

READING GUIDE

This Reading Guide has been developed to provide additional context to support your review of the attached document titled “**Summary of Potential Content for Updated Guidelines for Ontario Ministries on Consultation with Aboriginal Peoples**”.

Ontario understands both the importance and value of working with Aboriginal communities to create the updated Guidelines. Ontario recognizes how critical it is to work closely with Indigenous partners when considering any changes related to how the province fulfills its duty to consult. We welcome your comments and feedback on the attached document and look forward to hearing from you.

Purpose of the Document

The attached document is intended for discussion with Aboriginal communities and organizations, as well as industry and municipal organizations, as part of Ontario’s efforts to update its corporate guidance to ministries regarding the Crown’s duty to consult. It should not be relied on for any other purpose.

The document outlines possible content for new Consultation Guidelines (“Guidelines”) for Ontario ministries. It provides a summary of the types of information Ontario is considering including in new Guidelines. We will take the input and feedback provided into careful consideration as we finalize the Guidelines.

Additional Considerations

In addition to new Consultation Guidelines for ministries, Ontario may produce more in-depth supplemental materials on a number of topics, including:

- Municipalities and the duty to consult;
- Negotiating consultation protocols;
- The role of third party project proponents; and
- Avoiding and managing disputes.

New Consultation Guidelines will provide updated guidance to ministries on the Crown’s duty to consult. Meaningful consultation is but one way that Ontario is working to respect Aboriginal and treaty rights and work towards reconciliation. The Guidelines should be read alongside Ontario’s efforts towards the goal of reconciliation and closing the socioeconomic gap by promoting economic development and improving the way resource benefits are shared with Indigenous communities, as outlined in *The Journey Together, Ontario’s Commitment to Reconciliation*.

Summary of Potential Content for Updated Guidelines for Ontario Ministries on Consultation with Aboriginal Peoples

September 8, 2017

Contents

- A. Introduction and Overview 3**
 - 1) Context..... 3**
 - 2) Purpose of the Guidelines..... 4**
 - 3) Principles 4**
 - 4) How to Use the Guide 5**
- B. Understanding the Duty to Consult 5**
 - 1) The Legal Framework: Aboriginal & Treaty Rights in Ontario 5**
- C. Guidance for Ministries on Addressing the Duty to Consult 6**
 - 1) Preparation and Analysis 7**
 - 2) Conducting Consultation 9**
 - 3) Accommodation 11**
 - 4) Decision-Making, Implementation, and Follow-up 12**
- D. Supplementary Information 13**

A. Introduction and Overview

1) Context

This section of the Guidelines will outline why Ontario is updating its consultation guidelines and the context in which new guidelines to ministries are being developed.

In particular, this section will highlight the following:

- In 2006, Ontario released the *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights* (the “2006 Draft Guidelines”). The 2006 Draft Guidelines provided information to ministries to assist them as they developed ways to meet the duty to consult, and where appropriate, accommodate Aboriginal communities. The 2006 Draft Guidelines, which were made public, provided information on how Ontario fulfills the duty to consult.
- In the years since the development of the 2006 Draft Guidelines, there have been advancements in law and practice surrounding the duty to consult. Additionally, First Nation and Métis communities, industry proponents and municipalities have all indicated they want more detail about how Ontario fulfills its duty.
- This section of the Guidelines will also address the concept of Free, Prior and Informed Consent (FPIC) contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Ontario’s *The Journey Together: Ontario’s Commitment to Reconciliation with Indigenous Peoples* affirms that the province welcomes the leadership of the federal government on UNDRIP and is committed to considering policy options to address UNDRIP.
- Ontario recognizes that the law, policy and practice on Aboriginal consultation continue to evolve. Ontario’s current understanding of the law with respect to the duty to consult is that the requirement for consent is generally limited to decisions that will have a significant impact on established rights, particularly Aboriginal title. However, the values reflected in the UNDRIP, including the concept of FPIC, are consistent with Ontario’s commitment to establish and maintain constructive, cooperative and collaborative relationships with Aboriginal communities based on mutual respect. Working towards an approach on how to implement FPIC, in a manner consistent with the Constitution, treaties and case law, will involve ongoing discussions with Aboriginal communities and organizations, as well as the federal government.

- Ontario will continue to work with Aboriginal communities to enhance their participation in lands and resources matters, to fulfill its duty to consult, and to pursue opportunities for collaborative processes, shared stewardship arrangements and resource benefits sharing. It is Ontario's belief that these opportunities will be beneficial not only for Aboriginal communities, but will also provide a more predictable climate for investment, job creation and economic development.

2) Purpose of the Guidelines

This section will identify the purpose of the Guidelines as the provision of updated guidance to Ontario ministries on the duty to consult with Aboriginal communities.

Ministries have been, and will continue to, determine how best to address their duty to consult responsibilities within their mandates and legislative and regulatory frameworks. The Guidelines will provide overarching corporate guidance to support them in this work. This section will acknowledge that while ministries may have their own consultation processes, the Guidelines provide corporate guidance that should be read alongside and incorporated into ministry specific practices.

The Guidelines are also intended to set out Ontario's understanding and practice as of 2017. Recognizing that law and practice with respect to the duty to consult will change, the Guidelines will identify a timeline for reviewing and updating the content.

3) Principles

This section of the Guidelines will set out principles to guide ministries in fulfilling their duty to consult with Aboriginal communities. They are derived from case law on Aboriginal and treaty rights and the duty to consult, as well as broader Indigenous policy priorities for Ontario.

These principles will provide a foundation for building positive working relationships with Aboriginal communities, which is essential both in addressing the duty to consult and working towards reconciliation between the Crown and Aboriginal peoples in Ontario. The principles may include:

- **Respect for Aboriginal and treaty rights:** Ontario recognizes and respects Aboriginal and treaty rights and is committed to meeting the province's constitutional and other obligations in respect of Indigenous peoples, including the duty to consult and, where appropriate, accommodate.

- **Reconciliation:** Ontario will continue to uphold the honour of the Crown and contribute to reconciliation between the Crown and Aboriginal peoples through the duty to consult process.
- **Strong Relationships:** Ontario will support the rebuilding and strengthening of relationships with Indigenous communities through trust, understanding and respect.
- **Informed, Consistent, and Transparent Decision-Making:** Ontario will make decisions using the best available information, in an open, accountable way.

4) How to Use the Guide

This section will provide ministries with guidance on how to use the Guidelines. It will acknowledge that while ministries may have their own consultation processes, the Guidelines provide corporate guidance that should be read alongside and incorporated into ministry specific practices. In addition, this section will emphasize that consultation is fact specific and what is necessary to achieve meaningful consultation will vary with the circumstances.

While the primary audience for the Guidelines are ministries, this section will also note that the Guidelines may be helpful to Aboriginal communities, municipalities and proponents by providing transparency and clarity on Ontario's approaches to addressing the duty to consult.

B. Understanding the Duty to Consult

1) The Legal Framework: Aboriginal & Treaty Rights in Ontario

Fulfilling the duty to consult begins with an understanding of the legal framework in which the duty arises. The Crown's duty to consult is based on the principle of the honour of the Crown and the constitutional protection accorded to Aboriginal rights and treaty rights under *section 35 of the Constitution Act, 1982*. There is considerable direction from the Supreme Court of Canada and other courts about the duty to consult.

This section of the Guidelines will outline the legal framework for the duty to consult. Across Ontario, ministries are undertaking activities that have the potential to trigger the Crown's duty to consult. Ministries have a duty to consult with Aboriginal communities when a Crown decision or action has the potential to adversely impact the exercise of

an established or credibly asserted Aboriginal or treaty right. In some instances, accommodation measures may be necessary to avoid, mitigate or minimize these adverse impacts.

To provide a clear understanding of the legal framework, this section will answer the following questions:

- a) What are Aboriginal and treaty rights?
- b) Who holds these rights in Ontario?
- c) What is required for Ontario to fulfill its constitutional obligations to consult?
- d) What is accommodation and when is accommodation required?

C. Guidance for Ministries on Addressing the Duty to Consult

This section of the Guidelines will provide information and guidance to ministries regarding their consultation responsibilities when contemplating activities that could have an adverse impact on established or asserted Aboriginal or treaty rights. These activities may include:

- a) Developing and implementing policies and procedures;
- b) Issuing authorizations; and
- c) Undertaking projects.

The section will also provide guidance to support Ontario ministries when their duty to consult has been triggered. Generally, a consultation process has four phases:

1. Preparation and Analysis;
2. Conducting Consultation;
3. Accommodation; and
4. Decision-Making, Implementation and Follow-Up.

The structure of this section of the Guidelines will be based on these four phases. It is important to keep in mind that while these are presented as distinct phases, consultation is a flexible process that depends on the facts of each situation.

1) Preparation and Analysis

This part of the Guidelines will outline the steps involved in:

- Determining whether the Crown has a duty to consult in a particular situation;
- Assessing the scope of that duty; and
- Developing an appropriate consultation process.

There is a three-part test for triggering the Crown's duty to consult:

1. The Crown has knowledge, actual or constructive, of an established or asserted Aboriginal or treaty right;
2. There is contemplated Crown conduct; and
3. There is the potential that the contemplated conduct may adversely affect an established or asserted Aboriginal or treaty right.

The Guidelines will outline what a ministry should consider once it has determined that the duty to consult is triggered, including:

- **Which Aboriginal communities might be impacted by the Crown decision:**
 - Ministries should consider information that is available to the Crown, including:
 - A community's geographic proximity to the project;
 - treaty information;
 - established rights;
 - land claims;
 - litigation;
 - assertions to traditional territories; and
 - other known rights assertions.
 - As consultation activities proceed and ministries learn more about how the project could adversely affect the exercise of Aboriginal and treaty rights, their assessment of communities to which they owe the duty may change.
- **Assessing the strength of an Aboriginal or treaty rights claim:**
 - Aboriginal and treaty rights do not need to be established to trigger the Crown's duty to consult. It is enough for an Aboriginal or treaty right to be credibly asserted.
 - The assessment of the credibility and strength of the claim or right is an important component of the Crown fulfilling its duty to consult obligations. The strength of claim analysis will support ministries in assessing the

potential adverse impacts of a project on a community's rights and determining the depth of consultation required.

- **Potential adverse impacts on Aboriginal and treaty rights:**
 - Identifying potential adverse impacts on a community's Aboriginal or treaty rights will often include:
 - Analyzing potential impacts of the proposed project; and
 - Analyzing the extent and severity of the potential impact.
 - While ministries may have enough information to conduct an initial analysis of potential impacts, the initial analysis must be supplemented by discussions with Aboriginal communities to add to the Crown's understanding of the impacts of a proposed project.
 - Information from third party proponents may also help to identify potential impacts in connection with a proposed project.
- **The appropriate scope of consultation owed in the particular situation:**
 - The extent of consultation required in a particular circumstance is case specific and what is necessary to facilitate meaningful consultation will vary in different circumstances. Factors that influence the content and extent of a ministry's consultation obligations include:
 - In the case of established rights, the nature of the established right;
 - In the case of asserted rights, the strength of the assertion; and
 - The seriousness of the potential adverse impacts on the established or credibly asserted Aboriginal or treaty rights.
 - Discussions with Aboriginal communities about their rights and potential impacts to those rights, are important in determining the extent of consultation required in a particular circumstance. As Aboriginal communities and ministries consult, a ministry's initial assessment of its duty to consult obligations may change.

In addition, to support ministries in their consultation preparations, the Guidelines will provide guidance on the roles and responsibilities of third party project proponents and municipalities in the consultation process.

- **Third Party Project Proponents:**
 - The Crown can delegate procedural aspects of the duty to consult to third party project proponents. Procedural aspects are those portions related to the process of consultation. However, where a ministry has the duty to consult, the ministry is ultimately responsible for ensuring that the duty is met.

- The Guidelines will explain how ministries can delegate procedural aspects of consultation to a third party and outline the information that ministries should communicate to third parties and to the relevant Aboriginal communities, including: the procedural aspects that are being delegated, the communities that must be consulted, and the ministry's responsibility to maintain appropriate oversight and assess the adequacy of consultation.
- **Municipalities:**
 - In some circumstances, municipalities are third party project proponents, if they are seeking an approval, permit or authorization from Ontario. In these instances, ministries may delegate procedural aspects of consultation to municipalities.
 - In other circumstances, Ontario is of the view that municipalities have an independent duty to consult because they make decisions and take actions independently and without subsequent provincial approval that have the potential to adversely impact the exercise of Aboriginal and treaty rights. They can also mitigate, minimize or eliminate potential adverse impacts of their decisions.
 - The Guidelines will outline the role and responsibilities of municipalities in the consultation process. In addition, Ontario is considering developing tools and guidance to support municipalities in fulfilling their consultation responsibilities.

This section of the Guidelines will also outline the role of Aboriginal communities in the duty to consult process. It will note that Aboriginal communities play an essential role in consultation processes because they know best what their rights are, where they exercise them, and how a proposed government action or decision may impact their rights.

2) Conducting Consultation

Initiating Consultation

- This section of the Guidelines will outline the types of information that should be communicated to Aboriginal communities when a ministry wishes to consult with them on a proposed government action or decision. For example, this information should include: details about the proposed activity, any relevant regulatory approval processes, initial information about potential project impacts, timelines for responses, and ministry contact information.

- This section will also note that discussions with an Aboriginal community on how it prefers to be involved in a consultation process are important, particularly where extensive consultation is required.
 - This section will discuss the fact that a number of Aboriginal communities have their own approaches to consultation (e.g. Grand Council Treaty #3's Manito Aki Inakonigaawin, Six Nations of the Grand River Consultation and Accommodation Policy) that provide guidance on how they prefer to be consulted. This section will provide guidance on how ministries can approach this during discussions about consultation expectations.

Conducting Consultation

- Consultation processes will vary depending on the facts, the strength of the claim, and potential adverse impacts.
- Consultation may reveal the need for accommodation. Accommodation may involve taking steps to avoid, minimize or mitigate negative impacts on rights.
- A ministry's analysis of the activities required to fulfill its duty to consult in a particular circumstance may change as consultation progresses and a ministry learns more about both the potential project impacts and established and asserted Aboriginal and treaty rights.

Record Keeping

- Part of the consultation process involves keeping a consultation record. The Guidelines will outline:
 - Why record keeping is important; and
 - How ministries, municipalities, and third party proponents can create a consultation record and what types of information should be included.

Supporting Aboriginal Community Capacity to Participate in Consultations

- Many Aboriginal communities receive a high volume of notices about consultation on a wide variety of initiatives from many different ministries. Communities have regularly expressed how challenging it can be for them to participate meaningfully in consultation processes.
- MIRR provides general capacity support through the New Relationship Fund (NRF). The NRF helps First Nations and Métis communities consult and engage with governments and the private sector on land and resource matters. The funds

provided through the New Relationship Fund are not project specific: they are to assist communities as they build core consultation capacity.

- The NRF does not cover all project specific consultation needs. The Guidelines will outline relevant factors in determining whether project specific funding may be appropriate to enable Aboriginal communities to meaningfully participate in a specific consultation process. For example, this may include:
 - Engaging their own technical or subject matter expert capacity (e.g. to provide traditional land use studies, community values maps, documentation of traditional ecological knowledge, etc.);
 - Translating information, technical documents, and other material into Aboriginal languages; and
 - Honoraria or per diems to enable community members with Aboriginal and treaty rights knowledge to participation in a consultation process.

3) Accommodation

Accommodation refers to any measure(s) that will mitigate, avoid or eliminate the adverse impacts of a proposed Crown action or decision on established or credibly asserted Aboriginal or treaty rights.

When accommodation is required

- The Guidelines will discuss when accommodation may be required and will provide considerations for ministries in identifying options for accommodations, as well as in selecting appropriate accommodation measures. The Guidelines will also discuss the role of municipalities and third party project proponents in accommodation.
- The Crown may be required to take steps to accommodate an Aboriginal or treaty right:
 - Where a proposed Crown action or decision will adversely impact an established Aboriginal or treaty right; or,
 - Where a strong case exists for an asserted Aboriginal or treaty right and a proposed Crown action or decision could adversely affect this right in a significant way.
- Ministries may not know at the outset whether accommodation is required. Consultation with Aboriginal communities may reveal a need to accommodate.

Disagreements about accommodation measures

- It is the Crown's responsibility to determine whether accommodation is required and what accommodation measures are appropriate in the circumstances. Accommodation involves a balancing of Aboriginal and broader societal interests, and as such does not provide a veto to an Aboriginal rights-holder.
- Ideally, ministries and Aboriginal communities will agree on appropriate accommodation measures. However, circumstances may arise where a ministry and an Aboriginal community cannot agree on how to accommodate the exercise of the community's Aboriginal or treaty rights.
- While there is no obligation to reach an agreement on accommodation measures, where disputes arise, the Guidelines will advise ministries to consider alternative dispute resolution mechanisms, including traditional dispute resolution, to work through impasses, avoid litigation and preserve relationships.

4) Decision-Making, Implementation, and Follow-up

Adequacy of Consultation

- The Guidelines will discuss the decision-making process. Ministries are required to make an assessment about whether consultation and accommodation measures, where required, have been sufficient. If consultation and accommodation is sufficient, the ministry can proceed to make an action or take a decision.
- Where third parties have been delegated procedural aspects of consultation and the efforts of the third party are not sufficient, the ministry should consider: providing the third party with additional guidance on how to fulfill the aspects of the duty to consult delegated to it; carrying out consultation directly with the Aboriginal communities involved; and/or not granting the approval sought.
- The Guidelines will include considerations for ministries in reviewing the adequacy of consultation and accommodation, recognizing that each consultation should be treated individually and assessed on its own specific facts.

Communicating Decisions

- The Guidelines will identify the importance of communicating with potentially affected Aboriginal communities throughout the consultation process.
 - The results of consultation should be communicated to the appropriate Aboriginal communities. The information communicated will vary but could

include: a description of the consultation process, the ministry's response to concerns raised by Aboriginal communities, and the accommodation measures decided on, as required.

Implementation and Follow-up

- The Guidelines will note that ministries are responsible for ensuring the outcomes of a consultation process are implemented and monitored, including determining whether accommodation measures are in place and the effectiveness of implementation.

D. Supplementary Information

In addition to the Consultation Guidelines for ministries, Ontario may produce the following stand-alone guidance:

- a) For Municipalities – outline Ontario's understanding of the responsibilities of municipalities in fulfilling the duty to consult in certain circumstances
- b) For Proponents – outline Ontario's process for delegating the procedural aspects of consultation to project proponents
- c) Alternative Dispute Resolution