelines

Provincial guidelines have been produced or proposed by a number of provinces including Alberta, Saskatchewan, Manitoba, Ontario and Quebec.

These guidelines that set out the approach to be used by provincial government departments (and sometimes project proponents) respecting consultations with First Nations and Métis in circumstances where action contemplated by Government may adversely affect Treaty or Aboriginal rights. The content of the provincial guidelines usually covers:

- Legal background on Aboriginal rights and the duty to consult
- Principles to govern consultation
- Recommendations on the consultation process
- Issues related to Accommodation

These guidelines are based on the existing guidance of the Court and are intended to reflect, in a practical way, the minimum legal requirements established by the courts.

Appendix B-4 presents additional information on provincial guidelines on consultation.

2.2.5 Corporate Perspectives

Two major business groups have provided perspectives on Aboriginal consultation in recent years.

BC New Relationship Business Group

The Government of British Columbia and the First Nations Leadership Council invited the BC business community to offer its thoughts and recommendations on how a new consultation and accommodation regime might be structured in the province. Major business and industry associations (including the BC Chamber of Commerce, tourism association, forestry associations, and mining associations) formed the “New Relationship Business Group” to answer this challenge. The Group has recommended that First Nations and the BC government undertake action in the following priority areas:

- A new model for First Nation Consultation and Accommodation that considers both dimensions of the content of the duty to consult:
- A new government policy that clearly sets out the expectations, time frames and process (including funding) for First Nation consultation.
- Recognition that the responsibility for an effective process is shared by government and First Nations, such that both parties must participate in good faith in reaching consensus.
- Consultation on higher level plans is preferred to engagement on each and every minor permit.
- Acceptance that there are outstanding issues in the reconciliation of aboriginal and Crown titles that cannot be resolved through consultations on proposed development activities.

Canadian Energy Pipeline Association (CEPA)

Canadian Energy Pipeline Association has developed a cross-industry Aboriginal consultation framework for its member companies.

The consultation framework contains core consultation “principles” and associated CEPA “objectives,” as well as guidelines. Together the principles, objectives and guidelines form CEPA’s Aboriginal consultation framework and provide CEPA companies with the essential elements that are needed to guide their consultation activities.

CEPA’s consultation framework is consistent with current industry practices. It also addresses most of the over-arching principles found in consultation policies or other documents of Aboriginal groups, which were reviewed in developing this framework. The framework can be used as a foundation for companies to build more specific policies, or it can be used on its own as a guide to consultation activities.

Appendix B-5 presents additional information on corporate perspectives on consultation.

2.3 FIRST NATIONS GUIDELINES FOR CONSULTATION

2.3.1 Guidelines Developed by First Nations

Since 2004, a number of First Nations have drafted and adopted policies or guidelines related to consultation.

The emergence of these guidelines represents a new development in the nature of First Nation expectations regarding consultation, and set out specific policies, practices and approaches to guide the consultation process.

Specific aspects of the guidelines and policies are incorporated in the Consultation Fact Sheets that accompany this report (Appendix A).

Guidelines Adopted or Signed by First Nations	
BC	<ul style="list-style-type: none">▪ Simpcw First Nation Consultation and Accommodation Guidelines 2006▪ Hupacasath First Nation Territory Land Use Plan – Phase 2, 2004
Alberta	<ul style="list-style-type: none">▪ Horse Lake First Nation Consultation Policy, February 1, 2007
Saskatchewan	<ul style="list-style-type: none">▪ FSIN Consultation Policy
Ontario	<ul style="list-style-type: none">▪ Bkejwanong Territory (WIFN) Environmental Policies, Guidelines and Information for External Project Proponents, February 2006
Quebec	<ul style="list-style-type: none">▪ Consultation Protocol of First Nations of Quebec and Labrador

2.3.7 Joint First Nation-Crown Consultation Protocols

Joint First Nation-Crown protocols have also been signed in the Yukon, British Columbia, the Northwest Territories and Nova Scotia. In Ontario, a new Algonquin Consultation Protocol has recently been proposed.

Joint First Nation-Crown Consultation Protocols	
Yukon	<ul style="list-style-type: none"> ▪ Consultation Protocol between Carcross/Tagish First Nation and Yukon (Identical protocols signed with 7 other Yukon First Nations)
BC	<ul style="list-style-type: none"> ▪ Nisga'a Final Agreement ▪ Tsawwassen First Nation Agreement-in-Principle ▪ Lheidli T'enneh Agreement-in-Principle ▪ Maa-nulth First Nation Agreement-in-Principle ▪ Sliammon Agreement-in-Principle
NWT	<ul style="list-style-type: none"> ▪ Tlicho Agreement
Ontario	<ul style="list-style-type: none"> ▪ Algonquin Consultation Protocol (proposed)
NS	<ul style="list-style-type: none"> ▪ Mi'kmaq –Nova Scotia-Canada Consultation Process 2007

2.4 ISSUES IN FIRST NATIONS CONSULTATION

2.4.1 Common Perspectives

A number of commonalities emerge from this review of First Nation, industry, international and Canadian legal guidelines:

- ***Aboriginal Rights:*** Recognition of and respect for Aboriginal and treaty rights underpins the process of consultation.
- ***Crown Duty:*** The Crown always has a duty to consult, even when Aboriginal rights have not been proven.
- ***First Nations Obligations:*** First Nations have an obligation to identify their rights, act in good faith, participate in the consultation process and try to reach a mutually satisfactory solution.
- ***Third Parties:*** Although they have no duty to consult, Third Parties should be involved in the consultation process and can play a significant role in adjusting projects to avoid or minimize impacts on a First Nation.
- ***Mutual Respect:*** Mutual respect and trust are fundamental elements in establishing a good consultative relationship.
- ***Meaningful Consultation:*** Consultation must be meaningful and requires a genuine attempt to address interests and concerns.

- **Timing:** Consultation must be undertaken in a timely manner and as early in the decision/planning process as possible.
- **Information Sharing:** Information must be comprehensive and understandable.
- **Mitigation:** Residual impacts must be minimized or mitigated.
- **Scope:** The nature and scope of consultation will vary with the nature of the proposed activity and the impact to Aboriginal activities.
- **Funding:** Crown should provide funding for First Nations participation
- **Feedback:** Provide feedback and offer reasons for a decision, if necessary
- **Dispute Resolution:** Where a consultation results in no agreement, the parties may agree to enter into a process of dispute resolution

2.4.2 Divergent Views

At the same time, there are divergent views on the following issues.

- **Consent:** There is no consensus that First Nations or indigenous peoples should have the “right to say no” to projects that might affect them.
- **Community Support:** There are different perspectives on how to achieve informed community participation. In addition, once a community has agreed to a project it is not clear whether community support is needed at subsequent stages of a project and how it should be verified.
- **Government-to-Government Relationship:** There is no consensus that the duty to consult carries the expectation that First Nations should be equal players in resource management decisions.
- **Addressing Past Grievances:** There is no common agreement that the consultation process should also be used to address past grievances.

2.5 GUIDES AND RESOURCES ON CONSULTATION

2.5.1 Key Guides and Resources

A number of guides that addressed certain aspects of the consultation process were identified. These included the following.

- ***Consulting with the Crown: A Guide for First Nations***

This was produced by the Centre for Indigenous Environmental Resources in 2007. This guide discusses the legal definition of consultation and the duty of the Crown. It provides a tool to assist a First Nation in effectively engaging in consultation with Canadian provincial and federal governments. It sets out a six-step process that focuses heavily on the planning and education that takes place before consultation, and provides a means by which a First Nation can design a suitable consultation approach.

- ***Consultation Protocol of First Nations of Quebec and Labrador***

This was prepared by the First Nations of Quebec and Labrador Sustainable Development Institute in 2005. It is meant to be a practical tool for communities and First Nations that receive requests for consultations or demand to be consulted when they learn of proposed action that may affect First Nations. It is also intended as a reference tool in support of representations and negotiations at the federal and provincial levels. The Protocol provides background information on the origins, context and consequences of the federal and provincial governments' duty to consult and accommodate First Nations.

- ***First Nations Environmental Assessment Toolkit***

This toolkit was developed in 2004 by the First Nations Environmental Assessment Technical Working Group (FNEATWG), an informal organization of EA practitioners in BC. It provides information and practical advice that will help First Nations participate effectively in the EA processes. Relevant topics related to negotiation include the common law duty of the Crown to consult with First Nations; engaging the proponent; funding opportunities; and negotiating impact benefit agreements.

- ***Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada***

This report by Irene Sosa and Karyn Keenan for the Canadian Environmental Law Association was produced in 2001. It provides guidance on the following: the role of IBAs, the legal framework, the legal status of IBAs, using memorandum of understanding or agreement in principle to establish the "rules of the game" for the

negotiation, the contents of impact benefit agreements implementation and enforcement, costs and limitations,

- ***Sharing in the Benefits of Resource Developments: A Study of First Nations-Industry Impact Benefits Agreements***

This report was prepared by the Public Policy Forum in 2006. This report describes and analyzes of the role of Impact Benefits Agreements (IBAs) in the resource development process. It provides an understanding of why impact benefit agreements are negotiated, the content of the agreements, the negotiation process, linkages to Aboriginal and treaty rights, and participant satisfaction with the process and content.

2.5.3 Potential Knowledge Needs for First Nations

Consultation is a critical issue for First Nations. The complexity and importance of this issue has stimulated the development of laws, policies, protocols and guidelines developed by Canadian Courts and governments as well as by international institutions. More recently, the corporate sector is expressing its views on consultation.

The emergence of guidelines developed and adopted by First Nations is a recent phenomenon – but one which represents a significant advancement in First Nation governance. First Nations are now setting out their expectations, and establishing policies and practices that will shape the relationships between First Nations, other governments and with the corporate sector.

Information on the guidelines and protocols is, for the most part, in the public domain. Many are available on the internet, or in documents published elsewhere. However, there is no up-to-date or comprehensive source on the newly-emerging First Nation approaches to consultation. Finding the policies and understanding their common approaches – as well as innovative aspects – can involve significant time and effort.

This represents a significant gap in knowledge with consequences for the speed and effectiveness of the development of the strategic capabilities of First Nations in this area. The benefits of having the knowledge design and adopt effect approaches to consultation are becoming increasingly evident. Addressing the knowledge needs of First Nations is emerging as a priority issue.

3. CONSULTATION: MODELS AND ELEMENTS

3.1 Elements of Effective Approaches to Consultation

An analysis of the recent First Nations guidelines and protocols for consultation suggests that knowledge-building in five broad areas can help build the knowledge and capabilities of First Nations.

These are:

- ***Consultation principles*** define the rules or codes of conduct under which the consultation process should take place, enable a First Nation to identify and highlight exactly those rules by which it considers meaningful consultation must take place.
- ***Consultation procedures and steps*** refer to the series of actions that need to be taken to accomplish a successful consultation. 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.
- ***Consultation plans*** determine the parameters of the consultation, information needs, appropriate consultation methods scope, timing, resources, participants, nature of evaluation and feedback. Developing a consultation plan enables both parties to address important issues such as the use of facilitators, the participation of Third Parties in the consultation, funding, use of negotiating techniques, etc
- ***Accommodation*** is required when a proposed action will infringe upon a First Nation's rights. In these cases the legal duty to consult will necessitate concrete steps to accommodate Aboriginal interests. Accommodation may be put in place through impact benefit agreements.
- Lack of ***resources and funding*** has been a major stumbling block to meaningful and valid consultation and accommodation with First Nations. The duty to consult and accommodate, carries with it the obligation to ensure adequate and sustained funding for First Nations to carry out the ongoing work of identifying and articulating their interests and to participate in decision-making processes.

Each of these elements is developed in more detail in the Fact Sheets that are presented in the Appendix to this report. These Fact Sheets define and describe the individual elements, as well as explain the contribution that they can make to effective consultation. The Fact Sheets also provide concrete examples of how different First Nation organizations have implemented in each area, and indicate additional resources that are available to expand and further develop the six key elements.

3.2 Models for Consultation

These five elements appear in many of the First Nation protocols and guidelines that address the issue of consultation.

The following table presents an analysis of the coverage of the different themes in seven different First Nations guidelines and protocols.

Key Elements of First Nation Consultation Guidelines/Protocols							
	1	2	3	4	5	6	7
Consultation Principles	+	+	+	+	+	+	+
Consultation Procedures/Steps	+	+	+		+	+	+
Consultation Plans	+	+	+				
Accommodation and IBAs		+	+	+	+		
Resources and Funding		+	+	+	+	+	+
Sources:							
1. Federation of Saskatchewan Indian Nations Consultation Policy							
2. Simpcw First Nation Consultation and Accommodation Guidelines 2006							
3. AFNQL: Consultation Protocol of First Nations of Quebec and Labrador 2005							
4. Hupacasath First Nation TERRITORY LAND USE PLAN – PHASE 2, 2004							
5. Bkejwanong Territory Environmental Policies, Guidelines and Information for External Project Proponents, February 2006							
6. Horse Lake First Nation Consultation Policy, February 1, 2007							
7. Mi'kmaq –Nova Scotia-Canada Consultation Process 2007							

Three key observations emerge from this matrix:

- There is *no common model or 'one best way'* for consultation. The First Nation guidelines and protocols exhibit a number of differences in both areas of emphasis and level of comprehensiveness in how they approach consultation.
- While the guidelines and protocols differ in their areas of emphasis, there certain *priority issues* can be identified. All of the guides address the issues of consultation principles. Six of the seven examples deal with consultation procedures and steps, or with resources and funding.
- There is *variability in the configuration* of different elements. There are no patterns in the mix of elements across guidelines or protocols. Two of the guidelines incorporate all six elements, while four others address only three, differing elements. As a result, each guideline is unique, reflecting particular purposes or priorities.

These observations lead to the following conclusions.

- All of the topics are potentially relevant and important for First Nations preparing for consultation.
- Certain topics are likely to be important in all situations related to preparing First Nations for consultation. These include understanding the principles of consultation, and understanding consultation procedures and steps as well as issues relating to resources and funding. .
- Defining the particular mix of elements that is relevant depends on the situation. Many different models and configurations are possible. The key to success is first, understanding the different potential elements, and then selecting those that are appropriate to the specific situation and the goals of the consultation process.

5. REFERENCES AND RESOURCES

5.1 Abbreviations and Acronyms

AFNQL	Assembly of First Nations of Quebec and Labrador
CIER	Centre for Indigenous Environmental Resources
CEPA	Canadian Energy Pipeline Association
FNEATWG	First Nations Environmental Assessment Technical Working Group
FPIC	Free, Prior and Informed Consent
FSIN	Federation of Saskatchewan Indian Nations
HLFN	Horse Lake First Nation, Alberta
NCNFG	National Centre for First Nations Governance
WFIN	Walpole Island First Nation, Ontario

5.2 References and Resources

CEPA Consultation Framework: Principles, Objectives and Guidelines, Canadian Energy Pipeline Association 2008

Clarifying the Role and Responsibilities for Aboriginal Consultation and Accommodation Within DND/CF, LCdr Ken Osborne DND/CFLA LAS, Canadian Bar Association Newsletters, 2007

Consultation Protocol of First Nations of Quebec and Labrador, First Nations of Quebec and Labrador Sustainable Development Institute 2005

Consulting with the Crown: A Guide for First Nations, Centre for Indigenous Environmental Resources 2007

Crown and Aboriginal Duties: Practical Implications, David C. Nahwegahbow and Theresa Bananish, First Nations Strategic Bulletin Vol 5, Issues 4 & 5, April –May 2007

The Crown's Duty to Consult and Accommodate, Keith B. Bergner, Lawson Lundell LLP 2006

The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: ...or More of the Same? Fergus MacKay, Arizona Journal of International & Comparative Law Vol 22, No. 1, 2005

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First Nations Environmental Assessment Toolkit, First Nations Environmental Assessment Technical Working Group (FNEATWG) 2004

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Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada, Irene Sosa and Karyn Keenan, Canadian Environmental Law Association 2001

The Law of the Land: Amnesty International Canada's position on the conflict over logging at Grassy Narrows, Amnesty International Canada 2007

Revised Draft policy in Indigenous Peoples (OP 4.10): Staff Response to Public Comments, World Bank APRIL 6, 2005

Sharing in the Benefits of Resource Developments: A Study of First Nations-Industry Impact Benefits Agreements, Public Policy Forum 2006

APPENDIX A:

CONSULTATION MODELS AND FACT SHEETS

Models Matrix:	Models of Consultation
Fact Sheet 1:	Consultation Principles
Fact Sheet 2:	Consultation Procedures/Steps
Fact Sheet 3:	Consultation Plans
Fact Sheet 4:	Accommodation and IBAs
Fact Sheet 5:	Resources and Funding

APPENDIX B:

CURRENT PERSPECTIVES ON FIRST NATIONS CONSULTATION

B-1	Canadian Court Guidance on Consultation
B-2	International Guidance on Consultation
B-3	Provincial Guidelines on Consultation
B-4	Corporate Perspectives on Consultation

MODELS OF CONSULTATION

PURPOSE AND SCOPE:

The following matrix shows how different First Nations have configured the elements of consultation in different guidelines and protocols. As such, each one represents a different model of consultation with different levels of comprehensiveness and different areas of emphasis.

MODELS OF CONSULTATION:

Key Elements of First Nation Consultation Guidelines/Protocols							
	1	2	3	4	5	6	7
Consultation Principles	+	+	+	+	+	+	+
Consultation Procedures/Steps	+	+	+		+	+	+
Consultation Plans	+	+	+				
Accommodation and IBAs		+	+	+	+		
Resources and Funding		+	+	+	+	+	+
Sources:							
<ol style="list-style-type: none"> 1. Federation of Saskatchewan Indian Nations Consultation Policy 2. Simpcw First Nation Consultation and Accommodation Guidelines 2006 3. AFNQL: Consultation Protocol of First Nations of Quebec and Labrador 2005 4. Hupacasath First Nation TERRITORY LAND USE PLAN – PHASE 2, 2004 5. Bkejwanong Territory Environmental Policies, Guidelines and Information for External Project Proponents, February 2006 6. Horse Lake First Nation Consultation Policy, February 1, 2007 7. Mi'kMaq –Nova Scotia-Canada Consultation Process 2007 							

INTERPRETING THE MODELS MATRIX:

In interpreting the models matrix, three key observations emerge:

- There is *no common model or 'one best way'* for consultation. The First Nation guidelines and protocols exhibit a number of differences in both areas of emphasis and level of comprehensiveness in how they approach consultation.
- While the guidelines and protocols differ in their areas of emphasis, there certain *priority issues* can be identified. All of the guides address the issues of consultation principles. Six of the seven examples deal with consultation procedures and steps, or with resources and funding.
- There is *variability in the configuration* of different elements. There are no patterns in the mix of elements across guidelines or protocols. Two of the guidelines incorporate all six elements, while four others address only three differing elements. As a result, each guideline is unique, reflecting particular purposes or priorities.

USING THE MODELS MATRIX:

In using this matrix to develop models for specific First Nations, the following considerations are important:

- All of the topics are potentially relevant and important for First Nations preparing for consultation.
- Certain topics are likely to be important in all situations related to preparing First Nations for consultation. These include understanding the principles of consultation, and understanding consultation procedures and steps as well as issues relating to resources and funding. .
- Defining the particular mix of elements that is relevant depends on the situation. Many different models and configurations are possible. The key to success is first, understanding the different potential elements, and then selecting those that are appropriate to the specific situation and the goals of the consultation process.

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

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**Simpcw 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 choose 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 ¹,
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

Simpew First Nation Consultation and Accommodation Guidelines 2006

CONSULTATION PLANS

DEFINITION:

The consultation plan determines the parameters of the consultation, information needs, appropriate consultation methods scope, timing, resources, participants, nature of evaluation and feedback,

IMPORTANCE:

The development of a consultation plan is an important phase in the consultation process. Determining appropriate consultative activities are essential to the success of consultation and accommodation.

Developing a consultation plan enables both parties to address important issues such as the use of facilitators, the participation of Third Parties in the consultation, funding, use of negotiating techniques, etc

DESCRIPTION:

Consultation plans will vary from simple plans to elaborate plans spanning several years.

- The scope of the plan will depend on the nature of the action being contemplated and the importance of the First Nation interests at stake.
- The plans will determine appropriate consultation methods. These could range from simple information sharing to the negotiation of protocol agreements.
- The plans will also address appropriate consultative activities.
- The plan can identify the Parties and agree on appropriate participants.
- The consultation plan can establish further stages of the consultation and accommodation process.
- It can identify means by which First Nation interests may be accommodated

EXAMPLES:

Example FSIN

For each Consultation initiative, the FSIN will develop a plan which shall include, among other items, the following elements:

- Identify the objectives of the specific Consultation;
- Develop an action plan setting out roles and responsibilities, including financial resources, both internally and with the participants;
- Ensure that the values, interests, knowledge and contribution of participants are considered in a meaningful way;
- Identify in advance what information will be needed to support the Consultation process and how this will be shared with First Nations, and other persons who may be affected;
- Determine how communications will be managed before, during and after the Consultation process; and
- Identify evaluation and feed-back mechanisms.

Example Simpw Terms of Reference for Consultation

Agreed-to terms of reference include, at a minimum:

1. A schedule for consultation and accommodation negotiations,
2. The names/positions of authorized representatives of the Crown and the Simpcw Band Council who have the mandate/authority to participate in negotiations and make the decisions in question.
- 3 The scope of the consultation and accommodation negotiation (ie what topics, Activities or decisions are in question).
- 4 The timing and nature of required engagement of Third Parties.
5. Resourcing for the process
6. Requirements for the Crown and Third Parties to provide complete information about a proposed Activity necessary to understand its potential impacts on Simpcw Title or Rights, without cost to Simpcw peoples or organizations, and in a timely, manageable and understandable format, including the Initial Information package
7. Dispute resolution mechanisms

Example AFNQL

Establishing the Consultation Plan and Parameters of Consultation may occur through an exchange of letters or through face to face meetings.

The First Nations, Canada and/or the provinces shall agree on the Parameters of Consultation, including more specifically:

- a definition of the action being contemplated,
- broader implications of the action and its relationship with the policies of Canada and/or the provinces. At this point, a First Nation may decide to assert its right to be involved at a higher, strategic, level of decision making,
- the relationship of the current consultations with other processes. At this point, a First Nation may decide to specify that it is engaging in the consultative process without prejudice to its rights, as asserted in other processes, such as litigation or treaty negotiations.

The Consultation Plan must identify the First Nation, federal and/or provincial parties or bodies that will be engaging in consultation and accommodation and the corresponding contact people and their coordinates. First Nation, federal and/or provincial interlocutors should be of equal standing in their respective organizational hierarchies.

First Nations, Canada and/or the provinces shall determine the propriety of inviting third parties, notably representatives from industry or project-promoters, to participate in the consultation and accommodation process and provide information and funding, as needed.

The plan should determine appropriate consultative activities are essential to the success of consultation and accommodation.

The plan should address the means by which First Nation interests may be accommodated.

The plan should address appropriate consultative activities. Possible consultative activities include:

- meetings between decision-makers of equal standing,
- meetings between experts mandated by First Nations, Canada and/or the provinces,
- interest-based negotiations, rather than adversarial negotiations or positional bargaining,

- community meetings or “town-hall” type meetings at which members of First Nation communities provide input regarding the action being contemplated,
- focus groups, small meetings with First Nation constituencies (e.g. elders, youth, trappers, fishermen, loggers, business people), project site visits and visits to traditional territory,

SOURCES:

Consultation Protocol of First Nations of Quebec and Labrador 2005

FSIN Consultation Policy

Simpew First Nation Consultation and Accommodation Guidelines 2006

ACCOMMODATION

DEFINITION:

Accommodation refers to measures that mitigate or compensate for consequences resulting from the consultative process.

PURPOSE/IMPORTANCE:

Accommodation is required when a proposed action will infringe upon a First Nation's rights. In these cases the legal duty to consult will necessitate concrete steps to accommodate Aboriginal interests.

DESCRIPTION:

Some First Nations have set out their expectations with respect to accommodation. In some cases they have set out accommodation principles. Guidelines may also spell out the acceptable means of accommodation.

For example, accommodation may include modifying the original project, profit-sharing with First Nations, compensating First Nations, providing for ongoing collaboration and/or giving First Nations a continued role in decision-making

Accommodation Options Identified in FN Guidelines				
	Hupacasath	Simpcw	WIFN	AFNQL
Amendments to the Project	+	+		+
Project Cancellation		+		+
Joint Decision Making		+	+	+
Conservation Measures		+		
Revenue Sharing	+	+	+	+
Heritage fund arrangements	+	+		
Economic Development Opportunities	+	+	+	+
Training and Capacity Building	+	+	+	+
Use of the FN Land Use Plan	+	+		
Joint Ventures and partnerships		+		+

One important development is the emphasis that more and more First Nations are placing on cancelling a proposed activity if they feel that is the only option.

EXAMPLES:

Example
Hupacasath Guidance on Accommodation

Accommodation is required when a proposed action will infringe upon Hupacasath's aboriginal rights.

Principles in regards to Accommodation:

- When determining appropriate accommodation, the priority interests of the Hupacasath over other users, based on Hupacasath's constitutional status, will be reflected (*Gladstone, Mikisew*).
- Accommodation will include both the cultural and economic interests of the First Nation (*Haida*).
- The substance of Hupacasath's concerns will be addressed (e.g. conditions of development).
- The form of accommodation will be mutually acceptable.

Means of accommodation

Possible means of accommodation include, but are not limited to:

- Alternative courses of action or amendments to the terms of development to address aboriginal interests.
- Revenue sharing
- Heritage fund arrangements
- Economic development opportunities (e.g. harvesting, employment, contracts)
- Providing access to resources for community needs
- Capacity building
- Acknowledgment and use of the Hupacasath Land Use Plan

Example
WFIN: Development of a Memorandum of Understanding or
Impacts and Benefits Agreement

WIFN believes that MOUs and IBAs are useful mechanisms to accommodate our interests arising out of our aboriginal title, and for providing benefits to and creating a positive working environment for the conduct of business by proponents.

Some or all of the following items may be included in the MOU or IBA, depending on the complexity of the project and its potential impact on the environment and the WIFN community:

1. Recognition of WIFN's land claims, and its interest in self government.
2. Definition of an on-going role (e.g., liaison committee or a joint committee made up of WIFN and company appointees) for the community in jointly implementing, managing, and monitoring the project.
3. Definition of the make-up of the committee which would include representatives from the First Nation and possibly one or more consultants retained by the First Nation.
4. Preparing a schedule of meetings for the committee, and other proponent/First Nation meetings.
5. Agreement on the combination of national, provincial, or international environmental standards that will be used in the monitoring of the project.
6. Definition of the direct advisory role that WIFN would provide into the design, implementation, and evaluation of monitoring studies.
7. Description of what effective compliance monitoring, and environmental effects monitoring¹, would consist of for the project, and what the forms and records would be that are used to document the monitoring system.
8. Development of monitoring threshold levels that would trigger action and the notification protocols in that situation.
9. Establishing an annual schedule for the reporting and interpretation of monitoring results and for reporting to the committee, the community, and other interested Aboriginal communities in the local area.
10. Development of Notification Protocols to the First Nation for specific project construction or operation activities.
11. Establishment of annual budgets and disbursement mechanisms for on-going project related activities (for example, monitoring and database management activities), and for other environmental programs addressing broader regional objectives for which mutual benefit could be established.
12. Identification of all the potential costs and benefits for the community in the project, not only environmental but also social and economic. Identification of opportunities to develop business partnerships, and the definition of specific First Nation employment and training opportunities. Also opportunities for the provision of any other additional services to the community that the project provides potential for, should be identified.

13. Development of an Aboriginal relations policy by the project proponent, if not already in place.
14. Agreement on joint positions that may be required in any regulatory processes. For example, joint submissions to governmental bodies or regulatory agencies on draft Certificates of Approval may be possible after effective consultation has taken place. These submissions may include, for example, such issues as contingency plans, financial assurances, monitoring programs, or emergency response planning. Statements on meeting federal and provincial and other legal requirements for timely Aboriginal consultation and on the thoroughness of evaluation of Aboriginal impacts could also be included in the submissions.
15. Payments in lieu of tax payments.
16. Technical and financial support in enhancing research, monitoring and training capacities in all areas of environmental protection within the traditional territory, and in sharing information concerning environmental protection as it affects the traditional territory.
17. Agreement to participate in the Circle on Environment and Development which brings together governments, organizations, individuals, and private business to promote an integrated local perspective on environmental and development issues in the St. Clair watershed.
18. Maintaining the confidentiality of the agreement between the proponent and the First Nation.

It is intended that the MOU or IBA would be developed cooperatively and in a timely manner between the First Nation and the project proponent

The MOU or IBA should also anticipate the possibility that it is not possible for the First Nation and the project proponent to come to agreement on specific issues, in which case it may be necessary that the services of a skilled mediator will need to be retained to assist in defining a mutually agreeable plan of action or mitigation measures for both parties.

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.

Example Simpcw Accommodation Measures

Crown and Third parties must accommodate the Simpcw Signatories in relation to any Activity that may infringe on Aboriginal Title, Aboriginal Rights or interests of the Simpcw Signatories, by measures agreed to by the Simpcw Signatories, which may include but are not limited to:

- modifying or cancelling a proposed Activity to avoid or minimize the infringement of Simpcw Signatories Aboriginal Title and/or Rights;
- conducting joint land use planning, or reconciliation of Crown and Simpcw land use plans where available;

- co-management involving at least equally shared decision making authority;
- participation in future joint decision-making;
- undertaking up-front conservation measures and where necessary, restoration;
- revenue sharing;
- resource allocations to the Simpcw Signatories
- compensating the Simpcw Signatories for the infringement;
- providing economic development opportunities or other economic measures to the Simpcw People;
- limiting resource harvesting and extraction;
- providing training;
- Agreements or partnerships with industry or proponents;
- Contracts for Simpcw individuals and businesses;
- Participation in future joint decision-making;
- Joint ventures;
- Compensatory damages for past infringements;
- Other arrangements.

Example
AFNQL: Means of Accommodation

Consultation should include the identification of possible means of addressing First Nations interests and of options for accommodation,

The ways in which First Nation interests may be accommodated, could include:

1. abandoning the action being contemplated,
2. 2 alternatives to the contemplated action that adequately address the interests on all sides,
3. minor or major changes to the action being contemplated,
4. modifying a proposed project,
5. providing for First Nation participation in an action or project,
6. compensating the First Nation,
7. providing for ongoing consultation and accommodation of the First Nation with respect to an action or project and notably follow-up, mitigation and compliance monitoring activities,
8. First Nation economic benefits such as compensation, royalties, profit-sharing, equity interest, joint ventures, contracting, employment, and
9. consent and agreement to a new action, modified to accommodate First Nation interests.

SOURCES:

Consultation Protocol of First Nations of Quebec and Labrador 2005

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

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

Simpew First Nation Consultation and Accommodation Guidelines 2006

RESOURCES AND FUNDING

DEFINITION:

The duty to consult and accommodate, carries with it the obligation to ensure adequate and sustained funding for First Nations to carry out the ongoing work of identifying and articulating their interests and to participate in decision-making processes.

IMPORTANCE:

A major stumbling block to meaningful and valid consultation and accommodation with First Nations is the lack of financial and human resources needed to enable them to analyze and respond to consultations requests.

DESCRIPTION:

A persistent practical problem is the lack of financial and resource capacity of First Nations when consulted on complex projects. In addition, most First Nations in Canada are small and do not have the capacity to handle the potentially huge numbers of requests from governments for consultation about projects

Who pays for the consultation costs of the aboriginal people?. The Court does not address this issue.

Some provincial governments, such as Quebec have made it clear that funding is necessary in order to facilitate the participation of Aboriginal communities in the consultation processes initiated by the Government of Québec. To this end a financial support program will be prepared by the Secrétariat aux affaires autochtones, in collaboration with the Conseil du trésor

More typical is the approach taken by Saskatchewan. Although the Saskatchewan Guidelines recognize that an Aboriginal group may need funding in order to obtain independent technical information, it leaves decisions with respect to the provision of funding in the consultation process to each department or agency on a case by case basis.

First Nations are unanimous in the position that if federal and provincial governments are bound to act honorably in consultation, this includes the obligation to ensure that First Nations are on a fair footing with regard to information, expertise and resources. Funding is also needed from project proponents to address First Nations capacity issues.

EXAMPLES:

Example Horse Lake First Nation Fee for Service Model

The Horse Lake First Nation Industry Relations Corporation (HLFN IRC) will serve as a one contact/one window to streamline the exchange of information, communication, interaction, and relationship-building requisite for adequate and appropriate consultation to occur. It will negotiate agreements 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.

The role and functions of HLFN IRC are congruent with the Chipewyan Prairie Dene First Nation Industry Relations Corporation Fee-for-Service model, vis a vis interaction with proponents of proposed industrial development projects mandated by the Government of Alberta to consult with HLFN prior to commencing construction. The Fee-for-Service model encapsulates those activities required to complete resource development consultation in the manner approved by HLFN, such as:

- Fee-for-Service Assessment and Consultation Work Plan Development
- Public Disclosure Input/Review (if applicable)
- Terms of Reference Input/Review (if applicable)
- Application Review
- EIA Input/Review (including technical expertise, as required)
- Sites & Areas Assessment
- Coordination of Community Engagement and Participation
- Issues Report and Resolution
- Submission of Letter of Support or Objection

The HLFN IRC Director will make all arrangements, subject to adequate resources being made available by the developer, to engage Elders and Trappers, Chief and Council, and to have Band members participate in economic development and/or capacity building opportunities

The Crown or its appointed representative will provide resources to HLFN to allow it to meaningfully participate in the consultation process.

Example Walpole Island First Nation Approach to Funding

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. These resources required are related to both internal and external activities to the community that take place, e.g.,

community consultation activities or retaining outside technical assistance. If extraordinary issues are encountered during the consultation process additional reasonable funding may also be requested.

Example
Hupacasath Position on Funding

Mutually acceptable arrangements should be made to compensate Hupacasath for their costs associated with participating in the consultation process (e.g. staff or legal resources, mapping, community input).

Capacity gaps should be discussed, with creative methods discussed to address any capacity requirements so full participation in the consultation process is achieved.

Example
Simpew Approach to Funding and Capacity

The Simpew Guidelines set out the First Nation's expectations on funding and capacity as follows:

The Crown is responsible for providing an immediate and on-going, agreed-upon share of resource revenue sufficient to enable the Simpew People to meaningfully participate in land and resource decision-making as set out in these guidelines, including the following costs associated with both Activity-specific consultation and accommodation negotiations, and the development and implementation of new government-to-government decision-making institutions and structures:

- time and expenses of staff and other experts;
- travel and honoraria costs for elders and community resource people;
- costs for necessary Simpew planning, assessments, studies and research, and
- training for Simpew members

Third Parties will normally be required to contribute to Simpew capacity and costs of a meaningful consultation process as set out in the terms of reference for particular consultation and accommodation negotiations.

Example
AFNQL Provision of Funding:

At various stages in the AFNQL consultation process, provision must be made by the federal and/or provincial governments to ensure adequate funding for First Nations. This would address:

- costs of internal coordination,
- consultation and scoping,
- remuneration of community and other experts,
- research budgets,
- professional fees and
- consultant services to ensure genuine participation in establishing a Consultation Plan and the Parameters of 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

Horse Lake First Nation Consultation Policy, February 1, 2007

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

Simpchw First Nation Consultation and Accommodation Guidelines 2006

APPENDIX B-1: CANADIAN COURT GUIDANCE ON CONSULTATION

The Duty of the Crown

- Crown has a “duty to consult” based on the “honor of the Crown”.

Consultation Principles

- Crown must consult in good faith.
- Crown must have intention to substantially address First Nation concerns.
- Consultation must be meaningful.

Procedural Issues

- Crown must provide necessary information.
- Information must be provided in a timely way.

Accommodation

- Crown must explore options to resolve First Nation concerns.
- Crown must modify proposal to address First Nation concerns
- Compensation must be provided in event of significant residual impact

Aboriginal Obligations

- Consultation Is a two-way street with an obligation on the First Nation to also participate in good faith
- Aboriginal people must not frustrate the consultation process
- Aboriginal people do not have a veto

Third Party Obligations

- Third Parties have no duty to consult, but have strong interest
- Crown may delegate procedural aspects of consultation to industry proponents (e.g. environmental assessments)

Role of Project Developers

- It is now clear that it is the responsibility of the Crown, and not third parties, to initiate consultation and to discharge the duty to consult to the required degree. In practice, however, it is common for the Crown to delegate some of the responsibility to fulfill the duty to resource developers, or to require resource developers to consult as part of the regulatory process. As the project proponent is often the best source of information, First Nations and the Crown often prefer the proponent to be involved in the consultation process.

- Proponents are well served by participating in the process because it is the proponent's project that is at risk if the Crown's consultation proves inadequate. Thus, a proponent should develop a reasonable and effective plan of action to assess and address aboriginal interests in relation to its proposed project. A proponent should also attempt to work closely with the Crown and provide the Crown with as much information as possible.

APPENDIX B-2: INTERNATIONAL GUIDANCE ON CONSULTATION

Guidance from the United Nations

The *UN Development Program* promotes and supports the right of indigenous peoples to *free, prior informed consent* with regard to development planning and programming that may affect them

The *UN Declaration on the Rights of Indigenous Peoples* makes clear that Indigenous peoples have *the right to participate in decision making* and that States must obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them.

Guidance from the World Bank

The World Bank has adopted a policy that World Bank funded projects will need a process of *free, prior and informed consultation* with indigenous peoples, at each stage of the project, to identify their views and *to ascertain whether there is broad community support for the project*.

World Bank guidelines on Consultation with Indigenous Peoples indicate that an *effective* consultation process with indigenous peoples should involve the following elements:

- meaningful and good faith consultation;
- informed participation regarding the preparation and implementation of the project; followed by
- a culturally appropriate and collective decision-making process.

World Bank consultation procedures entail:

- establishing an appropriate gender and inclusive intergenerational framework that provides the affected Indigenous Peoples' communities opportunities for consultation at each stage of the project
- using consultation methods, appropriate to the social and cultural values of the affected Indigenous Peoples' communities and their local conditions, giving special attention to the concerns of Indigenous women, youth and children. Consultation methods could include using indigenous languages, allowing time for consensus building, and selecting appropriate venues, and
- providing the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of the potential adverse affects of the project) in a culturally appropriate manner at each stage of project.

- The level of detail needed to meet the requirements should be “proportionate” to the complexity of the project and “commensurate” with the nature and scale of the “potential effects” on indigenous peoples, whether positive or negative.
- It is significant that although informed participation is a substantially higher standard than consultation and requires active involvement in decision-making, the World bank provides no guidance on this concept should be implemented in practice.

APPENDIX B-3: PROVINCIAL GUIDELINES ON CONSULTATION

A number of provinces adopted or proposed guidelines that set out the approach to be used by provincial government departments (and sometimes project proponents) respecting consultations with First Nations and Métis in circumstances where action contemplated by Government may adversely affect Treaty or Aboriginal rights. The guidelines are designed to principles and procedures for consultation that will ensure a practical and efficient consultation process. They also address issues related to accommodation which arises, in some cases, from the duty to consult.

The content of the provincial guidelines usually covers:

- Legal background on Aboriginal rights and the duty to consult
- Principles to govern consultation
- Recommendations on the consultation process
- Issues related to Accommodation

These guidelines are based on the existing guidance of the Court and are intended to reflect, in a practical way, the minimum legal requirements established by the courts.

The following guidelines were reviewed:

- Alberta's First Nations Consultation Policy on Land Management and Resource Development 2007
- The Government of Saskatchewan Guidelines for Consultation with First Nations and Métis People: A Guide for Decision makers, May 2006
- Government of Quebec's Interim Guide for Consulting the Aboriginal Communities 2006
- Ontario's Draft Guidelines for Ministries on Consultation with Aboriginal Peoples related to Aboriginal Rights and Treaty Rights 2006
- Manitoba Draft Provincial Policy and Guidelines for Aboriginal Consultation 2007

APPENDIX B-5: CORPORATE PERSPECTIVES ON CONSULTATION

New Relationship Business Group in British Columbia

The Government of British Columbia and the First Nations Leadership Council invited the BC business community to offer its thoughts and recommendations on how a new consultation and accommodation regime might be structured in the province. Major business and industry associations (including the BC Chamber of Commerce, tourism association, forestry associations, and mining associations) formed the “New Relationship Business Group” to answer this challenge

The New Relationship Business Group encourages First Nations and the Government of British Columbia to undertake action in the following priority areas:

- A new model for First Nation Consultation and Accommodation that considers both dimensions of the content of the duty to consult: the presence and degree of First Nation interest in the lands and resources at issue; and the potential of a project or activity to negatively affect those First Nation interests.
- A new government policy that clearly sets out the expectations, time frames and process for First Nation Consultation and Accommodation, including recognition that agreements between government and First Nations are to be encouraged.
- Recognition that the responsibility for an effective process is shared by government and First Nations, such that both parties must participate in good faith in reaching consensus.
- Consultation on higher level plans is preferred to engagement on each and every minor permit.
- Acceptance that there are outstanding issues in the reconciliation of aboriginal and Crown titles that cannot be resolved through consultations on proposed development activities. Debating those issues in project consultations does not lead to their resolution and only diverts attention from the applications at hand.

Canadian Energy Pipeline Association (CEPA)

The Canadian Energy Pipeline Association has developed a cross-industry Aboriginal consultation framework for its member companies.

The consultation framework contains core consultation “principles” and associated CEPA “objectives,” as well as guidelines. Together the principles, objectives and guidelines form CEPA’s Aboriginal consultation framework and provide CEPA companies with the essential elements that are needed to guide their consultation activities.

CEPA's consultation framework is consistent with current industry practices. It also addresses most of the over-arching principles found in consultation policies or other documents of Aboriginal groups, which were reviewed in developing this framework. The framework can be used as a foundation for companies to build more specific policies, or it can be used on its own as a guide to consultation activities.

During the review of existing policies and guidelines, two main points emerged:

- ***Consultation is a priority issue for governments, industry and First Nations.***

Several provincial governments have developed or proposed consultation guidelines. A number of Aboriginal communities have also developed comprehensive principles, and many CEPA companies have either established guidelines or negotiated consultation agreements with Aboriginal communities.

- ***There are similarities and commonalities among basic principles***

A number of common principles emerged during the review of Aboriginal, industry, and legal guidelines. These principles are divided into eight broad categories:

- (i) Recognition of Aboriginal and treaty rights: Aboriginal rights must be respected;
- (ii) Relationships: consultation activities can create mutually beneficial relationships;
- (iii) Duty to consult: the Crown always has a duty to consult, even when Aboriginal rights have not been proven. The Crown is ultimately responsible for consultation, although some aspects of consultation may be delegated to industry;
- (iv) Underlying principles: consultation must be meaningful and requires a genuine attempt to address interests and concerns;
- (v) Timing: consultation must be undertaken in a timely manner and as early in the decision/planning process as possible;
- (vi) Information to community: information must be comprehensive and understandable;
- (vii) Identification of impacts accompanied with the development of appropriate mitigation plans: impacts must be minimized; and
- (viii) Scope of consultation: the nature and scope of consultation will vary with the nature of the proposed activity and the impact to Aboriginal activities.