8. The right to approach other world nations to further the aims of the Cree and Ojibway Nations of Treaty 9.
9. The right to use every necessary alternative to further the cause of our people.
10. The right to use all that the Creator has given us to help all of mankind.

The solution to our problems must come from within our local communities, the right to deal with those problems must rest with our people. We will regain our independence only through legislation that recognizes and supports our form of local government.

Our nationhood itself is sacred and cannot be negotiated. However, we are ready to start negotiating the implementation of this nationhood. For any nation to exist, it must have legislation that enhances its self-reliance and its local control.

We will now deal with the mechanics and processes of our sovereignty. Our primary objective is the attainment of spiritual, cultural, social and economic independence.
NAN gratefully acknowledges the assistance and wisdom of the original NAN Chiefs Committee who provided guidance in the development of this Consultation Policy.

NAN is also thankful for the expertise and contribution to the revisions of this policy of the following:

- Evelyn J. Baxter, B.A. LL.B., Ojibway Nation, Marten Falls
- Dr. David Peerla
- David Flood, R.P.F., Ojibway Nation, Matachewan
- Terry Wilson, R.P.F.
- Carol Ann Audet, B.A., Cree Nation, Constance Lake

This booklet was printed in partnership with the Canadian Boreal Initiative.

Unity, Strength, Success!
We are pleased to offer the third edition of the NAN Consultation policy and process. This edition is updated with respect to the most recent developments in Canadian jurisprudence, public policy and features a more concise adaptation of the consultation process. As with the first edition, this version is intended to inform and assist First Nations communities, government, and project proponents in planning for lands and resource development by helping all parties to reach full, informed decisions about resource development projects.

**History**
This process was originally derived from the work of the Nishnawbe Aski Nation staff and the Consultation Working Group made up of Chiefs and other NAN representatives. This group, formed in April 2001, conducted the research, information gathering and dialogue needed to complete this handbook. Upon ratification of the Chiefs, this policy may be amended from time to time (contact NAN for more information).

**A Basic Plan For Consultation**
This document outlines a basic plan for how meaningful consultation can take place between First Nations, government, and project proponents. Consultation is the means to developing clarity, certainty and consistency about Aboriginal and Treaty rights with respect to resource development. Doing so will be helpful to all parties concerned so that conflict related to impacts and infringements to Aboriginal and Treaty rights can be reduced to protect the environment, the Aboriginal way of life, and to help find ways to maximize stable economic growth and development.

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**THEREFORE BE IT RESOLVED** that the Nishnawbe Aski Nation Chiefs-in-Assembly further affirm these past political positions, in particular, with reference to the assertion of land and resource rights and responsibilities belonging to our people;

**BE IT FURTHER RESOLVED** that a strong and focused dialogue amongst our First Nations be initiated to formulate a strategic action plan on resource development in Nishnawbe Aski Nation that is consistent with our inherent right and past political positions;

**FINALLY BE IT RESOLVED** that the Nishnawbe Aski Nation Executive Council is mandated to ensue a political process with both levels of Crown Governments to address our resource development concerns based on our aboriginal and treaty rights and in particular, which calls upon the Crown to exercise fiduciary duty with respect to Nishnawbe Aski Nation First Nations’ Inherent-based rights.

**DATED AT THUNDER BAY, ONTARIO, THIS 31ST DAY OF MAY, 2001.**

MOVED BY: Ben Cheechoo, Proxy
Horneyave First Nation

SECONDED BY: Glenn Nolan, Proxy
Missanabie Cree First Nation

CARRIED.

Stan Beardy – Grand Chief
Raymond Ferris – Deputy Grand Chief
About Nishnawbe Aski Nation

In 1905-06, the Canadian Government, the Ontario Government and the Cree and Ojibway Nations signed Treaty No. 9. They made adhesions in 1929 and 1930. Prior to this, the Canadian Government and the Saulteaux-Cree Nations, of Northern Ontario and Manitoba, signed Treaty No. 5 in 1875. Those treaty bands within Ontario are also part of Nishnawbe Aski Nation. Grand Council Treaty No. 9 was formed in February 1973. In 1981, the name was changed to Nishnawbe Aski Nation. 49 First Nations are represented by Nishnawbe Aski Nation, the largest political territorial organization in Ontario.

The Aboriginal people of the Treaties No. 9 and No. 5 area are known as the Nishnawbe Aski. The name is translated as “the people and the land,” which reflects the special relationship the Nishnawbe Aski people have with the land. This relationship is sacred to our people and has been present since time immemorial and will be for future generations.

On behalf of the Chiefs, Councils and NAN communities, Nishnawbe Aski Nation maintains a continuous liaison with all levels of the provincial and federal governments. It also acts as a facilitator and coordinator of the directions of the Nishnawbe Aski Nation Chiefs. The NAN administration office coordinates individual Chief’s requests for meetings with governments and coordinates the Nishnawbe Aski Nation All Chiefs Assemblies, including attendance at National Assemblies.

Re-affirmation Of Nishnawbe Aski Nation
Past Positions On Lands & Resources

WHEREAS the people of Nishnawbe Aski Nation are the original owners of the lands and the resources and possess inherent jurisdiction over their traditional territories;

WHEREAS the Crown Governments through the James Bay Treaty Nine and Treaty Five guaranteed that we would continue to use the land as we had done since time immemorial and had also agreed, on a nation to nation basis, to share the wealth of the land from resource development according to the spirit and intent of the original treaty process with our people;

WHEREAS resource development in the Nishnawbe Aski Nation territory continues to proceed without meaningful involvement from our people who stand to be impacted the most from this activity;

WHEREAS the recent Speech from the Throne in the legislature reaffirms our concerns that Ontario’s plan for economic growth and development in the north will proceed without the required government to government dialogue with the Nishnawbe Aski people and with complete disregard for First Nation’s rights and their constitutionally protected status;

WHEREAS the leaders and people of Nishnawbe Aski Nation have a long and honourable history of defending their land rights in order to protect the self-determining future of the people and to ensure that development does not proceed until such time as access, revenue sharing and environmental protection in accordance with our traditionally defined sustainable resource development standards and political positions are secured;

WHEREAS the most comprehensive of these political positions are captured in two key documents: the Nishnawbe Aski Nation Declaration of 1977 and the Thunder Bay Pact, A Manifesto of the Nishnawbe Aski Nation, 1981 (attached);
First Nations

First Nations of Nishnawbe Aski Nation by Tribal Council and Independent First Nations without Tribal Council Affiliation

(refer to Appendices – Nishnawbe Aski Nation Map for specific locations)

Independent First Nations Alliance
Lac Seul First Nation
Muskrat Dam First Nation
Pikangikum First Nation
Kitchenuhmaykoosib Inninuwug (not a NAN member)

Keewaytinook Okimakinak
Deer Lake First Nation
Fort Severn First Nation
Kee-Way-Win First Nation
McDowell Lake First Nation
North Spirit Lake First Nation
Poplar Hill First Nation

Matawa First Nations
Aroland First Nation
Constance Lake First Nation
Eabametoong First Nation
Ginoogaming First Nation
Hornepayne First Nation
Long Lake #58 First Nation
Marten Falls Indian Reserve #65
Neskantaga First Nation
Nibinamik First Nation
Webequie First Nation

Mushkegowuk Council
Attawapiskat First Nation
Chapleau Cree First Nation
Fort Albany First Nation
Kashechewan First Nation
Missinabie Cree First Nation
Moose Cree First Nation
New Post First Nation

Shibogama First Nations Council
Kasabonika Lake First Nation
Kingfisher Lake First Nation
Wapekeka First Nation
Wawakapewin First Nation
Winnunmin Lake First Nation

Wabun Tribal Council
Beaverhouse First Nation
Brunswick House First Nation
Chapleau Ojibway First Nation
Matachewan First Nation
Mattagami First Nation
Weenusk First Nation

Windigo First Nations Council
Bearskin Lake First Nation
Cat Lake First Nation
Koochechving First Nation
New Slate Falls First Nation
North Caribou Lake First Nation
Sachigo Lake First Nation
Whitewater Lake First Nation

Independent Bands
Flying Post First Nation
Mikisew Council of the Cree Nation
Sandy Lake First Nation

Map courtesy of Nishnawbe Aski Legal Services Corporation
Nishnawbe Aski Nation Territory

The Nishnawbe Aski territory covers about two-thirds of the province known as Ontario. Stretching across the north, the territory spans 700 miles in length and 400 miles in width; from the Manitoba border in the west, to the Quebec border in the east and from the Hudson's and James Bay watersheds in the north and roughly to the Canadian National Railway line in the south. The 49 communities represented by the Nishnawbe Aski Nation are scattered throughout this area. The Treaty area includes the Districts of Cochrane, Timiskaming, Sudbury, Algoma, Thunder Bay and Kenora. Thirty-one of the First Nations are isolated and do not have year round road access.

Consultation Flow Chart

- **Initiation**: Development of new/expanded project or activity
- **Notice**: First Nations are notified that a project or activity is proposed
- **Information Exchange**: Government and First Nations exchange information
- **Communication**: First Nations and Government provide ongoing disclosure of activity to First Nations
- **Information Gathering**: First Nations prepare mapping and traditional knowledge
- **Analysis**: Information is reviewed, need for expert determination is determined, Crown provides resources
- **Negotiation/Accommodation**: First Nations and Government accept or reject proposal
- **Benefits**: Economic benefits are negotiated
- **Impasse or Reconciliation**: Proceeds to next stage
- **Resolution**: Crown decides to proceed or not

Consultation Flow Chart - Honour of the Crown

1. **Initiation**: Government develops new/expanded project activity
2. **Notice**: First Nations are notified
3. **Information Exchange**: Government and First Nations exchange information
4. **Communication**: Government and First Nations provide ongoing disclosure of activity to First Nations
5. **Information Gathering**: First Nations provide mapping, traditional knowledge, etc.
6. **Analysis**: Information is reviewed, need for expert determination is determined, Crown provides resources
7. **Negotiation/Accommodation**: First Nations and Government accept or reject proposal
8. **Benefits**: Economic benefits are negotiated
9. **Impasse or Reconciliation**: Proceeds to next stage
10. **Resolution**: Crown decides to proceed or not
Nishnawbe Aski Nation Languages

The people of Nishnawbe Aski Nation speak one of two distinctly separate languages, Cree and Ojibway, which belong to a common language stock known as the Algonkian group of languages. Cree is spoken by the coastal people and Ojibway by the interior people. Within both of these languages, there many dialects, each associated with a particular First Nation and location. In Northwestern Ontario alone, there are over 30 Cree and Ojibway dialects.

Nishnawbe Aski Nation Population

Nishnawbe Aski Nation has a total population on and off reserve of 45,000. Those living off reserve live in various communities across Ontario and Canada. It is estimated that between 2002 and 2026 the total population of the 49 NAN communities will increase by 39%. Over two-thirds of this population is under thirty (30) years of age.
Nishnawbe Aski Nation Living Conditions

The mean education level is less than grade nine. The unemployment rate is high in most communities (65% to 95%). Where employment exists, it is primarily seasonal (fishing, trapping, guiding, tourism). The result is that social transfer payments account for the bulk of family income.

These facts, in addition to related social, legal, and economic factors, contribute to a variety of serious problems. Apart from the isolation and lack of employment opportunities, other difficulties include poor housing, poor community services and infrastructure, inadequate medical and dental services, and a poor standard of education. Problems are also caused by the rapid disappearance of the traditional way of life, which includes the pursuits of hunting, fishing and trapping, due, in part, to advancing resource development.

Step 9 (Impasse or Reconciliation)

- In the event that there is no resolution to the First Nation request that an activity not proceed, the First Nation has the option to require that the Crown justify the infringement of the First Nation’s rights by proceeding to litigation.
- It is the position of the NAN First Nations that all activity on the disputed project shall cease until a decision regarding the justification of any infringement is obtained.

Step 10 (Benefits)

- If the concerns of the affected First Nation(s) can be met to the First Nation(s) satisfaction, then the proponent and the affected First Nation may enter into negotiations to determine suitable economic development opportunities for the First Nation(s).
Nishnawbe Aski Nation Future Directions

It has always been the desire of the NAN First Nations to break the cycle of dependency and become economically viable communities. Using the land's resources has always been a way NAN First Nations can become more self-sufficient communities, thereby improving their health, standard of living, education and social issues. Such measures are vital to re-establishing self-government in our First Nations.

For too long, government and industry have prospered, leaving First Nations out of the rewards reaped from the land. First Nations recognize the need to achieve equitable participation in resource development and are working toward breaking barriers that systemically exclude First Nations from meaningful participation in economic opportunities. This document is a step in that direction.

First Nations in NAN are re-claiming access to resource management decision-making so that resources will be managed on an integrated basis taking First Nation Aboriginal and Treaty Rights and environmental responsibilities into account.

First Nations are generally not opposed to resource development. First Nations want acknowledgement of the fact that government and industry, through resource development initiatives, are having a direct impact on the Treaty relationship that First Nations have with Canada and Ontario.

First Nation interests can be accommodated through revenue sharing, IBA, and equity participation in development projects. The future well-being of the environment, and the economic health of First Nations is dependent on building strong cooperative relationships with government and industry.

Step 7 (Analysis)
• Once the project information is fully disclosed, the First Nation shall review the information, and carry out an analysis of the impact of the proposed activity on Aboriginal and Treaty rights.

Step 8 (Negotiation/Accommodation)
• Once an infringement is identified, the First Nation and the government shall enter into discussions to determine how to reduce the impacts to satisfy the concerns of the First Nation.

• This includes the negotiation of any type of environmental protection/monitoring agreement. The environmental and rights issues must be dealt with separate from, and before economic benefits are negotiated.

• Other agreements may be co-management, impact benefits, revenue sharing, compensation, or other appropriate means to address the concerns of the First Nation and to ensure the Crown has dealt honourably with the First Nation, and that the proponent has not been a party to an Infringement of Constitutionally protected Aboriginal and Treaty rights.

• If the analysis results in finding that the proposed activity is determined to take place on or near any identified sensitive sites, areas of traditional activities or of environmental concern, the affected First Nation has the option to permit the activity on that area, subject to the conditions to be negotiated, or to request that no activity take place in that area.

• At this stage it may be necessary, as a procedural matter, to invite the proponent (if any) to participate.

Chef Glenn Nolan, Missanabie Cree First Nation

Using the land’s resources has always been a way NAN First Nations can become more self-sufficient communities...
Government and Industry

This guide is also intended to assist government and industry in understanding the positions of the NAN First Nations. Industry and government require certainty and clarity in their dealings with First Nations. Meaningful consultation will bring consistency and reduce potential conflict through out the territory. The new legal obligations placed on government will also result in changes in their approach to First Nations and the issues related to resource development, consultation, and accommodation and reconciliation.

How to Use This Policy

When using this policy, keep in mind the perspective or interest you represent and contemplate how this guide applies to your particular project or circumstances. This policy is geared toward helping First Nations, government and industry address projects or decisions that impact or infringe on Aboriginal and Treaty Rights.

Finally, it is important to understand that some First Nations may have additional requirements in order to protect their Aboriginal and Treaty rights.

We thank you for using this policy, and we wish you all the best in your application of the NAN Consultation Policy.

Step 4 (Technical Resourcing)

- The First Nation(s) shall examine the information to determine what expertise, if any, is required to assess and respond to the project information.

- The request for expertise will be forwarded to the government to ensure the First Nation can fully examine, analyze and understand the information.

Step 5 (Communication)

- An initial community meeting shall be held at the First Nation affected. This meeting is to be hosted by the government.

- The initial meeting is an information session only and is an opportunity for community members to see and hear the information for themselves.

- Regular meetings and communication with the affected First Nation are required for meaningful consultation. The frequency of communication shall be determined by the First Nation depending on the circumstances of the proposal and the level of comfort of the affected First Nation.

Step 6 (Information Gathering by First Nation)

- The affected First Nation will gather land use, traditional knowledge, etc. information to share with the government. The government shall give an undertaking to protect the First Nation information from improper use/disclosure.

- If this information is not available, the government will be expected to provide resources to the community to research and compile the information required to further the process.
Recently, many First Nations have been met with potential resource development and government policy issues in their traditional territories. These issues are related to various sectors in the resource industry such as forestry, mining, energy, tourism, parks, and infrastructure.

There has been mixed satisfaction in the First Nations’ dealings with resource companies and government. Consultation is not being done adequately, or at all, in some cases. This is largely due to the fact that there has been no effective policy or procedure in place that would provide a framework for government and industry on meaningful consultation.

The approaches taken to date by government and industry have been inconsistent and in some cases, unfair to First Nations. In recent cases decided by the Ontario Superior Court, B.C. Court of Appeal and the Supreme Court of Canada, in relation to consultation, it has been determined that consultation with First Nations must be carried out by government where there is any potential impact or infringement on Aboriginal and Treaty Rights. Consultation must be “meaningful and transparent,” and it must be done as a means to address First Nations’ concerns and to find ways to reduce any negative impacts or infringements on Aboriginal and Treaty rights. Further, the consent of the First Nations affected by a project or policy must be obtained.

On May 30th, 2001, the Nishnawbe Aski Nation Chiefs in assembly ratified the first edition of the Consultation policy and procedure.

Step 1 (Initiation)
- Before any project, license, permit, activity, etc. is commenced or approved, the government responsible for the proposed project must inform any potentially affected First Nation(s) and the Nishnawbe Aski Nation of the proposed activity.
- First Nations who are not prepared for this process will not be able to participate meaningfully.

Step 2 (Notice)
- The affected First Nation(s) shall respond to the initial notice indicating whether the proposal potentially impacts or infringes on Aboriginal and Treaty Rights.
- If there is a potential impact or infringement, then the First Nation requests further information and time to analyze the information. The First Nation will also need time and resources to retain needed expertise to conduct its analysis.
- It is inappropriate for the party issuing the initial information to place time limits on a response from the First Nation, particularly where a lack of capacity exists.
- Responses will be given in as timely manner as possible as resources are provided.

Step 3 (Information Exchange)
- Once a response is received from the affected First Nation(s), the notifying party will forward all relevant information about the proponent, the proposed activity and any other pertinent environmental, economic, etc. information available at that time.
The policy was translated into the 3 Aboriginal languages of the territory and widely distributed to First Nations, government, industry, and NGO’s all over the world. The policy created a great deal of interest – concern for some, relief for others. It was a ground breaking document given that nothing like it had ever been written before.

The policy presents the acceptable level of consultation required in order for it to be meaningful, and First Nations may adapt or change the policy and procedure to meet their specific needs in any given case.

The Consultation Process

Introduction

• This process is based on the fact that First Nations in NAN enjoy Aboriginal Title/Rights and Treaty rights, and that any proposed activity either on reserve lands or on traditional territories will likely infringe on these special rights.
• Before any infringement occurs, it must be justified according to law.
• Approval for resource development rests with the First Nation.
• This procedure sets out the minimum consultation requirements to deal with First Nations regarding Aboriginal and Treaty Rights.
• Be aware that for government and/or industry to rely on Provincial legislation to the exclusion of the Constitution of Canada may result in a compromise to the legitimacy of a project if the provincial legislation is relied upon as a tool to unlawfully ignore or infringe an Aboriginal or Treaty right or to state that the legislation does not require consultation – this is untrue – any activity which may impact or infringe Aboriginal or Treaty rights requires consultation, or be subject to Constitutional scrutiny.

For a view of the process, see Consultation Flow Chart on page 27.
Aboriginal Rights are those rights that belong to Aboriginal people and come from the Creator. The traditions and customs that have been practiced on the land since time immemorial add to the bundle of Aboriginal rights and make Aboriginal people distinct from others in Canada.

Treaty rights are those resulting from the oral and written agreements made between First Nations, Canada and Ontario. These rights are communal and have been recognized and affirmed in the Constitution Act, 1982.

Aboriginal and Treaty Rights are recognized and affirmed in the Constitution Act, 1982, and are upheld in the Supreme Court of Canada. Any activity/policy or project has the potential to infringe on these rights, which triggers the need for meaningful consultation with First Nations.

Key Elements of Consultation

In order for consultation to be effective, transparent and meaningful, certain key elements must be acknowledged in the process, these include:

- That it is a continuous process.
- It is about exchanging information.
- It is about building relationships.
- It is about getting feedback on the understanding and adequacy of the information.
- It is about exchanging additional information if required.
- It is about identifying issues.
- It is about accommodation and reconciliation.
- It is about fairness.
- It is about negotiating with the right attitude.

Success Depends On:

- Preparation
- Commitment
- Flexibility
- Accuracy
- Understanding
- Respect
- Credibility
- Thoroughness
- Cooperation
- Realistic goals
- Patience
- Transparency
- Accountability
- Responsibility

Aboriginal & Treaty Rights
• The Crown has a legal obligation to consult meaningfully with First Nations about any project, development, activity, policy, legislation or amendments to legislation which may impact on Aboriginal and/or Treaty rights.

• The duty to consult applies to the Federal and Provincial Crown indivisibly and it is part of the overall principle of the Honour of the Crown to deal fairly with First Nations.

• Consultation is to be done with an eye toward accommodating First Nation’s concerns by trying mitigating impacts or infringements on Aboriginal and Treaty Rights and to limit the damage done to the environment in the case of projects such as forestry or mining.

• According to Treaty interpretation, and judicial analysis, the Crown's right to "take up" land, particularly with respect to resource development, is not absolute, but must be balanced against First Nations’ Constitutionally protected rights to pursue hunting, trapping and fishing in their traditional territories.

• The consultation process is intended to achieve First Nation consent for the project, development, or other activity, and to negotiate compensation for the impacts to Aboriginal and Treaty Rights as a way to accommodation and reconciliation.

• The earlier consultation begins, the better.

• By virtue of the Treaty (No. 9 and 5), First Nations communities are not third party stakeholders compared with those who do not have Treaty rights and a special relationship to the Crown.

• Consultation must be open, public and inclusive.

• First Nations communities are entitled to adequate resources to allow them to participate in the consultation process and to determine the social and economic future of their members.

• The consultation process is community driven, sanctioned by the people, and the affected First Nation reserves the right to amend or adapt the consultation process to fit its particular needs or circumstances on a case by case basis.

• First Nations communities are entitled to participate in consultation on equal footing with government and industry, meaning that First Nations are entitled to the financial, technical and human resources necessary to fully understand and participate in a project.

• If development is to proceed, there must be accommodation between Aboriginal and Treaty Rights and resource development. Government bears the responsibility to ensure First Nations’ interests and use of the land is taken into consideration before a project proceeds and that the First Nation is satisfied their rights and interests have been satisfactorily accommodated and reconciled.

• The extent of consultation required will vary on a case by case basis depending on the nature of the project, it is recommended that each case follow the protocol and procedures set out in this policy.

• If a project/development goes ahead, the First Nation community should benefit on a long-term basis, be protected from environmental damage and be compensated for any infringement or loss of use of lands.

• Consultation is completed when a First Nation is able, through its members, to make full informed decisions about a proposed development, which now includes obtaining the consent from the First Nation for the project to proceed.
Nishnawbe Aski Nation Consultation Policy

The health of the environment is intrinsic to the protection of Aboriginal and Treaty rights, for without the land on which to exercise protected activities, there would be no purpose for addressing impacts or infringements. Therefore, a significant portion of the consultation exercise is related to environmental issues as they relate to the Aboriginal rights consideration.

• The First Nation community is the primary basis of authority in the Nishnawbe Aski Nation, and it is the First Nation(s) potentially most directly affected by a proposed project who must be consulted as early as possible.
• The Nishnawbe Aski People have the responsibility, as custodians, over the lands and resources given to them by the Creator.
• The People of the Nishnawbe Aski use the land for traditional activities, which forms the basis for the spirituality, culture and languages of the People.
• The custodian responsibility carries with it the duty to protect lands and resources for future generations, and to ensure development, if it occurs, results in benefits for the People of Nishnawbe Aski Nation, and that any development is done in an environmentally responsible manner.
• Consultation is the responsibility of the Crown.
• Consultation is communication and relationship-building and must be done in a meaningful and respectful manner.
• Consultation is information-sharing and issue-resolution prior to government decisions being made or authorizations, permits, or licenses being issued.
• Notification after government planning or approval is not consultation.

• Section 35 of the Constitution Act, 1982 recognize and affirm Aboriginal and Treaty rights, which gives rise to the origin of the duty of the Crown to consult where Aboriginal and Treaty rights may be infringed by a project, policy, or legislation.

• If no agreement can be reached, the Crown will have to justify any impact or infringement on Aboriginal and Treaty rights (usually in court).

• For meaningful consultation to occur, the Crown will have to provide the financial and human resources to allow the First Nations to participate in a meaningful way.
- The doctrine of the Honour of the Crown is the source of the government duty to consult.

- The government must act with honour, integrity, and fairness when dealing with First Nations.

- In order to uphold the Honour of the Crown, the government must act in good faith and avoid the appearance of sharp dealing when consulting First Nations.

- It infuses the process of treaty making and interpretation and is a good fundamental doctrine governing the relationship between First Nations and the Crown.

- Full, on-going disclosure is required for meaningful consultation.

- Proponents have a moral obligation to consult – it’s the right thing to do.

- Proponents cannot assume the Crown has discharged its duty to consult with First Nations. They risk having a court set aside the permits etc. if they assume too much of the Crown’s duty.

- Before a project or development is approved and allowed to go ahead, the First Nations and the proponent involved must negotiate environmental issues/protection and the First Nation economic development issues associated with the project.

- For meaningful consultation to occur, adequate funding should be provided by the government to ensure that First Nations can gain a clear and concise interpretation of information to help them assess the social, environmental, economic and legal impacts of the proposed activity.
• The doctrine of the Honour of the Crown is the source of the government duty to consult.

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Nishnawbe Aski Nation Consultation Policy

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- The People of the Nishnawbe Aski use the land for traditional activities, which forms the basis for the spirituality, culture and languages of the People.
- The custodian responsibility carries with it the duty to protect lands and resources for future generations, and to ensure development, if it occurs, results in benefits for the People of Nishnawbe Aski Nation, and that any development is done in an environmentally responsible manner.
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- Consultation is information-sharing and issue-resolution prior to government decisions being made or authorizations, permits, or licenses being issued.
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- Section 35 of the Constitution Act, 1982 recognize and affirm Aboriginal and Treaty rights, which gives rise to the origin of the duty of the Crown to consult where Aboriginal and Treaty rights may be infringed by a project, policy, or legislation.

- If no agreement can be reached, the Crown will have to justify any impact or infringement on Aboriginal and Treaty rights (usually in court).

- For meaningful consultation to occur, the Crown will have to provide the financial and human resources to allow the First Nations to participate in a meaningful way.

Chief Eli Moonias, Marten Falls Indian Reserve #65
• The Crown has a legal obligation to consult meaningfully with First Nations about any project, development, activity, policy, legislation or amendments to legislation which may impact on Aboriginal and/or Treaty rights.

• The duty to consult applies to the Federal and Provincial Crown indivisibly and it is part of the overall principle of the Honour of the Crown to deal fairly with First Nations.

• Consultation is to be done with an eye toward accommodating First Nation’s concerns by trying mitigating impacts or infringements on Aboriginal and Treaty Rights and to limit the damage done to the environment in the case of projects such as forestry or mining.

• According to Treaty interpretation, and judicial analysis, the Crown’s right to “take up” land, particularly with respect to resource development, is not absolute, but must be balanced against First Nations’ Constitutionally protected rights to pursue hunting, trapping and fishing in their traditional territories.

• The consultation process is intended to achieve First Nation consent for the project, development, or other activity, and to negotiate compensation for the impacts to Aboriginal and Treaty Rights as a way to accommodation and reconciliation.

• The earlier consultation begins, the better.

• By virtue of the Treaty (No. 9 and 5), First Nations communities are not third party stakeholders compared with those who do not have Treaty rights and a special relationship to the Crown.

• Consultation must be open, public and inclusive.

• First Nations communities are entitled to adequate resources to allow them to participate in the consultation process and to determine the social and economic future of their members.

• The consultation process is community driven, sanctioned by the people, and the affected First Nation reserves the right to amend or adapt the consultation process to fit its particular needs or circumstances on a case by case basis.

• First Nations communities are entitled to participate in consultation on equal footing with government and industry, meaning that First Nations are entitled to the financial, technical and human resources necessary to fully understand and participate in a project.

• If development is to proceed, there must be accommodation between Aboriginal and Treaty Rights and resource development. Government bears the responsibility to ensure First Nations’ interests and use of the land is taken into consideration before a project proceeds and that the First Nation is satisfied their rights and interests have been satisfactorily accommodated and reconciled.

• The extent of consultation required will vary on a case by case basis depending on the nature of the project, it is recommended that each case follow the protocol and procedures set out in this policy.

• If a project/development goes ahead, the First Nation community should benefit on a long-term basis, be protected from environmental damage and be compensated for any infringement or loss of use of lands.

• Consultation is completed when a First Nation is able, through it's members, to make full informed decisions about a proposed development, which now includes obtaining the consent from the First Nation for the project to proceed.
**Key Elements of Consultation**

In order for consultation to be effective, transparent and meaningful, certain key elements must be acknowledged in the process, these include:

- That it is a continuous process.
- It is about exchanging information.
- It is about building relationships.
- It is about getting feedback on the understanding and adequacy of the information.
- It is about exchanging additional information if required.
- It is about identifying issues.
- It is about accommodation and reconciliation.
- It is about fairness.
- It is about negotiating with the right attitude.

**Success Depends On:**

- Preparation
- Commitment
- Flexibility
- Accuracy
- Understanding
- Respect
- Credibility
- Thoroughness
- Cooperation
- Realistic goals
- Patience
- Transparency
- Accountability
- Responsibility

**Aboriginal & Treaty Rights**

Aboriginal Rights are those rights that belong to Aboriginal people and come from the Creator. The traditions and customs that have been practiced on the land since time immemorial add to the bundle of Aboriginal rights and make Aboriginal people distinct from others in Canada.

Treaty rights are those resulting from the oral and written agreements made between First Nations, Canada and Ontario. These rights are communal and have been recognized and affirmed in the Constitution Act, 1982.

Aboriginal and Treaty Rights are recognized and affirmed in the Constitution Act, 1982, and are upheld in the Supreme Court of Canada. Any activity/policy or project has the potential to infringe on these rights, which triggers the need for meaningful consultation with First Nations.
The policy was translated into the 3 Aboriginal languages of the territory and widely distributed to First Nations, government, industry, and NGO’s all over the world. The policy created a great deal of interest – concern for some, relief for others. It was a ground breaking document given that nothing like it had ever been written before.

The policy presents the acceptable level of consultation required in order for it to be meaningful, and First Nations may adapt or change the policy and procedure to meet their specific needs in any given case.

The Consultation Process

Introduction

- This process is based on the fact that First Nations in NAN enjoy Aboriginal Title/Rights and Treaty rights, and that any proposed activity either on reserve lands or on traditional territories will likely infringe on these special rights.
- Before any infringement occurs, it must be justified according to law.
- Approval for resource development rests with the First Nation.
- This procedure sets out the minimum consultation requirements to deal with First Nations regarding Aboriginal and Treaty Rights.
- Be aware that for government and/or industry to rely on Provincial legislation to the exclusion of the Constitution of Canada may result in a compromise to the legitimacy of a project if the provincial legislation is relied upon as a tool to unlawfully ignore or infringe an Aboriginal or Treaty right or to state that the legislation does not require consultation – this is untrue – any activity which may impact or infringe Aboriginal or Treaty rights requires consultation, or be subject to Constitutional scrutiny.

For a view of the process, see Consultation Flow Chart on page 27.
Recently, many First Nations have been met with potential resource development and government policy issues in their traditional territories. These issues are related to various sectors in the resource industry such as forestry, mining, energy, tourism, parks, and infrastructure.

There has been mixed satisfaction in the First Nations’ dealings with resource companies and government. Consultation is not being done adequately, or at all, in some cases. This is largely due to the fact that there has been no effective policy or procedure in place that would provide a framework for government and industry on meaningful consultation.

The approaches taken to date by government and industry have been inconsistent and in some cases, unfair to First Nations. In recent cases decided by the Ontario Superior Court, B.C. Court of Appeal and the Supreme Court of Canada, in relation to consultation, it has been determined that consultation with First Nations must be carried out by government where there is any potential impact or infringement on Aboriginal and Treaty Rights. Consultation must be “meaningful and transparent,” and it must be done as a means to address First Nations’ concerns and to find ways to reduce any negative impacts or infringements on Aboriginal and Treaty rights. Further, the consent of the First Nations affected by a project or policy must be obtained.

On May 30th, 2001, the Nishnawbe Aski Nation Chiefs in assembly ratified the first edition of the Consultation policy and procedure...
Government and Industry

This guide is also intended to assist government and industry in understanding the positions of the NAN First Nations. Industry and government require certainty and clarity in their dealings with First Nations. Meaningful consultation will bring consistency and reduce potential conflict throughout the territory. The new legal obligations placed on government will also result in changes in their approach to First Nations and the issues related to resource development, consultation, and accommodation and reconciliation.

How to Use This Policy

When using this policy, keep in mind the perspective or interest you represent and contemplate how this guide applies to your particular project or circumstances. This policy is geared toward helping First Nations, government and industry address projects or decisions that impact or infringe on Aboriginal and Treaty Rights.

Finally, it is important to understand that some First Nations may have additional requirements in order to protect their Aboriginal and Treaty rights.

We thank you for using this policy, and we wish you all the best in your application of the NAN Consultation Policy.

Step 4 (Technical Resourcing)

• The First Nation(s) shall examine the information to determine what expertise, if any, is required to assess and respond to the project information.

• The request for expertise will be forwarded to the government to ensure the First Nation can fully examine, analyze and understand the information.

Step 5 (Communication)

• An initial community meeting shall be held at the First Nation affected. This meeting is to be hosted by the government.

• The initial meeting is an information session only and is an opportunity for community members to see and hear the information for themselves.

• Regular meetings and communication with the affected First Nation are required for meaningful consultation. The frequency of communication shall be determined by the First Nation depending on the circumstances of the proposal and the level of comfort of the affected First Nation.

Step 6 (Information Gathering by First Nation)

• The affected First Nation will gather land use, traditional knowledge, etc. information to share with the government. The government shall give an undertaking to protect the First Nation information from improper use/disclosure.

• If this information is not available, the government will be expected to provide resources to the community to research and compile the information required to further the process.
Future Directions

Step 7 (Analysis)
- Once the project information is fully disclosed, the First Nation shall review the information, and carry out an analysis of the impact of the proposed activity on Aboriginal and Treaty rights.

Step 8 (Negotiation/Accommodation)
- Once an infringement is identified, the First Nation and the government shall enter into discussions to determine how to reduce the impacts to satisfy the concerns of the First Nation.
- This includes the negotiation of any type of environmental protection/monitoring agreement. The environmental and rights issues must be dealt with separate from, and before economic benefits are negotiated.
- Other agreements may be co-management, impact benefits, revenue sharing, compensation, or other appropriate means to address the concerns of the First Nation and to ensure the Crown has dealt honourably with the First Nation, and that the proponent has not been a party to an Infringement of Constitutionally protected Aboriginal and Treaty rights.
- If the analysis results in finding that the proposed activity is determined to take place on or near any identified sensitive sites, areas of traditional activities or of environmental concern, the affected First Nation has the option to permit the activity on that area, subject to the conditions to be negotiated, or to request that no activity take place in that area.
- At this stage it may be necessary, as a procedural matter, to invite the proponent (if any) to participate.

Nishnawbe Aski Nation Future Directions

It has always been the desire of the NAN First Nations to break the cycle of dependency and become economically viable communities. Using the land’s resources has always been a way NAN First Nations can become more self-sufficient communities, thereby improving their health, standard of living, education and social issues. Such measures are vital to re-establishing self-government in our First Nations.

For too long, government and industry have prospered, leaving First Nations out of the rewards reaped from the land. First Nations recognize the need to achieve equitable participation in resource development and are working toward breaking barriers that systematically exclude First Nations from meaningful participation in economic opportunities. This document is a step in that direction.

First Nations in NAN are re-claiming access to resource management decision-making so that resources will be managed on an integrated basis taking First Nation Aboriginal and Treaty Rights and environmental responsibilities into account.

First Nations are generally not opposed to resource development. First Nations want acknowledgement of the fact that government and industry, through resource development initiatives, are having a direct impact on the Treaty relationship that First Nations have with Canada and Ontario.

First Nation interests can be accommodated through revenue sharing, IBA, and equity participation in development projects. The future well-being of the environment, and the economic health of First Nations is dependent on building strong cooperative relationships with government and industry.
Living Conditions

Nishnawbe Aski Nation Living Conditions
The mean education level is less than grade nine. The unemployment rate is high in most communities (65% to 95%). Where employment exists, it is primarily seasonal (fishing, trapping, guiding, tourism). The result is that social transfer payments account for the bulk of family income.

These facts, in addition to related social, legal, and economic factors, contribute to a variety of serious problems. Apart from the isolation and lack of employment opportunities, other difficulties include poor housing, poor community services and infrastructure, inadequate medical and dental services, and a poor standard of education. Problems are also caused by the rapid disappearance of the traditional way of life, which includes the pursuits of hunting, fishing and trapping, due, in part, to advancing resource development.

Step 9 (Impasse or Reconciliation)
- In the event that there is no resolution to the First Nation request that an activity not proceed, the First Nation has the option to require that the Crown justify the infringement of the First Nation’s rights by proceeding to litigation.
- It is the position of the NAN First Nations that all activity on the disputed project shall cease until a decision regarding the justification of any infringement is obtained.

Step 10 (Benefits)
- If the concerns of the affected First Nation(s) can be met to the First Nation(s) satisfaction, then the proponent and the affected First Nation may enter into negotiations to determine suitable economic development opportunities for the First Nation(s).
Nishnawbe Aski Nation Languages

The people of Nishnawbe Aski Nation speak one of two distinctly separate languages, Cree and Ojibway, which belong to a common language stock known as the Algonkian group of languages. Cree is spoken by the coastal people and Ojibway by the interior people. Within both of these languages, there are many dialects, each associated with a particular First Nation and location. In Northwestern Ontario alone, there are over 30 Cree and Ojibway dialects.

Nishnawbe Aski Nation Population

Nishnawbe Aski Nation has a total population on and off reserve of 45,000. Those living off reserve live in various communities across Ontario and Canada. It is estimated that between 2002 and 2026 the total population of the 49 NAN communities will increase by 39%. Over two-thirds of this population is under thirty (30) years of age.

Note

• Once a proponent is invited to participate in consultation with a First Nation(s), there must be regular meetings with the proponent representatives and the affected First Nation(s) to determine issues and try to resolve concerns.

• When a proponent participates in the consultation process, it in no way discharges the Crown from its duty to consult.

• The Crown cannot delegate its duty to consult to third parties.

• The consultation process is cyclical in nature and must be followed at each phase in the development of any project such as mining or forestry, depending on the scale of the project and the potential impacts (Refer to Consultation Flow Chart on page 27 for a clear illustration of the process).

• This is in keeping with the fact that consultation is an ongoing process and is a means of building respectful relationships and open communication.

• Every activity or proposed development is to be handled generally in the manner set out above, with whatever modifications the circumstances of each case warrants.

• The more complicated or extensive a proposed activity is, the more involved the consultation process will have to be.

• The level of involvement needed is to be mutually determined by the participants in the consultation.
The Nishnawbe Aski territory covers about two-thirds of the province known as Ontario. Stretching across the north, the territory spans 700 miles in length and 400 miles in width; from the Manitoba border in the west, to the Quebec border in the east and from the Hudson’s and James Bay watersheds in the north and roughly to the Canadian National Railway line in the south. The 49 communities represented by the Nishnawbe Aski Nation are scattered throughout this area. The Treaty area includes the Districts of Cochrane, Timiskaming, Sudbury, Algoma, Thunder Bay and Kenora. Thirty-one of the First Nations are isolated and do not have year round road access.
First Nations of Nishnawbe Aski Nation by Tribal Council and Independent First Nations without Tribal Council Affiliation

(refer to Appendices – Nishnawbe Aski Nation Map for specific locations)

**Independent First Nations Alliance**
- Lac Seul First Nation
- Muskrat Dam First Nation
- Pikangikum First Nation
- Kitchenumhaykooib Inninuwug (not a NAN member)

**Keewaytinook Okimakanak**
- Deer Lake First Nation
- Fort Severn First Nation
- Kee-Way-Win First Nation
- McDowell Lake First Nation
- North Spirit Lake First Nation
- Poplar Hill First Nation

**Matata First Nations**
- Aroland First Nation
- Constance Lake First Nation
- Eabametoong First Nation
- Ginoogaming First Nation
- Hornepayne First Nation
- Long Lake #58 First Nation
- Marten Falls Indian Reserve #65
- Neskantaga First Nation
- Nibinamik First Nation
- Webequie First Nation

**Mushkegowuk Council**
- Attawapiskat First Nation
- Chapleau Cree First Nation
- Fort Albany First Nation
- Kashechewan First Nation
- Missinabie Cree First Nation
- Moose Cree First Nation
- New Post First Nation

**Shibogama First Nations Council**
- Kasabonika Lake First Nation
- Kingfisher Lake First Nation
- Wapekeka First Nation
- Wawakapewin First Nation
- Wunnumin Lake First Nation

**Wabun Tribal Council**
- Bearskin House First Nation
- Brunswick House First Nation
- Chapleau Ojibway First Nation
- Matachewan First Nation
- Mattagami First Nation
- Wahgoshig First Nation

**Windigo First Nations Council**
- Bearskin Lake First Nation
- Cat Lake First Nation
- Koochechung First Nation
- New Slate Falls First Nation
- North Caribou Lake First Nation
- Sachigo Lake First Nation
- Whitewater Lake First Nation

**Independent Bands**
- Flying Post First Nation
- MoCreebec Council of the Cree Nation
- Sandy Lake First Nation
- Weenusk First Nation

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Map courtesy of Nishnawbe Aski Legal Services Corporation
About Nishnawbe Aski Nation

In 1905-06, the Canadian Government, the Ontario Government and the Cree and Ojibway Nations signed Treaty No. 9. They made adhesions in 1929 and 1930. Prior to this, the Canadian Government and the Saulteaux-Cree Nations, of Northern Ontario and Manitoba, signed Treaty No. 5 in 1875. Those treaty bands within Ontario are also part of Nishnawbe Aski Nation. Grand Council Treaty No. 9 was formed in February 1973. In 1981, the name was changed to Nishnawbe Aski Nation. 49 First Nations are represented by Nishnawbe Aski Nation, the largest political territorial organization in Ontario.

The Aboriginal people of the Treaties No. 9 and No. 5 area are known as the Nishnawbe Aski. The name is translated as “the people and the land,” which reflects the special relationship the Nishnawbe Aski people have with the land. This relationship is sacred to our people and has been present since time immemorial and will be for future generations.

On behalf of the Chiefs, Councils and NAN communities, Nishnawbe Aski Nation maintains a continuous liaison with all levels of the provincial and federal governments. It also acts as a facilitator and coordinator of the directions of the Nishnawbe Aski Nation Chiefs. The NAN administration office coordinates individual Chief’s requests for meetings with governments and coordinates the Nishnawbe Aski Nation All Chiefs Assemblies, including attendance at National Assemblies.

Resolution 01/85

Re-affirmation Of Nishnawbe Aski Nation
Past Positions On Lands & Resources

WHEREAS the people of Nishnawbe Aski Nation are the original owners of the lands and the resources and possess inherent jurisdiction over their traditional territories;
WHEREAS the Crown Governments through the James Bay Treaty Nine and Treaty Five guaranteed that we would continue to use the land as we had done since time immemorial and had also agreed, on a nation to nation basis, to share the wealth of the land from resource development according to the spirit and intent of the original treaty process with our people;
WHEREAS resource development in the Nishnawbe Aski Nation territory continues to proceed without meaningful involvement from our people who stand to be impacted the most from this activity;
WHEREAS the recent Speech from the Throne in the legislature reaffirms our concerns that Ontario’s plan for economic growth and development in the north will proceed without the required government to government dialogue with the Nishnawbe Aski people and with complete disregard for First Nation’s rights and their constitutionally protected status;
WHEREAS the leaders and people of Nishnawbe Aski Nation have a long and honourable history of defending their land rights in order to protect the self-determining future of the people and to ensure that development does not proceed until such time as access, revenue sharing and environmental protection in accordance with our traditionally defined sustainable resource development standards and political positions are secured;
WHEREAS the most comprehensive of these political positions are captured in two key documents: the Nishnawbe Aski Nation Declaration of 1977 and the Thunder Bay Pact, A Manifesto of the Nishnawbe Aski Nation, 1981 (attached);
We are pleased to offer the third edition of the NAN Consultation policy and process. This edition is updated with respect to the most recent developments in Canadian jurisprudence, public policy and features a more concise adaptation of the consultation process. As with the first edition, this version is intended to inform and assist First Nations communities, government, and project proponents in planning for lands and resource development by helping all parties to reach full, informed decisions about resource development projects.

History
This process was originally derived from the work of the Nishnawbe Aski Nation staff and the Consultation Working Group made up of Chiefs and other NAN representatives. This group, formed in April 2001, conducted the research, information gathering and dialogue needed to complete this handbook. Upon ratification of the Chiefs, this policy may be amended from time to time (contact NAN for more information).

A Basic Plan For Consultation
This document outlines a basic plan for how meaningful consultation can take place between First Nations, government, and project proponents. Consultation is the means to developing clarity, certainty and consistency about Aboriginal and Treaty rights with respect to resource development. Doing so will be helpful to all parties concerned so that conflict related to impacts and infringements to Aboriginal and Treaty rights can be reduced to protect the environment, the Aboriginal way of life, and to help find ways to maximize stable economic growth and development.
NAN gratefully acknowledges the assistance and wisdom of the original NAN Chiefs Committee who provided guidance in the development of this Consultation Policy.

NAN is also thankful for the expertise and contribution to the revisions of this policy of the following:
Evelyn J. Baxter, B.A. LL.B., Ojibway Nation, Marten Falls
Dr. David Peerla
David Flood, R.P.F., Ojibway Nation, Matachewan
Terry Wilson, R.P.F.
Carol Ann Audet, B.A., Cree Nation, Constance Lake

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Unity, Strength, Success!

1977 Declaration

In order to regain our freedom, we must establish our own control and return to our traditional Philosophy of Life. We recognize only one ruler over our nation — the Creator, who made us part of nature. We are one with nature, with all that the Creator has made around us. We have lived here since time immemorial, at peace with the land, the lakes and rivers, the animals, the fish, the birds and all of nature. We live today as a part of yesterday and tomorrow in the great Cycle of Life. We remember the legacy of Old Joseph, as he spoke to his son Chief Joseph in 1871: "My son, my body is returning to my Mother Earth, and my spirit is going very soon to see the Great Spirit Chief, when I am gone, think of your country, you are the Chief of these people, they look to you to guide them, always remember that your father never sold his country... this country holds your father's body, never sell the bones of your father and your mother. "The success of our future will depend on our leaders of tomorrow. These young people are adjusting to new forms of knowledge. Our experience will also strengthen their involvement. We expect that you in turn will encourage your young people to understand our lifestyle. Today, we are here to tell you who we are. We, the Nishnawbe Aski, have inalienable rights; they are:

1. The right to self-government.
2. The right to receive compensation for our exploited natural resources.
3. The right to receive compensation for the destruction and abrogation of our hunting and fishing rights.
4. The right to renegotiate our treaty.
5. The right to negotiate with the elected governments of your society through appropriate levels of representation.
6. The right to approach the judicial, government and business institutions of your society in our quest for self-determination and local control.
7. The right of our elected Chiefs to deal with your society's elected cabinets on an equal basis.
8. The right to approach other world nations to further the aims of the Cree and Ojibway Nations of Treaty 9.

9. The right to use every necessary alternative to further the cause of our people.

10. The right to use all that the Creator has given us to help all of mankind.

The solution to our problems must come from within our local communities, the right to deal with those problems must rest with our people. We will regain our independence only through legislation that recognizes and supports our form of local government.

Our nationhood itself is sacred and cannot be negotiated. However, we are ready to start negotiating the implementation of this nationhood. For any nation to exist, it must have legislation that enhances its self-reliance and its local control.

We will now deal with the mechanics and processes of our sovereignty. Our primary objective is the attainment of spiritual, cultural, social and economic independence.