

Legal and Policy Tools for Source Water Protection in Indigenous Communities

APPENDIX 5: TEMPLATE CONSULTATION AND ACCOMODATION PROTOCOL

This template is provided for informational purposes only and is not legal advice. This template is an Appendix to the toolkit “Legal and Policy Tools for Source Water Protection in Indigenous Communities,” current to January 2019.

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Canadian
Environmental Law
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VI. Legal Tool: Consultation and Accommodation Protocol to Advance Source Water Protection

As a result of the community workshops and meetings with the CMO Steering Committee, it became apparent that due to developments outside of the community (ie. the siting of landfills or the issuance of water taking permits), threats to source water could be exacerbated. Therefore, there was an opportunity to ensure concerns about source water protection were considered and central to decision-making and discussions, between CMO, government officials and private companies.

Therefore, this chapter details the role of consultation and accommodation in advancing source water protection. Accompanying this discussion, is a template Consultation and Accommodation Protocol (see Appendix 5), which expressly includes considerations of source water protection, the mitigation of negative effects and community involvement in water quality and environmental monitoring.

1. Advancing Source Water Protection through the Duty to Consult and Accommodate

The Crown's duty to consult and accommodate is a foundational legal doctrine, applicable to Indigenous communities, their rights and interests. The duty to consult is an essential corollary to the process of reconciliation, required by s.35 of the *Constitution Act, 1982*, which seeks to rectify the power imbalance between First Nations and Canada.

The general framework for the duty to consult was first provided by the Supreme Court of Canada, in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, following a petition by the Haida Nation seeking an order that the Minister of Forests had "breached or failed in his fiduciary duty to consult with the Haida Nation by failing to properly consult."²⁷ As concluded by the court in this seminal ruling:

The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest 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.²⁸

It is clear law that the duty to consult must be satisfied *prior* to decisions being made. This also requires the Crown to address First Nations' concerns, for the reason that "consultation that excludes from the outset any form of accommodation would be meaningless."²⁹

²⁷ Docket No. A950625

²⁸ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida Nation]

²⁹ *Mikisew Cree First Nation v Canada (Minister of Heritage)*, 2005 SCC 69, para 54

2. The Scope of the Duty to Consult

The courts have recognized that the duty to consult and accommodate will vary with the circumstance. The degree of consultation required depends on the strength of the First Nations' claim and the seriousness of the potential impact on the rights asserted.³⁰

In *Haida Nation*, the court used the concept of a spectrum to frame their analysis of the duty to consult and accommodate. Accordingly,

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice [. . .]

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case [. . .]

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The 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 (emphasis added).³¹

Even in instances where the duty the consult may be at the lower end of the spectrum, it can still be used to successfully overturn decisions which infringe on First Nations' interests and rights.

Since the *Haida Nation* decision in 2004, over 350 cases have relied on the duty to consult, namely in the judicial review of government permits for resource permits.³² Those in which the duty to consult and accommodate was successfully used to uphold traditional and ecological values include:³³

- Holmaco First Nation (2004): Province's approval of salmon fish farming licences in Bute Inlet
- Mikisew Cree (2004): Crown's approval of a winter road in Wood Buffalo National Park, AB

³⁰ *Haida Nation*, paras 39 and 43-45

³¹ *Haida Nation*, paras 43 – 45

³² Greg McDade, "Haida Nation – The Origins of the Haida Litigation" in William A. Tilleman & Alistair Lucas, QC, eds, *Litigating Canada's Environment: Leading Canadian Environmental Cases by the Lawyers Involved* (Toronto: Thomson Reuters Canada Limited, 2017), p 123 [Litigating Canada's Environment]

³³ *Ibid*

- Huu-ay-aht First Nation (2005): new BC forestry strategy and approval of unsustainable volumes of logging in their territory
- Ka'a'Gee Tee First Nation (2007): oil and gas development projects in the Mackenzie Valley impacting wildlife and trapping
- Xats'ull First Nation (2008): a permit to Gibraltar Mines Lt. to discharge materials into the Fraser River
- West Moberly First Nation (2011): permits granted by BC for mining exploration harming traditional caribou-hunting territory
- Ross River Dena Council (2012): overturning the Yukon Territory's legislated procedure for allowing automatic mineral claims
- Na-Cho Nyak Don (2015): struck down the approval of a new land use agreement in the Peel Watershed on the basis of favoured development
- Fort Nelson First Nation (2015): provincial environmental assessment approval of a project to develop several sand and gravel mines
- Coastal First Nations (2016): environmental assessment certificate for Enbridge's Northern Gateway Pipeline Project to develop a heavy oil pipeline

In carrying out the duty to consult and accommodate, the Crown may delegate procedural aspects of the consultation process to the proponent, however, the duty remains the Crown's responsibility. Thus, it is up to the Crown to "provide direction on the scope of the consultation required in the circumstances;" "provide ongoing direction, oversight and supervision of the process;" and "assess the sufficiency of consultation and accommodation, where required, and make a decision."³⁴

3. The Scope of Accommodation

Like consultation, the degree of accommodation depends on the strength of the claim to particular rights, and the potential harm which could be caused by the proposed activity. Where consultation is on the low end of the spectrum, accommodation may be a discussion of the issues raised and an attempt to address concerns. Conversely, if a high degree of consultation is required, accommodation may require the mitigation of harms or the negotiation of impact or community benefit agreements.

If neither consultation nor accommodation are adequate, and not responsive to the concerns of the First Nations community, a court can direct there be further consultation or, that the permit or application be revoked pending completion of adequate consultation.³⁵

³⁴ *Eabametoong First Nation v Minister of Northern Development and Mines*, 2018 ONSC 4316, para 21

³⁵ *Ibid*

4. Legal Precedent: Consultation and Accommodation Protocol

i. Purpose of a Consultation and Accommodation Protocol

Fulfilling the duty to consult and accommodate has become a prerequisite for development and indeed, many “how to” books and websites dedicated to the topic are available for proponents seeking permits or resource development approvals. While the duty to consult and accommodate may be a recognized legal doctrine, there is not necessarily a reciprocal ability – often due to capacity constraints - among First Nation communities to exercise these rights to engagement. This toolkit further appreciates that not all First Nations communities are aware of their rights within consultation processes nor, equipped with resources to guide their community’s involvement and safeguarding of interests and rights.

A consultation and accommodation protocol can set out the intention, rights and interests of a First Nation community. And, as it is expected that First Nation communities participate in the consultation process, it is important to have a process by which concerns and expectations can be outlined with sufficient detail and specificity, in order to trigger their direct consideration by the Crown or proponents.

ii. Principles and Laws Informing this Toolkit’s “Consultation and Accommodation Protocol”

Drawing on the approach taken in a number of publicly available consultation protocols from First Nation communities in Ontario and guidance from cases, international treaties and the earliest of First Nation-Crown documents which recognize nation-to-nation relationships, (the Royal Proclamation of 1763), enclosed in **Appendix 5** is a template Consultation and Accommodation Protocol.

The Consultation and Accommodation Protocol aims to provide a starting point for discussion and baselines asks which can be relied upon by a First Nation. The template is intended to facilitate First Nations’ ability to uphold their rights and interests and be a resource for all First Nations involved in consultation. It is also applicable in the contexts of drafting terms of reference or community benefit agreements, where First Nations may seek to retain experts or require financial resources, to ensure adequate dissemination of information, studying or monitoring of effects on traditional and ecological values.

United Nations Declaration on the Rights of the Indigenous People

The Protocol incorporates the principles of the *United Nations Declaration on the Rights of the Indigenous People* (UNDRIP).³⁶ UNDRIP is expressly recognized in the preamble of the Protocol and the principle of “free, prior, and informed consent” incorporated into “Section II. Principles Guiding Consultation” and “Section IV. Accommodation.”

³⁶ “United Nations Declaration on the Rights of Indigenous Peoples,” online: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

While UNDRIP is not binding, as a signatory, Canada should be compelled to act as if it is. The principles and standards enunciated in UNDRIP provide greater protection to Indigenous and treaty rights and should be used as an interpretation tool for section 35 constitutional rights. Incorporating UNDRIP within the text of the protocol is a means of advancing equality among Indigenous peoples, governments and private entities with whom they may be consulting.

Truth and Reconciliation Calls to Action

In 2015, the Truth and Reconciliation Commission released its 94 Calls to Action in order to advance the process of Canadian reconciliation.³⁷ A number of the Calls to Action are directly relevant to the Consultation and Accommodation Protocol and have been incorporated into its provisions. For instance, Call to Action No. 18 has been incorporated in “Section II – Principles Guiding Consultation.” Accordingly, it states:

We call upon the federal, provincial, territorial, and Aboriginal governments to acknowledge that the current state of Aboriginal health in Canada is a direct result of previous Canadian government policies, including residential schools, and to recognize and implement the health-care rights of Aboriginal people as identified in international law, constitutional law, and under the Treaties.

³⁷ Truth and Reconciliation Commission of Canada, “Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,” online: http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf

[Name of First Nation]

CONSULTATION & ACCOMMODATION PROTOCOL

As approved by Chief and Council on [DATE]

Table of Contents

- Revision History.....3
- Preamble.....4
 - “Kanuhela:tuksla – Thanksgiving Address” from Oneida Nation of the.....4
- I. Purpose and Application10
- II. Principles Guiding Consultation10
- III. The Consultation Process12
 - i. Trigger12
 - ii. Notice12
 - iii. Level of Consultation.....13
 - iv. Inquiry.....14
 - v. Capacity Funding Agreement.....14
 - vi. Community Decisions15
- IV. Accommodation15
- V. Dispute Resolution15
- APPENDICES17
 - A. [NAME] First Nation Maps17
 - B. Consultation Flow Chart17
 - C. Consultation Service Fees17

Revision History

Revision Number	Date	Description of Revision	Approved by

Preamble

THE [NAME] FIRST NATION,

Affirming that the watersheds of [LIST AND NAME] have been our home for millennia;

Recognizing [EXPAND AS APPROPRIATE WITH ADDITIONAL TEXT, SEE EXAMPLES BELOW];

“Kanuhela:tuksla – Thanksgiving Address” from Oneida Nation of the

Whereas the Onyota’aka – The people of the standing stone understand that being stewards of the land is an inherent right that the nation has exercised through time immemorial.

Whereas the Nan-fan treaty of 1701 acknowledges the Beaver Hunting Territory for our continued use and inherent economic right and title to that land forever.

Whereas the Oneida Nation of the Thames recognizes the importance of the environment and living and harmony with the land and ourselves.

Whereas the Onyota’aka through the kanuhela:tuksla gives thanks to all of creation, must ensure the sustainability of its community and its people.

Therefore it be resolved that the Oneida Nation of the Thames Elected council adopt the Kanuhela:tuksla as the preamble for the Oneida Environment Department and to protect all creation under the Nan-fan treaty of 1701 land base with this understanding.

Kanuhela:tuksla – Thanksgiving Address

Tsyaʔ -ta-huh-si:-yost on^ nahte oh^:tu Ka-li-wa-teh-kw^ʔ

Ak-kwe-kuʔ uska tsiʔ ^-twah-weʔ-nu:-ni u-kwaʔ-ni-ku:-laʔ

T^ -twa-ta-nu-he-la-tu k^ -tyoh-kwa tsiʔ she-ku ^-wa:-tu

Ska:n^ ^-twa-nuh-tu-nyu-he-keʔ ta:ne: tho n^ -yo-tu-ha-keʔ

u-kwaʔ-ni-kuh-la

Listen well for what is before us. Everyone will put our minds together as one. We will thank everyone that we still can be happy, and so shall our minds be.

A-kwe-ku uska tsiʔ ^-twah-weʔ nu:ni u-kwaʔ-ni-ku:-laʔ

T^ -yeth-nu-he-la-tu yu-khi-nul-ha tsi she-ku

Ka-to-k^ ni-ya-koʔni-ku-lo:-t^ yu-khi-ya:-wi-heʔ

a-tun-het-slaʔ ta:ne tho n^ -yo-tu-ha-ke u-kwa-ni-khu-la

We will put our minds together as one. We will thank our mother earth that her mind is still the same that she provides us with life. And so shall our minds be.

A-kwe-ku uska tsi ^twah-we-nu-ni u-kwa?-ni-ku-la?
T^-twa-nu-he-la:tu: k^?-ni-yo-h^te-sha? tsi? she:ku
Ka-to-k^ ni-yo?-ni-ku-lo:-t^ tho ^-wa-tu:ni n^
yo?-ta-li-h^ t^-ska-we-la-w^li ta:-ne: tho
n^-yo-tu-ha-ke? u-kwa?-ni-kuh-la?

We will put our minds together as one. We will thank the plants that it is still the same, and grows when warm air returns. And so shall our minds be.

A-kwe-ku uska tsi ^-twah-we?-nu:-ni u-kwa?-ni-ku:la
T^-twa-nu-he-la:tu: o-yu?-kwa?-u:-we tsi? she-ku
Twat-sta? ye-lih-wa?-ne-ka:tha? ne: o-tsis-ta:ke
Y^-wa-tya-ha-ke? ka-nyo:-n^ t^-wa-tu-hu-tsyu-we?
Ta:ne: tho n^-yo-tu-ha-ke? u-kwa?-ni-kuh-la?

We will put our minds together as one. We will thank the tobacco that we still use it as it is needed. And so shall our minds be.

A-kwe-ku uska tsi? ^-twa-hwe?-nu:-ni u-kwa?-ni-ku:-la?
T^-twa-nu-he-la:tu: o-nuh-kwat tsi? she-ku ka-to-k^
ni-yo?-ni-ku-lo:-t^ nene: y^-ka-kw^ha-ke? n^
ka-nuh-wak-t^sla? ^-tka-lih-wa-ti-h^tho ta:ne: tho
n^-yo-tu-ha-ke? u-kwa-?ni-kuh-la?

We will put our minds together as one. We will thank the medicine that it is still the same, it will be picked when sickness comes. And so shall our minds be.

A-kwe-ku uska tsi' ^twa-hweʔ-nu-ni u-kwa'-ni-ku:-la
T^ya-thi-nu-he-la:tu ku-ti-lyo'-shu-ha tsiʔ she-ku
Ka-to-k^ ni-yo-tiʔ-ni-ku-lo:t^ naʔ-te-yo-li:-wa-ke
Yu-khi-ya-wi-heʔ ka-yaʔ-ta-ken-ha-slaʔ ta:ne: tho
N^yo-tu-ha-keʔ u-kwaʔ-ni-kuh-laʔ

We will put our minds together as one. We will thank the animals that their minds are still the same.
And so shall our minds be.

A-kwe-ku uska tsiʔ ^twa-hweʔ-nu-ni u-kwaʔ-ni-ku:-laʔ
T^ye-thi-nu-he-la:tu ka-lu-teʔ-shu-ha tsiʔ she-ku
Ka-to-k^ ni-yo-tiʔ-ni-ku-lo-t^ ne:ne: ku-wa-kwa-n^
Wah-taʔ tane: tho n^yo-tu-ha-keʔ u-kwaʔ-ni-kuh-laʔ

We will put our minds together as one. We will thank the trees that they still respect the maple tree.
And so shall our minds be.

A-kwe-ku uska tsiʔ ^twa-hweʔ-nu-ni u-kwaʔ-ni-ku:-laʔ
T^ye-thi-nu-he-la:tu oh-ne:-ka-nus tsiʔ she :ku
Ka-to-k^ ni-yo-tiʔ-ni-ku-lo-t^ kwah tsiʔ
Tyoh-na-we-lo-teʔ tsiʔ ni-yo:-le tkah-ne-ko-wa:-n^seʔ
tane: tho n^yo-tu-ha-keʔ u-kwaʔ-ni-kuh-laʔ

We will put our minds together as one. We will thank the water that it is still the same, from the
spring and into the great lakes. And so shall our minds be.

A-kwe-ku uska tsiʔ ^twa-hweʔ-nu-ni u-kwaʔ-ni-ku:-laʔ
T^ye-thi-nu-he-la:tu o-tsiʔ-t^ha-shu-ha tsiʔ she-ku
Ka-to-k^ ni-yo-tiʔ-ni-ku-lo-t^ tane: tho n^yo-tu-ha-keʔ
u-kwaʔ-ni-ku:-laʔ

We will put our minds, together as one. We will thank the birds that their minds are still the same. And so shall our minds be.

A-kwe-ku uska tsi? ^twa-hweʔ-nu-ni u-kwaʔ-ni-ku:-laʔ
T^he-thwa-nu-he-la:tu e-thwa-tsi-ha tsi? she-ku
Ka-to-k^ ni-ho-niʔ-ku-lo-t^ tane: tho n^yo-tu-ha-keʔ
u-kwaʔ-ni-ku:-laʔ

We will put our minds together as one. We will thank the sun that he is still the same. And so shall our minds be.

Ta:ne: on^ k^ʔ-nu:-waʔ te-ka-lih-wa-kha-shyu-kw^
E:-ni-ke ka-ha-wih-tu ka-li-wa-y^ta-kw^ a-kwe-ku
Uska tsi? ^twah-we-nu:ni u-kwaʔ-ni-ku-la
T^ye-thi-nu-he-la:tu la-tih-sa-ka-yu:-te-seʔ
yaʔ-te-wa-tsh^tho-seʔ nu-kwa: tha-ti-y^ta-khwaʔ
a :se : sh^nu-nya :-thaʔ tsi? yu-hu-tsya:teʔ ta:ne:
tho n^yo-tu-ha-ke u-kwaʔ-ni-kuh-laʔ

At this time, it was decided that it is important we unite our minds together as one. We will thank the Thunderers from the west as they renew the earth. And so shall our minds be.

A-kwe-ku uska tsi? ^twa-hweʔ-nu-ni u-kwaʔ-ni-ku:-laʔ
T^ye-thi-nu-he-la:tu yu-khuh-so-thaʔ tsi? Ka-to-k^
ni-ya-ko-ni-ku-lo:-t^ tane: tho n^yo-tu-ha-keʔ u-kwaʔ-ni-ku:-laʔ

We will put our minds together as one. We will thank our grandmother the moon, that her mind is still the same. And so shall our minds be.

A-kwe-ku uska tsi? ^twa-hweʔ-nu-ni u-kwaʔ-ni-ku:-laʔ
T^ye-thi-nu-he-la:tu yo-tsis-to-kwa:lu tsi? she-ku

La-ti-yaʔ-ta-slu:-ni-heʔ ka-lu-ya:-ke tane: tho
n^-yo-tu-ha-keʔ u-kwaʔ-ni-ku:-laʔ

We will put our minds together as one. We will thank the stars that they still beautify the night sky.
And so shall our minds be.

A-kwe-ku uska tsiʔ ^twa-hweʔ-nu-ni u-kwaʔ-ni-ku:-laʔ
T^-ya-thi-nu-he-la:tu kaya: ni-yu-kwe:-ta-ke tsiʔ she-ku
Ka-to-k^ yu-khi-ya-wi-heʔ tsiʔ na-yu-kwa-li-hot^ha-keʔ
tane: tho n^-yo-tu-ha-keʔ u-kwaʔ-ni-ku:-laʔ

We will put our minds together as one. We will thank the four beings that they still give us the way we
should live. And so shall our minds be.

A-kwe-ku uska tsiʔ ^twa-hweʔ-nu-ni u-kwaʔ-ni-ku:-laʔ
T^-het-twa-nu-he-la:tu skanyatali:yo tsiʔ shaloliway ^:ni
Nen kanuhelatuksla' ta:ne tho n^-yo-tu-ha-ke'
u-kwaʔ-ni-ku:-laʔ

A-kwe-ku uska tsiʔ ^twa-hweʔ-nu-ni u-kwaʔ-ni-ku:-laʔ
T^-he-thwa-nu-he-la:tu shu-kwa-ya-ti-shuʔ tsiʔ nahte
a-kwe-ku ka-wy^-n^-ta-u: ta:ne tho n^-yo-tu-ha-ke'
u-kwaʔ-ni-ku:-laʔ, tane: on^ tho ni-yo-le
n^-ka-ti-wat-kwe-ni tsiʔ nahte ka-li-wa-y^:-tah-kw^
ne: ^-snel-he-keʔ ska:n^ tsiʔ we-twa-nuh-tu-ni
tane: tho ni-ka-w^na-ke tane:

We will put our minds together as one. We will thank the creator for everything he has prepared for
us, and so shall our minds be. This is as many words as I have said so we'll be at peace amongst
ourselves and our minds. This is all the words.

Excerpt from: “Deshkan Ziibing/Chippewas of the Thames Consultation Protocol”^[i]

The watersheds of southwestern Ontario have been the home of Anishinaabe people for millennia. Widespread archaeological evidence of the “Western Basin Late Woodland Tradition” confirms our traditional oral history teachers’ accounts of this lengthy Anishinaabe dwelling in our territory of Waawayaanong, or “Round Lake.” This region is known as the third stopping place of the Water Drum on its sacred journey to Madeline Island, centuries before the era of colonization. We have continued to dwell here despite the disruptions stemming from conflicts with other Anishinaabe nations also dwelling near the Great Lakes, from the wars between various settler powers between 1757 and 1815, and from the imposition of Britain’s, then the United States’, and Canada’s colonial rule.

Deshkan Ziibiing edbendaagzijig, “those that belong to Antler River” (The Chippewas of the Thames First Nation) comprise one of the traditional Anishi naabe nations governing the territory of Waawayaanong, collectively known now as the Waawayaanong Anishnaabeg Southwest Treaty Council. As a governing body, Deshkan Ziibiing has lengthy experience in developing relations with other communities interested in the lands and waters of Waawayaanong, as early French explorers recognized, and as our historic treaty-making with Britain demonstrates.

Excerpt From: “Alderville First Nation Consultation Protocol”^[ii]

Alderville First Nation (AFN), as a part of the Anishinabeg, have a long history in this region of Ontario, dating back centuries through the Anishinabeg migrations to the Great Lakes to the subsequent occupation of Southern Ontario at the beginning of the 18th century. Since The Great Peace of Montreal in 1701 to the present, AFN and its ancestors have been a party to events in Southern Ontario that have helped make the province what it is. With the ratification of the 1763 Royal Proclamation at Niagara in 1764, to the early treaties of the 1780s along the Lake Ontario frontier, and the Williams Treaties of 1923, AFN has evolved along with this history and today proudly resides on the territory it has known consistently as home for over 7 generations.

AFN members are the caretakers of our Traditional Territory as described herein, and possess Aboriginal and Treaty rights over lands and resources within our Traditional Territory.^[iii]

Recalling the Royal Proclamation of 1763 which recognizes the [NAME] First nations’ rights to our land;

Guided by section 35 of the *Constitution Act, 1982* which recognizes and affirms our existing Aboriginal and Treaty rights as Aboriginal Peoples of Canada;

And Guided by the United Nations’ Declaration on the Rights of Indigenous Peoples, to which Canada is a signatory;

And Guided by our traditional understanding of treaties [NAME OF TREATY(S) AND DATE(S)] which in no way eliminate our enduring ability to benefit from the lands and waters within our territory;

Recognizing that the Supreme Court of Canada has established that Aboriginal Peoples asserting Aboriginal and Treaty rights must be consulted prior to the occurrence of any decisions, conduct or activities that may have an impact on the rights and interests of Aboriginal Peoples;

Affirming that all interest in lands continue to this day, unless extinguished by a constitutionally applicable statute, rule of law, or principle of equity,^[iv]

Recognizing that [NAME] First Nation is a self-determining [nation/people] with the right to freely pursue economic, social and cultural development, the [NAME] First Nation,

Adopts this Consultation Protocol, which is in full force and effect as approved by [NAME] First Nation Chief and Council on [DATE], and call upon the Crown and proponents to respect our honour, abide by tradition and practices, both present and in the future.

I. Purpose and Application

1. This protocol ensures that our relationships with the Crown and proponents develop in ways which are respectful of the breadth of [NAME] First Nation's responsibilities to these watersheds, and based on a respectful application of Canadian laws, the process and principles for consultation and accommodation as set out herein.
2. This protocol shall apply in any instance where there is a real or perceived threat to our right, use or full enjoyment of our territory, either as a community or as individuals.

II. Principles Guiding Consultation

3. The [NAME] First Nation has a unique worldview and their own value systems. We have customary laws and teachings, which demonstrate our responsibility to sustain our tradition and contemporary way of life.^[v]
4. The [NAME] First Nation are the guardians, interpreters and collective owners of our culture, past, present and future knowledge systems. We maintain the right to exercise control over our cultural heritage and traditional knowledge, as a means of protection and right to determine levels of access to data or information collected.^[vi]
5. While recognizing that the duty to consult is not triggered by historical impacts, and it is not the vehicle to address historical grievances,^[vii] it may at the same time, be impossible to understand the seriousness of the impact of a proposed project without considering that the current state of Indigenous health in Canada is a direct result of previous Canadian government policies, whose cumulative and ongoing impacts affects any new project or relationship.^[viii]
6. Impacts must be understood and addressed in consideration of the unique physical, cultural and socio-economic effects on [NAME] First Nation, in order to obtain their free, prior and informed consent before adopting or implementing measures which may affect them.

7. Recognizing that scientific and technical expertise is neither value-free nor able to solve all challenges, it must be strengthened, by the inclusion and supplementation of [NAME] First Nation's ecological wisdom.

8. The [NAME] First Nation requires consultation that benefits the community, in terms of facilitating the engagement of our community, enabling local capacity and building trusting relationships in furtherance of reconciliation^[ix] and in accordance with the following shared understanding:

- [LIST AND DEFINE TERMS, AS APPROPRIATE. SEE EXAMPLES PROVIDED BELOW]

Excerpt from: "Deshkan Zibing/Chippewas of the Thames Consultation Protocol"^[x]

(1) Gdinawendimi: "We are all related." A basic truth of our creation story is that we are related to everything that shares the world with us. Our original Anishinaabe doodem ancestors: Ajijaak "Crane," Waabizhesh "Marten," Bneshiinh "Bird," Wawashkesh "Deer," Maang "Loon," Giigoonh "Fish," Mko "Bear;" all demonstrate that we humans are related to, that is, are family with, beings who are other than human. That our ancestors shaped our treaties with Britain by inscribing many of those same doodemag on treaty texts indicates that they extended the web of kinship relations to include settlers. We expect that all consultation and discussion with governments and third parties will focus on how the proposed project will foster this relatedness.

(2) Mno-bmaadiziwin: "The good life." We understand that the Creator placed us within our world's web of spiritual and bio-physical relationships in order for life to flourish, for all to enjoy the world. Life flourishes when we base our relationships on the gifts of the Seven Grandfathers: Nbwaakaawin "wisdom," Zaagidiwin "love," chi "respect," Aakde'ewin – or Zoongide'ewin "bravery," Gwakwaadiziwin "honesty," Dbaadendiziwin "humility," Debwewin "truth." We expect that all proposals from and discussions with governments and third parties will demonstrate how the proposed project enhances the good life for all our relations.

(3) Naaknigewin: "Law". This measure for our decisions and determinations is the gift of the Creator. We expect that all consultation and discussion with governments and third parties will aim to respect and embody law as the measure for our decisions provided by the Creator.

(4) Anishinaabe dbendizawin: "Anishinaabe independence," or "self-determination." Some of our elders overcame their repressive years spent within the local residential school, and were able to play crucial roles in entrenching the recognition of our rights into sec. 35(1) of Canada's Constitution Act, 1982. Their personal struggles have taught us that we were created to live as an independent people, and are therefore able to ally with, but not to become subject to, other independent peoples. Many British treaty negotiators failed to understand this. Canada's unilateral imposition of regulations on our people, and its presumptuous administration of our lands, stems from its own consistent failure to understand this. Nevertheless, we have seen in some settler leaders, such as Sir William Johnson and his work at Niagara in 1764, the enduring possibility that our peoples might finally create a relationship of equality. William Johnson's Two Row Wampum embodies this alliance of equals, each party free to follow its own way without interference, but each also attentive to the wellbeing of the other. We expect that all proposals from governments will respect this most basic tenet of the Two Row Wampum.

Excerpt From: “Curve Lake First Nation Consultation and Accommodation Standards”[xii]

Reconciliation: The principle of reconciliation shall govern and guide any and all consultations and accommodations undertaken pursuant to these Standards.

Reasonableness: The consultation process must reflect reasonable and genuine efforts made by all parties with clear, efficient and reasonable timelines established.

Reconciliation: The principle of reconciliation shall govern and guide any and all consultations and accommodations undertaken pursuant to these Standards.

Reasonableness: The consultation process must reflect reasonable and genuine efforts made by all parties with clear, efficient and reasonable timelines established.

Protection of Traditional Heritage: Curve Lake First Nation shall be notified of and take part in the process of traditional re-burial or traditional ceremonies with archaeological findings including but not limited to human remains and artifacts that may have historical significance to our First Nation to protect our traditional heritage and culture.

Protection of Future Generations: First Nation peoples are caretakers of Mother Earth and realize and respect Her gifts of water, air, land and food. Everything that is taken and used with the understanding that we take only what we need and we protect Her gifts as to ensure future generations, both native and non-native, will not be put in peril. They shall always have clean water to drink, fresh air to breathe, natural lands with its medicines and trees, and shall always have good food to eat including, but not limited to, wild game, fish and plant life. This should never be an exception.

III. The Consultation Process

i. Trigger

9. The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct.^[xiii] Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights.^[xiv]

ii. Notice

10. Notice and details of the proposed undertaking should occur prior to any undertaking, prior to any finalization of proposals, which may affect the rights or interests of the [NAME] First Nation. The notice should contain, the following considerations:

- Nature, scope and location of proposed activity
- Proposed timeframe for development
- Means of carrying out the consultation, including any applicable regulatory processes

- How the proposal relates, adds to or takes away from other consultation processes

iii. Level of Consultation

11. [NAME] First Nation determines its participation in the consultation based on preliminary assessment of project impact,
- A. Minimal impact consultation [OUTLINE PROCESS AND PROVIDE CONTACT DETAILS]
 - B. Moderate impact consultation [OUTLINE PROCESS AND PROVIDE CONTACT DETAILS]
 - C. Extensive impact consultation [OUTLINE PROCESS AND PROVIDE CONTACT DETAILS]

Excerpt from: “Deshkan Ziibing/Chippewas of the Thames Consultation Protocol”^[xv]

A. Minimal impact consultation

1. Information about a proposed project is received by Chief, and forwarded to the Director of Lands and Environment and the Consultation Coordinator,
2. The Consultation Coordinator screens the proposal, logs details, and scans the entire package into a database,
3. The Consultation Coordinator prepares a response, and forwards it to the appropriate party (government department or third party proponent). Typically, the response indicates that Deshkan Ziibing has no concerns, and requests continued updates about the proposal, should details change. Consultation service fees apply.

B. Moderate impact consultation

1. Information about a proposed project is received by Chief, and forwarded to the Director of Lands & Environment, and the Consultation Coordinator,
2. The Consultation Coordinator screens the proposal, logs details and scans entire package into database,
3. The Consultation Coordinator adds to the log of projects submitted monthly to the Environment Committee. Time sensitive responses will be emailed to the Environment Committee, with recommendations and comments for quicker response. The Coordinator prepares a response, and posts it to the appropriate party.

Response 1: Deshkan Ziibiing requests consultation. The appropriate party will be invited to meet with the Lands & Environment department, and may be asked to provide capacity: requests for jobs, job training or a formal request for Capacity Funding Agreement.

Response 2: Deshkan Ziibiing requests additional information in order to determine the extent of concern. Consultation service fees apply.

C. Extensive impact consultation

1. The process is similar to that of medium impact consultation,

2. With the completion of a necessary Capacity Funding Agreement, and where appropriate, such additional agreements as memoranda of understanding, or community benefit agreements.

As well as with the necessary addition of a Deshkan Ziibiing-determined community engagement process, and community ratification.

iv. Inquiry

12. In furthering a mutually-respectful and equal relationship between the [NAME] First Nation, the Crown or delegated third parties, all relevant information must be provided. At the request of the [NAME] First Nation, further documentary disclosure may be necessary to allow for a careful evaluation of the project's impacts on our rights and interests. This includes the provision of information and communications upon which the proposal is based.

13. In order to facilitate obtaining the [NAME] First Nation's free, prior and informed consent, procedural accommodations which allow parties to build deeper understandings and considerations unique to [NAME] First Nation, must be accounted for at the earliest of decision-making stages. Therefore, in addition to procedural fairness rights to meaningful response and information, due to the longstanding relationship between the Crown and [NAME] First Nation, the following supporting materials may be required to enable a fair and respectful consultation process:

- Timeline required for [NAME] First Nation's review, including:
 - Proposed meetings and location
 - Respectful of internal consultation necessary to revise and comment upon draft documents
- Estimated budget and requested resources per Capacity Funding Agreement, including:
 - Independent legal advice
 - Independent experts for review of project's potential impacts
 - Additional studies and research as needed to inform [NAME] First Nation's participation
- Project-specific consultation plan or Terms of Reference

To facilitate good faith consultation efforts, the above-listed elements may require revision as consultation proceeds.

v. Capacity Funding Agreement

14. For those projects deemed to require Moderate and Extensive consultation, a Capacity Funding Agreement will be drafted to ensure [NAME] First Nation can seek independent legal advice and retain the necessary experts to review the effects of the proposed projects. Only through a thorough understanding of the potential impacts can the project's effects on [NAME] First Nation's rights and interests be fully considered.

vi. Community Decisions

15. The [NAME] First Nation has a responsibility to maintain, strengthen and preserve our community's rights and interests. Therefore, any decisions or opinions of council should feed into the consultation process.

16. Upon the provision of sufficient information, capacity to review and conduct studies where necessary, [NAME] First Nation will communicate the risks and potential impacts resulting from the proposed activity on its rights and interests. Despite consultation having taken place, lacking the resolution of the potential impacts on the rights and interests of [NAME] First Nation, agreement may not be achieved between the [NAME] First Nation and the Crown, or proponent.

IV. Accommodation

17. Real accommodation resolves the impact on [NAME] First Nation rights. Therefore, in lieu of this purpose, the Crown and proponents must ensure all principles, as outlined in Section II Principles Guiding Consultation, have been considered and incorporated into decision-making and consultation. Translating consultation into specific accommodation may require both interim protections and concrete commitments.

18. Recognizing that one-off approvals do not foster sustainable decision-making, there must be a concomitant consideration of past damage and ecological degradation and a willingness to adjust to changing social, environmental and socio-economic circumstances.^[xvi]

19. Upon the request of [NAME] First Nation, the development of a mitigation plan and agreement - respecting the principles set out herein, may be required which includes:

A. Detailed planning for assessing and addressing potential impacts, and under what conditions mitigation actions will be implemented.

B. Rigorous study and monitoring aimed at the reduction of uncertainties.

C. The participation and involvement of [NAME] First Nation in the design, implementation and performance of any study, monitoring or mitigation effort.

20. Effects of climate change must be considered within the decision-making and mitigation planning process. This includes:

A. Recognizing that ecosystem configuration may change throughout a project's lifespan and thus decision-making must account for new consultation triggers and the need for ongoing ecological baseline studies.

B. Changes to levels of ecological disturbance, either to the land, water or atmosphere, may occur and a constant environment cannot be assumed. Therefore, unforeseen effects should be identified and addressed through an adaptive approach.

V. Dispute Resolution

21. [NAME] First Nation reserves the right to access and seek prompt resolution through just and fair procedures for the resolution of any conflicts or disputes resulting herein with the Crown. [NAME] First Nation also has the right to effective remedies for all infringements of individual and collective rights which give due consideration to the customs, traditions, rules and legal systems of the community and international human rights.

Excerpt from: "Deshkan Ziibing/Chippewas of the Thames Consultation Protocol"^[xvii]

- a. Deshkan Ziibing expects that its expressed and timely intention to pursue dispute resolution will be sufficient for the other parties to place a hold on project development until the dispute is resolved.
- b. Given our historic commitment to resolving disagreements without "warm discussion", the first step in resolving disputes must be honest, good faith discussion in which the Deshkan Ziibing and the Crown acknowledge that they each have equal decision-making power with the other.
- c. Should agreement between representatives of the parties be unreachable, continuing discussion should take place between such senior-level decision-makers as Chief, Ministers, deputy ministers, and executives.
- d. Should these discussions fail to yield agreement, the parties may call in the services of a neutral mediator, whose costs will be borne by agreement with the Crown and the proponent.
- e. If the dispute between Deshkan Ziibing and the other parties is a matter of scientific, technical, historical, archeological, or other such knowledge, the parties may rely upon an assessment from a panel of experts, chosen in equal number by the parties, and whose expenses will be provided by agreement with the Crown and the proponent.
- f. Termination of any agreements or processes prior to completion of consultation should be subject to what the Supreme Court has referred to as "the duty of good faith and honest performance" (Bhasin v. Hrynew, 2014).
- g. Deshkan Ziibing reserves all right to pursue such adjudication as may seem to it necessary, whether within Canada's courts, or before international bodies, such as the Inter-American Court of Human Rights.

Excerpt From: "Alderville First Nation Consultation Protocol"^[xviii]

- a. Any dispute as between the parties in the negotiation of a Consultation agreement shall be referred to alternative dispute resolution as follows:
 - i. The matter shall be put forth to a designated representative of AFN and a senior representative of the Proponent for a negotiated resolution.
 - ii. If the AFN representative and senior representative of the Proponent are unable to reach a negotiated resolution within an agreed upon or otherwise reasonable time, the matter shall be referred to mediation. The mediator shall be an individual mutually agreed upon by the parties. The

mediator shall attempt to reach a mediated resolution within 60 days of the date of conduct of the mediation or such other time period as may be agreed among the parties.

iii. If the parties are unable to agree to a mediator or if they are unable to reach a resolution as a result of mediation, then, the matter shall be referred to arbitration. The arbitration body shall be composed of one person, if the parties are able to agree to one person; if not, then, each party shall name one arbitrator and the two shall name a third impartial arbitrator. The arbitrator(s) shall make a decision on the dispute within 90 days of the date of conduct of the mediation or such other time period as may be agreed among the parties.

iv. In the event of an issue arising that requires either mediation or arbitration, it is expected that the Crown will be a party to and shall actively participate in the process. Where the Crown, either federally, provincially or both as appropriate, fails or refuses to participate, it will be up to AFN or the Proponent jointly or severally to determine whether to proceed with alternative dispute resolution or to refer the matter to the appropriate court for an order requiring Crown participation.

v. The Proponent shall bear all costs of dispute resolution.

APPENDICES

A. [NAME] First Nation Maps

[TO BE INCLUDED BY FIRST NATION]

B. Consultation Flow Chart

[TO BE DEVELOPED AND PROVIDED BY FIRST NATION]

C. Consultation Service Fees

[TO BE DEVELOPED AND PROVIDED BY FIRST NATION]

[i] Deshkan Ziibing/Chippewas of the Thames First Nation, Wiindmaagewin Consultation Protocol (26 November 2016), online: <https://www.cottfn.com/wp-content/uploads/2016/02/Wiindmaagewin-CONSULTATION-PROTOCOL-Final-Nov-2016-2.pdf>

[ii] Alderville First Nation, Consultation Protocol (April 2015), online: <http://alderville.ca/wp-content/uploads/2017/02/AFNProtocol2.pdf>

[iii] Cite

[iv] Adapted from: <http://www.cottfn.com/duty-to-consult/>

[v] Available online: <http://www.apnql-afnql.com/en/publications/documents.php>

[vi] Ibid

[vii] Chippewa, at para. 41

[viii] West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2011 BCCA 247, 18 B.C.L.R. (5th) 234, at para. 117

[ix] Ibid

[x] Deshkan Zibing/Chippewas of the Thames First Nation, Wiindmaagewin Consultation Protocol (26 November 2016), online: <https://www.cottfn.com/wp-content/uploads/2016/02/Wiindmaagewin-CONSULTATION-PROTOCOL-Final-Nov-2016-2.pdf>

[xi] <https://onlc.ca/wp-content/uploads/2016/01/Oneida-Language-Work-Book.pdf>

[xii] Curve Lake First Nation, Consultation and Accommodation Standards (27 May 2013), online: <https://www.curvelakefirstnation.ca/documents/CLFN%20Consultation%20and%20Accommodation%20Standards%202016.pdf>

[xiii] *Haida*, at para. 35; *Carrier Sekani*, at para. 31

[xiv] Clyde River, at para. 25

[xv] Deshkan Zibing/Chippewas of the Thames First Nation, Wiindmaagewin Consultation Protocol (26 November 2016), online: <https://www.cottfn.com/wp-content/uploads/2016/02/Wiindmaagewin-CONSULTATION-PROTOCOL-Final-Nov-2016-2.pdf>

[xvi] Richardson, 8

[xvii] Deshkan Zibing/Chippewas of the Thames First Nation, Wiindmaagewin Consultation Protocol (26 November 2016), online: <https://www.cottfn.com/wp-content/uploads/2016/02/Wiindmaagewin-CONSULTATION-PROTOCOL-Final-Nov-2016-2.pdf>

[xviii] Alderville First Nation, Consultation Protocol (April 2015), online: <http://alderville.ca/wp-content/uploads/2017/02/AFNProtocol2.pdf>