

Government of New Brunswick Duty to Consult Policy

Aboriginal Affairs Secretariat
Province of New Brunswick

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A. Introduction

Section 35 of the *Constitution Act, 1982* “recognizes and affirms” the “existing” Aboriginal and treaty rights in Canada. Aboriginal rights derive from the long-standing use and occupancy of Canada by Aboriginals prior to European settlement. In order for an aboriginal custom, practice or tradition to be considered an aboriginal right, it must be integral to the distinctive culture of an aboriginal society. These include the right to hunt, trap, fish, gather and follow Aboriginal customs, practices and traditions on ancestral lands. Treaty Rights include the specific rights of the Aboriginal peoples embodied in the treaties entered into with Britain and, after confederation, Canada.

In addition to the right to use their ancestral lands, First Nations in the Maritime Provinces assert that they did not surrender their lands to the Crown, so they also claim title to the land itself. Aboriginal title has not been proven in the Courts.

The common law duty to consult is based on a judicial interpretation of the obligations of the Crown (federal, provincial and territorial governments) regarding established or asserted rights of the Aboriginal peoples of Canada and refers to the obligation to ensure that Aboriginal people are adequately consulted about matters that may affect an Aboriginal or treaty right.

In three landmark decisions by the Supreme Court of Canada: 1. Haida Nation, and 2. Taku River Tlingit First Nation, both in 2004, followed by 3. Mikisew Cree First Nation in 2005, it was determined that the Crown has a duty to consult and, where appropriate, accommodate when it contemplates conduct that might adversely impact Aboriginal or treaty rights, or Aboriginal title. The duty stems from the Crown’s unique relationship with Aboriginal peoples and its’ responsibility to reconcile Aboriginal and non-Aboriginal interests.

The Province of New Brunswick has a duty to consult with First Nations when contemplating an action or a decision that may infringe upon proven or asserted Aboriginal and treaty rights. The *Duty to Consult Policy* provides direction to the provincial government on consultation with the *Mi’gmaq* (Mi’kmaq) and *Wolastoqiyik* (Maliseet) First Nations in New Brunswick (listed in Appendix A). It applies to strategic and operational decisions made by the Crown or its’ agents, affecting Crown land and resources under provincial jurisdiction that may adversely impact the exercise of Aboriginal and treaty rights.

The Policy outlines the types of decisions that may trigger the duty to consult, the roles and responsibilities of the Federal and Provincial Governments and First Nations and provides guidance to ensure that adequate consultation has taken place on matters that may affect Aboriginal and treaty rights. The Aboriginal Affairs Secretariat will assist in this interpretation and will take the lead establishing consistent policies, procedures and practices across the provincial government.

B. Duty to Consult Policy

1. Policy Statement

The Government of New Brunswick will consult with First Nations before an action or decision is taken that may adversely impact Aboriginal and treaty rights.

2. Policy Goal

The goal of the Policy is to facilitate and maintain mutually beneficial relationships between the Government of New Brunswick, First Nations and industry.

3. Objectives

The Policy will fulfill the following objectives:

- a. To fulfill the Crown's obligation to consult First Nations where aboriginal and treaty rights may be affected in accordance with the affirmation of aboriginal and treaty rights in the Constitution of Canada;
- b. To balance constitutionally protected aboriginal and treaty rights with the Government of New Brunswick's constitutional mandate to manage public lands and resources for the benefit of all New Brunswickers;
- c. To provide meaningful opportunities for First Nations input into government decisions that may affect Aboriginal and treaty rights;

These objectives are designed to establish transparent and effective standards and procedures and provide greater certainty for government, industry and First Nations.

4. Guiding Principles

Integrity and Good Faith

The Government will approach consultation with an open mind and conduct itself with integrity during consultation, and deal in good faith with First Nations. During the decision-making process, the Government will listen and respond to First Nations concerns regarding potential impacts on Aboriginal and treaty rights.

Respect

Consultation will be undertaken in a spirit of mutual respect and trust.

Government's Duty

The duty to consult on matters subject to provincial jurisdiction lies with the Government of New Brunswick. The Government retains final decision-making authority, and must ensure that the duty to consult has been fulfilled. First Nations do not have veto over decisions.

Reciprocal Responsibility

There is an equivalent responsibility on First Nations to participate in consultation with good faith. First Nations' concerns regarding potential impact on Aboriginal and treaty rights should also be made known to Government and (or) its agents.

Transparency and Accountability

Consultation processes will be timely, accountable, transparent, and results oriented.

C. The Duty to Consult

1. Policy Application

The Policy applies to Government actions and decisions regarding Crown land and resources, which may impact the exercise of Aboriginal and treaty rights, including:

- a) Hunting;
- b) Trapping;
- c) Fishing;
- d) Gathering; and,
- e) Other traditional uses associated with ceremonial activities and culturally significant sites.

2. Matters Subject to the Duty to Consult Policy

The duty to consult applies to decisions or actions of the Crown regarding Crown land and resources that may adversely affect asserted or judicially established Aboriginal and treaty rights.

The duty to consult may also extend to decisions or actions of the Crown regarding unoccupied or undeveloped private land, where there are asserted or established Aboriginal and treaty rights.

3. Triggers

The duty to consult is triggered when the Crown is considering an action or decision that may adversely affect Aboriginal and treaty rights. The following actions and decisions are considered potential triggers for the duty to consult:

Regulations, Policies, Plans and Procedures

- The creation, amendment or implementation of regulations, policies or procedures, including strategic and operating plans, which may negatively impact the traditional use of Crown land and resources or the way a right is exercised;

Resource Management

- Licensing, leasing, permitting or regulating access to fish, wildlife, forests, minerals or other Crown resources;

Crown Land Management

- Changing public access to Crown lands and resources (including the disposal of Crown lands);
- Designating unoccupied land or undeveloped resources for purposes that are incompatible with traditional uses;

Land use and Environmental Regulation

- Approvals leading to the depletion or impairment of Crown land use or resources;
- Disturbing or damaging culturally significant areas;
- Development in proximity to First Nations communities;
- Other actions or decisions that may negatively affect Aboriginal and treaty rights.

4. Roles and Responsibilities

The Provincial Government

The Government of New Brunswick is responsible for the administration and management of Crown land and natural resources within the province, and will exercise its authority in the interests of all residents of New Brunswick. The Province has a duty to consult with First Nations on matters within provincial jurisdiction that may infringe on Aboriginal and treaty rights. The Crown may delegate aspects of the duty to consult process to third parties (e.g. technical experts, project proponents), but remains responsible for decision-making and fulfilling legal requirements related to the duty to consult.

The **Aboriginal Affairs Secretariat (AAS)** is responsible for ensuring that consultation occurs on behalf of the Crown. In this role, AAS works with legal counsel, technical advisors, regulatory authorities, departments, industry, First Nations and other parties to assess the risk of infringement, define the scope of the consultation process and determine whether the duty to consult has been fulfilled.

The Federal Government

The Government of Canada has a duty to consult and accommodate, as a result of federal actions and decisions that have potential adverse impacts on Aboriginal and treaty rights. Where there are overlapping jurisdictions and responsibilities, the federal and provincial governments will work to develop and implement joint processes.

First Nations Communities

First Nations that are potentially affected by proposed activities are responsible for participating in the consultation process, either directly or through their authorized representatives, as designated by their respective governments.

D. Conclusion

The Government of New Brunswick is committed to strengthening relationships with First Nations, for the benefit of all New Brunswick. The Province acknowledges that it has a legal obligation to consult with First Nations.

The Government of New Brunswick recognizes the benefits of consulting First Nations when making decisions that affect their rights and interests. Early engagement of First Nations by both the public and private sectors will enhance the decision-making and project development process to ensure optimum project outcomes.

The Government of New Brunswick regards the *Duty to Consult Policy* as a fundamental step towards achieving these goals.

Appendix A

NEW BRUNSWICK'S FIRST NATIONS

MI'GMAG FIRST NATIONS

Bouctouche First Nation

9 Reserve Road
Bouctouche Reserve, NB
E4S 4G2

Burnt Church First Nation

620 Bayview Drive
Burnt Church First Nation, NB
E9G 2A8

Eel Ground First Nation

47 Church Road
Eel Ground, NB
E1V 4E6

Eel River Bar First Nation

11 Main Street, Suite 201
Eel River Bar First Nation, NB
E8C 1A1

Elsipogtog First Nation (Big Cove)

373 Big Cove Road
Big Cove, NB
E4W 2S3

Fort Folly First Nation

PO Box 1007
Dorchester, NB
E4K 3V5

Indian Island First Nation

61 Island Road
Indian Island, NB
E4W 1S9

Metepenagiag First Nation (Red Bank)

PO Box 293, STN Main
Red Bank, NB
E9E 2P2

Pabineau First Nation

1290 Pabineau Falls Road
Pabineau First Nation, NB
E2A 7M3

WOLASTOQIYIK FIRST NATIONS

Kingsclear First Nation

77 French Village Road
Kingsclear First Nation, NB
E3E 1K3

Madawaska First Nation

Administration Band Office
1771 Main Street
Madawaska First Nation, NB
E7C 1W9

Oromocto First Nation

4 Hiawatha Court
PO Box 417, RPO Oromocto Mall
Oromocto, NB
E2V 2J2

Saint Mary's First Nation

150 Cliffe Street
Fredericton, NB
E3A 0A1

Tobique First Nation

6 First Street
Tobique First Nation, NB E7H 2A9

Woodstock First Nation

3 Wulastook Court
Woodstock First Nation, NB
E7M 4K6

Appendix B

GLOSSARY

Aboriginal – A term used when referring to matters that affect First Nations (Indian) and *Métis* peoples. It is capitalized and used as an adjective (e.g., Aboriginal person, Aboriginal rights).

Aboriginal peoples – A collective name referring to the original inhabitants of North America and their descendants. Section 35(2) of the *Constitution Act*, 1982 states that: "In this Act, aboriginal peoples of Canada includes the Indian, Inuit, and Métis peoples of Canada." These separate groups have unique heritages, languages, cultural practices and spiritual beliefs.

Aboriginal rights – Rights that some Aboriginal peoples of Canada hold, as part of an Aboriginal community, which are protected by Section 35(1) of the *Constitution Act* (1982). These rights derive from their ancestors' long-standing use and occupancy of Canada, prior to European settlement, as well as the associated customs, practices and traditions that make Aboriginal societies distinct. They include the right to hunt, trap, fish, gather and follow Aboriginal customs, practices and traditions on ancestral lands.

Aboriginal self-government – Governments designed, established and administered by Aboriginal peoples.

Aboriginal title – A legal term that recognizes an Aboriginal right to the exclusive use and occupation of land. It is possible that two or more Aboriginal groups may be able to establish Aboriginal title to the same land. It derives from the long-standing use and occupancy of the land, prior to European settlement and Crown sovereignty.

Band – As defined under the *Indian Act*, a Band is body of Indians that are declared as such by the Governor General in Council, and for whose common use and benefit lands have been set aside or monies held on their behalf by the Government of Canada. The term "First Nation" is often used in place of the term "Band".

Band Council – The governing or administrative body of a Band, elected according to procedures established by the *Indian Act*. They are responsible for administering band provisions granted under the *Indian Act* and carrying out the regular business of the Band, including community infrastructure, by-laws and other services.

Band Council Resolution (BCR) – A written decision adopted at a duly convened meeting of the Chief and Council, which is supported by a majority of the members.

Band Membership – The recognition and associated privileges accorded to an Indian whose name appears on an approved Band List. Where a Band has adopted its own membership code, it may define who has a right to membership in the Band, so being a status Indian is not necessarily synonymous with being a Band member. Status Indians who are not Band members are listed in the General list.

Chief – The leader of a First Nation community or Band Council, who is duly elected by the members of the First Nation, or by the councillors according to the *Indian Act*, or through custom elections. The title may also refer to Chiefs elected to regional or national representative bodies (e.g., Regional Chiefs, Assembly of First Nations).

Appendix B

GLOSSARY

Collective rights – Shared rights that are granted to an individual, due to their membership in a group, which are practiced for the benefit of the community, as distinct from personal or civil rights that are held by an individual, for their own benefit.

Constitution Act (1982, revised from the British North America Act, 1867) – The *Constitution Act* defines Canada's system of government, as well as the civil rights of all Canadian citizens. **Section 91(24)** confers upon the federal government the power to make laws in relation to "Indians and Lands reserved for Indians". **Section 35(1)** recognizes and affirms Aboriginal and treaty rights. As a result of this Constitutional protection, governments have an obligation not to infringe upon Aboriginal and treaty rights without justification and due process.

Crown – Federal and provincial government departments, ministries and Crown agencies, including government employees that are doing the work of the government.

Crown land – lands owned by the federal or provincial government, on behalf of the Crown, including submerged land. It often includes natural resources on Crown land or within jurisdictional authority, for instance, wildlife, minerals, petroleum and water.

Duty to consult – Obligation of governments to ensure that Aboriginal people are adequately consulted about matters that may affect an Aboriginal right or treaty right that has been recognized and affirmed by Section 35(1) of the *Constitution Act*, 1982.

First Nation(s) – A term that came into common usage in the 1970s to replace the

word "Indian" and refers to both status and non-status Indians. The term has no legal standing. The term may be used (in singular or plural form) as a synonym for "Band", in reference to specific community or, more generally, to peoples of Aboriginal descent.

Indian Act – Legislation administered by the Government of Canada, which is designed to give effect to legal and fiduciary authority for "Indians and Lands reserved for the Indians", pursuant to Section 91(24) of the *Constitution Act*, 1867.

Indian Register – a centralized record of all persons registered as Indians in Canada.

Indian Reserve – Lands owned by the Government of Canada, and held in trust for the use and benefit of an Indian Band, for which they were set apart from other public land. The legal title to such lands is vested in the federal government.

Indian Status – An individual's legal status as an Indian, as defined by the *Indian Act*.

Métis – Historically, the term "*Métis*" applied to the children of French fur traders and Cree women in the Prairies and of English and Scottish traders and *Dene* women in the North. Today the term broadly describes people with mixed First Nations and European ancestry who identify themselves as *Métis*. In 2003, the Supreme Court of Canada affirmed the *Métis* rights recognized in Section 35(1) of the *Constitution Act* (1982). In order for this ruling to apply, the individual or organization must demonstrate that their ancestors were members of a historically established *Métis* settlement prior to Crown sovereignty.

Appendix B

GLOSSARY

Native – A term used to refer generally to Aboriginal peoples. The term "Aboriginal person" is preferred to using "native".

Non-status Indian – A person who identifies themselves as Indian or member of a First Nation, but is not registered as an Indian under the *Indian Act*, or recognized as such by the Government of Canada. The Aboriginal rights of non-status Indians are not defined under the *Indian Act*.

Off-reserve – People, communities, services or objects that are not part of a reserve, but relate to First Nations.

On-reserve – The geographic location of a First Nations band or reserve, comprising the physical infrastructure and community services of the community.

Peace and Friendship Treaties – Treaties signed by the British and the Mi'kmaq, Maliseet and Passamaquoddy prior to 1779. Unlike treaties signed elsewhere in Canada, these agreements did not require First Nations to surrender rights to lands or resources.

Registered Indian – A person who is defined as an Indian under the *Indian Act* and who is registered under the *Act*. It is also referred to a "Status Indian".

Reserve – A tract of land, the legal title to which is held by the Government of Canada, and that is set apart for the use and benefit of an Indian Band. The *Indian Act* provides that this land cannot be owned by individual band or First Nation members.

Royal Proclamation of 1763 – Enacted by the British Government to ensure that the

interests of Indian people and their lands were protected and the Indian people were dealt with fairly if that interest was extinguished.

Rights-holder – A person or entity that is alleged or recognized as possessing rights (established or asserted). A right entails an obligation on behalf of the government to respect, promote, protect, and fulfill the right.

Status Indian (Registered Indian) – An Indian person who is registered (or entitled to be registered) under the *Indian Act*. The *Act* sets out the requirements for determining who is an Indian for the purposes of the *Act*.

Traditional Activities – Activities undertaken by Aboriginal peoples that were carried out dating back to pre-contact periods.

Traditional Ecological Knowledge (TEK) / Traditional Use Studies (TUS) – Refers to consultation with Aboriginal people about geographically defined areas (on land or water) that are or were used for traditional purposes. The information is usually compiled through discussions with Elders and community members about the locations of historical, archaeological or sacred sites, as well as important areas for hunting, fishing, trapping, gathering and other traditional activities. This research is often undertaken during a feasibility study or review process such as an Environmental Impact Assessment (EIA) to evaluate the potential impact of a proposed development on traditional land uses, as well as Aboriginal Rights and Treaty Rights.

Appendix B

GLOSSARY

Traditional Lands – Lands used and occupied by First Nations before European contact. Also referred to as ancestral lands or traditional territory.

Treaty Rights – The specific rights of the Aboriginal peoples embodied in the treaties they entered into with the Crown government, initially Britain and after confederation, Canada. They address matters such as the creation of reserves and the rights of Aboriginal communities to participate in traditional practices such as hunting, fishing, gathering and ceremonial activities, and may also provide for annuities and other benefits. Treaty rights are protected by section 35 (1) of the *Constitution Act*, 1982.

Tribal Council – A group or association of First Nation Band Councils that operate under the direction of the Chiefs of the respective Bands. It represents the interests of these Bands and may administer funds or deliver common services to these Bands.

Trigger – The elements necessary for the duty to consult to exist: 1) Crown conduct, referring to a contemplated action or decision; 2) a potential adverse impact; and, 3) Aboriginal or treaty rights, established or asserted, that may be adversely affected.

With or Without Prejudice – Describes communication, either written or verbal. To designate a communication as “without prejudice” is to declare that the party does not waive its right to non-disclosure of the communication. Such communications may be referred to as being “off-the-record”. This term is often used during negotiations and litigation. Should there be a request for without prejudice or off-the-record discussion, advice from legal counsel should be sought.