



GINOOGAMING FIRST NATION

Resource Development Office

Consultation and Accommodation Protocol

2014



GINOOGAMING FIRST NATION

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GINOOGAMING FIRST NATION CONSULTATION AND ACCOMMODATION PROTOCOL

PREAMBLE

WHEREAS Ginoogaming First Nation (GFN) has never ceded, surrendered or in any way relinquished Title or Rights to its Aboriginal and Treaty Lands, and continues to hold title, exercise rights and jurisdiction and assert interests over its Aboriginal and Treaty Lands.

WHEREAS activities by the Crown or Third Parties within and/or adjacent to the traditional territory of GFN that may have impacts to its Aboriginal and Treaty Lands are a serious infringement of GFN Aboriginal Title and Rights.

WHEREAS activities by the Crown or Third Parties within and/or adjacent to the traditional territory of Ginoogaming First Nation that may have impacts to its Home Lands are a serious infringement of Ginoogaming First Nations Aboriginal Title and Rights.

THEREFORE GFN has developed the Ginoogaming First Nation Consultation and Accommodation Protocol to clearly define its expectations with respect to activities proposed by the Crown or Third Parties within and/or adjacent to its Aboriginal and Treaty Lands and to clearly define the obligations of the Crown and Third Parties.

1.0 PURPOSE OF THIS PROTOCOL

1.1 This document sets out GFN's expectations with respect to consultation and accommodation by the Crown, industry and other Third Parties that propose to undertake activities by the Crown, industry and other Third Parties that propose to undertake activities and/or make decisions that may infringe upon its Aboriginal Title and Rights. The Protocol is designed to provide a systematic approach to reconciling GFN's pre-existing sovereignty with the assumed sovereignty of the Crown in relation to land and resources.

2.0 DEFINITIONS

2.1 In this document:

- (a) "Activity" includes, but is not limited to any legislation, regulation, policy, procedure, plan, tenure, grant, license, permit, restriction, amendment, approval, authorization,

transfer, transaction, operation or other activity, which may have an impact on GFN's Aboriginal Title and other Aboriginal Rights in its Aboriginal and Treaty Lands .

(b) "First Nation" refers to the GFN, whose members are Aboriginal people, who are recognized as a band pursuant to the *Indian Act*, R.S. 1985, c.I-5 and who are represented by their duly elected Chief and Council.

(c) "Aboriginal Rights" means practices, customs and traditions that are integral to the distinctive culture of the GFN members, and which have their origins pre-contact as well as from section 35 of the *Constitution Act*, 1982, which recognizes and affirms existing Aboriginal and Treaty Rights of the Aboriginal peoples of Canada.

(d) "Aboriginal Title" means that the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of Aboriginal practices, customs and traditions integral to its distinctive culture. Aboriginal

Title flows from the use and occupation by the First Nation of Aboriginal and Treaty Lands prior to Ontario's assertion of sovereignty over the Aboriginal and Treaty Lands, and Ginoogaming First Nation Law. It is a communally held proprietary interest in the land with an "undeniable economic component." Aboriginal Title is based on the First Nation's connection to the land, and encompasses:

- (i) The right to land itself and to choose the uses to which it is put;
- (ii) A right to the resources of the land;
- (iii) The right to self-governance and to exercise GFN First Nation customary law-making authority;
- (iv) The right to benefit economically from its Aboriginal and Treaty Lands ;
- (v) An inherent conservation limit; lands held pursuant to Aboriginal Title cannot be used in a manner that is irreconcilable with the nature of the First Nation's attachment to those lands. Thus, Aboriginal Title does not encompass uses that would make it impossible for the future generations of the First Nation's members to sustain themselves from the land;
- (vi) The right to protect and provide stewardship throughout its Aboriginal and Treaty Lands;
- (vii) The right to pursue commercial opportunities within its Aboriginal and Treaty Lands;
- (viii) The right to harvest the resources of its Aboriginal and Treaty Lands for domestic purposes and for trade, barter and sale; and,
- (ix) An inescapable economic component such that fair compensation will ordinarily be required when Aboriginal Title is infringed.

(e) "Crown" includes the Crown in right of Canada or the Crown in right of Ontario, their cabinets, committees, ministries, crown corporations, local governments (municipalities and regional districts), agencies, employees and contracted agents, representatives and delegates for the purpose of the duties of consultation and accommodation;

(f) "Protocol" means the Ginoogaming First Nation Consultation and Accommodation Protocol; and,

(g) "Third Party" includes but is not limited to, any individual, researcher, corporation,

firm, municipality, regional district, industry, society or other non-governmental organization carrying on Activities in GFN Aboriginal and Treaty Lands.

3.0 SCOPE OF THIS DOCUMENT

3.1 This Protocol applies to all Activities of the Crown and Third Parties as defined in Section 2; Definitions.

3.2 This Protocol is subject to periodic review by GFN and is in effect until further notice.

4.0 INTERPRETATION PRINCIPLES

4.1 The following conditions apply to the use of this Protocol:

- (a) This Protocol sets out the First Nation's minimum requirements for consultation and accommodation;
- (b) Nothing in the Protocol shall limit or take away from the Crown or Third Party's consultation and accommodation obligations pursuant to the Canadian Constitution, statute or common law;
- (c) This Protocol does not acknowledge the scope or content of any jurisdiction of the Crown;
- (d) Nothing in these Protocol shall constitute GFN's endorsement of current or repealed legislation, regulations, policies, procedures or practices of Crown or the plans, policies, procedures or practices of Third Parties in GFN Aboriginal and Treaty Lands ;
 - (i) Which GFN had no meaningful role in creating or administering; and,
 - (ii) Which do not reflect an honorable reconciliation of pre-existing GFN jurisdiction with the Crown's asserted jurisdiction;
- (e) Nothing in this Protocol shall be construed so as to prejudice any legal or other positions taken, or that may be taken by GFN in any court, tribunal or administrative proceedings, process, treaty negotiation or otherwise;
- (f) Nothing in this Protocol shall be interpreted in a manner, which extinguishes or denies the GFN's Aboriginal Title or Rights, within the meaning of sections 25 and 35 of the *Constitution Act*, 1982, regardless of whether such titles, rights or privileges are recognized, established or defined at the time of execution or implementation of this Protocol;
- (g) Nothing in this Protocol shall be construed so as to justify any infringement of GFN's Title or Rights or to prevent or to limit the exercise of such Title or Rights;
- (h) Nothing in this Protocol shall be construed as conferring consent or providing approval of any past, existing, new or ongoing Activities within the Aboriginal and Treaty Lands ; and,
- (i) This Protocol is "without prejudice" to Aboriginal Title and Rights, and to any future settlement of the land question that reconciles pre-existing First Nation sovereignty with the assumed sovereignty of the Crown.

5.0 CONSULTATION AND ACCOMMODATION

5.1 Underlying Principles of Meaningful Consultation.

Meaningful engagement is realized when GFN has adequate knowledge and resources to participate fully in consultation processes. Proponents should not rely on government consultation policy and procedures alone to guide engagement with GFN. Rather, GFN requests Proponents adopt this Consultation and Accommodation Protocol in the interest of avoiding unnecessary delays in project development and uncertainty resulting from instances of inadequate Crown consultation.

In some cases, GFN may undertake environmental, socio-economic and cumulative impact assessments to determine potential impacts to GFN Aboriginal and Treaty Rights. This may require a Traditional Land Use Study and/or evaluations of existing oral histories, land management plans, current industrial and traditional land use and occupation maps, archaeological and bio-physical studies. GFN may pursue funding from the Crown and Proponent to conduct and respond to studies.

Specifically, GFN requests that the Proponent engage with GFN prior to submitting applications or requests to the Crown for the following activities:

- (a) Resource extraction activities, including, but not limited to, conventional and non-conventional oil and gas exploration and related development activity, mining, forestry, fishing guide-outfitting, hydro-electric and alternative energy development, etc.;
- (b) Policy and/or legislative changes;
- (c) Changes in land status, tenure dispositions, transfers and replacements;
- (d) Construction, expansion, amendment or decommissioning of facilities and associated infrastructure;
- (e) License, permit, lease or change in tenure or status for the collection, diversion or withdrawal of fresh surface water; and,
- (f) Amendments to Crown decisions.

The following principles will inform the consultation and accommodation process regarding Lands;

- (a) The Crown is required to consult with and accommodate GFN with respect to proposed Activities in GFN Aboriginal and Treaty Lands, prior to any Crown decision to authorize or permit such Activities and to follow this Protocol in doing so. The duty to consult and accommodate includes the following core principles.
 - (i) The duty to consult stems from the honor of the Crown;
 - (ii) The duty arises if Crown decisions may potentially infringe GFN Title and Rights;
 - (iii) If there is the potential that Aboriginal Title and Rights are infringed, accommodation is required;
 - (iv) The Crown cannot delegate its duty to Third Parties, although it may delegate some administrative aspects of that duty;
 - (v) Consultation is an ongoing obligation of the Crown; and,
 - (vi) First Nations can only engage in a consultation process where there is a meaningful opportunity with available resources.
- (b) At the discretion of GFN and the Crown, Third Parties may be required to participate

in consultation at the operational level and to accommodate GFN but decision-making/approval authority remains at the government-to-government level;

(c) The process of consulting with and accommodating GFN must be separate from other consultations by the Crown and Third Parties with interest groups, and cannot be displaced with any regional First Nation consultation or public consultation.

(d) The Crown and Third Parties must come to the table with willingness and mandate to be flexible.

(e) GFN must have an opportunity to express its concerns, and proposed alternatives in relation to a proposed activity, and these concerns and proposed alternatives must be addressed and accommodated by the Crown and Third Parties as set out in Section 12, below.

(f) Negotiations are required and must be in good faith, and all alternative options must be on the table including a “no-activity” option if this is the approach to accommodating Aboriginal Title and Rights required by GFN.

(g) Consultation must occur at all stages in relation to Activities that potentially infringe on Aboriginal Title or Rights. GFN must be notified, consulted and involved in decision-making in all stages relating to Activities, including but not limited to;

- (vii) Management of the land and resources;
- (viii) Strategic, long, medium and short term planning;
- (ix) Assessment of environmental impacts of prior or proposed development;
- (x) Environmental protection;
- (xi) Conservation practices;
- (xii) Land disposition (sale of Crown lands);
- (xiii) New municipal designations (lands available for Residential building);
- (xiv) Restoration of the land and resources;
- (xv) Scientific and technical decision-making;
- (xvi) Federal and provincial legal, policy, approval, regulation and permitting changes;
- (xvii) Engagement of First Nation members;
- (xviii) Safety concerns;
- (xix) Access issues;
- (xx) Cultural and historical preservation;
- (xxi) Restoration of traditional harvest areas;
- (xxii) Recovery of sacred areas;
- (xxiii) Protected areas and rules of access;
- (xxiv) Learning of traditional uses and history of the land;
- (xxv) Proposed economic developments;
- (xxvi) Contemplated activity that will negatively impact Aboriginal and Treaty Rights;
- (xxvii) Operational plans/processes; approvals which may lead to the issuance of a permit, license, lease or change in land status;
- (xxviii) Monitoring; and,
- (xxix) Any amendments to such decisions.

- (h) Ongoing and past infringement of GFN Title and Rights require current consultation and accommodation since it is not in keeping with the duty and honor of the Crown to rely in its decisions (past and present) on unfulfilled duties of consultation and accommodation. Moreover, where current decisions rely on past unfulfilled duties of the Crown which is carried out would perpetuate such unfulfilled duties, the Crown must consult and accommodate in respect of all the original decisions relating to any such activities;
- (i) Decisions about activities shall be made on a government-to-government basis with the formal involvement of GFN. The Crown shall not make decisions about activities, authorize or permit activities nor undertake any activities without the full participation and approval of GFN with GFN to be involved in all legal, policy and strategic level decisions;
- (j) Legal, policy and strategic level decisions, including, but not limited to, decisions regarding permits, licenses, approvals and land use planning will be made first on a government-to-government basis and will be binding upon Third Parties;
- (k) All development projects or decisions with potential impact on GFN must be made carefully and in the best interests of GFN's long-term well-being;
- (l) GFN expects to play a meaningful role in any Environmental Assessment (EA) or regulatory approval processes. This will include, if requested by GFN, a role in establishing the scope and terms of reference for such EAs, participating and conducting EAs and to appoint a member(s) to any committees/bodies established for the purposes of consultation or coordination. GFN also expects to be able to review and comment on environmental impact statements, screenings, and studies or like reports. This will include, if requested by GFN hiring professional expertise for technical review, given the volume and complexity of Federal and Provincial Environmental Assessments. Note that EAs and any role that GFN might take in regard to these do not, on their own, satisfy the Crown's Duty to Consult;
- (m) It takes time to make good decisions that consider all relevant matters, and it takes time to build and maintain good relations, and sufficient time must be provided for consultation, and if applicable, accommodation of GFN by the Crown and Proponents;
- (n) All parties to the consultation and accommodation process are expected to treat each other with respect and act in good faith, in an honest, open and transparent manner;
- (o) The Crown, and if applicable Proponents must always consult with GFN with the intent to accommodate, by taking all feasible steps, GFN's legitimate concerns about the impact of the development project or decision;
- (p) GFN must be consulted by the Crown and if applicable, Proponents from the earliest stages of any proposed development project or decision which may have an impact on GFN. In this way, strategic and long-term planning is facilitated and GFN's input can be taken into account in the consideration of relevant alternatives to the project or decision, its design, and assessment of its environmental and socioeconomic effects. This should be a demonstrable benefit to the planning exercise, and greatly reduce the potential for conflict at later stages;
- (q) While the Crown may delegate procedural aspects of the consultation and accommodation process to the Proponent, it is expected, at a minimum, to remain engaged and to maintain an oversight role over the entire process, and will continue to

fulfill its responsibilities to GFN;

(r) The Crown and Proponent are expected to fund, and/or ensure funding is provided, for all reasonable costs of GFN to participate in a meaningful and informed way in the consultation and accommodation process, for any development project or decision which may have an impact on GFN;

(s) The Crown must not dispose of, or grant to any party any interest in land which would have an impact on GFN (either in its Aboriginal and Treaty Lands, or which would impact its Treaty Rights) without the prior and informed consent of GFN;

(t) GFN is a respected and principled steward of the biophysical environment. GFN's input and perspective in any consultation and accommodation process will likely include the use of traditional ecological and cultural knowledge, alongside knowledge from Western scientific and technical sources; and,

(u) GFN recognizes the need to identify and develop new and appropriate ways through which aboriginal and non-aboriginal parties may create sustainable development opportunities from the resources that exist within GFN's Aboriginal and Treaty Lands.

5.1.1 Accommodation and Mitigation

As GFN and the Crown work through the Consultation Process, GFN may identify concerns related to the infringement of Aboriginal and Treaty Rights by proposed activities or decisions. GFN is committed to working with the Crown and the Proponent to minimize these impacts and reconcile competing interests on the land.

The Crown has a duty to reasonably accommodate GFN in the attempt to reconcile industrial development with GFN rights and interests. In return, GFN is committed to working toward reasonable, appropriate and workable accommodation of our rights and interests and mitigation of the ill effects of development on the land and our ability to exercise our treaty rights in GFN Aboriginal and Treaty Lands.

Through meaningful dialogue with both the Crown and the Proponent, GFN is committed to negotiating, in a timely manner, a reasonable approach to development that builds capacity in the community, is sustainable for local and traditional economies, minimizes adverse impacts to the land, air and waters and ensures the ability to practice Aboriginal and Treaty Rights and interests in GFN Aboriginal and Treaty Lands for generations to come.

Before a project or development is approved the Crown and the Proponent should discuss the economic development issues associated with the project to ensure long-term participation throughout the lifecycle of industrial development including planning and assessment, project construction, operation and maintenance, as well as decommissioning and/or deactivating and reclamation phases.

In accordance with the Crown's duty to consult, Third party interests must not be granted and significant developments within GFN Aboriginal and Treaty Lands must not proceed without adequate consultation with GFN and reasonable accommodation of GFN rights and interests.

The Proponent can assist the Crown and facilitate consultation through early and meaningful engagement with Ginoogaming First Nation.

Accommodation and mitigation measures must include, but are not limited to:

- (a) Modifying or cancelling a proposed activity or decision to avoid or minimize impacts or infringements of GFN Treaty and Aboriginal Rights and interests;
- (b) Undertaking conservation measures and restoration and reclamation initiatives;
- (c) Limiting the pace and scale of resource extraction activities;
- (d) Engaging in a detailed assessment of the potential impacts of the proposed activity or decision;
- (e) Conducting joint land use planning, or reconciliation of Crown, Industry and GFN land use plans;
- (f) Participation in future joint decision-making;
- (g) Revenue sharing;
- (h) Compensation for past, present and future infringements and negative impacts;
- (i) Provision of business development opportunities, including employment and contracting agreements for GFN members;
- (j) Provision of training, education and scholarships to GFN members; and,
- (k) Community economic agreements, partnerships and/or joint ventures.

5.2 TERMS OF REFERENCE

5.3 The Crown must initiate consultation at the earliest stage in the decision-making process and conclude mutually agreed-to terms of reference for consultations and accommodation negotiations with GFN:

- (a) Before a decision is made which may infringe on Aboriginal Title or Rights.
- (b) Without GFN first having to raise questions about a proposed activity in order to initiate consultation.

5.4 Agreed-to terms of reference include, at a minimum:

- (a) A schedule for consultation and accommodation negotiations that:
 - (i) Prioritizes concluding negotiations about strategic level decisions between the Crown and GFN before operational decisions are made;
 - (ii) Includes time and resources to conduct archaeological and traditional use studies, land use planning and community consultations where requested by GFN;
 - (iii) Accommodates timeframes proposed by GFN in recognition of present First Nation limitations in capacity and resources; and,
 - (iv) Reflects the steps set out in Section 9 below;
- (b) The names and positions of the Crown's authorized representatives and Third Parties who have the mandate/authority to participate in negotiations and make the decision(s) in question.

(c) A framework and work plan for a strength of claim analysis and dialogue by GFN and the Crown. The fulfillment of the duty to consult requires a clear and focused first step of an assessment of the strength of the claim of GFN's claims to rights and potential impacts on those rights. The result of this first step will inform the level and degree of consultation required. The analysis will, at a minimum include:

- (i) Determining the strength of claim of the rights at issue;
- (ii) Outlining the nature and significance of the rights; and,
- (iii) Determining the potential degree of severity of the impact on the rights.

The assessment of the strength of a claim at the very least requires the Crown to sit down with GFN and discuss openly the First Nation's claim. This is an iterative process that must take place with open dialogue and sharing of information so that the level of the duty to consult can be determined. This requires the Crown to make the duty to consult a first priority when contemplating a new development or project on GFN Aboriginal and Treaty Lands. The adequacy of the first step assists in determining the depth of consultation and accommodation.

- (d) The scope of the consultation and accommodation negotiation;
- (e) The timing and nature of required engagement of Third Parties;
- (f) Resourcing for the process consistent with Section 8 – Funding and Capacity below;
- (g) Requirements for the Crown and Third Parties to provide complete information about a proposed activity necessary to understand its potential impacts on GFN Aboriginal Title or Rights, without cost to GFN, and in a timely, manageable and understandable format, including the information package described under Section 12, Step 1 – Initial Information about activity, below; and,
- (h) Dispute resolution mechanisms consistent with Section 12, Step 6 – Dispute Resolution, below.

5.5 Anticipated Outcomes of Consultation

5.6 The Crown and Third Parties must accommodate GFN in relation to any activity that may infringe on Aboriginal Title, Aboriginal Rights or interests of GFN by measures agreed to by GFN which may include but are not limited to:

- (a) Modifying or cancelling a proposed activity to avoid or minimize the infringement of GFN's Aboriginal Title and/or Rights;
- (b) Conducting joint land use planning or reconciliation of Crown and Third Party land use plans where available;
- (c) Co-management involving at least equally shared decision-making authority;
- (d) Participation in future joint decision-making;
- (e) Undertaking up-front conservation measures and where necessary, restoration;
- (f) Revenue sharing;
- (g) Resource allocations to Third Parties;
- (h) Compensating GFN for the infringement;
- (i) Providing economic development opportunities or other economic measures to GFN's

- measures;
- (j) Limiting resource harvesting and extraction;
 - (k) Providing training;
 - (l) Agreements or partnerships with industry or Proponents.
 - (m) Contracts for GFN individuals and businesses;
 - (n) Participation in future joint decision-making;
 - (o) Joint ventures;
 - (p) Compensation for past infringements; and,
 - (q) Other arrangements.

5.7 Reports on the outcomes of consultation/negotiations, decisions made, and rationales for any decisions are prepared with the participation of GFN and validated by GFN.

5.8 Interim and final agreements are to be set out in writing.

6.0 NO LIMITATIONS ON DEFENDING TITLE AND RIGHTS

6.1 The Crown or Third Parties must not require GFN to accept limitations on its right to challenge activities or pursue dispute resolution or legal action as a condition of any of the potential measures for accommodation outlined above.

6.2 The Crown and Third Parties must provide GFN with a reasonable opportunity to challenge any decision in relation to an activity, including holding Activities in abeyance while dispute resolution proceeds as set out in Section 12, Step 6, below, and/or during legal proceedings.

7.0 ADDITIONAL OBLIGATIONS OF PARTIES IN CONSULTATION

7.1 Crown Obligations.

Fundamentally, the Crown has a fiduciary duty to Aboriginal peoples and that fiduciary duty applies with respect to the Honor of the Crown to consult and accommodate. It is the responsibility of the Crown to operate in good faith and uphold the Honor of the Crown, and fulfill its duties towards GFN with respect to Treaty and Aboriginal Rights.

Any potential infringement of GFN's rights raises obligations on the part of the Crown to consult with GFN and to find means to accommodate proposed infringements. If proposed infringements cannot be justified, the Crown is obligated not to proceed with approval of the activity. The Crown must:

- (a) Work with GFN on a government-to-government basis to identify potential activities that may give rise to a duty to consult GFN and accommodate its interests and concerns;
- (b) Recognize its legal obligations to GFN, and the obligation to uphold the honor of the Crown and conduct itself with utmost good faith with respect to GFN;
- (c) Not pursue the extinguishments of Aboriginal Title or Rights as a condition of its ongoing relationship with GFN;
- (d) Not attempt to delegate its obligations and responsibilities in relation to consultation

and accommodation to Third Parties;

(e) Provide adequate resourcing to GFN so that consultation and accommodation negotiations can occur to address potential impacts on Aboriginal Title and Rights held by the First Nation through the strength of claim analysis;

(f) Actively participating in and abiding by the terms of, the consultation and accommodation process set out in this Protocol;

(g) Acting with honor, integrity, fairness and in good faith when dealing with GFN;

(h) Providing full and ongoing disclosure of information with respect to the project or decision of interest;

(i) Consulting with an intention to accommodate GFN's concerns, when possible at an early stage in the planning, by attempting to mitigate impacts or infringements on GFN's rights, and limit damage done to the biophysical environment in GFN's Aboriginal and Treaty Lands ;

(j) Undertaking and disclosing to GFN an assessment of the extent of its Duty to Consult;

(k) Providing early and ongoing opportunities for GFN to voice its concerns, comment on key outputs of any decision-making and planning process, and have a meaningful and influential role in the decision-making and planning process;

(l) Adjusting timelines of development projects or decisions without causing undue hardship to the Crown or any Proponent, until such time as GFN has fully participated in, considered and identified its concerns, and had these concerns accommodated with respect to such projects or decisions by either the Crown or the Proponent as applicable;

(m) Ensuring the consultation and accommodation process is adequately and securely funded, and providing funding to GFN for this purpose where applicable; and,

(n) Ensuring the consultation and accommodation process is coordinated amongst all levels of government.

7.2 Third Party Obligations.

Proponents may have been delegated procedural aspects of consultation by the Crown and have a moral imperative and business interest in engaging GFN in meaningful consultation about any development project or decision they are pursuing which may have an impact on GFN's rights or Aboriginal and Treaty Lands . Proponents cannot assume that the Crown has discharged its duty to consult with GFN. It is in the best interest of Proponents to engage with GFN to demonstrate a commitment to relationship-building, open communication and good business practice. GFN's consent for such projects, if provided, is an important component of project feasibility and sends an important message to investors and/or stakeholders. Proponents are therefore urged to abide by the following in going forward with a meaningful consultation and accommodation process with GFN. Third Parties must:

(a) Recognize that GFN is a level of government in Canada;

(b) Recognize that in the absence of proper consultation with and accommodation of GFN regarding their activities, Third Parties may find themselves without the right to operate in GFN Aboriginal and Treaty Lands

- (c) Where requested by GFN, engage in cooperative planning prior to submitting plans to GFN and the Crown for approval;
- (d) Provide adequate resourcing to GFN so that information on the Third Party's activity can be shared with First Nation members so that community input on potential impacts on Aboriginal Title and Rights held by the First Nation can be considered;
- (e) Actively participating in, and abiding by the terms of, the consultation and accommodation process set out in the Protocol;
- (f) Acting in good faith when dealing with GFN;
- (g) Providing full and ongoing disclosure of information with respect to the project or decision of interest, and potential impacts;
- (h) Consulting with an objective to accommodate GFN's concerns, by mitigating or compensating for impacts or infringements on GFN's rights, and limit damage done to the biophysical environment in GFN's Aboriginal and Treaty Lands ;
- (i) Adjusting timelines of the development project or decision to allow GFN adequate time to fully participate in, consider and identify its concerns, and respond to the consultation and accommodation process;
- (j) Seeking out opportunities to increase GFN's comfort with or trust in the project, through means such as community environmental monitoring, community liaison or oversight committees or staff, a role in the Proponent's project planning and decision-making, etc.;
- (k) Seeking out opportunities to increase GFN's capacity and benefits arising from the project such as economic and human development opportunities, support for community strategic or economic development planning or community-based land-use planning, etc.;
- and,
- (l) Entering into and actively participating in dispute resolution processes, if necessary, to reach a mutually acceptable agreement to accommodate GFN's concerns.

7.3 Ginoogaming First Nation's Responsibilities.

GFN will fulfill the following responsibilities in upholding the integrity of the Protocol, as an expression of its ultimate responsibility to protect its rights and Traditional Territory and further the sustainability of its people. Contingent on funding and capacity as set out in Section 8 – Funding and Capacity below, GFN must:

- (a) Actively participating in and abiding by the terms of, the consultation and accommodation process set out in the Protocol, including those terms agreed to in project-specific consultation workplans;
- (b) Provide the Crown and Third Parties with the names of GFN's representatives to whom to address the consultation;
- (c) Work with Canada and Ontario on a government-to-government basis;
- (d) Acting with honor, integrity and good faith to implement this Protocol and when dealing with the Crown and Proponents;
- (e) Take reasonable steps to increase GFN's capacity to implement this Protocol and improve them where necessary;

- (f) Provide timely and detailed responses to consultations made pursuant to this Protocol according to an agreed to terms of reference;
- (g) Manage funds received for participation in consultation and accommodation in an accountable and transparent manner;
- (h) Sharing information provided by the Crown and Proponents about the project or decision of interest with its members, as applicable;
- (i) Where applicable, assistance and/or advice in gathering the views and perspectives of its members on the development of a project or decision of interest;
- (j) Early and active participation in dispute resolution processes, if necessary, to reach a mutually acceptable agreement to accommodate GFN's concerns;
- (k) Suggesting ways that the Crown or Proponent could adjust timelines to allow GFN adequate time to fully participate in, consider and identify its concerns and respond to the consultation and accommodation process;
- (l) Suggesting opportunities to increase GFN's comfort or trust with the project; and,
- (m) Suggesting opportunities to increase GFN's capacity and benefits arising from the project.

7.4 Trigger for Consultation

The consultation and accommodation process set out in this Protocol is triggered when the Crown is contemplating any development project or decision, or is aware of any proposed development project by Proponents that may have an impact on GFN.

Unless GFN otherwise decides, if any development project or decision is underway before consultation with GFN is completed and such consultation would have been triggered, the Crown and where applicable the Proponent must undertake consultation and if applicable, accommodation of GFN. GFN expects the Crown to suspend such projects or decisions where to do so would not cause undue hardship to the Crown or any relevant Proponent, until consultations are complete.

7.5 Content of Notice about Project or Decision

- (a) A Proponent or the Crown must give notice early in the project's planning cycle, as soon as a Proponent is considering developing a project in, or that could affect GFN Aboriginal and Treaty Lands ;
- (b) The notice should be a letter that includes:
 - (i) Key Proponent/Crown contact names and roles, in order of seniority;
 - (ii) A statement of the nature of the decision or project being considered;
 - (iii) A brief synopsis of the details of the matter to be decided, or project proposed including a map;
 - (iv) A summary of readily identifiable potential impacts of the decision or project;
 - (v) A description of any process, activities, timeline or limitations associated with the decision or the project;
 - (vi) Contact information for the designated representative of the Crown and Proponent;

- (vii) An indication of when and how GFN will receive a comprehensive information package about the decision or project being considered;
- (viii) A list of reports and studies that the Proponent will prepare in support of the project; and,
- (ix) A request for a formal meeting regarding the Proponent's plans and interests in the proposed project.

8.0 FUNDING AND CAPACITY

8.1 The Crown is responsible for providing an immediate, on-going and agreed upon share of resource revenue sufficient to enable GFN to meaningfully participate in land and resource decision-making as set out in this specific Protocol, including the following costs associated with both activity-specific consultation and accommodation negotiations, and the development and implementation of new government-to-government decision-making institutions and structures:

- (a) Time and expenses of staff and other experts;
- (b) Travel and honoraria costs for elders and community resource people;
- (c) Costs for necessary GFN planning, assessments, studies and research;
- (d) Training for GFN members; and,
- (e) Resources so that GFN can provide information to its members via mail outs.

8.2 Third Parties will normally be required to contribute to GFN capacity and costs of a meaningful consultation process as set out in the terms of reference for particular consultation and accommodation negotiations.

8.3 Sufficient resourcing is necessary so that adequate analysis of GFN strength of claim can occur pursuant to Paragraph 5.4 (c) above.

9.0 PROCEDURES FOR TYPES OF ACTIVITIES

9.1 In addition to underlying principles and party-specific principles above, GFN's procedures for consultation and accommodation by Crown and Third Parties with regard to specific types of activities are as follows:

- (a) GFN will provide the Crown with the names and contact addresses for GFN officials designated to deal with consultation and accommodation on legal and policy changes, and strategic decisions made;
- (b) The Crown will fully inform GFN about proposed legal or policy changes, and proposed strategic decision-making and planning processes that may impact GFN's Aboriginal Title and Rights;
- (c) Representatives of GFN will provide the Crown with a description of their strategic decision-making and planning processes, and related laws, policies and principles;
- (d) GFN and the Crown will meet to develop a mutually agreed-to process for:

- (i) Reconciling their respective land use decision-making, planning and approval processes; and,
- (ii) Future collaboration with respect to planning and land-use decision-making;
- (e) These understandings will be in writing and will contain provisions for dispute resolution as per Section 12, Step 6 below;
- (f) This process will be conducted in a government-to-government manner;
- (g) The parties will:
 - (i) Evaluate the process annually through a review process that accommodates GFN's proposals with respect to timelines, funding and process; and,
 - (ii) Implement the outcomes of the review process.

10.0 EXISTING ACTIVITIES AFFECTING GINOOGAMING FIRST NATION TITLE AND RIGHTS

10.1 The Crown must work with GFN to complete a systematic review of past decisions about existing activities affecting GFN Aboriginal and Treaty Lands that were made without honorable consultation and accommodation of GFN.

10.2 Crown and Third Parties will fully inform GFN about existing activities affecting its Aboriginal and Treaty Lands, including an information package as detailed in Section 12, Step 1 below.

10.3 GFN and the Crown will meet to develop a mutually agreed-to approach for:

- (a) GFN to consult with its members on existing Activities; and,
- (b) for the Crown to meet its obligations to accommodate GFN's Aboriginal Title and Rights in relation to existing activities, by steps including but not limited to, modification of existing strategic and operational plans, or modification or cancellation of Activities that may have a negative effect on GFN Aboriginal Title and Rights on Aboriginal and Treaty Lands .

11.0 ADAPTIVE MANAGEMENT AND RESPONSES TO NEW INFORMATION

11.1 New activities must be consistent with strategic or operations plan or accommodation measures previously agreed to with GFN pursuant to the process described above.

11.2 However, where new scientific cultural or technical information related to GFN Aboriginal and Treaty Lands has become available or come to the knowledge of GFN, Crown or Third Parties, consistency with previously agreed-to plans or accommodation measures may no longer be sufficient to justify activities which potentially impact on GFN Aboriginal Title and Rights.

11.3 Crown or Third Parties must share new scientific, cultural or technical information related to GFN Aboriginal and Treaty Lands with GFN.

11.4 Accommodation measures must include GFN’s involvement in designing and implementing compliance and effectiveness monitoring of Activities. Monitoring must demonstrate that activities meet or exceed agreed-to accommodation measures, and GFN’s expectations regarding the protection and inclusion of their resource values.

11.5 Accommodation measures and agreements are periodically reviewed and updated to integrate the results of monitoring and new technical, indigenous and scientific information that becomes available.

12.0 SPECIFIC CONSULTATION AND ACCOMMODATION STEPS

12.1 Step 1 – Initial Information about Activity. Initially, the Crown and/or Proponent will notify GFN of intentions and provide with detailed information regarding the proposed activity or decision. Information provided should be accurate in presenting the size, scope and magnitude of the activity or decision and indicate reasonable alternatives to the proposed activities. The Crown and the Proponent should also indicate which regulatory bodies will review the proposed activities.

12.2 The Crown or Third Party planning to undertake an activity will provide GFN with an information package at the earliest possible stage, containing sufficient information for GFN to fully consider the Proposed activity (the “Information Package”). GFN requests the information is provided in a form that is understandable to GFN and not excessively technical. The Crown and/or Proponent should be prepared to assist GFN in understanding technical documents, either through capacity sharing or providing capacity funding to hire technical expertise. The Information Package will include:

- (a) The name and telephone number of the appropriate Crown or Third Party contact;
- (b) Clearly drawn or reproduced or referenced maps of the area in question;
- (c) All inventories, assessments and other background information upon which proposals are based, including any archaeological, ethnographic, traditional use, environmental or other reports, maps and map data or other information;
- (d) A copy of any assessments and inventories in the hands of Third Parties or the Crown (eg. ecological or cultural assessments relating to streams terrain, archaeology), and the “pre-consultation assessments” recommended in any provincial guidelines or any aboriginal interest assessments required by the Crown;
- (e) A complete description of the proposed activity including a description of the land and resources involved and a description of the current and anticipated value of the proposed activity;
- (f) The timeframe for the commencement and completion of the activity;
- (g) The details of any anticipated impacts on the land itself and an initial assessment of any anticipated impacts to Aboriginal Title or Rights; and,
- (h) Information on any anticipated economic benefits for GFN;
- (i) Other information as may be requested by GFN to provide additional information to

GFN staff or advisors to allow GFN to understand the process and substance of the proposed activity or decision. Additional information may include, but is not limited to:

- (i) A summary of known traditional use information and traditional ecological knowledge relevant to the proposed project area;
- (ii) A preliminary environmental risk assessment of proposed activities;
- (iii) Relevant ethnographic, archaeological, hydrological, ecological and bio-physical reports, studies and assessments available to be reviewed in relation to the proposed project; and,
- (iv) Resource conservation and reclamation plans.

(j) If there are any activities that cause potential transboundary effects that may potentially infringe and impact GFN Aboriginal Title and Rights on the Aboriginal and Treaty Lands from lands adjacent to the Aboriginal and Treaty Lands, GFN reserves the right to invoke the Consultation and Accommodation Protocol on that activity. [Although not necessarily a legal principle, there should be some consideration of transboundary impacts]

12.3 Step 2 – Initial Ginoogaming First Nation Review. Once information-sharing has begun, GFN will assess proposed activities and/or decisions, using culturally-based criteria, to determine whether activities have the potential to impact GFN rights and interests, particularly with respect to cultural, historical and treaty connections to GFN Aboriginal and Treaty Lands. Regardless of magnitude of proposed activities, meaningful consultation cannot occur if the Crown and/or Proponent unilaterally exclude, deny or minimize the potential for a proposed activity or decision to impact GFN rights in interests in GFN Aboriginal and Treaty Lands. In addition to the need for a historically grounded and culturally based review of proposed activities, GFN is concerned that the cumulative impacts of industrial development will render Treaty Rights meaningless as access to land and health of GFN Aboriginal and Treaty Lands is diminished through progressive industrial development. Meaningful consultation requires that GFN is provided an opportunity to determine the potential of all industrial activity within GFN Aboriginal and Treaty Lands that impact GFN rights and interests.

12.4 GFN will review the Information Package and may request further information relating to the proposed activity such as background information referenced by the agency, site or area visits or further studies or assessments. Upon receipt of the information and details regarding development within its Aboriginal and Treaty Lands, and after an initial community review, GFN will provide a timeframe for response and indication of the financial/human capacity required to accommodate them, along with an explanation for the timeframe and funding required.

12.5 Step 3 – Strength of Claim Analysis

A strength of claim analysis by GFN and the Crown must be undertaken as described in paragraph 5.4(c).

12.6 Step 4 – Initial Ginoogaming First Nation Response

12.7 Subject to financial considerations, GFN will provide a written response detailing any concerns and objections regarding the proposed activity, and subject to capacity, recommendations as to how those concerns or objections may be met or accommodated. Where there are concerns or objections that GFN believes may be resolved with further review, GFN will provide the Crown or Third Party with an estimate of the time and cost of conducting the further review. If GFN is unable to respond to the referral immediately it will notify the relevant Crown or Third Party of what alternative timeframe is appropriate.

12.8 Step 5 – Crown/Third Party Reconsideration

12.9 Upon receipt of a response from GFN, the Crown or Third Party will reconsider the activity in a manner consistent with this Protocol. If the Crown or Third Party cannot fully implement the accommodation requested by GFN it will initiate a meeting with the Crown or Third Party to address those concerns or objectives.

12.10 Step 6 – Protocol Relationship with Neighboring First Nations

12.11 GFN reserves the right to engage in establishing and entering into Protocol Relationships with neighboring First Nations.

12.12 The purpose of the Protocol relationship is to:

- (a) Establish a mutually beneficial, co-operative and productive relationship based upon the Aboriginal Rights and Treaty Rights of the respective First Nation with respect to the negotiation of agreements with the Crown and Third Parties;
- (b) Provide a process through which the First Nations can work cooperatively to negotiate agreements with the Crown and Third Parties which are fair and equitable agreements to each of the First Nations; and,
- (c) Ensure that the individual primary responsibility of each First Nation to represent its members and to protect the collective and individual rights of its members is respected and not compromised in any manner by the Protocol Relationship.

12.13 Step 7 – Consultation and Accommodation Negotiations

12.14 GFN and the relevant Crown or Third Party will meet and seek to reach agreement with respect to the activity. The result of the meeting will be either:

- (a) An agreement to proceed with the activity as planned;
- (b) An agreement to proceed with the activity with conditions and accommodations as agreed by the parties;
- (c) An agreement to abandon or postpone the activity, with or without an agreement to conduct a further review; or,

(d) No agreement

12.15 The result of the meeting will be put in writing and a copy of the document may be shared with GFN's members at a community meeting for its review and approval.

12.16 Step 8 – Dispute Resolution

12.17 Where the result of a consultation meeting is “no agreement,” the parties may agree to enter into a process of dispute resolution. GFN must have equal decision-making power within this process.

12.18 The principles that will inform the dispute resolution process are as follows:

- (a) The parties will meet to discuss the dispute in a constructive manner, and work collaboratively to achieve consensus on the matter;
- (b) If agreement cannot be reached, any related activities will be held in abeyance, and the dispute will be referred to GFN's council, senior Crown officials and the senior management of a Third Party to attempt to reach agreement on the matter. Crown and Third Party representatives must have authority to make decisions on matters being discussed. The parties may choose to involve a mutually acceptable Third party in a mediation role to assist in reaching agreement;
- (c) If an agreement between GFN and the Crown or Third Parties cannot be reached, then a mutually acceptable Third party arbitrator may be asked to recommend a final decision to the parties;
- (d) Matters that are set aside pursuant to sub-paragraph (b) above will not reduce or fetter the obligations of the Parties to continue to deliberate in good faith and strive to achieve consensus decisions on accommodations related to other Activities;
- (e) In the case of dispute over scientific or technical matters, the parties may each appoint an equal number of qualified members to a scientific panel which will recommend a decision on the matter; and,
- (f) The costs of dispute resolution will be borne by the Crown and/or Third Parties.

12.19 Step 9 – Implementation and Monitoring. Meaningful consultation and accommodation as it relates to GFN's Aboriginal and Treaty Rights and interests require that GFN and the Crown and/or Proponent monitor long-term impacts of activities on the land and rights. This includes ongoing assessment of the cumulative impacts of industrial development on the land and GFN rights and interests. The ultimate goal of the GFN Consultation and Accommodation Protocol is to reconcile the rights and interests of GFN, the Crown and Proponents in GFN “”.

12.20 Where an activity proceeds, either as initially planned or as modified pursuant to this process, the Crown or Third Party will implement accommodation measures in a timely manner. Implementation will include monitoring by GFN appointed monitors. The Crown and/or Third Party will cover the cost of monitoring.