

BULLETIN

Woodlot Licences: Information Sharing and Consultation with First Nations

1. INTRODUCTION

This bulletin provides information and guidance specific to woodlot licence tenure holders and Ministry of Forests, Lands and Natural Resource Operations (FLNR) staff when undertaking information sharing and consultation with First Nations. In addition to becoming familiar with the information provided in this bulletin, the following are recommended reading:

- *Guide to Involving Proponents When Consulting First Nations*.
British Columbia Ministry of Aboriginal Relations and Reconciliation. 2014.
- *Updated Procedures for Meeting Legal Obligations When Consulting First Nations – Interim*.
Province of British Columbia. May 7, 2010.
- *Cutting Permit & Road Tenure Administration Manual – Version 3*.
Ministry of Forests and Range. March 1, 2010.
- *First Nation Information Sharing Bulletin for Woodlot Licence Planning*.
FRPA Administration Bulletin No. 5. November 8, 2006 (updated 2016)

2. BACKGROUND

The legal obligation for consultation in respect of asserted or proven aboriginal rights and title (Aboriginal Interests) and treaty rights rests with the Crown. The Supreme Court of Canada in *Haida* (2004) recognized that the government could delegate procedural aspects of consultation to a proponent. A woodlot licensee is a proponent. The *Guide to Involving Proponents When Consulting First Nations* (page 3) recognizes this possible delegation by the government to a proponent and, if a proponent has indicated a willingness to undertake the procedural aspects of consultation, that the Province may rely on these efforts. The Province has also taken steps to delegate the information sharing step of the consultation process through legislation (discussed further below). The Province, however, is ultimately responsible for ensuring adequate consultation and, where appropriate, accommodation is completed before a Crown decision is made.

Before making a decision to replace a woodlot licence, approve a Management Plan or a Woodlot Licence Plan (WLP), or issue a Cutting Permit or Road Permit, the statutory decision maker (SDM) must determine if First Nations consultation has been adequate and legislated requirements have been met. The level of consultation that is undertaken for a particular proposed activity or decision is dependent upon the strength of the First Nation's Aboriginal Interests and the degree of adverse impact the proposed activity will have on those interests. Where there is a relevant agreement* in place between the Crown and First Nation, it may set out the appropriate level of consultation that is required.

3. TERMS COMMONLY USED IN THIS BULLETIN

Cultural Heritage Resource (CHR) is defined as an object, a site or a location that is the focus of a traditional use by an aboriginal people that is of continuing importance to that people, and not regulated under the Heritage Conservation Act. CHRs would include a First Nation's Aboriginal Interest(s) but does not include archaeological resources or sites. WLPPR, section 9(1)(d) identifies conserving and protecting CHRs as an objective set by government.

Aboriginal Interests refers to established treaty rights or claimed (as yet unproven) or established

* Relevant agreements include but are not limited to Forest & Range Consultation and Revenue Sharing Agreements, Strategic Engagement Agreements, Forest and Range Opportunities (FRO), Protocol Agreements, Interim Measures Agreements, etc.

(proven) aboriginal rights (including Aboriginal title). Aboriginal rights are practices or traditions integral to a First Nation culture at the time of contact. Examples include fishing, hunting and gathering plants. Aboriginal title is a subcategory of aboriginal rights that is a unique interest in land that encompasses the right to exclusive use and occupation of land for a variety of purposes. Treaty rights are held by a FN in accordance with the terms of a historic or modern treaty agreement with the Crown.

Delegation is when the Province assigns the responsibility for carrying out some procedural aspects of consultation to a proponent; i.e. a woodlot licensee. The various forms of delegation are described in section 4 of this bulletin.

Procedural aspect, or information sharing as it is commonly referred to in this bulletin, generally refers to the direct engagement component of consultation. It involves sharing information and discussing proposed plans and activities that may impact Aboriginal Interests and/or CHRs. More specifically, it may include:

- Providing relevant information about a proposed project to a First Nation early in the planning process;
- Making reasonable efforts to meet with First Nation groups affected by the plan to discuss the proposed activity.
- Considering modifications to proposed plans and projects to avoid or help mitigate impacts to Aboriginal Interests and/or CHRs, and
- Documenting engagement, specific Aboriginal Interests and/or CHRs that may be impacted and any modifications to address concerns and providing this record to the decision maker.

4. DELEGATION OF PROCEDURAL ASPECTS OF CONSULTATION TO WOODLOT LICENSEES

Procedural aspects of consultation may be delegated and considered part of the Province's legal duty to consult with First Nations. Delegation may occur through:

- 4.1 Legislation
- 4.2 Commitment in a WLP,
- 4.3 Acceptance by a WL licensee, or
- 4.4 Voluntary.

4.1 Legislation - Woodlot Licence Planning & Practices Regulation (WLPPR), Section 17(3.1)

Through section 17(3.1) of the WLPPR, the Province has delegated information sharing with respect to a Woodlot Licence Plan (WLP) or a WLP amendment to woodlot licence holders. Before submitting a WLP or amendment for approval, a woodlot licensee is required to make reasonable efforts to meet with and discuss the proposed plan or amendment with First Nation groups that may be affected by the WLP or amendment during the review and comment period which commences on the date the notice is published. The review and comment period is 30 days unless the minister determines that a longer time period is required, or 5 days if the plan is dealing with an emergency. The woodlot licensee must include a description of the efforts made to comply with this requirement when submitting the plan for approval. The outcome of this information sharing will be considered by the decision maker and may influence the consultation process undertaken by FLNR.

There is no set formula (i.e. how many letters or phone calls) to determine what constitutes a reasonable effort. Reasonable is generally considered to be fair, proper, just and suitable under the circumstances.

The delegation under section 17(3.1) is specific to a WLP or amendment. It does not apply to the pre-application stage or what is often referred to as information gathering in advance of preparing a WLP,

and it does not extend to management plans, cutting permits, road permits or licence replacements unless such commitment is in a licensee's approved WLP (described in 4.2 below).

4.2 Commitment in a Woodlot Licence Plan

A commitment in an approved WLP to information share with First Nations is considered a form of delegation. By signing the WLP, a licensee has confirmed their willingness to carry out the procedural aspects of consultation specified in the WLP. Most often the commitment involves sharing information about cutting permits, roads, and/or silviculture projects; or it may involve notification about operational activities, field trips, or periodic reviews of the woodlot operations.

A woodlot licensee who no longer wishes to carry out the procedural aspects committed to in their approved WLP will need to submit a WLP amendment to the appropriate SDM in order to revise this commitment. The Guide to Involving Proponents When Consulting First Nations (page 6 – Application Stage) states "The proponent is responsible for advising the Province about its willingness to be involved in the consultation process." Such an amendment request would be considered an expression of a licensee's change in their willingness to be involved in the consultation process and as such, it will be considered by the SDM when making a decision regarding the amendment. Such an amendment may trigger the need for First Nation consultation prior to a decision being made. Prior to submitting an amendment, the licensee may wish to consider discussing the issue, reason or trigger for seeking such an amendment with the SDM.

4.3 Acceptance by a WL Licensee

In situations where procedural aspects have not been delegated to a woodlot licensee via legislation or committed to in a WLP, the ministry may request a woodlot licensee's participation in a First Nation consultation process. It is a licensee's choice whether or not to accept such a request. FLNR staff cannot insist that licensees participate with information sharing. However, it may be in a woodlot licensee's best interest to do so in order to enable an efficient and timely approval process, develop a positive relationship with a First Nation and to ensure that appropriate and sufficient operational details regarding the licensee's proposed activities are available to the First Nation prior to a decision being made.

Where a woodlot licensee is willing to accept such a request, the "Guide to Involving Proponents When Consulting First Nations" suggests that the licensee should advise the Province of its willingness to be involved in the procedural aspects of the consultation process. Upon the licensee advising and the Province accepting the licensee's involvement; the information sharing step is considered delegated to the licensee. The licensee's efforts will be considered part of the Province's duty to consult with the First Nation and as such will be considered by the SDM when determining whether consultation has been adequate.

Before asking a woodlot licensee to accept a delegation, ministry staff may consider a number of factors in determining the level of engagement required and whether or not to involve a licensee including (described in the Guide to Involving Proponents When Consulting First Nations):

- The nature of the proposed activity;
- The nature of Aboriginal Interests or CHR potentially impacted;
- The capacity of a woodlot licensee to manage engagement activities. This may include such things as the licensee's knowledge, demeanor and capacity to provide information regarding the details or context of the proposed activity;
- The opportunity for the licensee to incorporate appropriate avoidance or mitigation measures into the project design and/or implementation;
- Any relevant agreement with First Nations setting out a consultation process;

- The willingness of the licensee to be involved in the consultation process (note that it is a licensee's responsibility to advise the ministry if they are not willing to be involved in a consultation process); and
- The willingness of the First Nation to engage with the licensee including whether previous attempts by the licensee have or have not been particularly productive and/or whether the First Nation will be sending an invoice for services that the licensee will likely be unwilling to pay.

Before making a decision to accept a request to share information with a First Nation, a licensee should consider:

- Which First Nations are involved;
- What procedural aspects they are specifically being asked to address;
- What policies or procedures the First Nations have with respect to consultation; e.g. will they send an invoice for their involvement; and
- Whether or not the First Nation(s) has expressed a willingness to work with the licensee. This may exist through an agreement between the First Nation(s) and the Province, or via direct contact with the First Nation by FLNR.

If the Province does not offer this information as part of its request for the licensee's participation, then a licensee may consider asking for it.

If and when the Province and the licensee are in agreement regarding the role and responsibility of the licensee, then delegation has occurred. A licensee may request that a delegation be in writing and include the information listed in the bullets above. Coming to an understanding regarding roles and responsibilities will provide guidance, better define the process, and provide a clearer understanding of when a licensee's efforts to carry out procedural aspects have concluded.

Inferring or suggesting that a plan or permit cannot or will not be approved, or approval may be delayed if a licensee doesn't accept a delegation that is not a legislated requirement is not appropriate and could render a delegation invalid.

4.4 Voluntary

In situations where delegation has not occurred, a woodlot licensee may choose to voluntarily engage with First Nations at any time or over any subject. Where that engagement is relevant to a proposed Crown decision requiring First Nation consultation, then that engagement will be considered by the statutory decision maker when determining the adequacy of consultation prior to making a decision.

5. ROLES & RESPONSIBILITIES

Before a woodlot licensee undertakes any information sharing process with a First Nation, it is suggested that the licensee and district discuss:

- any information regarding possible Aboriginal Interests or CHR that may exist in the area;
- any relevant issues or concerns previously raised by the First Nation(s); and
- questions that the licensee may have regarding the information sharing process.

Before a SDM makes a decision with respect to a plan or permit associated with a woodlot licence, he/she must determine if First Nations consultation has been adequate and legislated requirements have been met. The SDM may consider, amongst other things;

- Any existing information on Aboriginal Interests or CHR gained from other consultation efforts;
- Any information sharing that has taken place between a licensee and the First Nations;
- Information received from First Nations concerning their stated Aboriginal Interests or about their CHR; and
- Any efforts taken by the licensee to address adverse impacts to Aboriginal Interests or CHR.

A woodlot licensee is not required to be a professional forester in order to undertake and fulfill the information sharing process. Furthermore, a woodlot licensee who undertakes information sharing as required under section 17(3.1) of the WLPPR or where willing to accept a delegation of information sharing requirements is not required to retain a professional consultant to carry out the procedural aspects of consultation.

A licensee and government must act honorably and honestly when information sharing.

5.1 Woodlot Licence Replacement

Section 46 of the *Forest Act* requires the minister, subject to certain conditions, to offer a replacement for a woodlot licence during the 6-month period following the ninth anniversary of an existing woodlot licence.

FLNR will consult with First Nations regarding a woodlot licence replacement. FLNR may request that a woodlot licensee participate in the information sharing step of the consultation process. Before agreeing to such a delegation, a licensee should know what their role and responsibilities will be and be clear on the steps they will follow to fulfill the information sharing requirement.

5.2 Management Plan

Section 45(1)(f) of the *Forest Act* stipulates that the woodlot licence document must require the holder to submit a management plan for the approval of the minister, at times specified by the minister.

FLNR will consult with First Nations regarding a new or revised management plan. If FLNR does ask a woodlot licensee to be involved, then consideration should be given to the licensee's role and whether or not there should be a formal delegation of procedural aspects.

5.3 Woodlot Licence Plan

New WLP

Section 9(1) of the WLPPR requires a woodlot licensee to specify a result or strategy in their WLP that is consistent with the objective of conserving and protecting CHR that are the focus of a traditional use by an aboriginal people that is of continuing importance to that people and not regulated under the *Heritage Conservation Act*. Recall that CHR would include a First Nation's Aboriginal Interests.

Knowing about the CHR and Aboriginal Interests that exist within a woodlot licence is fundamental to developing appropriate results or strategies to conserve and protect them. A woodlot licensee should request information about CHR and Aboriginal Interests from FLNR and, most importantly, from the identified First Nation or First Nations with interests in the woodlot area to ensure a full and comprehensive knowledge base is generated on CHR such as:

- A map and list of First Nations with Aboriginal Interests over the WL area, including appropriate contact people;
- Information obtained through previous consultation efforts by FLNR;
- Agreements between the government and First Nations that specify the terms, conditions and time frames for consultation;
- Information on CHR that have been identified by the minister as "resource features;" and
- Known information on ethno, traditional use and archaeological sites.

A licensee could choose to prepare their WLP based on CHR information received from FLNR and other sources. Before submitting their WLP for approval, they are required to make reasonable efforts to meet with First Nations as part of the review and comment requirement (WLPPR section 17(3.1)). After addressing any information or comments received, a licensee would then submit their WLP for approval along with a description of the efforts made to comply with the requirements under 17(3.1). The SDM reviews the WLP, including the factors relating to CHR in Schedule 1, Section 5 of the WLPPR.

If it is determined that a licensee's efforts with respect to section 17(3.1) have not been reasonable, then the SDM may require a licensee to do more. Where a licensee's efforts are considered reasonable but the SDM determines consultation has been inadequate, then the responsibility for any additional consultation rests with FLNR. There is no legal obligation for a woodlot licensee to participate although FLNR may ask for, and a licensee may accept, a delegation of procedural aspects with respect to the additional consultation. Based on the additional information forthcoming from FLNR, a woodlot licensee may need to change the results or strategies in their WLP.

HELPFUL HINT: If a cutting permit and/or road permit will be required soon after a WLP is approved, consider including them as part of the information sharing/consultative effort for a WLP.

WLP amendment

Some WLP amendments require the minister's approval. Others do not. Those that do, are subject to the review and comment provisions as per WLPPR, section 17(3.1). As such a woodlot licensee would have to advertise the amendment for 30 days and during that period of time, make reasonable effort to meet with First Nations that may be affected by the amendment. The outcome of this information sharing and the issues or concerns raised by a First Nation, may influence the level of consultation undertaken by FLNR with respect to the amendment.

Some minor amendments do not require the minister's approval (see WLPPR, section 21). The likelihood is that these amendments will not trigger the need for First Nation consultation. However, upon receipt of a copy of an amendment, the ministry may carry out consultation if the minister determines it is necessary to do so.

WLP extension

If the minister decides consultation is necessary with respect to a WLP extension, there is no legal obligation for a woodlot licensee to carry out information sharing unless the extension involves an amendment that is subject to review and comment as per WLPPR, section 17(3.1). FLNR may ask the licensee to accept a delegation of procedural aspects with respect to the extension (see section 4.3 of this bulletin).

5.4 Cutting Permits and/or Road Permits

A woodlot licensee may obtain a road permit (RP) and cutting permit (CP), including 1 CP, only if it is consistent with a woodlot licence plan (*FRPA* section 12(2)). This means a woodlot licensee must ensure all harvesting and roads are done in accordance with the approved WLP; including the results or strategies for CHRs.

There is no legislated requirement for a woodlot licensee to engage with First Nations over cutting and road permits unless a licensee has committed to do so in their approved WLP. The Cutting Permit & Road Tenure Administration Manual (page 46) recognizes that Government has a legal obligation to ensure that First Nations have been adequately consulted regarding proposed forest and range decisions and, where appropriate, accommodated for adverse impacts on Aboriginal Interests by forest and range activities including the issuance of a CP or RP. With respect to involving licensees, the manual indicates that ministry staff cannot insist on early information sharing but it is in the agreement holder's best interest that enough operational details are available to the First Nation sufficiently prior to the CP/RP application to facilitate consultation and, potentially, appropriate accommodation (page 47).

A licensee may volunteer to, or FLNR may ask a licensee to, participate in the consultation process by sharing information with respect to a cutting permit or road permit. It may be in a licensee's best interest to provide operational details to First Nations well in advance of submitting the CP/RP application to facilitate consultation and the process to issue the permit.