

Indigenous Consultation in Environmental Assessment Processes

Ontario Association for Impact Assessment
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Why consult with Indigenous communities during an EA process?

- Common law **duty to consult** Aboriginal communities (Section 35 of the *Constitution Act*, 1982) – rights
- **Statutory requirements** (e.g., Sections 5.1, 13.1 and 14(2) of the Ontario *Environmental Assessment Act*) – interests
- **Agreements, protocols, relationship-building**, etc.
- The province has a duty to consult when it contemplates an action or decision that could adversely affect an established or credibly asserted **Aboriginal or treaty right**.
- The Supreme Court of Canada (SCC) has said that '**procedural**' aspects of consultation can be delegated to proponents, while '**substantive**' aspects cannot be delegated.

Procedural aspects of consultation

Procedural aspects of consultation typically delegated to project proponents involve **notifying and consulting directly** with communities by:

- sharing information with communities **early** in the process to assist them in identifying any **potential adverse impacts on Aboriginal or treaty rights**
- consulting with communities to identify how potential adverse impacts on rights could be **avoided, managed and/or mitigated**
- documenting consultation efforts in the EA submission so that the Crown can assess their **sufficiency**

Substantive aspects of consultation

Substantive aspects that cannot be delegated include:

- assessing whether there is a **duty to consult**
- **identifying Indigenous communities** to be consulted on a rights basis
- providing **oversight**, as required
- assessing whether **accommodation** is necessary
- determining whether consultation, and accommodation if required, are **sufficient** to fulfill the Crown's duty

Ultimately the duty to consult rests with the Crown, and the province must be satisfied that its duty has been fulfilled prior to making a decision on an EA.

Indigenous communities' role

Indigenous communities' role includes:

- providing information on **potential impacts to Aboriginal and treaty rights**
- identifying if **capacity support** is needed
- responding to opportunities to **comment**
- responding to proponent's responses to **indicate if concerns have been addressed**

All parties are expected to act in good faith.

Getting a list of Indigenous communities for EA consultation

Most Class/Streamlined EAs:

Regional Environmental Assessment Coordinator (REAC) will respond to Notice of Commencement with a list of communities to be consulted

Individual EA:

Request a list from your assigned Project Officer or from the Director of Environmental Approvals Branch (EAB) (email: eaasibgen@ontario.ca, indicate 'potential duty to consult')

Also notify Director of EAB:

- if project could adversely affect an Aboriginal or treaty right
- if consultation stalls
- if a Part II Order/Elevation Request is anticipated

Paying for consultation-related costs

EA proponents are expected to pay **reasonable costs** to enable a community to participate in an EA process:

- plain language or translated **materials**
- technical **support**, 3rd party **review**
- participation in **field programs**, **Indigenous knowledge studies**, workshops and other **meetings**, etc.

Reasonableness depends on the **scope of the project**, the nature of the **rights** and the project's **potential impacts** on those rights.

MOECC's expectations

Meaningful consultation is not about the number of letters you mailed or meetings you had (or attempted), but the **substance of the dialogue**.

Beyond meeting the basic requirements, the most important factor considered in our review of a consultation program is how issues (including questions, comments and concerns) are **addressed**.

This does not mean what section of the report addresses the topic, but actually **how the issue changed or informed the project, mitigation measures, monitoring, follow-up, results of the EA**, etc.

A **summary** of issues raised, by community, and how they have been addressed, and a **detailed record of consultation**, are expected for most EAs. The record should also show how the proponent has followed-up with communities to confirm issues have been addressed.

THANK YOU

QUESTIONS?

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