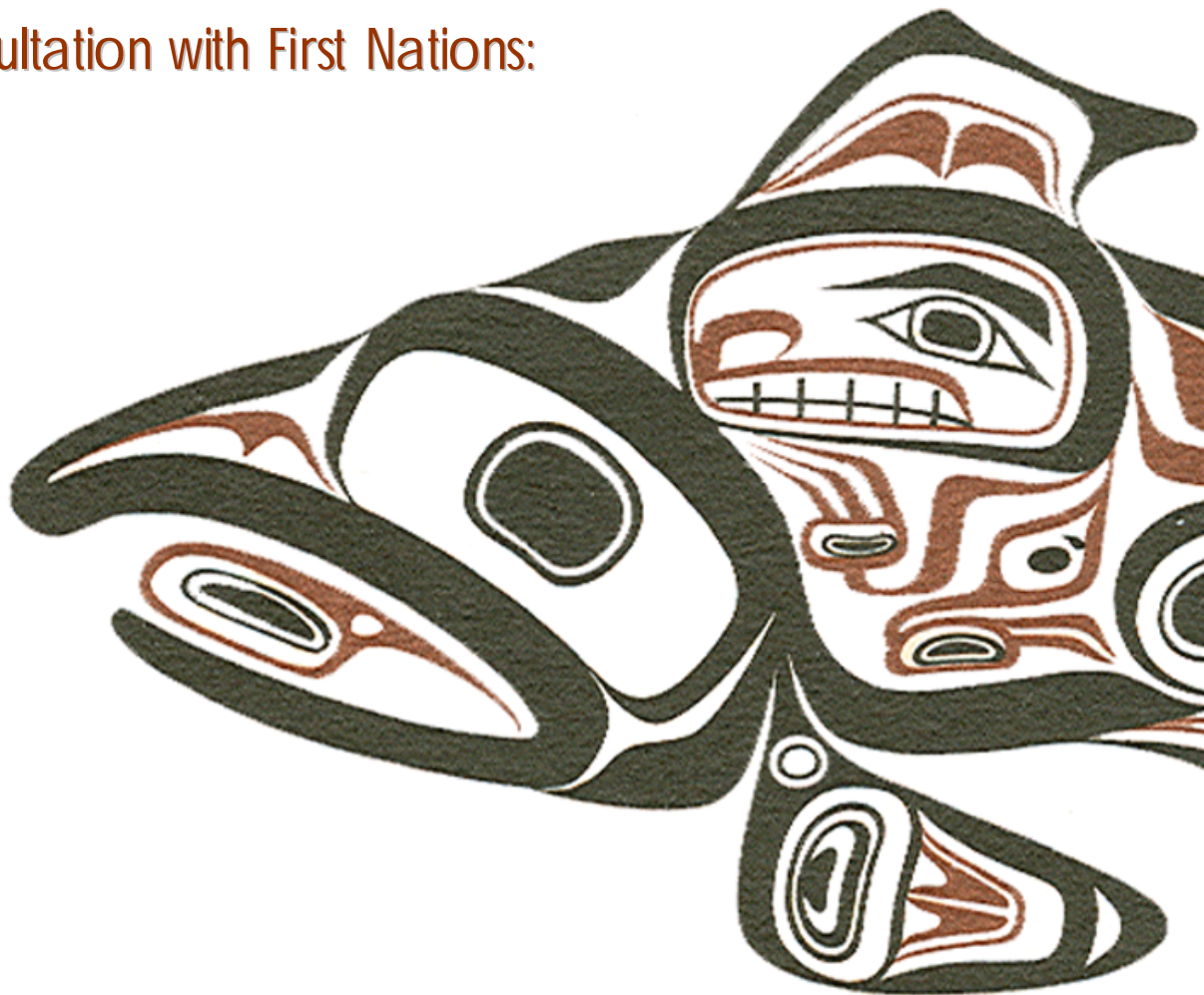




Fisheries and Oceans
Canada

Pêches et Océans
Canada

Consultation with First Nations:



BEST PRACTICES

- A LIVING DOCUMENT –
JUNE 2006

Canada

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How to Use This Document:

This document has been developed by DFO Pacific Region to provide some interim guidance to staff in Pacific Region pending the development of national policies and guidelines respecting consultation with First Nations (FNs). The Government of Canada plans to develop a comprehensive policy and/or guidelines for consulting with FNs and plans to involve FNs in the development of a policy and/or guidelines.

This document is not meant to be a statement of DFO or Government of Canada policy. Rather, it is a collection of "best practices" gathered from the experience of DFO staff, from other government departments, from other jurisdictions and from FNs. It is meant to raise awareness and to provide suggestions to staff on how to improve DFO's consultations with FNs in the interim, as the Department moves toward a more collaborative style of management, and the federal government works with FNs to develop a national policy on consultation.

This document is a living document, and will be reviewed and reoriented on a regular basis. It is meant to improve as a result of discussions with FNs and others, and as DFO's own consultation practices further develop and improve. It is hoped that providing DFO Pacific Region staff with some practical guidance based on best practices will result in more efficient use of FNs', and DFO's staff time and resources, and will result in DFO more effectively addressing the interests of FNs as they relate to DFO's mandate.

Background:

In its landmark 2004 decision in *Haida v. BC*, the Supreme Court of Canada (SCC) emphasized that the honour of the Crown is always at stake in its dealings with Aboriginal peoples and that, depending on the circumstances, the honour of the Crown may require the Crown to consult with and reasonably accommodate Aboriginal interests pending resolution of claimed Aboriginal rights and title. With respect to what the legal duty to consult may entail, the SCC said that "(t)he controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."

DFO's *Consultation Framework* states that "DFO will undertake consultations in order to improve departmental decision-making processes, promote understanding of fisheries, oceans and marine transport issues, and strengthen relationships" (v). The Privy Council Office describes consultation as "an interactive process seeking direct participation from Canadians." The key point is that, other than in situations of urgency, consultation is usually a process rather than a singular event or act. A consultation process could consist of a variety of

steps/initiatives, such as information sharing, bilateral discussions and meetings, letters expressing views or concerns, telephone calls, faxes, e-mails, etc. The form that the process takes depends on many things, including , but not limited to, the objectives of consultation, any existing agreements or protocols, and the level of impact a particular issue or decision has on the people being consulted.

In its decision in *Haida v. BC*, the SCC noted that "every case must be approached individually." Further, citing the Government of New Zealand's consultation guidelines with the Maori people, the SCC said that:

"consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed.

Genuine consultation means a process that involves:

- gathering information to test policy proposals;
- putting forward proposals that are not yet finalised;
- seeking [Māori] opinion on those proposals;
- informing [Māori] of all relevant information upon which those proposals are based;
- not promoting but listening with an open mind to what [Māori] have to say;
- being prepared to alter the original proposal; and
- providing feedback both during the consultation process and after the decision-process."

The importance of consultation with First Nations:

The federal government consults with Aboriginal people for many reasons. For example:

- To meet legal requirements;
- To develop and/or strengthen mutually respectful relationships with Aboriginal people;
- To fulfill policy commitments and improve policy development. FNs can:
 - Provide new approaches from their cultural perspective;
 - Identify pitfalls or gaps in our thinking; and
 - Raise issues we have not considered.

At the heart of consultation is a commitment to constructive and mutually respectful relationships with FNs, based on reconciliation, enhanced collaboration, effective working partnerships and mutual respect. DFO strives to

involve FNs in the early stages of policy, project and program development where policies, projects or programs may affect the interests of FNs. Consultation allows for an open forum of information exchange, assists DFO in addressing the concerns and interests of FNs, and generally results in better policies, projects or programs. DFO is moving along the “spectrum of engagement”¹ from informing and consulting to greater involvement and collaboration of FNs in management and conservation of the resource. This also matches FN’s aspirations. While this will take some time, DFO staff should be striving for greater collaboration and partnerships with First Nations. In the interim, the best practices in this document should be followed as we work together to move forward.

Legal Context:

Existing Aboriginal and treaty rights are “recognized and affirmed” in section 35 of the *Constitution Act, 1982* (in its 1997 in *Delgamuukw v. BC*, the SCC confirmed that Aboriginal title is a type of Aboriginal right).

In its 1990 decision in *R. v. Sparrow*, the SCC held that the adequacy of consultation is an important factor to consider in assessing whether an infringement of an Aboriginal right can be justified by a government. In its subsequent decision in *R. v. Badger*, the SCC held that the same analysis applies to determining whether an infringement of a treaty right can be justified by government.

R. v. Sparrow and subsequent cases dealt with situations where the existence of Aboriginal or treaty rights was not at issue, i.e. the existence of the right was acknowledged or admitted by government for the purpose of the case and the issues were whether or not the right was infringed and whether or not the infringement could be justified by government. These cases left unanswered the question of what legal duty governments have to consult with FNs when Aboriginal rights are claimed but not yet established through, for example, litigation.

That question was answered in the 2004 decision of the SCC in *Haida v. BC*. In that decision, the SCC held that the Crown has a legal duty to consult with Aboriginal groups and, in some circumstances, accommodate their interests when the Crown has knowledge of the potential existence of Aboriginal title or other Aboriginal rights and is making decisions that might adversely affect the Aboriginal title or other Aboriginal rights. The SCC emphasized that the scope of the duty will vary depending on the circumstances but also that the honour of

¹ It is generally accepted that there are several levels of engagement, beginning with informing, and then moving along a spectrum of increased two-way engagement of consultation, to involving and collaborating.

the Crown is always at stake in the relationship between the Crown and Aboriginal people.

Courts have emphasized that, although the Crown's legal duty to consult will require different responses in different situations, in all cases the Crown must act in good faith to provide meaningful consultation appropriate to the circumstances. The common thread on the Crown's part must be the intention to substantially address Aboriginal concerns as they are raised through a meaningful process of consultation.

It is important to note the following comments also made by the SCC in *Haida v. BC*:

The SCC emphasized that, in a process of consultation and accommodation:

- FNs do not have a veto;
- FNs have an obligation not to frustrate the process; and
- There is no obligation on governments and FNs to reach agreement.

What DFO issues might require consultation with FNS?

NOTE: this is not an exhaustive list, but refers to common areas of interaction:

- Agreements under the Aboriginal Fisheries Strategy (AFS) and under the Aboriginal Aquatic Resources and Oceans Management (AAROM) program
- Issues that are identified by FNs
- Agreement in Principle and other agreements and arrangements in the British Columbia Treaty Commission process
- Integrated Fisheries Management Plans
- In-season fishing decisions
- Integrated oceans management
- Marine Protected Areas
- Policies and programs
- Aquaculture screening assessments
- Habitat referrals and permits
- Salmon enhancement initiatives: Excess Salmon to Spawning Requirements opportunities, Community Economic Development
- Statutory requirements (e.g. *Species at Risk Act*, regulatory changes)

Here are some preliminary questions to consider regarding consulting with FNs:

1) Could Aboriginal rights or Aboriginal title, or treaty rights, be affected by the proposed DFO action or decision?

- In *Haida v. BC*, the SCC stated that "the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."
- Could established Aboriginal rights (e.g. the Heiltsuk Nation's Aboriginal right to harvest herring spawn on kelp for commercial purposes) be affected?
- Are there modern treaty rights that may be affected (e.g. under the Nisga'a Final Agreement or the Yukon Final Agreements?)
- Are there claimed Aboriginal rights or Aboriginal title that may be affected?
- Are there historic treaty rights (e.g. Douglas Treaty rights) being claimed that may be affected?

2) What is the reason for the consultation?

- Strengthening the Government of Canada's relationship with FNs
- Policy (new, revised policies)
- Operational requirements
- Legal
- Statutory obligations (e.g. *Species at Risk Act*)
- Treaty (consultation obligations set out in treaties)

3) Which FNs might be impacted by this decision and how should they be contacted?

- Consider the impact a potential decision might have by: Geographic area / Tribal groupings / Linguistic groups / AAROM bodies / individual FNs
- Who are the rights holders or representatives of rights holders?
 - Consultation should generally be with bands unless they direct that consultation occur at a tribal, or some other level.
 - Elected Chief and Council are the band representatives. The Chief may delegate councilors or other band members to represent the band with respect to fisheries issues. When a representative, other than the elected Chief, is representing a bands' interests it is desirable to have this delegated authority in writing from the Chief or Chief and Council.
 - Hereditary Chiefs

- Other exceptions: e.g. trapline holders
- Do I have contacts for these FNs?
- Are the FN(s) part of an AAROM group?
- Is there an existing treaty, agreement or consultation protocol with that group? If there is, the established process should be followed.

Assessing the need for, and scope of, consultation:

In *Haida v. BC*, the SCC stated that the content of the duty to consult and accommodate "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and the seriousness of the potentially adverse effect upon the right or title claimed." The SCC also stated that "to facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements."

Staff should conduct an assessment of the need for, and scope of, consultation with FNs. Once the assessment is done, the Crown is supposed to determine where on the "spectrum" of consultation duties the duty to consult with the particular FN falls. The level of consultation chosen should correspond with the strength of claim and the level of impact.

There are two separate elements to this determination:

- 1) Strength of claim: "preliminary assessment of the strength of the case supporting the existence of the right or title"; and
- 2) Impact: an assessment of "the seriousness of the potentially adverse effect upon the right or title claimed."

Suggested approaches:

1. At the beginning of the consultation process, DFO staff should contact the DOJ office at DFO to determine what information is already available to DFO regarding, e.g., the FN's historical use of certain species or certain areas. Staff may also contact DFO Area Aboriginal Liaisons and DFO Area Chiefs for additional information, or refer to colleagues in other federal departments.

Once internal consultation is complete, you may consider asking the FN for whatever information it has to support its claimed Aboriginal rights or Aboriginal title that might be affected by the proposed DFO action or decision (e.g. any historical or anthropological information that the FN has regarding its historical use of certain species or certain areas).

DFO staff should also determine from DFO Treaty and Aboriginal Policy Directorate whether the FN is in the BC Treaty Commission process and, if so, at which stage of the process.

Further, DFO staff should consult with DOJ regarding whether the FN is involved in any litigation in which Aboriginal rights or Aboriginal title are asserted.

2. Seek information from the FN regarding what it perceives as the potentially negative impact of the proposed DFO action or decision.

What is the level of impact of the proposed DFO action or decision?

Once an assessment has been done to determine the strength of claim and the extent of impact (if any), the following suggested processes could be followed:

No Impact:

If DFO is confident that the proposed DFO action or decision will have no impact on any Aboriginal rights or Aboriginal title claimed by any FNs, there should be no legal duty to consult with First Nations in the circumstances. However, DFO may nonetheless want to consult with First Nations to confirm that there is no impact and for the purpose of developing and improving relationships with First Nations.

Limited Impact:

If DFO's view is that the claim to the Aboriginal rights or Aboriginal title by the FN is weak or limited, or the potential for the proposed DFO action or decision to adversely affect the claimed right or title is minor, the only legal duty on DFO may be to give notice, disclose information, and discuss any issues raised in response to the notice.

Medium to High Impact:

In all other circumstances, DFO staff should consider following the proposed "Six Step Process" described below, and consider how that process could best be applied with respect to the particular DFO action or decision.

The Proposed "Six Step Process"

"Gathering information is an important part of the consultation process. But this alone is not sufficient. Consultation occurs only when the information we have gathered is used to test the advice we produce and feedback is given to those who provided the information during the development of policy advice" (*Consultation with Maori*, 1997).

If the impact is medium to high, it is proposed that DFO staff should generally follow the basic six steps described below. Keep in mind that each case will be different, and the actions taken under each step will vary, depending on the circumstances.

RECORDS OF CONSULTATION:

It is very important to keep records of all letters, meetings (including attendance lists), telephone calls, site visits, and other efforts by the Crown to consult with FNs at all stages of consultation. These are all considered to be elements of the consultation process, although no one element unto itself is considered full consultation, unless the FN has agreed that it is. For your convenience, a template for recording meetings is provided on the following internal website: <http://info.pac.dfo.ca/policy/consultation.htm>. In addition, records should be housed in a central, accessible storage location.

Step 1. Inform First Nations of Intent to Consult:

- It is important to provide sufficient information so that the First Nation can decide whether or not to participate in the consultation process. Send a letter/fax/e-mail-pdf that outlines:
 1. the issues, decisions that need to be made, and potential impacts on FNs (as DFO understands them)
 2. the timeline
 3. the proposed process for consultation
 4. whether or not there is funding available for participation. If there is funding available, clearly stipulate the conditions.
- *Who does the letter go to?* The letter should go to the First Nation or Aboriginal group that asserts that it holds the Aboriginal rights or Aboriginal title that may be affected. In the case of a policy issue, the letter should generally go to Chief/Council with cc to Fisheries Technician/Manager and Band Manager. In the case of an operational fishery issue, the letter should generally go to Fisheries

Technician/Manager with a cc to Chief and Council and the Band Manager. Who the recipient of correspondence should be, and who it should be copied to, should be one of the first things discussed with a FN in a consultation process.

- In the case of broader policy issues, letters should also go to Aboriginal organizations (i.e. BCAFC, UBCIC), but it is important to remember that these organizations emphasize that they do not hold rights.
- For a full list of Aboriginal contacts in Pacific Region (by area and category), please link to the Regional Stakeholder List by using the instructions here:
<http://info.pac.dfo.ca/policy/regkeystakeholder.htm>
- Provide preliminary information for review (if available).
- Follow up with a phone call to confirm receipt of information/notification of intent to consult.

Step 2. Information Exchange (Initial Meeting):

- Work with First Nation(s) to determine suitable dates and venues.
- Where aggregate meetings are the most efficient and effective way for DFO and FNs to exchange information, encourage such aggregate meetings.
- Use community venues/hospitality, where available.
- If conducting large-scale consultation, consider using the services of a skilled, non-partisan facilitator who has experience working with FNs. A non-partisan facilitator would not belong to the community where you are undertaking consultations.
- Provide information at least 10 days in advance of the meeting.
- The information exchange is an opportunity to present information and clarify issues, as well as identify initial concerns. Ensure that the appropriate DFO staff are present to answer questions concerning the issues under discussion.
- Provide the offer of a follow-up bilateral discussion, and a DFO contact should a FN wish to set up a meeting.

Step 3. Bilateral Discussions (Follow-up Meeting(s)):

- Offer of bilateral discussion should be made when informing FNs of intent to consult, and during the information exchange.
- Follow-up the offer with direct contact to determine if FN is interested in a bilateral meeting (letter and/or phone call).
- The bilateral discussions are an opportunity to discuss FNs concerns and interests, clarify information, provide DFO's

perspective, and explore ways in which the FNs' interests and concerns may be addressed.

- Where possible, it can be helpful if, prior to bilateral meetings, FNs outline their initial concerns so that meetings are as productive as possible and DFO is prepared with answers to their questions/concerns.
- Bilateral discussions may result in the need for additional information and/or response. Additional meeting(s) or communication may be required to address further concerns and answer questions.

Step 4. FNs' Response to DFO:

- Where possible, it can be helpful if FNs provide a written or verbal response to what has been discussed during the bilateral consultations.
- Additional meeting(s) may be required to address further concerns.

Step 5. DFO Response to FN:

- Wherever possible, DFO will provide a written response to the concerns raised during the consultative process. This response should explain in as much detail as appropriate, how the FNs' interests and concerns have, or have not been addressed by DFO and suggest whatever follow up steps may be appropriate.
- Hold a face-to-face meeting to discuss what was heard during consultation, and DFO's response (including explanations of any changes to proposals resulting from the consultation process).

Step 6. Issue Resolution/Accommodation:

- As emphasized by the SCC, a requirement to accommodate can only be determined through a meaningful consultation process:

"47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: ". . . the

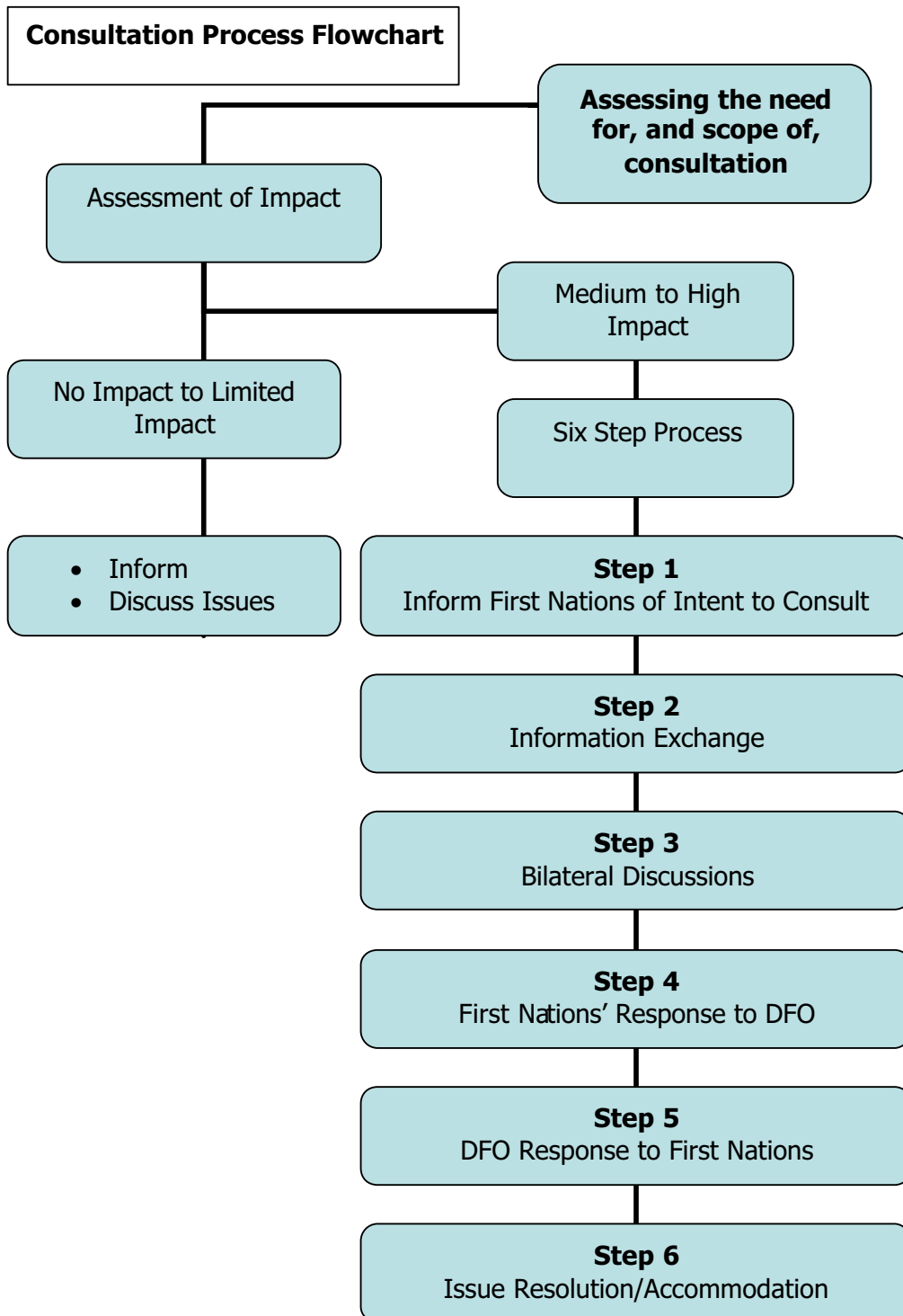
process of accommodation of the treaty right may best be resolved by consultation and negotiation”.

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

49 This flows from the meaning of “accommodate”. The terms “accommodate” and “accommodation” have been defined as to “adapt, harmonize, reconcile” . . . “an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise”: *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.

50 Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests."

PLEASE NOTE: There have been requests from First Nations that accommodation be in the form of compensation. Please consult with DOJ on this issue.



General Best Practices

For broader, regional issues that may impact some or all FNs, stakeholders and the public, DFO has developed and is testing a more coordinated approach to consultation. This involves an annual internal assessment of upcoming issues that require consultation (apart from regular, operational issues), and the “bundling” of all issues into a series of FNs and multi-interest community dialogues around the Province of BC in the fall of each year. This provides FNs, stakeholders and the public with greater clarity around consultation; an organized and “one-stop” approach to consultation; multiple avenues and opportunities for engagement (including electronic); and, a more community-based opportunity for dialogue and exchange of ideas. Appendix A contains a case study that describes the Fall Fisheries and Oceans Community Dialogue approach.

Here are some more general best practices to follow:

1. Prior to consultation:

- Where appropriate (e.g. for larger scale undertakings, or issue-specific consultations) develop a consultation plan. See <http://info.pac.dfo.ca/policy/consultation.htm> for template.
- Start planning and undertaking the process early.
- Where possible, work with FNs, as a first step, to develop a process that is beneficial and acceptable to both parties (where appropriate, this could be described in a consultation protocol, a joint consultation plan, or some other type of document).
- Discuss and/or develop with FNs the agenda for consultation meetings.
- If there is a parallel multi-sectoral consultation process, start the FNs consultation process first (it generally takes more time).
- Invite FNs to attend the multi-sectoral process as well.
- Determine if there are other DFO meetings/consultations occurring in the area. Contact DFO leads for these issues and coordinate meeting.
- Talk to area staff prior to undertaking consultation. To promote continuity and relationship-building, involve local area staff who have developed a relationship with the FN in the consultation process, if possible.
- Determine if there are other government department meetings/consultations occurring in the area (contact Consultation Secretariat). If doing so makes the consultation process more efficient and effective for all involved, attempt to coordinate meetings.

2. During the consultative phases:

- Do not present proposals that are already finalized and have no room for change, unless it is for information only.
- Provide clarity around the objectives of each meeting (why are we here, what are we discussing, what are the next steps, what are the timeframes, how will the information be used).
- Information should be provided in a manageable and understandable format. Use plain, non-technical language, where possible, and use alternatives to power point.
- There should be adequate time for review, wherever possible, within the context of any time limits imposed, e.g., in statutes such as the *Species at Risk Act*.
- Keep records of all letters, meetings (including attendance lists), telephone calls, site visits, and other efforts by the Crown to consult with FNs. These are all considered to be elements of the consultation process.²
- In large-scale consultations, the Crown may hire a third party to assist with design, organization and facilitation of the process. However, a third party cannot undertake consultation on behalf of the Crown.
- Provide hospitality, if possible, particularly for all-day or multi-day meetings.

3. Post-Consultation:

- Where appropriate, be prepared to consider altering the original proposal to accommodate FNs' interests and concerns.
- Follow-up with FNs in writing to explain in as much detail as appropriate, how their interests and concerns have, or have not been addressed.

Cultural Considerations:

- What is the history and language of the FN? Division of language groups in BC:
<http://atlas.gc.ca/site/english/maps/peopleandsociety/lang/aboriginallanguages/bycommunity>

² Please note that it is important to document all stages of the consultation process.

- What are the key social issues, economic structures, cultures and religions within the FN?
- FNs governance: Is the FN operating under the *Indian Act*, a Final Agreement, a self-government agreement or a traditional governance system?
 - Although the *Indian Act* stipulates a governance model for Aboriginal people, FNs may follow their own traditional governance systems. Learn about governance structures by talking to FNs.
 - Understanding the governance system will help you clarify who your contacts in the community will be, how the community makes decisions and who the key decision-makers are, and the timeframe needed to undertake a consultation process.
- Capacity issues:
 - Some FN communities have staff/people that regularly deal with fisheries/oceans-related issues. This may facilitate the consultation process. However, some communities do not have hired fisheries experts or resource management staff. Consultations with these communities may take longer.
- Funding:
 - Does DFO provide funding for participation through AFS agreements, AAROM funding, or other funding?
 - If DFO does provide funding for participation – how MUCH participation does it fund (e.g. it may cover specific activities and not others).
 - If no funding is provided through the above mechanisms, funding for travel should be offered, where possible, and clear guidelines for funding provided.
- Timelines:
 - FNs require adequate time to consult within their communities. This should be taken into account in developing timeframes for consultation.
- Meeting Timing:
 - Familiarize yourself with seasonal customs. For example, many FNs will not want to meet with government officials during certain months due to fishing or other activities.
 - Talk to people in the community about upcoming events that might clash with your proposed dates.
- Meeting Locations:
 - It is important to ask FNs where they would like to hold their meetings. It is suggested to hold meetings in FNs facilities – this is respectful, convenient and supports the community.
- Hospitality:
 - Provide hospitality where possible, particularly for meetings that last all day and require FNs to travel to the meeting location.

- Use community caterers, where possible, and observe diet preferences/requirements.
- Welcomes / Opening Prayers:
 - Ask the host FN if an opening prayer is required. This might only be reserved for higher profile consultations.
 - Ask the host FN to provide a welcome to participants.
 - Lead DFO participant should always thank and acknowledge the host FN at the beginning and the end of the meeting.

Developing a Consultation Agreement/Protocol:

Some FN may prefer to jointly develop a consultation agreement or protocol with DFO.

NOTE: DFO staff must ensure they have a mandate to negotiate consultation protocols with FNs prior to making any agreements. Please check with your Area/Regional Director prior to negotiating protocols.

Some Possible Components of a Consultation Protocol:

- Statement of common goals / principles
- Scope of the consultation process: what gets discussed where and with whom?
- Anticipated timeframes
- Communication process
- Available funding
- Key FN and DFO contacts
- Documentation of the process

APPENDIX A: CASE STUDIES

1) FALL FISHERIES AND OCEANS COMMUNITY DIALOGUE

***Fall Community Dialogue – Pacific Region**

http://www-comm.pac.dfo-mpo.gc.ca/pages/consultations/consultation2005/main_e.htm

Contact: Jay Hartling

Sector: Consultation Secretariat, Policy Branch, Pacific Region
604-666-7013
hartlingj@pac.dfo-mpo.gc.ca

Timeframe: May-September, 2005 (planning) October-December, 2005 (implementation/reporting)

* DFO, Pacific Region consults on a number of broad, policy-related issues every year. In addition, with the *Species At Risk Act* (SARA), annual consultation has become routine. The concept of a “community fair” or “community market” approach to consultation was developed in the Pacific Region to respect and value the time and input given by FNs, stakeholders and the public to DFO’s consultation processes; to improve the effectiveness and efficiency of Departmental consultations; and to provide the widest range of opportunities possible for input and collaboration. The ultimate goal is to improve departmental proposals on each of the key issues. It is important to talk to people in their communities (or as close as possible, given DFO’s own constraints). The “community market” approach is a result of a number of recommendations over the years from FNs, stakeholders and the public.

The Pacific Region first experimented with a combined issue, community-based dialogue approach in 2004. Three unrelated issues were discussed during a two-day timeframe:

- Proposed Rockfish Conservation Areas (FAM)
- New Proposed SARA Legal Listings (Policy/FAM)
- Three SARA Draft Recovery Strategies for Sakinaw Lake sockeye, Cultus Lake sockeye and Interior Fraser coho (Policy/FAM)

On Day 1, DFO held information sessions with FNs. On the evening of Day 1, there was a public open house. On Day 2, stakeholders and interested community residents held a dialogue session. Agendas were organized according to the relevance of each issue to the community or area visited.

Fall 2005 Community Dialogue Case Study Overview:

Planning for the Fall 2005 Community Dialogue Sessions began in May 2005. Regional Directors (through RD, Policy) identified a number of key issues requiring consultation in the coming year. A consultation plan was developed and approved by RMC in July 2005.

Policy Branch (Consultation Secretariat) coordinated the development and implementation of the consultation plan with the participation of a multi-sectoral team. The multi-sectoral team had representatives from Fisheries Management, Oceans/Habitat and Enhancement, Treaty and Aboriginal Policy, Policy, Department of Justice at DFO and Communications. The multi-disciplinary team helped to refine the consultation plan, and were involved in the development and implementation of many of the key milestones in the plan. Fortunately, the Consultation Secretariat has developed considerable in-house expertise to undertake planning and implementation, so these costs were borne "in-kind".

The suite of issues requiring some level of consultation in the fall of 2005 were:

- Fisheries Reform (FAM)
- Groundfish Industry Integration Proposal (FAM)
- Proposed Rockfish Conservation Areas for the Strait of Georgia (FAM)
- Wild Salmon Policy – implementation plan (Policy)
- New proposed SARA listings (open house only) (Policy/FAM)
- Draft SARA freshwater recovery strategies (Policy/FAM/OHEB)

The Aboriginal portion of the consultation plan was developed in parallel to the multi-stakeholder process (see section titled *Consultation with First Nations* below). The plan was discussed with the BC Aboriginal Fisheries Commission (BCAFC), and the BCAFC was contracted to organize and undertake the information exchange portion of the consultation process.

Attempts were made to work with the Province of BC (MOE), Environment Canada and Parks Canada to coordinate multi-department consultations during the same timeframe (and with similar stakeholder groups). This was only partly successful – Parks Canada attended 2-3 meetings and participated in open houses in communities where their issues were relevant (National Marine Conservation Area).

Budget:

The overall budget was developed by the Consultation Secretariat, with a specific component for First Nations consultation. The total consultation budget

consisted of the sum of each available consultation budget from each individual initiative, so no new monies were required. DFO was able to conduct a process of this magnitude based on already available funds. The cost was shared between Policy, Treaty and Aboriginal Policy, Fisheries and Aquaculture Management (Fisheries Reform, Rockfish), Species At Risk Act (Policy). A specific portion of the total budget was devoted specifically to FNs consultation.

The budget covered the following:

- contract to consultant to help design, implement and facilitate the entire process
- contract to BCAFC to organize and implement information exchanges
- contract to NTC to deliver local information exchange (Port Alberni)
- meeting logistics (rooms, A/V, equipment)
- consultation materials (workbooks, storyboards, consultation guides, etc.)
- travel/accommodation for participants, as needed (FNs and stakeholders)
- hospitality (food and beverage)
- advertising (public notices)
- printing
- shipping
- staff travel

Consultation Process

Pre-consultation:

- Multi-sectoral team: Consultation Secretariat (CS) plus Team developed consultation plan.
- RFP to hire consultants to assist with development of process, materials, schedules, agendas, facilitation and report-writing.
- In house: meeting and staff scheduling, all registration, logistics, hospitality, material distribution, shipping, web, communications (media and materials), presentations, on-site support.
- Consultation plan approved by RMC.
- CS developed budget and assigned costs.
- CS developed schedule of deliverables.
- Contacted other government departments (Province of BC, Environment Canada, Parks Canada) to determine if they were interested in coordinating activities.
- Team developed all background materials, presentations, consultation guides.
- Mailed out invitation and registration information to all First Nations in BC, key stakeholder groups and organizations, local governments, Province of BC. The invitation letter included information on the sessions, a link to a website that contained all agendas and background documents, and a number to call for further information.

- Notice placed "In the Loop" for DFO staff.
- Held regional all-staff briefing via web-conference on September 30.

Consultation:

- News release announced fall community dialogue sessions September 13, 2005: http://www-comm.pac.dfo-mpo.gc.ca/pages/release/p-releas/2005/nr057_e.htm
- Website launched same day: http://www-comm.pac.dfo-mpo.gc.ca/pages/consultations/consultation2005/main_e.htm Available on web: meeting schedules, registration information, agendas, background information, draft policies and reports, DFO contacts, and mechanisms for providing feedback and comments through the web, e-mail, fax and snail-mail.
- Placed ads in 60 community newspapers around the province (Sept. 24 – Nov. 11).
- Used list-servs, staff contacts and e-mail lists to follow up and "spread the word".
- Held 13 open houses, four two-day multi-interest dialogue sessions, two one-day multi-interest dialogue sessions, and seven First Nations information exchanges (see website above for detailed agendas and dates).
- Travel funding was provided, as needed.
- Hospitality was provided on both days (breakfast, lunch, beverages).

Consultation with First Nations:

- Letters were sent to all 198 FNs in BC, Tribal Councils and key Aboriginal organizations inviting them to participate in FN information exchanges and multi-interest dialogues, as well as an opportunity for bilateral meetings. The letter also contained the link to a website with all background information on each of the issues, as well as a phone number to call for further information.
- DFO contracted the BC Aboriginal Fisheries Commission (BCAFC) to facilitate information exchanges in seven FNs communities. DFO delivered the presentation and answered questions from FN representatives.
- Travel funding was available for one representative of each FN community.
- DFO contracted the Nuu-chah-nulth Tribal Council to deliver an information exchange in Port Alberni.
- In addition to providing information on how to arrange bilateral meetings in the letter of invitation, follow-up was made in-person at the information exchanges.
- Several FNs attended the multi-interest dialogue sessions.
- Follow-up bilateral meeting were held with several FNs.

Post-consultation:

- All written submissions and input from information exchanges, multi-interest dialogues and bilateral meetings were recorded. All meeting records are posted on the internet.
- Two summary reports were produced: one by the consultants (Norton-Arnold & Co) who conducted the multi-interest dialogues; and one by the BCAFC on the FNs information exchanges. The final reports are also available on-line.
- An update for staff was placed through "In the Loop".

Challenges:

- *Planning:* a coordinated effort requires significant planning (at least four months in advance) and support.
- *First Nations consultation:* This is an ongoing challenge, but DFO continues to improve its consultation with FNs.
- *Resources:* need to identify key staff, get commitments of people and \$\$ early, and set up system to manage funds.
- *Inclusiveness:* continues to be a challenge to ensure "word" gets out broadly, and that we provide as many opportunities as possible to participate.
- *Timeframe:* requires a significant commitment from First Nations and stakeholders to attend and actively participate in meetings.
- *Level of complexity of issues:* Some issues are highly technical, some are more high-level and policy oriented. It is important to design communications materials and presentations that explain issues simply and clearly (and briefly!).
- *Level of consultation of issues:* Some issues were presented as updates, or for information only. Other issues required significant input. It is important to clarify the purpose and level of consultation for each issue – in correspondence and in meetings.
- *Coordination with OGDs:* Need to work more closely with other government departments to coordinate their participation, when appropriate.
- *Analysis:* organizing the diversity of feedback/input and providing that to internal decision-makers in a helpful format.
- *Travel Funding and Hospitality:* These meetings require a significant commitment from FNs, stakeholders and the public to participate in 1-2 days of meetings. Those who attend meetings give up their personal time to provide DFO with valuable information and input. If possible, DFO should make an effort to provide some travel assistance, where needed, as well as hospitality. With extremely tight agendas, providing food and beverage ensures that participants stay in the room, and meetings

proceed according to the agenda. It also provides good opportunities for networking and "off-line" discussions.

Lessons Learned:

- Start the planning **EARLY** (identify issues and funding in April, contract for consultation in June, organization from May to September).
- Get "buy-in" from senior management, and a commitment of appropriate regional and area staff participation. Process with RMC needs to start sooner (April).
- Develop a team timeline for deliverables and stick to it!
- Engage internal team on a weekly to bi-weekly basis to ensure everything is on track.
- Presentations: should be short, concise and understandable.
- In public meetings, be very clear about how the process works and the objectives of each section of the agenda.
- Use a variety of engagement methods (process variation) in the agenda. This keeps people interested and engaged.
- Provide hospitality and cover travel, where necessary (meetings that last one full day or longer).
- Make sure area staff are engaged from the beginning, and participate in local meetings.
- Review methods for "getting the word out" – i.e. are public notices in community papers a good investment?

APPENDIX A: CASE STUDIES

2) AN AREA -BASED CONSULTATION MODEL: BC INTERIOR – SHUSWAP FISHERIES COMMISSION

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Determining what is effective consultation is often time consuming with uncertainties such as at what point consultation is adequate on a given issue. Consultation protocols with Aboriginal organizations in the local area can help reduce these uncertainties.

The example is based on an existing process with the Shuswap Fisheries Commission with modifications based on:

- the six steps identified in the “Best Practices Document” (refer to comments and suggestions under each of the six headings in the Best Practices Document);
- considerations for making the consultation process more efficient; and
- FNs desire to link consultations to their needs.

Step 1. Inform First Nations of Intent to Consult:

- Information provided to all FNs as per “Best Practices” document.
- Review any existing Enforcement Protocols and make arrangements with DFO and First Nations staff to implement the agreed process.
- Consider if these are consultation meetings that will be carried out annually with structured components (generally area-based).
- If initiated from RHQ, get an area-based lead that will work with the RHQ lead to facilitate planning.
- Consider if there is an expectation that the consultations are linked to “co-management” arrangements with the Aboriginal organization.

Step 2. Information Exchange (Initial Meeting):

- Consider if the meetings are policy orientated or technical in nature to assist DFO staff and the First Nation at what level the meeting will be held and where (generally, policy issues are of a political nature and often representation at the Aboriginal Chiefs level can be expected).
- If at all possible this stage should be held in a larger forum such as an AAROM body

Step 3. Bilateral Discussions (Follow-up Meeting(s)):

To link consultations to co-management, the Shuswap Fisheries Commission (SFC) and DFO have agreed to four technical working groups and a policy forum, each co-chaired by the SFC & DFO:

- Tech working groups:
 - a) Conservation & mgt planning
 - b) Stock Assessment
 - c) Habitat Restoration & Protection
 - d) Business Planning & Economic Development
- Policy Forum:
 - SFC suggests the DFO representative be at the Area Director level. In the BCI case, DFO's Area Aboriginal Affairs Advisor attends and co-chairs these policy forums (representing the Area Director).
 - Policy forum meetings are held once a year.

Step 4. FNs' Response to DFO:

- It would be helpful to encourage a collective/coordinated response from a broader based organization such as a tribal council or AAROM body.

Step 5. DFO Response to FN:

- Need to ensure that the responses are in writing and within the given timeframe, to the extent possible.

Step 6. Issue Resolution/Accommodation:

- Issue resolution based on a mediated process has been requested in some instances and consideration may be given to this on a shared-cost basis.

APPENDIX B

Best Practices: Consultation Review of Documents

DFO Internal

Consultation Framework and Toolbox for Fisheries and Oceans Canada. March 2004. <http://info.pac.dfo.ca/policy/consultation.htm>

Consultation with Aboriginal People: The SCC Decision in Haida and Taku. DFO Consultation Network Meeting. September 2005.

Guidelines to Consensus Building. DFO.
<http://info.pac.dfo.ca/policy/consultation.htm>

Code of Conduct for Participation in Fisheries and Oceans Canada, Pacific Region Consultations. <http://info.pac.dfo.ca/policy/consultation.htm>

External

The Canada Oceans Strategy. http://www.cos-soc.gc.ca/doc/pdf/COS_e.pdf

Fisheries and Oceans Sustainable Development Strategy. Progress Report on 2001-2003 Strategy. http://www.dfo-mpo.gc.ca/sds-sdd2004/NextStrategy_e.htm

Government of Canada

Aboriginal Affairs Secretariat. Parks Canada.
http://www.pc.gc.ca/culture/proj/saa-aas/index_E.asp

Aboriginal Traditional Knowledge and Environmental Management. Environment Canada. http://www.ec.gc.ca/science/sandesept02/article1_e.html

Guidelines for Effective Regulatory Consultation. Privy Council Office.
http://info.pac.dfo.ca/policy/documents/Regulatory_Consultation_Guidelines_E.pdf

The Nisga'a Treaty. Indian and Northern Affairs Canada.
http://www.ainc-inac.gc.ca/pr/info/nit_e.html

Umbrella Final Agreement Between the Government of Canada, the Council of Yukon Indians and the Government of the Yukon. http://www.ainc-inac.gc.ca/pr/agr/umb/index_e.html

Other Jurisdictions

Aboriginal Affairs Branch. Province of BC. <http://www.for.gov.bc.ca/haa/>

Aboriginal Rights and Title Document. Province of BC. June 1999.
<http://www.for.gov.bc.ca/tasb/manuals/policy/resmngmt/rm15-1.htm>

BC FN Forestry Policy Forum. Discussion paper. March 2003.
http://www.for.gov.bc.ca/haa/Docs/Forest_Policy_Forum.pdf

BC Hydro. Negotiations and Consultation.
<http://www.bchydro.com/ard/initiatives/initiatives922.html>

BC Hydro Statement of Principles for Relations with Aboriginal People.
<http://www.bchydro.com/info/reports/reports23817.html>

BC Treaty Commission. <http://www.bctreaty.net/cgi-bin/search/search.cgi>

BC Treaty Commission. Changes to Public Consultation Concerns. May 2002.
http://www.bctreaty.net/files_2/pdf_documents/may_update.pdf

Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development. May 2005.
<http://www.aand.gov.ab.ca/PDFs/ConsultationPolicy-May16.pdf>

Government of British Columbia Consultation. <http://www.gov.bc.ca/arr/consult/>
<http://www.for.gov.bc.ca/tasb/manuals/policy/resmngmt/rm15-1ap.htm>

Government of British Columbia Policy for Consultation with First Nations. October 2002.
http://www.gov.bc.ca/bcgov/content/docs/@2QS7M_0YQtW/consultation_policy_fn.pdf

Government of Ontario. Aboriginal Consultation. Dec 2005.
<http://www.serviceontario.ca/mining/english/FirstNationConsultation.htm>

GVRD Aboriginal Affairs Update. Consulting and Accommodating First Nations: Recent Supreme Court of Canada Decisions, Implications for Local Governments, and Possible Mitigation Strategies.
<http://www.gvrd.bc.ca/growth/pdfs/AboriginalAffairsBulletin5.pdf>

Looking Back Looking Forwards a Review of the BC Treaty Process. May 2005.
http://www.bctreaty.net/files_2/pdf_documents/review_bc_treaty_process.pdf

Ministry of Aboriginal Relations and Reconciliation. Province of BC. 2005.
http://www.gov.bc.ca/bvprd/bc/channel.do?action=ministry&channelID=-536896053&navId=NAV_ID_province

South Island Forest District Consultation Site.
http://www.for.gov.bc.ca/dsi/First_Nations.htm

First Nations

Aboriginal Mapping Network. 2002.
<http://www.nativemaps.org/news/NewGovtPolicy.html>

Government of New Zealand. A Guide for Consultation with Maori. 1997.
http://www.justice.govt.nz/pubs/reports/1998/maori_consultation/index.html
http://www.justice.govt.nz/pubs/reports/1998/maori_consultation/

Kla-soms Kwuth Tooqen. Consultation Process and Cultural Heritage Policy.
<http://www.nativemaps.org/referrals/policy/firstnations/Consultation.html>

Maori Consultation. 2003.
http://www.nzpf.ac.nz/resources/magazine/2001/june/maori_consultation.htm

Nuu-chah-nulth Tribal Council draft Consultation Protocol. Letter to DFO from Francis Frank, Nuu-chah-nulth Tribal Council. Nov 2005.

Siksika Nation - Consultation Is Key to Strong Governance. Tara Lee Wittchen. March 2004. http://www.ainc-inac.gc.ca/nr/ecd/ssd/col84_e.html

Recent Negotiations between Fraser River First Nations and DFO on the Future of the Watershed Process. November 2002.
http://www.frafs.ca/resources/secretariat/documents/IEC_Presentation.pdf

Union of BC Indian Chiefs. Respect & Reconciliation: First Nation Heritage Conservation. September 2005.
http://www.ubcic.bc.ca/News_Releases/UBCICNews09120502.htm

Other

Aboriginal Bulletin. New Provincial Policy on Consultation with First Nations. Fasken Martineau DuMoulin. November 2002.
[http://www.fasken.com/WEB/FMDWEBSITEFRENCH.NSF/0/AD4589443CE1D74285256C7C007CD901/\\$File/ABORNOV02.PDF?OpenElement](http://www.fasken.com/WEB/FMDWEBSITEFRENCH.NSF/0/AD4589443CE1D74285256C7C007CD901/$File/ABORNOV02.PDF?OpenElement)

Consultation Requirements in the Post-Treaty Context (Nisga'a). Nov 2005.
http://www.hg.org/articles/article_860.html.

Consultation with First Nations: When Does the Obligation Arise? October 2002.
http://www.davis.ca/publications/2000-10_consultation_with_first_nations_obligations.pdf

Development of a Protocol Framework for Meaningful Consultation with Canada's Aboriginal People on Forest Management. North American Commission for Environmental Cooperation. 1999.
<http://www.cec.org/grants/projects/details/index.cfm?varlan=english&ID=108>

Online Consultations and Events - Top Ten Tips for Government and Civic Hosts.
<http://www.publicus.net/articles/consult.html>

Treaty Negotiations: What Works, What Doesn't. A Negotiators Dialogue. Nov 25. http://www.sfu.ca/dialogue/publications/Treaty_What_Works.pdf