



Aboriginal opinions about the consultation processes in forest management in Québec

Highlights

- Consultation processes should take into account the fact that Aboriginal people have rights and responsibilities they want to assert.
- The obligation to consult and accommodate Aboriginal people results in the multiplication of consultation and accommodation processes, thereby swamping groups and communities that are already being heavily consulted. Yet there seems to be no formal consultation mechanism that would allow the various stakeholders working on the land in different fields of activity to harmonize their consultation approaches.
- Several procedures have been developed for consulting Aboriginal people, but except for those developed by the Aboriginal people themselves, these guides and consultation tools have rarely been approved by any Aboriginal authority.

The importance of Aboriginal viewpoints on consultation processes

Aboriginal people are experiencing a proliferation of mechanisms calling for them to participate in the management and development of forest territories. Among those mechanisms, the *consultation processes* are probably the ones most often used by government managers and third parties having rights within a territory (e.g., the forest industry, municipalities, etc.).

In 2004, court decisions involving the Haida Nation and the Tlingits of Taku River clarified the legal obligations of governments regarding Aboriginal people whenever the former are contemplating an operation in a territory, if this action may impact on the exercise of Aboriginal ancestral rights and whether or not those rights have been defined by an agreement or court decision. Indeed, the provincial governments responsible for the management of public lands are instructed not to grant rights or land areas without having consulted and accommodated the Aboriginal people who hold or claim rights of occupation and use of those lands. Therefore, it becomes a primary concern to ensure the legitimacy of the consultation processes as much for those doing the consulting as for those being consulted.

The objective of the study was to determine if the way in which consultation processes are being carried out impacts participation by Aboriginal people. To fully capture the participatory practices of the Aboriginal people, we must first understand how they perceive the consultation process. Since no previous study had achieved that objective, we decided to examine the Aboriginal viewpoint concerning modes of consultation. To do this, we analyzed 33 documents submitted by Aboriginal organizations within the following consultation processes: the Québec provincial forest management regime review;



the approval of a consultation policy, and an independent commission's study of the state of forest management.

Initiatives that incorporate “Aboriginal consultations”

The primary objective of consultation processes is to exchange information. Consultations seek to encourage individuals or groups to set forth their opinions and interests in view of a given project. Consultation groups may be standing or temporary. They may take various forms, such as discussion forums, advisory committees, opinion polls, etc. These processes are explicitly not decision-making; in other words, they do not allow the participants to play an active role in the making of a decision. Several initiatives have been set in motion to supervise the consultation processes carried out with Aboriginal people in the area of forest management. The authors of these initiatives are varied. They include the federal, provincial, and local governments, the private sector (mostly the forest industry), the certification bodies (FSC, CSA, SFI), the courts, and obviously the Aboriginal organizations and representatives. We have identified four main processes that illustrate the principles and regulations for consultations:

- 1) the consultation mechanisms of the provincial government's forest management regime;
- 2) the consultation processes resulting from agreements;
- 3) the consultation requirements resulting from court decisions; and,
- 4) the consultation principles developed by certifying bodies.

The consultation mechanisms of the provincial forest management regime

In Canada, the provincial governments are responsible for the management of public lands through programs, policies, laws, regulations, etc. In the last few years, however, governments have developed new processes to involve the general population and Aboriginal people in forest management, particularly in relation to plans developed by the forest industries for forest resource management. In Québec, the forest industries are charged with soliciting and collecting comments from the other stakeholders located on the land with respect to the management plans the industries are developing. Since the Ministère des Ressources naturelles et de la Faune of Québec (MRNF, Ministry of Natural Resources and Wildlife) revised its Forests Act (*Loi sur les Forêts*) in 2001, holders of timber supply and forest management agreements (TSFMA/CAAF) are also responsible for consulting certain groups, including Aboriginal people, *before* making their plans. However, the MRNF has not formally set forth the modes of participation. In 2002, MRNF adopted its own policy on consultation. Although this policy does not apply to the consultation processes carried out by the industries, it comprises holding separate consultations with Aboriginal communities and developing the modes of consultation cooperatively with the communities being consulted.

The consultation processes resulting from agreements

Consultation processes result from agreements, such as the one defined in the *Agreement concerning a New Relationship (Paix des Braves) between the Government of Québec and the Crees of Québec*. These processes provide both a political and a judicial framework for Aboriginal participation in forest management. Indeed, this is primarily intended to ensure that Aboriginal people participate in the management of forests that are located on territories they occupy. Nevertheless, these mechanisms do not always ensure that the Aboriginal people have real decision-making power; rather, they give them a power of recommendation. For instance, in the case of the Cree-Québec Forestry Board, the Agreement allows the Minister to retain veto power over recommendations submitted by the Board. These processes are often ongoing, and they are usually structured as committees. Members who sit on these committees are still usually appointed by the Aboriginal and non-Aboriginal governments. Parity of representation exists

on both sides; that is, Aboriginal and non-Aboriginal groups have an equal number of representatives.

The consultation requirements resulting from court decisions

Certain decisions handed down by the provincial courts and by the Supreme Court of Canada have addressed the issue of methods of consultation related to development activities on land where Aboriginal people have recognized ancestral rights, or where these rights are in the process of negotiation (and definition). In its decisions on the Haida Nation and the Tlingits of Taku River, the B.C. Court of Appeal specified that the duty to consult was incumbent upon the government, and that therefore it could not be delegated to third parties such as the forest industries. The Court further stipulated that the duty to consult did not necessarily mean that an agreement had to be reached, and that both parties were enjoined to collaborate in good faith. It was specified that the right to be consulted and accommodated did not confer a power of veto on the Aboriginal communities. (Several Aboriginal groups are contesting this last point.) And lastly, the obligation to consult and accommodate remains even in the absence of recognized and defined rights.

The consultation principles developed by certifying bodies

When a business enters into a process of certification, Aboriginal people are sometimes called upon to express their opinions about forest management practices. Forest certification standards are defined as a method of providing evidence, via the market, that the wood and paper products are obtained through sustainable ecological forestry practices. In Québec, the major forest certification processes incorporating clauses related to the participation of Aboriginal people are those of the Canadian Standards Association (CSA) and the Forest Stewardship Council (FSC). The CSA certification process mentioned that the forms of participation (or consultation) are set at the discretion of the organizer, but that the consultation process must in certain cases be a separate one. The FSC certification proposes 10 principles, the third of which, “Indigenous Peoples’ Rights”, addresses the “recognition and respect of the legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources.” To apply this principle, the FSC proposes various mechanisms such as consultation processes. It specifies that consultation must be “effective and meaningful.” To this end, the FSC states that the forms of the consultation mechanism should be developed in collaboration with the participating community. Here, the consultation processes would serve particularly to obtain free and informed consent of the communities involved in cases when, for instance, the forest management plans were not collaboratively developed.

Aboriginal viewpoints on modes of consultation

An analysis of Aboriginal documentation for various consultation processes has allowed us to set up an assessment grid to evaluate the key dimensions to be considered when establishing a consultation process. The reader is reminded that this grid was obtained through an analysis of 33 documents submitted for various consultation processes by Aboriginal people (band and tribal councils, associations, etc.). Taking into account the Aboriginal views on modes of participation in consultations allows us to achieve various objectives in the area of sustainable forest management, including the assurance of effective Aboriginal participation in the consultation process, the integration of Aboriginal knowledge and wisdom into forest



Figure 1. Meeting of the Cree-Québec Forestry Board.
Photo courtesy of the Cree-Québec Forestry Board.

management, the recognition of ancestral rights and responsibilities claimed or recognized, and the reduction or elimination of conflicts.

It is important to note that the viewpoints of the Aboriginal people are varied, and that they are not always unanimous concerning the way to consult or to participate. These recommendations are based on trends. For instance, one group might want to participate in a process open to non-Aboriginal people to know the positions of others, while another group might prefer a separate participative process. We must, therefore, be extremely careful in interpreting these recommendations, *as they are not representative of all Aboriginal groups and individuals.*

Table 1. Key Dimensions and Recommendations concerning Aboriginal Viewpoints

	Dimensions	Recommendations
Process	<i>Status of the Process</i>	According to the documents analyzed, it would seem preferable to define the approach by a law, a memorandum of understanding, an agreement, or certification standards that have previously been acknowledged by the group being consulted.
	<i>Ongoing Character of the Process</i>	There seems to be no preference for either ongoing (e.g., advisory committees) or temporary (e.g., public hearings) consultation processes.
	<i>Timing of the Participation</i>	It would be preferable to conduct the consultation at the beginning planning stages of the project.
	<i>Frequency of Participation</i>	Aboriginal viewpoints on frequency of participation are varied. For some, Aboriginal participation should be continuous: before, during, and after a given project in an area. Others consider participation to be important at certain key stages, such as development, decision making, and project implementation.
Participants	<i>Targeted Participants</i>	Privileged participants are, first of all, official spokespersons such as band and tribal councils and advisory committees (e.g., the James Bay Advisory Committee on the Environment). Thereafter, if the population at large is invited to participate, the analyzed documents suggest giving special attention to young people, women, and elders.
	<i>Status of Participants</i>	Consultation processes for Aboriginal people only are preferred over processes open to both Aboriginal and non-Aboriginal people. However, some documents specify that open processes remain a viable option since they allow people to understand more fully the interests of other groups.
	<i>Representative Nature</i>	The consultation processes should be structured to ensure parity of procedure (such as an equal number of Aboriginal and non-Aboriginal participants).
	<i>Role of the Participants</i>	Aboriginal people are prepared to play more than a simple participatory role. They want to collaborate in the proper execution of consultation processes by working, for instance, as organizers, consultants, facilitators, etc.
Decision Making	<i>Power of the Consultation Mechanism</i>	Consultations should allow Aboriginal people to have a real impact on the decision-making process.
	<i>Form of Decision Making</i>	If decisions are made, the preferred form is consensus. Arbitration mechanisms, jointly prepared, are also suggested for cases in which the parties cannot achieve consensus. Voting was also recognized as a form of decision-making when consensus cannot be achieved.
Resources	<i>Financial and Technical Resources</i>	Aboriginal participants do not always have the resources to participate effectively in the consultations. Some financial and technical support would favour the participation of individuals and groups.
	<i>Time Allowed for Preparation</i>	Participants should be allowed at least one month to set forth their opinions and interests concerning the project in question.
	<i>Shared Information</i>	Information shared in the course of the process must be complete, explained in plain language, and in some cases translated. The proponent should at least provide an indication of expected project impacts on Aboriginal rights and on the occupation of the land.
Relations	<i>Interactions between Participants and Organizers</i>	The preferred mode of interaction is that which allows participants and organizers to communicate informally and actively.

Conclusion

The obligation to consult and accommodate Aboriginal people whose rights are defined by agreement or court decision, as well as those who “have no treaty,” transforms the stakes of consultation processes in Québec. Indeed, most of the Aboriginal communities in Québec (except the Cree, Naskapi and Inuit) have not yet ceded their ancestral rights as affirmed and recognized by the Constitution. Additionally, based on court decisions involving the Haida Nation and the Tlingits of Taku River, the obligation to consult and accommodate must not be delegated to a third party such as the forest industry. And yet, in Québec, the government continues to delegate part of this consultation task to industries.

More generally, we note that consultation processes, such as the MRNF’s “separate consultations” are increasingly set up in collaboration with Aboriginal people. An assessment of expectations conveyed by Aboriginal people regarding methods of participation shows that the Aboriginal people have no preference for either ad hoc or ongoing mechanisms. In addition, separate consultation processes are not the unanimous choice of Aboriginal people, nor does ongoing participation throughout the course of a project achieve consensus. Therefore, Aboriginal participation at certain key stages of a given project, such as the development stage, would also result in an effective consultation process.



Figure 2. Photo courtesy of Natural Resources Canada.

Recommendations

- Each consultation process should be evaluated to determine whether or not it fits the obligation to consult and accommodate Aboriginal people in terms of their ancestral rights (claimed and/or recognized).
- It is important to ensure that the consultation process has official status with the Aboriginal participants. The development of a mechanism of confirmation for the process would certainly favour participation by the Aboriginal people. If approval by the group concerned is necessary, then Aboriginal participation in a consultation process does not mean that the Aboriginal participants have approved the project. A memorandum of understanding would also confer the assurance of a certain ongoing character on the methods of facilitating the progress of future consultations.
- Each process must be adapted to the specific conditions of the target groups. Organizers must take into account the socio-economic and cultural contexts of participating Aboriginal groups. For instance, if an important event is taking place at the same time as an activity within the consultation process, Aboriginal participation may be limited or even non-existent, thus voiding the whole process.
- The obligation to consult communities has brought about a contrary effect: it has created an overabundance of consultation processes so that communities are called upon to express themselves simultaneously on a variety of projects. Consequently, they are not able to set forth their opinions and interests adequately for each project. It is important that the organizers inform themselves of other consultations in progress if they wish to ensure effective Aboriginal participation.



Further reading

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