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Chiefs of Ontario – Minimum Standards and Principles for Consultation and Engagement[1]

Disclaimer

The Chiefs of Ontario is not a holder of Aboriginal and Treaty Rights and is not a party to consultation unless otherwise mandated by the Chiefs-in-Assembly. The content of this document shall not hinder the autonomy and authority of First Nations as rights-holders. It is the prerogative of First Nations to determine their consultation processes and the Crown must adhere to the process requirements of First Nations. As such, this document is without prejudice to the ongoing and future processes of First Nations.

This document was put together by Chiefs of Ontario to provide guidance to Ontario ministries on principles to respect and follow when consulting and engaging with First Nations in Ontario.[2] This list is non-exhaustive and leaves space for the inclusion of standards and principles identified directly by First Nations.[3] Further, this list must continue to evolve to reflect First Nations' nationhood, inherent jurisdiction, and traditional laws and customary practices, the minimum standards set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and developments in legislation, case law, policy, and practice, including the Aboriginal and Treaty Rights guaranteed under section 35 of the *Constitution Act, 1982*. The guidance in this document does not replace nor should it be held above the consultation guidance or standards provided directly by a First Nation.

Ontario must recognize First Nations' assertion of rights. This recognition includes First Nations' assertions of an infringement of treaty rights resulting from the cumulative impacts from various Ontario decisions and activities.[4] First Nations' assertion of rights,

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[1] The terms "consultation" and "engagement" are sometimes used interchangeably, though, more accurately, consultation refers to processes that carry a legal duty to consult First Nations while engagement refers to processes that do not carry a legal duty to consult but the interests of First Nations are at play. For the purposes of this document, the guiding principles listed apply and must be followed during processes of **both** rights-based consultation and interest-based engagement. The reasons for this are varied: (1) there are often differences in opinion between First Nations and the government as to whether a right is potentially impacted; (2) by making a decision to engage rather than consult based on an assumption that rights are not implicated, the government is pre-empting processes and speaking on behalf of First Nations rights without the necessary input; and (3) undertaking engagement processes at a lower standard erode the nation-to-nation relationship, the spirit of reconciliation, First Nation sovereignty, and free, prior, and informed consent.

[2] This document and its contents are without prejudice to any rights, obligations, communications, initiatives, work, negotiations, and/or litigation undertaken by First Nations, Aboriginal rights-holders, and Treaty rights-holders, and First Nations organizations, and is without prejudice to the inherent and Treaty rights of all First Nations in Ontario.

[3] Reference to First Nations includes First Nations rights-holders, Aboriginal rights-holders, and Treaty rights-holders.

[4] *Yahey v British Columbia*, 2021 BCSC 1287.

as well as any proposed government development on traditional and treaty territory, triggers the Crown's duty to consult and accommodate.

The spirit of this document echoes the conclusion of Justice Linden in the Ipperwash Inquiry Report, "Past approaches are simply no longer adequate."[5] We urge your ministries to stop relying on past approaches that have not served First Nations, and we suspect, have not served your departmental work either.

The relationship between First Nations and the Crown is historic and must be governed by principles of bilateral nationhood. Ontario ministries must honour the minimum standards and principles that First Nations have continuously called for, and which are summarized below. The way in which you design your ministry's consultation and engagement processes will either honour and live up to these standards and principles, or erode them.

This document is to be used in tandem with the ***Engagement Checklist*** to ensure you have a baseline knowledge of necessary consultation and engagement processes.

The guiding standards and principles are as follows:

Principles of inherent jurisdiction and governance

Consent-based process: UNDRIP explicitly requires that governments seek First Nations' free, prior, and informed consent to proposed government decisions or actions.[6] Consent must be consistent with the minimum standards set out in UNDRIP.[7] Examples of consent-based processes include:

- *Consent as the goal:* First Nations have the right to give or withhold consent to a project that may affect them or their territories, and are able to negotiate the conditions under which the project will be designed, implemented, monitored, and evaluated.[8]
- *Consent-based accommodation*: The right of First Nations to give or withhold consent to a project that may affect them or their territories includes the right to negotiate accommodation from the Crown.[9] The Crown is to report back to First

[5] Report of the Ipperwash Inquiry, Vol. 2, p. 173.
[6] United Nations, United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295, 13 September 2007, at arts 8, 10, 12.2, 14.3, 15.2, 17.2, 19, 20, 22.2, 23, 25, 26, 27, 28.2, 29.2, 30.2, 31.2, 32, 36.2, 38, 39, 40, 41.
[7] The Crown must respect and fulfill the processes and obligations that flow from each First Nations' requirements and standards for consent-based consultation and engagement.
[8] *Ibid*; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, at para 168 [*Delgamuukw*].
[9] *Haida Nation v. British Columbia* (Minister of Forests), 2004 SCC 73 at paras 10, 47, 53.

Nations to address any concerns on accommodation measures the Crown has been directed by First Nations to implement.[10]

Nation-to-Nation Relations: Consultation and engagement must reflect nation-to-nation relationships with the Crown[11] and be respectful of First Nations' inherent rights to land[12] and self-governance[13]. Consultation and engagement processes must respect and uphold treaties, treaty processes, and treaty relationships.[14] Examples of nation-to-nation processes include:

- *Protection and preservation of Aboriginal and Treaty Rights:* First Nations' rights and interests must be recognized and upheld as the minimum standards guiding the consultation and engagement process as guaranteed under section 35 of the *Constitution Act, 1982*.[15]
- *Environmental Protection and Sustainable Development*: First Nations have the right to self-determine the sustainable and equitable development and proper management of their lands or territories, resources, and the environment.[16] First Nations are in the best position to identify the necessary measures to mitigate or prevent adverse environmental impacts.[17]

True Reconciliation: The foundation for true reconciliation is recognition of First Nations' nationhood, and is based in the truthful acknowledgement of past and current wrongdoings towards First Nations on the part of colonial governments.[18] True reconciliation includes upholding the inherent right of First Nations to self-determine

[10] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 at paras 50-61.
[11] Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (2015) at 357.
[12] UNDRIP at art 26.
[13] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para 139.
[14] UNDRIP at art 37; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 67 [*Mikisew Cree*].
[15] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35(1) ["Constitution Act"].
[16] The Crown's responsibility to avoid decisions and actions that will harm the environment and sustainable development can be found in *Tsleil-Waututh Nation v. Canada (Attorney General),* 2018 FCA 153.
[17] If an environmental assessment is to be relied on to satisfy an aspect of the Crown's duty to consult, the Crown must provide First Nations with full and transparent involvement, in both the planning and implementation of the assessment process. See *Dene Tha' First Nation v Canada (Minister of Environment)* [2007] 1 CNLR 1; *Ka'a'gee Tu First Nation v Paramount Resources Ltd. et al*, 2007 FC 763.
[18] The Crown must respect and fulfill the processes and obligations that flow from each First Nations' requirements and standards for true reconciliation.

their economic, social, cultural, and knowledge development.[19] The path to true reconciliation cannot be based in rights denial, but rather, it must be based in inherent jurisdiction and the rights guaranteed by section 35(1) of the *Constitution Act, 1982*.[20] Elements of the process of reconciliation flow from the Crown's duty of honourable dealings with Indigenous peoples.[21]

- *Decolonize Crown processes:* Crown ministries are to engage in ongoing training in cultural competency and First Nations history, Treaties, law, and languages.[22]
- *Ownership of information:* The First Nations principles of ownership, control, access, and possession (OCAP®) assert that First Nations have control over data collection processes, and that they own and control how this information can be used.[23] Any consultation or engagement processes that deal with First Nations data are to adhere to OCAP principles. Ontario ministries should take OCAP training to understand these data principles.[24] Any issues pertaining to ownership and/or confidentially should be identified at the outset.

Principles of co-existence and economy

Supporting capacity needs: The Crown must facilitate and provide First Nations with ongoing and sustainable technical, financial, translation, and other capacity needs to ensure rights-holders can fully prepare for, and engage in, adequate and respectful consultation with the Crown and negotiations with private sector interests respecting impacts and benefits.[25] Examples of measures that support capacity needs include:

- *Ample time:* In addition to providing resources, the Crown is to provide adequate time for First Nations to review materials, conduct their own engagement and lead their own processes, and to provide input.[26] The time required at each stage of the process will be determined by the individual First Nation according to their internal needs. Specific capacity supports required must be community-specific, as needs will vary between urban and remote, north and south, and so on.

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[19] UNDRIP at art 4.
[20] Constitution Act at s 35(1); R*. v. Van der Peet*, [1996] 2 SCR 507.
[21] *Haida Nation* at paras 16, 32; *R. v. Kapp*, 2008 SCC 41 at para 6; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24 [*Taku Rive*r]; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 61.
[22] The federal government offers its federal officials training in areas relevant to the duty to consult. We implore the Ontario government to do the same: https://www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810.
[23] https://fnigc.ca/ocap-training/.
[24] https://www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810.
[25] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069 at para 31 [*Clyde River*].
[26] *Saugeen First Nation v. Ontario (MNRF)*, 2017 ONSC 3456 at para 27 [*Saugeen First Nation*].

Relationship building: The standards for the Crown's behavior stems from the honour of the Crown and are based on accountability towards First Nations, including consulting in good faith, cautiously and modestly requesting information, and having an honest intention of substantially addressing First Nations concerns.[27] The honour of the Crown gives rise to a fiduciary duty which requires that the Crown act in the best interests of First Nations and in their interests.[28] Beyond those standards, many First Nations expect and require the Crown to actively build mutually respectful long-term relationships which honour treaty rights and respect self-determination.[29] Engagement activities that uphold relationship building principles include:

- *Avoid sharp dealings*: The Crown is to avoid sharp dealings and must take diligent care not to take advantage of or act in a way that may compromise the will and position(s) of the First Nation and a respectful consultation and engagement process.
- *Ongoing and respectful dialogue:* The Crown needs to engage in ongoing dialogue with rights-holders on their proposed action or decision, any potential overlap or impact with ongoing neighboring consultation processes, any potential impacts to Aboriginal and Treaty protected and recognized rights, and how those impacts may be avoided, minimized, or mitigated, throughout the engagement process.[30]

Principles of respectful process

Standardized and comprehensive processes: Ministries must fulfill their consultation obligations by employing standardized approaches to consultation and engagement, which are predictable and transparent to First Nations, but also adaptable to the specific facts of each case.[31] Elements of a standardized and comprehensive process include:

- *Advance notice:* The relevant ministry to provide advance notice to the impacted or potentially impacted rights-holders,[32] rather than issuing mass notifications across the province. This notice must occur prior to the Crown acting on their proposed action or decision, and prior to the public posting of regulations.[33]

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[27] UNDRIP at art 32; *Haida Nation* at para 19; *Mikisew Cree* at para 67.
[28] *Haida Nation* at para 18.
[29] *Ibid* at para 16, 19, 25; *R. v. Badger*, [1996] 1 SCR 771 at para 41; *Manitoba Metis Federation Inc. v. Canada (Attorney General)* at paras 68–72; Delgamuukw at para 168.
[30] *Tsleil-Waututh v. Canada (Attorney General)*, 2018 FCA 153 at para 565.
[31] *Ibid* at paras 14, 20.
[32] When considering rights holders, the Crown must ensure it does not neglect traditional governments and their roles, as based on the political structures and processes of a given First Nation.
[33] *Halfway River First Nation v. British Columbia*, [1999] 4 C.N.L.R. 1 (B.C.C.A.) at paras 160-161 [*Halfway River*].

Advance notice must always provide a reasonable amount of time for the rights-holders to determine next steps, based on their internal timelines.

- *Accountable delegation:* The Crown's duty to consult cannot be delegated to third parties.[34] Only specific procedural process can be delegated to municipalities and/or project proponents.[35] Where procedural aspects of the duty are delegated to a third-party, the Crown must monitor and supervise the delegated process to ensure that the First Nation's concerns are fully addressed.
- *Milestone achievement:* Each milestone required from the consultation process must be satisfactorily exhausted and fulfilled before moving onto the next stage of the process.[36] Each stage of the process cannot be rushed and must take the paced desired by First Nations. The satisfaction and fulfillment of each stage of the process will be determined by the First Nations.

Community-specific approach: Within a standardized approach, the Crown should avoid pan-Indigenous approaches to ensure that predictable, comprehensive steps make room for community-specific needs. Standardized elements of consultation and engagement processes must be tailored to reflect First Nations' internal government and community consultation processes, internal decision-making processes, and timelines.[37] Engagement activities that fulfill the principle of a community-specific approach include:

- *Flexibility and adaptability:* Consultation is a flexible and iterative process that depends on the facts of each situation and potentially changing circumstances. The unique circumstances of First Nations must be incorporated into processes, such as interprovincial territories or traditional laws that call specific processes to take place. Consultation and engagement processes must adapt to new information, unforeseen issues, and guidance from First Nations.[38]
- *Indigenous Dispute Resolution:* Dispute resolutions should always be available to First Nations when conflicts arise throughout the consultation and engagement process.[39] These resolution mechanisms used must be those desired by the First Nation being consulted.

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[34] *Haida Nation* at para 53.
[35] *Ibid*.
[36] *Halfway River* at para 167.
[37] (2004) Strengthening the Relationship: Report on the Canada-Aboriginal Peoples Roundtable April19th, 2004, at 18, http://caid.ca/RepRndTblDisApr2004.pdf.
[38] *Haida Nation* at para 45.