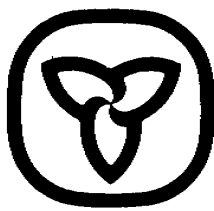


# Reaching Effective Consultation

**A Guide on How to Get There!**  
*“When in doubt, check it out”*



Ontario



**Developed By:**  
**Lands Working Group**  
**Endorsed By:**  
**Anishinabek/Ontario Resource Management Council**  
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For additional copies of this publication, please contact:  
Intergovernmental Affairs Program

Union of Ontario Indians  
Nipissing First Nation  
P.O. Box 711  
North Bay, ON  
P1C 1C3

Tel: (705) 497-9127  
Fax: (705) 497-9127

e-mail: [info@anishinabek.ca](mailto:info@anishinabek.ca)

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## **Background**

The Anishinabek/Ontario Resource Management Council (A/ORMC) was conceived through discussion between Vernon Roote, the Grand Council Chief of the Anishinabek Nation and John Snobelen, the Ontario Minister of Natural Resources. It was created to address a number of concerns the Anishinabek Chiefs raised in regard to problems they were having with the MNR.

The A/ORMC is an advisory body, created in November of 2000, by a Memorandum of Understanding and given responsibilities to provide advice to the Minister and Grand Council Chief on the management of natural resources affecting Anishinabek communities in Ontario. (See Map in Appendix B)

The goal of the A/ORMC is to improve communication, dialogue, and relations between the parties. The A/ORMC provides an opportunity for the Anishinabek First Nations and the Ministry to discuss resource management issues, exchange information, facilitate a common understanding and collaborate on the resolution of issues.

The A/ORMC consists of senior policy officials, District Managers, Regional Grand Chiefs and First Nations representatives. Working Groups have been established in Forestry, Lands, Fish & Wildlife, Water Management and Enforcement.

The A/ORMC allows for direct discussion between senior representatives of the Anishinabek and the MNR on a variety of issues. Major issues include the lack of communication and consultation on important land and resource issues as well as a lack of discussion between the parties when MNR develops policies and legislation that could affect the rights of First Nations and their members.

It does not supersede the authority of local First Nation governments or absolve the Ontario government of its responsibility to consult with First Nations.

## **Introduction**

The A/ORMC identified the need to develop guidelines that can lead to meaningful consultation.

The A/ORMC recognize that the courts are defining legal duties and responsibilities to consult, however these are open to differing interpretations and are continually evolving. As a result, the parties have determined a need to develop a practical guide to outline how MNR and Anishinabek First Nation communities can provide, receive, review and comment on information.

The following may serve as a practical guide for Anishinabek First Nation communities and MNR districts to initiate dialogue, which will lead to the development of an effective consultation process. It is important to acknowledge that these guidelines are available only as a tool to assist in working towards meaningful consultation. The A/ORMC recognize that Anishinabek First Nation communities and MNR may choose to develop or use their own consultation mechanisms.

The Anishinabek Nation participated in the development of these consultation guidelines without prejudice to Aboriginal and Treaty rights and without prejudice to its position of being a partner in natural resource use, development and planning. These guidelines are also without prejudice to the rights, power, privileges, jurisdiction or responsibilities of each party, and does not confer on any party any right, power, privilege, jurisdiction or responsibility beyond the limit of the respective constitutional or legal authority of that party.

The A/ORMC endorses these guidelines and recommends that they be considered for use when dealing with consultation matters.

## **Purpose**

The A/ORMC agree that it is of mutual benefit to consult so that accurate and relevant information is exchanged in a timely manner, as defined by what is agreed to by both parties at the outset of the development of the consultation process, to assist in informed decision-making on lands and resource matters.

The ultimate goal is to ensure that natural resource management and planning occurs in a respectful manner with consideration for current and future resource use. Both parties agree to recognize and respect Aboriginal and Treaty rights, and will work towards avoiding infringement on those rights. It is understood that Aboriginal and Treaty rights continue to evolve and be defined.

Both parties agree that there may be instances where infringement may occur. There must be compelling reason to justify infringement. Both parties will work towards minimizing any infringement. An additional goal is to assist in building a working relationship based on trust.

## **Definition of Consultation**

For the purpose of these guidelines, consultation is a process that facilitates the provision and receipt of natural resource information, between the parties, to assist in making informed decisions. (See Appendix 'A' for additional terms defined for use in this document)

## **Basic Criterion of Effective Consultation**

To be effective a consultation process should result in and ensure the respectful and timely exchange of all relevant information between both parties; such as what is being proposed, the rationale for the proposal, timeframes, related issues and concerns. The consultation should be carried out as early as possible so that it is meaningful to the implementation of the initiative and provides the best protection of both parties' rights.

The process would ensure that each party has the means to participate in order to achieve a full understanding of the information relevant to the specific initiative.

The consultation process should be flexible, designed to fit specific situations and needs, carried out within a reasonable amount of time and agreed to by both parties.

Neither party should deliberately frustrate the consultation process to delay decision-making, but each party should endeavour to participate in good faith.

Information given or received within the consultation must be held confidential to the parties in the process. Confidential information obtained during the process may be used in other situations with consent from the applicable party.

Parties should be cautioned to have regard for requirements under the Freedom of Information and Protection of Privacy Act.

## **Pre-Consultation**

These guidelines are designed with the understanding that both parties will have initiatives that they want to implement and each will be inviting consultation with the other party.

Each party must examine the initiative to determine if it impacts or infringes on the other. An evaluation of the merits of the initiative should be based on the fundamental principles of respect, courtesy and good will. The parties may use assessment factors included in these guidelines to determine whether or not to consult.

If consultation is not undertaken, it must be documented.

If the party decides no consultation is required then the initiative is implemented without consultation, however notification may occur primarily for information purposes.

If the party determines that consultation is required then it may proceed using these guidelines.

### **Assessment Factors**

The A/ORMC understands that there is to some degree a legal requirement to consult with Aboriginal Peoples when undertaking resource development initiatives that may impact Aboriginal lands, resulting from recent court rulings.

This document is not intended to define Aboriginal and treaty rights, nor define the circumstances required for determining when a legal duty to consult exists. These guidelines are drafted with the understanding that the legal duty to consult will be the very least that is expected. Anishinabek First Nation communities, MNR staff and third parties are encouraged to improve on and move beyond the minimum requirement and work towards building positive relationships.

The preferred option is for a party to choose to invite consultation on all its initiatives. However, it is the responsibility of each party to decide on which matters it will consult. Each party is accountable for its decisions and may be asked to substantiate its decision with documentation. ***A minimum requirement for assessing is the legal requirement.***

Consultation may be initiated from three different parties, or any combination of:

- A. Anishinabek Nation
- B. Ministry of Natural Resources
- C. Third Party

Whoever initiates the consultation shall be referred to as the proponent. If “A” or “B” are the initiators of an undertaking the following steps and considerations are provided as information when designing a joint consultation process.

If any initiative is brought forth from a third party then the MNR may require the proponent to undertake consultation with the First Nation(s) as part of their approval process.

The following factors should be considered when any one of the three parties is considering consultation:

- Infringes on legal rights
- Effects conservation, health and safety
- Impacts on Anishinabek values

- Effects natural resource values
- Effects local economies and/or people
- Impacts on public interest
- Will change the way the land is used by local people
- Need for information

There may be other factors that warrant consideration for consultation.

Consultation should be undertaken on initiatives such as, but **not limited to:**

- |                              |                                      |
|------------------------------|--------------------------------------|
| • Ontario's Living Legacy    | • Licence Allocation                 |
| • Baitfish                   | • Aqua/culture Operations            |
| • Great Lakes Heritage Coast | • Hunt Camp/Incidental Buildings     |
| • Caribou                    | • Trapping Cabins                    |
| • Park Planning              | • Non Timber Forest Initiatives      |
| • Dispositions               | • Energy Developments                |
| • Forest Management Planning | • Resource Based Tourism Initiatives |

### **Consultation Process**

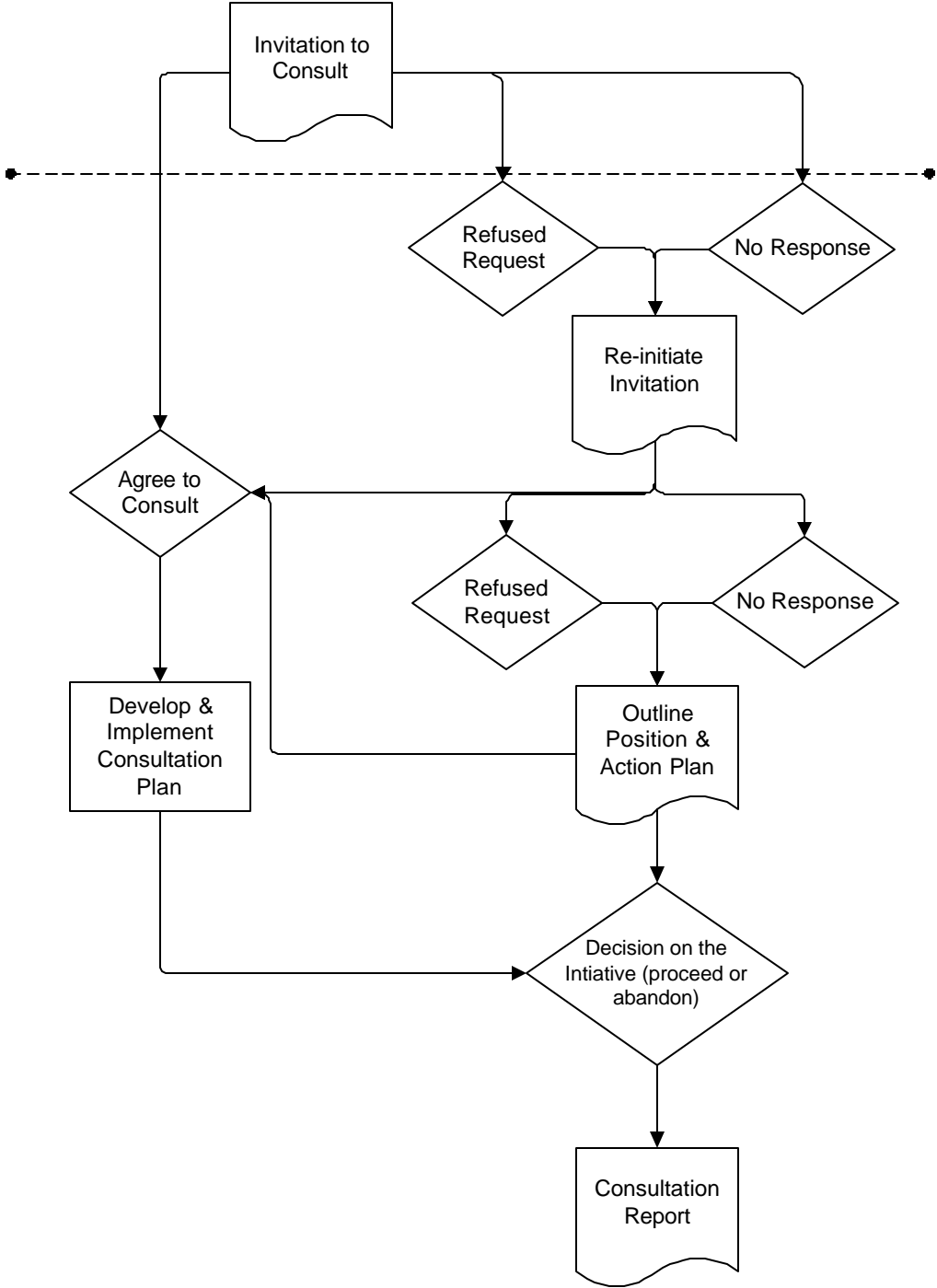
Once a party decides consultation is required then it may proceed using these guidelines. The consultation process illustrated in the flowchart (Figure 1) should be followed in conjunction with the text in the next section "Consultation Steps".

Following an invitation to consult, one of three things may occur: Either the invited party accepts/agrees to consult, refuses the request to consult or doesn't respond.

The next course of action will be determined based on the response.



# Consultation Process Flowchart



Note: The consultation process illustrated in the flowchart above should be followed in conjunction with the text in the next section “Consultation Steps”.

**FIGURE 1**

## **Consultation Steps**

There should be recognition by the proponent that an internal assessment to decide whether to enter into consultation occurs. The amount of time required to complete this assessment should be taken into account when sending out an invitation to consult, for example internal communication structure, capacity to access expertise, complexity of initiative, etc...

Each of the following corresponds to the boxes on the flowchart (Figure 1).

### **Invitation to Consult**

The proponent sends out an invitation to the other party(s). The invitation should:

- Identify who has been invited to participate
- Be in writing
- Be addressed to an identified contact (name, title, etc.) and sent in a variety of ways such as by mail, fax, email or in person.
- Describe reason for initiative - need, impact, benefit and full disclosure
- Include information about the initiative (Introduction to initiative – area, description, etc.)
- Include contact information
- Be sent within a reasonable time
- Suggest a meeting and time to discuss next steps

### **Agree to Consult**

If there is an agreement to consult then this agreement should be documented in writing by all parties. Agreement to consult does not mean agreeing to the initiative.

### **Refused Request**

The invitation has been refused by the invited party through letter, email, phone call, in person or fax.

### **No Response**

The invited party did not provide a response after a reasonable time through letter, email, phone call, in person or fax . This should be documented to be included in the Consultation Report. A 'No Response' by the party invited to consult does not mean agreeing to the initiative.

## **Re-Initiate Invitation**

If there is a refusal or no response, resend the invitation for greater certainty.

- Resend the invitation – purpose, intent etc.
- Try a new method and approach – i.e. in person
- Revisit/confirm potential parties

The invitation may have been rejected or ignored due to capacity issues.

## **Outline Position and Action Plan**

The proponent must communicate with the invited party(s) that did not respond or refused to consult on its position, with respect to the initiative and present an action plan. The communication should:

- Include a description of the initiative
- Provide summary of activities undertaken to-date
- Explain that the process for determining whether the initiative will proceed is continuing
- Define timeframes for future action and decision making
- Keep invitation open
- Document any information that is relevant to the initiative

If there was no response or a refusal to participate based on a lack of capacity, then the action plan may try and address this issue where possible.

## **Develop & Implement Consultation Plan**

The parties meet to develop and implement a consultation plan, which may include:

- An outline and agree on scope of consultation
- A schedule of meetings, location and timeframes
- Designated contacts
- An agreement on disclosure of information and format
- Potential needs for consultation – i.e. staffing
- An agreement on how to address needs – i.e. staff resources
- An outline and agreement on method of consultation – i.e. feasts, open meetings, site visits
- A jointly agreed upon workplan – location, timing, parties involved

- An agreement on how information is formatted, presented and exchanged
- An agreement on process for feedback
- An agreement on how information is shared internally and externally
- Timeframes for deciphering and analyzing information
- An agreement that each party will develop a position and relay it
- An agreement on future information exchanges beyond this consultation process
- An agreement on definitions
- An agreement on a method of dispute resolution

### **Decision on the Initiative (Proceed or Abandon)**

A decision on the initiative is made.

The results of the consultation plan or action plan will be one of the factors in determining if the initiative proceeds or is abandoned.

It is understood that the decision will be made with consideration for the concerns or issues that have been documented during the consultation process.

The decision and rationale for the decision should be documented in writing and communicated to all parties. The decision and rationale will be included in the Consultation Report.

### **Consultation Report**

Once a decision has been made on the initiative the proponent will prepare a consultation report.

The consultation report should include:

- A description of the initiative
- The rationale for the decision
- A list of who was invited to participate in the consultation process
- A summary of activities undertaken to-date – i.e. meetings
- A description how information provided by other party was used
- Information on the current status of the initiative
- A description of the process for on-going information exchange if required
- Any other relevant information

## **Summary**

Successful consultation will be when there is an agreed upon process, begins at the outset of any initiative and the process is followed through.

There may be instances when the party has refused to participate or has not responded.

The intention of these guidelines is always to leave the lines of communication open and to keep information flowing.

At some point in the process the invited party(s) may choose to be involved in the process to some extent. However, it must be understood that once the initiative is underway it will require a modified approach to consultation that may be more like information sharing and discussion.

## **Appendix “A” – Definitions**

The following definitions are intended solely to clarify terms used in this document.

### **Anishinabek Nation**

The Anishinabek Nation, incorporated as the Union of Ontario Indians, is a political advocate and secretariat to 43 member First Nations across Ontario. The Union of Ontario Indians is the oldest First Nation political organization in Ontario and can trace its roots back to the Confederacy of the Three Fires, which has existed long before European contact.

### **Ministry of Natural Resources**

The Ministry will contribute to the environmental, social and economic well-being of the people of Ontario through the sustainable development of natural resources.

### **Flexible**

Open and receptive to the views of others.

### **Good Faith**

Disclosure of relevant information, respectful communication and timely response to questions.

### **Infringement**

To trespass or intrude on the rights, interests and possessions of another. To take possession of what belongs to another by gradual advances into their limits or jurisdiction

### **Meaningful Consultation**

A clear intent by both parties to engage in flexible discussions where the outcome of a particular issue is not presupposed.

### **Reasonable Time**

Fair allocation of time to collect, receive, exchange and evaluate information. Should not be viewed as excessive and should where possible be mutually agreed upon.

**Note:** As concerns or clarification on terminology are raised, this section may be expanded or modified.

**Appendix “B” – Map - Anishinabek Nation**

