

Consultation framework: Implementing the duty to consult with Aboriginal communities on mineral exploration and mine production in Ontario

Mines & Minerals Division

Ministry of Northern Development, Mines,
Natural Resources and Forestry

Posting date: December 8, 2021



Consultation framework: Implementing the duty to consult with Aboriginal communities on mineral exploration and mine production in Ontario

This document replaces the former 2012 Ministry of Northern Development and Mines policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration. It reflects the ministry’s current operational practices regarding consultation with Aboriginal communities called for by regulatory decisions that occur at various points through the mining sequence.

Table of contents

- I. Context and guiding principles..... 4
 - Purpose 4
 - Introduction 4
 - Responsibilities of communities 6
 - Delegation to project proponents 6
 - Consultation spectrum..... 7
 - Capacity..... 9
 - Accommodation..... 9
 - Record keeping 10
 - Factors relevant to ministry decisions 11
 - Dispute resolution..... 11
 - Differing perspectives and reconciliation 11
- II. Community identification 13
 - Overlapping territories 14
 - Communities subject to change 14
 - Identifying scope of consultation 15
 - Ministry coordination 16
 - Approach to assertions of rights and/or land use 16

III. Early exploration	18
Scope of consultation	18
Approach to consultation at submission of an Exploration Plan.....	18
Approach to delegation	19
Process steps.....	19
Discretion to require a permit	20
Approach to consultation at application for an Exploration Permit	20
Approach to delegation	20
Process steps.....	21
Decision.....	22
Temporary hold.....	22
Discussion of impacts and mitigation	22
Decision despite no response	23
Stop work orders and permit amendments	23
IV. Advanced exploration and mine production.....	24
Scope of consultation	24
Approach to consultation	24
Approach to delegation	24
One window coordination	25
Consultation process steps	26
Ministry review and initial direction.....	27
Consultation carried out.....	27
Ministry review and decision	29
Submission of Closure Plan (CP)/Closure Plan Amendment (CPA)	29
Ministry files the CP/CPA.....	29

I. Context and guiding principles

Purpose

This document provides information and direction to proponents and communities by outlining how the Ministry of Northern Development, Mines, Natural Resources and Forestry (the ministry) implements the consultation framework set out in the *Mining Act* and regulations. It is specific to the steps and considerations required as the ministry fulfills its duty to consult with Aboriginal¹ communities and, where appropriate, accommodate their established or credibly asserted Aboriginal and treaty rights.

Introduction

Ontario's *Mining Act* (the Act) and associated regulations provide a framework for authorizing mineral exploration and development activities in the province. This document outlines the steps to be taken to meaningfully consult with Aboriginal communities whose Aboriginal or treaty rights may be adversely affected by proposed mineral exploration or mine production activities, and provides further information and direction to proponents and communities about how the ministry will implement the consultation framework set out in the Act and regulations.

The ministry acknowledges that consultation processes are fluid and evolving. Ontario has adopted an approach that is practical, flexible, and responsive to how consultation processes generally unfold. It reflects a graduated approach, with consultation increasing in depth as projects advance through the mineral development process. The consultation required at each stage of the mining sequence is proportional to the strength of the assertion of rights, where they have yet to be established, and the seriousness of potential adverse effects to those rights that may result from the activities in question.

This is not a manual for proponents and communities who may wish to engage directly with one another for relationship and business reasons. Guidance on best practices for engagement between proponents and communities can be found elsewhere. The focus here is to explain how the ministry fulfills the Crown's duty to consult with respect to mineral exploration and mine production.

The Crown has a duty to consult with Aboriginal communities when considering actions or decisions which have the potential to adversely affect a community's established or credibly

¹ The term "Aboriginal" is used in section 35 of the *Constitution Act, 1982* and will be used throughout this document, rather than the term "Indigenous", because the focus of this document is the manner in which the ministry will satisfy its duty to consult in relation to constitutionally protected rights.

asserted Aboriginal or treaty rights. This duty will sometimes call for the Crown to accommodate communities' rights (see [Accommodation section](#)), and applies even where the Crown has the right to take up lands under a treaty.

In most cases, treaties between the Crown and First Nations in respect of lands within Ontario provide for treaty harvesting rights, such as to hunt, trap, fish and gather. These rights are subject to the ability of the Crown to take up off-reserve lands for mining, forestry, settlement and other purposes. The Crown's right to take up treaty lands is in turn subject to important limitations including the duty to consult²

The duty to consult flows from the honour of the Crown and from s. 35 of Canada's *Constitution Act, 1982*, the fundamental objective of which is reconciliation. The honour of the Crown is a constitutional principle that requires Ontario to act honourably in all of its dealings with Aboriginal peoples.

Reconciliation is an ongoing process between the Crown and Aboriginal peoples, which involves negotiating, building understanding, and finding new ways for Aboriginal and non-Aboriginal peoples to live and work together. Consultation processes can provide a forum that assists in advancing reconciliation, through open and meaningful dialogue that considers and balances the respective rights and interests of Aboriginal communities and industry proponents affected by Crown decisions.

Where the duty to consult with one or more Aboriginal communities is triggered, the Director of Exploration, for early exploration activities, or the Director of Mine Rehabilitation in the case of advanced exploration and mine production, must be satisfied that appropriate consultation has been carried out before making regulatory decisions under the Act. This requires that the ministry consider:

- what information has been provided to the Aboriginal community about the activities proposed, including:
 - the scale of those activities
 - their likely on-the-ground impacts
 - location
 - their timing and duration
- what opportunities the community received to review and/or discuss the proposed activities relative to the scope of consultation required (see [Consultation spectrum section](#))

² A further qualification on the Crown's right to take up lands is that enough land must remain available for the exercise of treaty rights to ensure that such rights remain meaningful.

- what concerns, if any, were raised by the community about the potential of the proposed activities to adversely affect its Aboriginal or treaty rights, including how specific or detailed the community has been about how, when and where its members exercise the rights in question, and the potential for adverse effects
- how those concerns might be accommodated, avoided, eliminated or minimized, if appropriate — including consideration of both community and proponent suggestions and recommendations (see [Accommodation section](#))

Responsibilities of communities

Consultation is a reciprocal process, calling for the good faith participation of Aboriginal communities. This requires communities to identify specific concerns they may have about potential adverse effects to their Aboriginal or treaty rights from the activities proposed. Additionally, communities are expected to respond in a timely manner.

The ministry encourages communities to have proportional expectations about the scope and depth of consultation to reflect the scale and nature of the proposed activities. Consultation falls on a spectrum — what may be appropriate for a large-scale project will not be appropriate for earlier exploration activities.

Communities will be expected to respond constructively to the good faith efforts of the Crown and/or its delegates, and to consult without taking positions intended simply to delay or prevent Crown decision-making.

In fulfilling the duty to consult, the ministry has and retains the ultimate responsibility for substantive aspects of the duty, such as identifying the communities to be consulted, assessing assertions made about Aboriginal or treaty rights, and assessing the adequacy of consultation and, where appropriate, accommodation.

Delegation to project proponents

The ministry may delegate procedural aspects of consultation to project proponents. The ministry's usual practice is to carry out consultation in relation to proposed early exploration activities without delegating to proponents (Exploration Plans: see [Approach to Delegation](#) and [Process Steps](#) sections. Exploration Permits: see [Approach to Delegation](#) and [Process Steps](#) sections). In contrast, the ministry routinely delegates procedural aspects of consultation to proponents with respect to decisions on proposed steps at advanced exploration or mine production stages, which may be more complex (Advanced Exploration and Mine Production: see [Approach to Delegation](#) and [Consultation Process Steps](#) sections). The extent of that delegation will be determined case by case, largely depending on the complexity and stage of the proposed project. The ministry will consider the capacity of the

proponent to undertake consultation and assist where necessary. This assistance can include helping to facilitate discussions between communities and proponents.

When delegating, the ministry will provide direction to proponents in writing. The ministry will explain the procedural steps to be carried out by proponents, which may include:

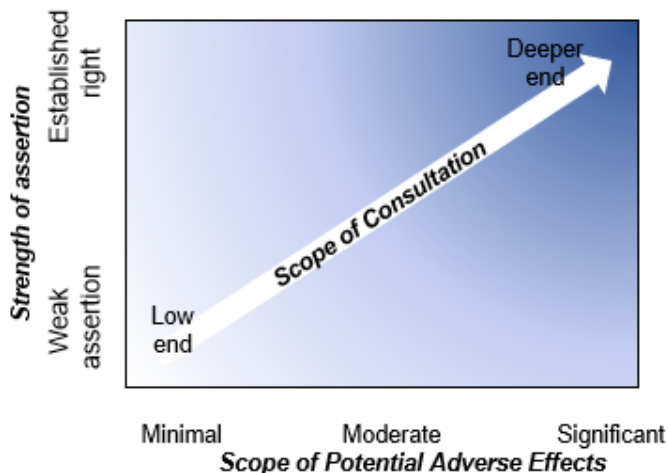
- providing communities with clear and accessible information about their proposed activities, and considering community capacity needs in reviewing and understanding that information (see [Capacity section](#))
- meeting with the community — ideally in person, or by phone or videoconference where in-person meetings may not be feasible — to discuss specific concerns they may have about potential adverse effects to Aboriginal or treaty rights
- discussing potential ways to avoid, eliminate or minimize adverse effects to Aboriginal or treaty rights
- keeping the ministry informed of their ongoing efforts and involving the ministry directly, if an issue arises that the proponent is having difficulty resolving
- seeking and following ongoing direction from the ministry on the adequacy of the process conducted and what further steps may be necessary

Consultation spectrum

The scope or content of the duty to consult falls along a spectrum. Where the duty falls on that spectrum is determined on a case-by-case basis by:

1. Conducting a preliminary assessment of the strength of the assertion of rights (where the right relied upon has not been established).
2. Assessing the seriousness of potential adverse effects to those rights.

Consultation spectrum diagram

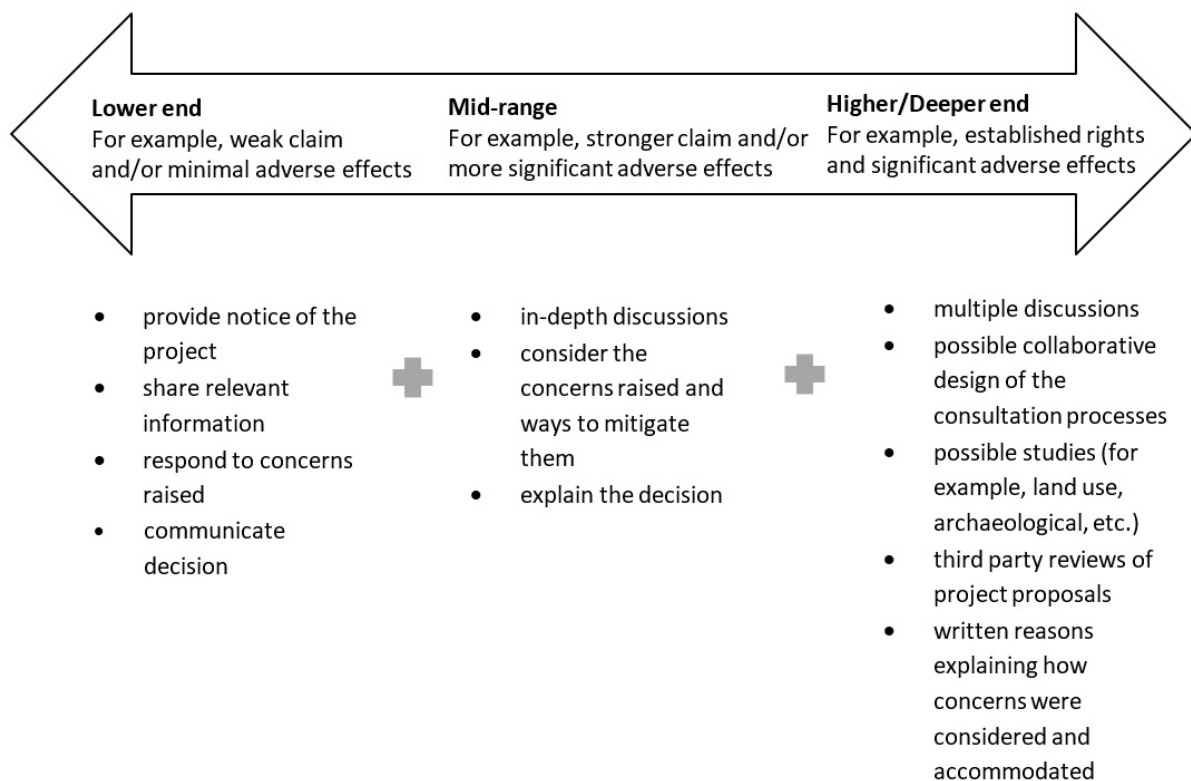


Meaningful consultation will always require that communities which are owed the duty to consult are:

- informed about the proposed activities
- given an opportunity to raise concerns about the potential of those activities to adversely affect their Aboriginal or treaty rights
- provided an explanation of how their concerns were addressed
- informed of the ultimate decision or action

The spectrum approach is not intended to be rigid and different factors may require different approaches. The following illustrates elements the courts have found appropriate at different points on the spectrum:

Scope of consultation diagram



Capacity

There is currently no specific legal obligation to provide capacity funding to communities being consulted. It is important, however, that communities are able to effectively engage in the process. The ministry broadly supports capacity needs, where appropriate, and continues to pursue initiatives that enable communities to effectively participate in consultation processes at all stages. Examples of these capacity supports include:

- education and awareness-building programming where staff actively liaise with communities for general and project specific questions
- funding for staff positions within some communities to facilitate the review of ministry notifications and to support consultation processes
- in some cases, funding for values mapping and other projects that support communities to gather and store traditional knowledge
- funding to sponsor community members to attend mining conferences and other learning and networking opportunities

Project proponents that have been delegated procedural aspects of consultation for projects at later, more advanced stages of the mining sequence may consider and, where appropriate, contribute to the reasonable capacity needs of communities related to their specific project proposal.

Accommodation

Accommodation refers to measures that will avoid, minimize or mitigate the adverse effects of proposed exploration or development activities on established or credibly asserted Aboriginal or treaty rights. Accommodation will not be required in all cases but, where it is, the accommodation measures should be directly linked to the nature and seriousness of the adverse effects of the specific project. It should also be balanced with the broader public interest in having the project proceed and, where applicable, the Crown's treaty right to take up lands for mining and other purposes.

Even where the Crown's duty to consult calls for accommodation, this does not generally give Aboriginal communities a veto over decision-making, nor are the ministry and the Aboriginal community required to agree on what is considered appropriate accommodation. However, efforts will be made to achieve consensus if possible. What is required is that there be a reasonable process to understand the concerns raised about adverse effects to Aboriginal and treaty rights and to discuss ways to address them.

Accommodation can be provided by taking steps to avoid, mitigate or minimize potential adverse effects to Aboriginal and treaty rights. This can be achieved through changes made by

the proponent to their project plans, or through terms and conditions imposed by the ministry on authorizations granted. Examples of terms and conditions may include:

- restrictions on when activities can take place
- identification of areas to be avoided
- habitat replacement
- rehabilitation of sites

While the ministry has tools available to mitigate site-specific adverse effects to Aboriginal or treaty rights, proponents and communities may also discuss and agree upon mitigation measures that are preferable to them in the context of a specific project.

Where proponents and communities agree on mitigation measures, in order for the ministry to enforce those measures, the measures should be shared with the ministry. Where mitigation measures have been agreed to and those measures are reflected only in an agreement between the proponent and Aboriginal community, the ministry must still determine whether it is satisfied that appropriate consultation has been carried out.

Record keeping

Detailed records will be critical to the ministry's decision-making process. All parties (government, proponents, communities) should maintain records of their participation in the consultation process. Those records may be required by the ministry to aid in decision-making and resolving any differences of opinion or recollection regarding the process.

Where proponents and Aboriginal communities have engaged directly to discuss potential adverse effects to Aboriginal or treaty rights, or potential accommodation, the information exchanged will become part of the consultation record. The ministry's own records and information provided by communities and proponents will be required to inform ministry decisions. Proponents should keep detailed records of their communications at all stages and be prepared to submit these records to the ministry, some of which include:

- detailed logs of any communications
- summaries of information exchanged regarding potential adverse effects to Aboriginal and treaty rights
- measures discussed to accommodate

The ministry also encourages communities to keep records of communications, and to provide a copy to the ministry if requested or if the community would like to clarify their understanding of the communications process.

Factors relevant to ministry decisions

Ultimately, the ministry must be satisfied that appropriate consultation has been carried out. Information that is relevant to the ministry's decision-making, particularly where procedural aspects of consultation have been delegated to a proponent, includes:

- the information and support a proponent has provided to help inform the community about the proposed exploration and/or development activities
- the information a proponent has gathered about potential adverse effects to Aboriginal or treaty rights and details about the opportunities that have been provided to raise and discuss those potential adverse effects
- measures that have been considered, discussed and/or agreed upon to mitigate or otherwise accommodate potential adverse effects to Aboriginal or treaty rights

Proponents will be asked to provide this information to the ministry. Where there are gaps in the information necessary for the ministry to make a decision, further consultation may be required.

Dispute resolution

The *Mining Act* includes provision for a form of dispute resolution, where warranted, to resolve issues pertaining to consultation processes carried out by the ministry (*Mining Act*, ss.170.1(1)(c) and O. Reg 308/12, ss.21). Most disputes that arise can be managed within the consultation process, prior to regulatory decisions being made.

The *Mining Act's* dispute resolution process is only intended to address issues related to the consultation process and is not appropriate to resolve other disputes that may arise between communities and proponents.

Differing perspectives and reconciliation

The Crown and Aboriginal communities can have differing views on some fundamental issues (for example, jurisdiction, the scope of existing rights and treaty interpretation). These differing views raise issues that go to the broader and ongoing processes of reconciliation and treaty interpretation, which all parties should recognize cannot be resolved through consultation processes on individual project approvals alone.

This does not diminish this ministry's continued support of broader government initiatives to advance reconciliation, including the resolution of, for instance, historic grievances and asserted rights to share in the benefits of resource development.

At the project-specific level, positive relationships — built on openness, trust and respect — will go a long way to bridging differing perspectives. The Crown, industry, and Aboriginal people alike have roles to play in consultation processes and in building relationships that allow the parties to work constructively together to achieve practical outcomes. These practical outcomes and relationships can serve as a foundation for the broader overall objective of reconciliation.

II. Community identification

The ministry is required to identify those Aboriginal communities (First Nation and Métis) whose established or credibly asserted Aboriginal or treaty rights may be adversely affected by proposed mineral exploration and development activities. While this is largely based on existing Crown knowledge, this will also be informed by, among other things, communities themselves who have a reciprocal responsibility to participate in the consultation process and provide information about their rights.

The ministry will identify communities based on the information in the possession of the Crown at the time a project is proposed and in relation to the scale of the project and its potential impacts. Provincial ministries have been working together and with communities to understand and map the areas in which communities exercise established or credibly asserted Aboriginal or treaty rights. This promotes a common understanding that provincial ministries can draw upon when a new project is proposed.

Ministries will continue to collaborate and consider other sources of information to determine whether a community has or credibly asserts Aboriginal or treaty rights in a given area, and where its members exercise such rights. This could include, for example:

- maps of values
- land uses and other traditional knowledge or oral history
- court decisions
- watershed maps
- land claims
- secondary sources such as historical reports or treaty diaries
- other relevant information

The ministry's process for community identification is as follows:

1. Analyze the project's 'footprint', meaning the area where the proposed activities will occur, plus off-site areas that may be impacted.
2. Identify the established and credibly asserted Aboriginal or treaty rights covering lands in the project footprint, including which communities hold or assert those rights.
3. Identify which communities exercise established or credibly asserted s. 35 rights within the project footprint.
4. Assess if the project activities have potential adverse effects on those Aboriginal or treaty rights.
5. List the communities whose Aboriginal or treaty rights may be adversely affected by the project activities.

The ministry will consider new information communities provide about specific Aboriginal or treaty rights that may be unknown to the ministry when the original list of communities is created.

Overlapping territories

The territories in which different Aboriginal communities have, or credibly assert, Aboriginal or treaty rights frequently overlap. In these situations, Ontario has an obligation to consult with all potentially affected communities. In some cases, the overlapping communities will dispute the claims of one another, asserting priority or even denying the rights of one over another.

Where communities have territorial overlaps or disputes, the ministry's preference is that these communities resolve these issues together and come to a consensus position on rights and territories that they then share with the Crown. Where this has not occurred, the ministry will continue to rely on the information in the possession of the Crown to identify communities for consultation, recognizing that the duty is triggered at a low threshold and a credible assertion will be sufficient to trigger the duty, at least at the low end of the spectrum (see [Approach to Assertions section](#)).

Communities subject to change

Proponents and communities should be aware that as rights continue to be clarified, the ministry's identification of communities to be consulted on any given project may change.

Some scenarios in which community consultation lists may change can include:

- activities becoming more localized, reducing the project footprint and thereby reducing or eliminating potential adverse effects to rights previously identified
- projects advancing through the mining sequence having a larger footprint that can create more potential for adverse effects on credibly asserted Aboriginal or treaty rights
- activities becoming more disruptive in a localized site that could create new impacts to Aboriginal or treaty rights that were not previously identified
- changing land use patterns/practices within treaty areas
- new information about rights and/or land use patterns

In general, changes in the scale and scope of activities throughout the mining sequence can have different impacts on Aboriginal and treaty rights. The list of communities must remain flexible through early exploration, advanced exploration and mine production. This ensures the Crown meets its ongoing duty to consult obligations.

When mining claims are first registered, the ministry notifies Aboriginal communities in the area of the claims and provides proponents with lists of the communities who have been notified. Community identification at claim registration is automatically generated based on general information and is simply meant to signal that there are Aboriginal communities and interests in the area of registered claims. Proponents may also wish to engage with communities to build relationships.

The lists of communities generated at claim registration are not intended to cover all communities that may need to be consulted in relation to different steps in the mining sequence, or to suggest that all communities appearing on those lists must be consulted on every step in the mining sequence. Community identification for consultation purposes occurs later, based on the fact-specific, multi-factor process described above.

Communities that have not been identified by the ministry may also approach a proponent with an expectation of being engaged or consulted by the proponent. In those circumstances, proponents should advise the ministry. As the ministry generally undertakes consultation at early exploration, those communities will be encouraged to make their assertions directly to the ministry for follow-up.

Identifying scope of consultation

The ministry will assess the scope of consultation required for each community identified for consultation, based on a preliminary assessment of the strength of the assertions of rights where the rights at issue have not been established and the significance of potential adverse effects to those rights (see [Consultation Spectrum section](#)).

Early exploration activities which require an Exploration Plan or Exploration Permit tend to be localized, temporary and low impact. Accordingly, while each Exploration Plan and application for an Exploration Permit will be reviewed in relation to its specific circumstances and potential for adverse effects, the ministry anticipates that the scope of consultation will generally be at the lower end of the spectrum. At these stages, the ministry generally carries out the consultation process called for by the *Mining Act* without delegating aspects of the process to proponents.

For advanced exploration and mine production projects, which require a Closure Plan or Closure Plan Amendment, impacts can vary significantly. Therefore, the scope of consultation required will be assessed project by project.

When delegating aspects of consultation to project proponents of advanced exploration and mine production projects, the ministry will identify the communities to be consulted as well as the scope of consultation required, including rationale for that decision.

Generally, the scope of the consultation that is required changes throughout the mining sequence, and aligns with the strength of the assertion of rights where the rights at issue have

not been established, and the significance of potential adverse effects to those rights resulting from the activities being undertaken at the project site.

Ministry coordination

Mineral exploration and mine production projects are subject to multiple regulatory approvals and/or environmental assessment requirements across a number of provincial ministries and federal departments. Government-side systematic efforts are being made to ensure consistency in the identification of communities to be consulted through an inter-ministry/inter-government coordination process. The goal is to provide a consistent Crown approach to identifying communities for consultation.

Different ministries/departments may have different statutory requirements regarding consultation. Certain environmental assessment and protection approvals require that proponents engage with interested communities, stakeholders and the public generally.

Approach to assertions of rights and/or land use

Aboriginal communities may claim, or assert, that they have or exercise Aboriginal or treaty rights in areas where they were not previously understood to have or credibly assert such rights.

When an assertion of this nature is received, the ministry will work with communities to understand the assertion to assess its credibility. This will include a request that the community, through its Chief and Council:

1. Confirm the territory in which the traditional (historic) or current exercise of Aboriginal or treaty right(s) is being asserted, with detail and specificity.
2. Where the community has previously worked with the ministry to confirm the territory in which they exercise Aboriginal and/or treaty rights, provide an explanation of what has changed to prompt the new, expanded assertion.
3. Provide some form of corroborating evidence, readily available to the community (new research or mapping is not required) — as examples, this could be by way of transcripts of oral history, values or other maps, historical research and secondary sources the community has gathered, and statements from Elders and other community members.

The ministry will share information obtained and confirmed by the community with other ministries for review and to determine credibility.

Where the ministry becomes aware of an assertion and is considering a decision that would trigger the duty to consult if the asserted right had been established, it will make a preliminary

assessment of the credibility of the assertion. The time required to thoroughly investigate an assertion can be considerable, often much longer than the time available for a given ministry decision.

The ministry's preliminary assessment of the credibility of assertions will be conducted in parallel with ongoing consultation processes. These assessments will be based on relevant information and evidence that is known to the ministry or can be gathered promptly, including what can be readily supplied by the Aboriginal community making the assertion.

Where the ministry determines through its preliminary assessment that an assertion is sufficiently credible to trigger the duty to consult, and that decisions under consideration have the potential to adversely affect the credibly asserted right, the community making the assertion will be included in consultation processes going forward, as appropriate, at least at the low end of the spectrum.

III. Early exploration

Scope of consultation

Early exploration activities can have potential adverse effects to Aboriginal and treaty rights that are quite localized (site specific) and time limited. Because early exploration activities generally have only minimal impacts to lands, early exploration projects are typically considered to be at the lower end of the consultation spectrum (see [Consultation Spectrum section](#)).

Consultation for exploration plans and permits is generally carried out directly by ministry staff and can include:

- written correspondence
- email and telephone communications
- virtual or in-person meetings

Additional consultation efforts, such as site visits or community meetings, can be included on a project-specific basis where required. This ensures the ministry has flexibility in cases where the particular activities or their location may have an increased potential for adverse effects to particular and localized Aboriginal or treaty rights.

Proponents and communities should be aware that consultation is an ongoing requirement. There will be opportunities for further consultation when proponents seek approvals for new permits as a project increases in scale and scope, as there may be more potential for adverse effects on Aboriginal or treaty rights.

Approach to consultation at submission of an Exploration Plan

Early exploration activities set out in [Schedule 2 of Ontario Regulation 308/12](#) require the submission of an Exploration Plan. These activities typically cause very limited impacts on the ground and are quite localized and temporary, such as:

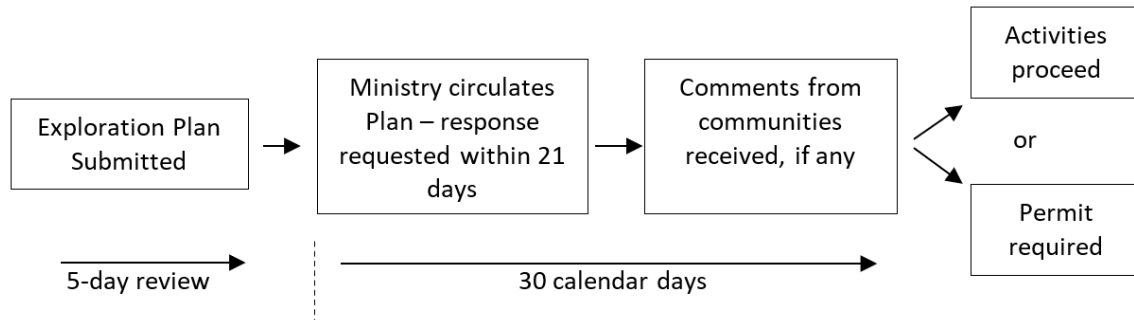
- narrow line cutting (less than 1.5 m wide)
- stripping or trenching of small areas and volume
- using backpack drills

The Act and regulations provide for a process at the lowest end of the consultation spectrum. This process ensures Aboriginal communities are notified about the proposed activities and have an opportunity to raise concerns about the potential for site-specific impacts to Aboriginal or treaty rights, if any.

Approach to delegation

Generally, the ministry will not delegate procedural aspects of consultation to proponents who have submitted an Exploration Plan and will communicate directly with Aboriginal communities to fulfill the Crown's duty to consult.

Process steps



Implementation of the consultation approach provided for in the Act and regulations includes the following steps and considerations.

- the ministry will identify the Aboriginal communities to be consulted about the plan no later than five days after receiving the Exploration Plan. (see [II. Community identification section](#))
- the ministry will circulate an information package with a copy of the submitted Exploration Plan to the identified Aboriginal communities (the Circulation Date, as defined in Ontario Regulation 308/12)
- communities are asked to inform the ministry of any concerns about potential adverse effects to their Aboriginal or treaty rights within three weeks of the Circulation Date
- communities are expected to outline their concerns about potential adverse effects by noting specifically how the proposed early exploration activities may have an adverse effect on the exercise of specific rights in specific areas
- where site-specific concerns are raised about potential adverse effects to Aboriginal or treaty rights, the ministry will discuss those concerns with the proponent to consider whether there are voluntary measures the proponent could take to mitigate those concerns. For example, the proponent could revise the project design, specific location or timing of activities included in the submitted Exploration Plan

- where project-specific concerns about potential adverse effects to Aboriginal or treaty rights are addressed to the satisfaction of a Director of Exploration (appointed under s. 78 of the *Mining Act*), and the Director does not determine that an Exploration Permit is required for other reasons, the submitted Exploration Plan will be sufficient to allow the proposed activities to proceed. The proponent may commence activities covered by the submitted Exploration Plan 30 days after the Circulation Date

Discretion to require a permit

Where project-specific concerns about potential adverse effects to Aboriginal or treaty rights cannot be satisfactorily addressed within the regulatory process for the filing of an exploration plan, the Director of Exploration may direct the proponent to apply for an Exploration Permit (Ontario Regulation 308/12, s. 18). This provides additional time for the ministry to adequately consider the site-specific concerns raised by the community about potential adverse effects to rights and to contemplate any appropriate mitigation measures to address the concerns, including potential terms and conditions attached to an Exploration Permit.

Approach to consultation at application for an Exploration Permit

Early exploration activities set out in [Schedule 3 of Ontario Regulation 308/12](#) require a proponent to apply for an Exploration Permit. These activities tend to have more potential for physical disturbance to the land but are still quite localized, temporary and of low relative impact. Some of these include:

- wider line cutting
- stripping and trenching of larger areas and volume
- drilling with more substantial equipment
- multiple activities carried out simultaneously
- activities being intensified (for example, 20 drill holes instead of two)

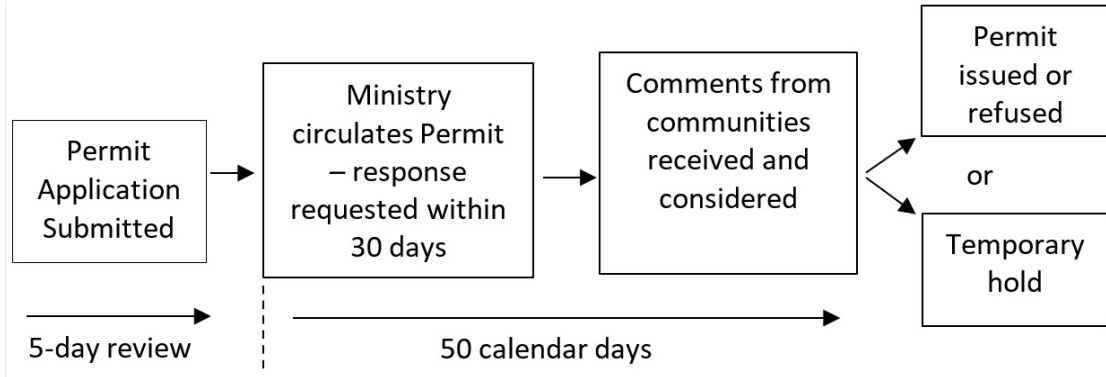
While these activities are still considered to be at the low end of the consultation spectrum, the ministry's process allows more time and flexibility for consultation with potentially impacted Aboriginal communities. The process addresses the potential variation in project scale and scope detailed in the bullets above, and the potential complexities of given situations.

Approach to delegation

The ministry will generally fulfill its obligations by consulting directly with communities. The ministry may also periodically require the involvement of proponents where the process

would benefit from their participation. If participation by proponents is required, the ministry's expectations will be communicated clearly to proponents.

Process steps



Implementation of the consultation approach provided for in the Act and regulations includes the following steps and considerations:

- the ministry will identify the Aboriginal communities to be consulted about the application within five days of receiving it (see [II. Community identification section](#))
- the ministry will circulate an information package with a copy of the Exploration Permit Application to the identified Aboriginal communities (the Circulation Date)
- communities are asked to inform the ministry of concerns they may have about potential adverse effects to Aboriginal or treaty rights within 30 days of circulating the Exploration Permit Application
- communities are expected to outline concerns about potential adverse effects with clarity and detail, noting how the early exploration activities proposed may have a direct adverse effect on the exercise of specific rights in specific areas
- the ministry will follow up with communities during the application period to confirm receipt of the information package and to discuss community concerns, if any, about potential adverse effects to Aboriginal or treaty rights, and measures that could mitigate those concerns (see [Discussion of Impacts and Mitigation section](#))

Decision

The Director of Exploration will make the decision to issue or refuse an Exploration Permit Application when satisfied that appropriate consultation has been carried out (Ontario Regulation 308/12, s. 15). The Director will make these decisions within 50 days of the Circulation Date.

Temporary hold

Where specific concerns have been raised about potential adverse effects to Aboriginal or treaty rights, the Director of Exploration will determine whether additional time is required to adequately consider the concerns and to complete related consultation, including with respect to any accommodation measures that may be called for. If additional time is required, the ministry may place a temporary hold on the application process. The ministry is committed to avoiding temporary holds where possible by working to resolve concerns within the legislated time frame. The ministry may also place a temporary hold on the process at the request of a proponent, for any reason (Ontario Regulation 308/12, s. 16).

A temporary hold will be issued for no more than 30 days. The ministry will only extend the hold in limited circumstances. The ministry will engage in ongoing communication with proponents to ensure that the reasons for the hold are being addressed.

When a temporary hold is lifted, the application process resumes from the point at which the temporary hold was issued (for example, if the hold was issued at day 35 of the 50-day application process, it resumes at day 35 when the hold is lifted).

Discussion of impacts and mitigation

The ministry asks that Aboriginal communities provide specific information about potential adverse effects to Aboriginal or treaty rights. Detail and clarity are required for the ministry to properly understand community concerns, and so that effective mitigation measures can be identified, implemented and enforced where appropriate.

Some concerns about potential adverse effects to Aboriginal or treaty rights will be addressed through applicable legislative and regulatory requirements and restrictions of other authorizing ministries (for example, permits to take water, species at risk).

The ministry will work with proponents to consider feasible measures to mitigate concerns raised, including modification of:

- the project design

- the location of proposed exploration activities
- the timing of activities

Those measures would then be reflected in the issued Exploration Permit.

The ministry also has tools to address concerns raised including:

- the imposition of project specific terms and conditions on the Exploration Permit
- surface rights restrictions applied to the mining claim
- withdrawal of certain areas as Sites of Aboriginal Cultural Significance (see ministry policy: [Sites of Aboriginal Cultural Significance: Withdrawals and Restrictions \(PDF\)](#))

Should there be any mitigation measures discussed and agreed upon directly between the proponent and an Aboriginal community, these should also be reflected in a revised Exploration Permit Application and/or shared with the ministry to be incorporated in terms and conditions on Exploration Permits that may be issued.

Decision despite no response

The Director of Exploration will make a decision on a permit where good faith efforts have been made to consult and a community fails to respond at all or, in a timely manner, with specific concerns about potential adverse effects to their Aboriginal or treaty rights arising from the proposed activities. The ministry will, nonetheless, make an informed decision on the permit based on its existing understanding of the rights and interests that may be impacted by the activities proposed.

Stop work orders and permit amendments

The Crown's duty to consult and, where appropriate, accommodate, is an ongoing obligation. Permitting decisions will be made based on the best information available at the time, which depends upon the reciprocal good faith participation of Aboriginal communities in the process. The ministry relies on communities being willing to identify concerns about potential adverse effects to Aboriginal or treaty rights in a specific and timely way.

There may be certain situations, however, where a specific adverse effect to an Aboriginal or treaty right was not anticipated or could not have been identified prior to a permit being issued and activities starting. In those circumstances, the ministry will work with proponents and Aboriginal communities to address those impacts in a timely manner, seeking cooperative and mutually agreed upon mitigation measures.

In the absence of cooperative resolutions to issues arising after an Exploration Permit has been issued, the ministry has other tools available, such as stop work orders, permit amendments, or permit cancellations.

IV. Advanced exploration and mine production

Scope of consultation

For advanced exploration and mine production activities, the potential for adverse effects to Aboriginal or treaty rights can vary widely from project to project.

Advanced exploration and mine production projects require a Closure Plan and can be expected to have medium to high potential for impacts on the ground. Projects at these stages of the mining sequence will often require consultation processes from the mid-range to the high end of the consultation spectrum (see [Consultation Spectrum section](#)). Some activities may be proposed on lands previously disturbed (such as brownfield sites), causing limited new impacts and triggering a process at the lower end of the consultation spectrum. Likewise, a project may trigger no new consultation obligations if there is no significant change to the level or intensity of activities where adequate consultation has already taken place.

Approach to consultation

The ministry will create a project- and community-specific assessment of the level(s) of consultation required with Aboriginal communities prior to the submission of a Closure Plan or Closure Plan Amendment. Not all communities will be adversely affected to the same degree by advanced exploration and mine production activities, so varying levels of consultation may be owed to different communities on any single project (see [Consultation Spectrum](#) and [II. Community identification sections](#)). This ensures the ministry can satisfy the varying degrees of consultation that may be required on different projects.

Approach to delegation

As a general practice, where a Closure Plan or Closure Plan Amendment is required, the ministry will formally delegate procedural aspects of consultation to proponents. That delegation will be made in writing and will identify the communities to be consulted and the scope of consultation those communities may be owed. The ministry may also direct the proponent to prepare a plan of consultation that will serve as a road map for the consultation steps the proponent proposes to carry out. Proponents can reach out to the ministry for guidance on carrying out their consultation plan. The ministry can help proponents make contact with the communities identified to facilitate discussions between proponents and communities, if required.

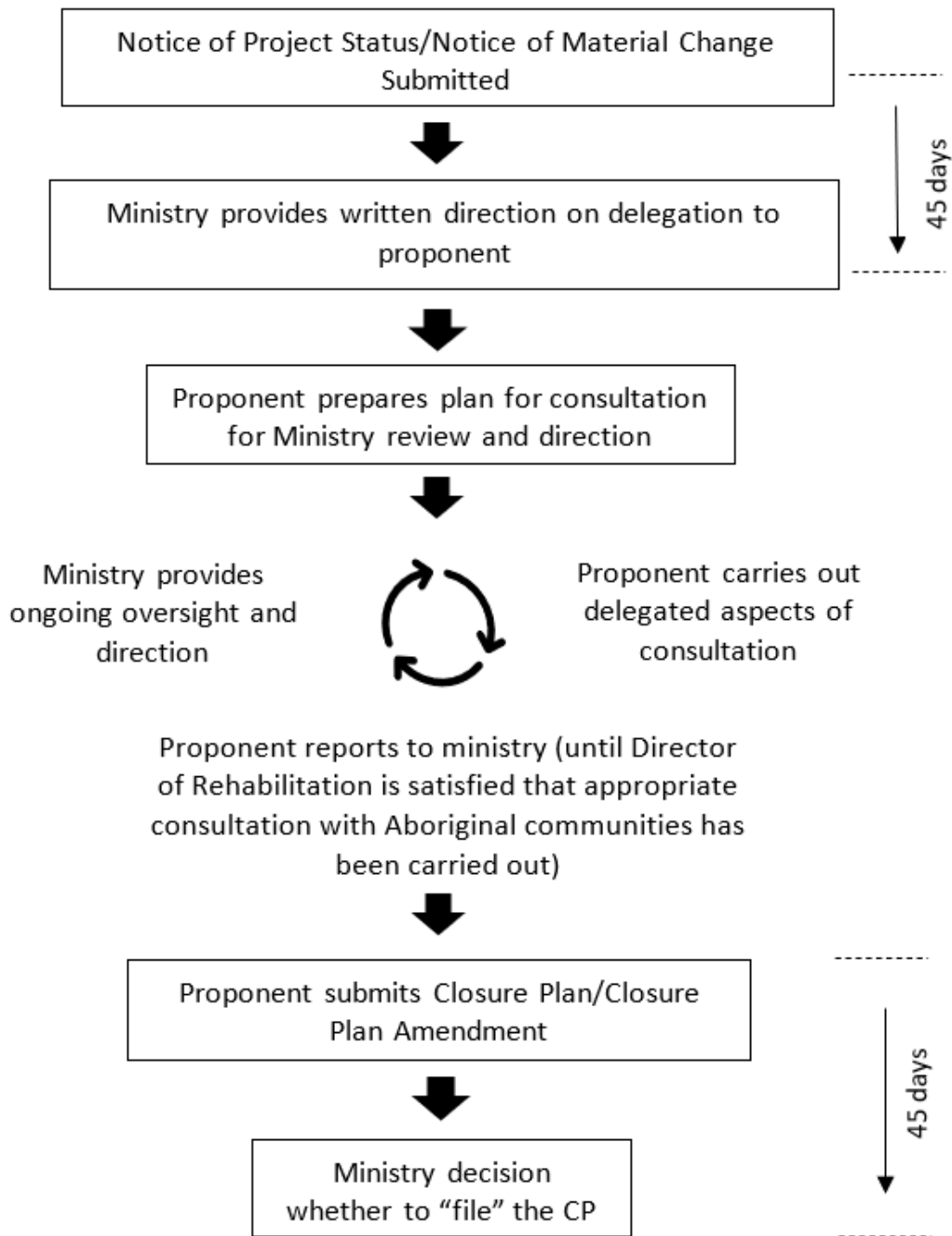
One window coordination

Mineral development projects that require permits or approvals from more than one ministry may proceed through a One Window Coordination Process that sets out roles and responsibilities of ministries and proponents. The objectives of the One Window Coordination Process are to ensure:

- there is coordination of communication among all provincial ministries or agencies involved in the project
- collective Crown approach to Crown identification of Aboriginal communities for the project by all ministries involved in granting authorizations for the project
- combined ministerial information requests from the proponent
- information sharing throughout the project

The One Window Coordination Process may be expanded to include relevant federal ministries as appropriate.

Consultation process steps



The time required to carry out adequate consultation on Closure Plans and Closure Plan Amendments can vary depending on the project, the proponent and the communities involved. The ministry will work with the parties, as necessary, to keep consultation focused, efficient and moving forward in a timely manner.

Ministry review and initial direction

As illustrated above, implementation of the consultation approach provided for in the Act and regulations includes the following steps and considerations.

- Receipt of a Notice of Project Status or Notice of Material Change (the Notice) will trigger a determination by the ministry as to whether the activities or changes proposed in the Notice require consultation with Aboriginal communities.
- The Director of Rehabilitation will provide written direction to the proponent within 45 days of receiving the Notice. This information will be shared with communities to be consulted. This direction will include:
 - details on the procedural aspects of consultation that are being formally delegated to the proponent, including the requirement that they prepare a plan for consultation — where the ministry has determined that this is appropriate, which will generally be the case (a guide to preparing a plan for consultation will be provided)
 - which communities will be included in the consultation process (see [II. Community identification section](#)), which includes coordination with other ministries to ensure consistency in identification of communities owed the duty to consult)
 - the scope of consultation required for communities included in the consultation process (see [Consultation Spectrum section](#))

Consultation carried out

- Consultation will be carried out pursuant to the plan for consultation and any ongoing direction provided by the ministry. Ministry staff will seek to provide proponents with information in the ministry's possession that may assist with scoping and carrying out consultation efforts. The plan for consultation will typically include the approach the proponent will take to:
 - inform the community about the proposed project, including ensuring information is accessible and easily understood and that the capacity needs of the community have been considered
 - gather information from the community about how the project might adversely affect their Aboriginal or treaty rights

- provide the community with enough time and opportunity to understand the project and its potential adverse effects
 - consider and discuss ways to mitigate concerns raised about adverse effects to Aboriginal or treaty rights
 - directly involve the ministry in the process, to enable ongoing oversight and direction
 - manage timelines while providing flexibility to respond to evolving information
 - maintain records
 - provide interim reports to the ministry on the progress of the consultation, particularly with regard to the concerns being raised about potential adverse effects to Aboriginal or treaty rights and discussions about mitigating those effects
- The ministry will review the plan for consultation and provide further direction, as required, both about the plan itself and as the proponent then carries out the plan.
 - At this time, proponents also often prepare and share a draft Closure Plan or Closure Plan Amendment — a draft serves as a useful frame of reference and a source of detailed information when discussing project planning with both the ministry and Aboriginal communities.
 - Prior to submitting a Closure Plan or Closure Plan Amendment for filing, proponents will be required to submit a consultation report, summarizing the process they have conducted, the concerns that were discussed about potential adverse effects to Aboriginal or treaty rights, and how those concerns are proposed to be accommodated, where appropriate. Where proponents and communities discuss and agree on mitigation measures, in order for the ministry to consider and enforce those measures, they should be shared with the ministry, as this information will inform the Director of Rehabilitation's determination of whether it is satisfied that appropriate consultation has been carried out. Mitigation or other accommodation measures related to the potential for project-specific adverse effects to Aboriginal or treaty rights must be outlined in a Closure Plan or Closure Plan Amendment.
 - The ministry will review the consultation report, discuss the report with the Aboriginal communities that were consulted, and determine if further direction is required. Consultation will be carried out until the Director of Rehabilitation is satisfied that appropriate consultation with Aboriginal communities has been carried out in accordance with the regulation. If the ministry determines that the Crown's duty to consult has been satisfied, and on that basis indicates to the proponent that no further direction on consultation is provided, the proponent may proceed to submit the Closure Plan or Closure Plan Amendment. The time it may take to carry out the process will depend on the project, the proponent and the communities involved.

Ministry review and decision

Submission of Closure Plan (CP)/Closure Plan Amendment (CPA)

Once a Closure Plan or Closure Plan Amendment is submitted to the ministry, it may be circulated to other ministries with regulatory approvals related to the project. A proposal for a Closure Plan will also be posted to the Ontario Environmental Registry for comment. Closure Plan Amendment proposals are typically posted as information postings (unless it is a minor administrative change).

The Closure Plan or Closure Plan Amendment will also be circulated to the Aboriginal communities which had been consulted, for their information.

Ministry files the CP/CPA

Within 45 days of the date of its submission, the Closure Plan or Closure Plan Amendment will either be formally filed (which is the proponent's approval to proceed) or it will not be filed and the proponent will be asked to resubmit, addressing any deficiencies that may have been identified.