

TRCA ENGAGEMENT GUIDELINES (June 2015)

INTRODUCTION

The following are Guidelines for Toronto and Region Conservation Authority (TRCA) when it engages with Anishinaabe, Haudenosaunee and Huron-Wendat nations, and Métis councils about TRCA projects.

The Supreme Court of Canada has determined that the provincial and federal government (“the Crown”) and its agents owe a duty to consult Aboriginal peoples when it contemplates conduct that may adversely affect existing or asserted Aboriginal or treaty rights. While third parties such as TRCA do not have this duty, the Crown may delegate procedural aspects of consultation to them through legislation or other means.

TRCA conducts engagement for projects where and as delegated by legislation or other clear means. Where TRCA is unsure if engagement has been triggered for a project, TRCA will attempt to obtain clarification from the Crown about any roles and responsibilities that may be delegated to TRCA.

TRCA is responsible for managing the engagement process for projects for which TRCA is the proponent. The TRCA department that currently carries out the engagement procedures is the Archaeology Resource Management Services department. For a glossary of terms, see **Appendix A**.

GENERAL PRINCIPLES

TRCA’s aim is to develop a positive relationship with nations, confederacies, and councils that have established or asserted rights that may be impacted by TRCA Projects, through a process of meaningful, mutually respectful engagement. There is no single way to conduct meaningful engagement. The process of engagement will vary depending on the project’s impacts and the level of interest indicated by nations, confederacies, and councils.

The engagement and commenting process must take place within the legislated timelines, described by the relevant legislation (e.g. *Environmental Assessment Act*).

These Guidelines do not preclude TRCA from working with nations, confederacies, and councils on other TRCA initiatives where they share common ground and goals such as educational programming, management/master plans, and property stewardship initiatives.

These Guidelines are not intended to alter the legal obligations of TRCA or nations, confederacies, and councils. TRCA will engage with nations, confederacies, and councils in accordance with these Guidelines, but must ensure that the engagement process meets the minimum standards set out in the relevant legislation.

WHEN TRCA IS REQUIRED BY LAW TO ENGAGE

TRCA carries out engagement for TRCA Projects that are subject to legislation requiring engagement.

The following is a list of legislation and related documents that may trigger engagement for TRCA Projects.

- *Environmental Assessment (EA) Act*
- Conservation Ontario Class Environmental Assessment for Remedial Flood and Erosion Control Projects (Conservation Ontario, January 2002) as amended (CO Class EA)
- Approvals under the *Ontario Water Resources Act (OWRA)* or *Environmental Protection Act (EPA)* may trigger engagement if delegated by the Ministry of Environment
- *Funeral, Burial and Cremation Services Act, 2002*
- *Ontario Heritage Act (1990)*

WHEN TRCA MAY CONDUCT ENGAGEMENT ON BEHALF OF THIRD PARTIES

When a third party's project or undertaking on TRCA-owned land triggers engagement, or when a third party employs TRCA as a consultant not on TRCA-owned land, TRCA may conduct engagement on behalf of the third party if agreed to in writing prior to the start of the project.

The parties will agree to roles and responsibilities for TRCA and the third party when conducting engagement. TRCA's Archaeology Resource Management Services may lead the engagement or assist the third party proponent with the process, if and as agreed. However, the third party proponent and the Crown will retain their respective responsibilities to ensure that the duty to consult is fulfilled.

Table 1 sets out some examples for determining when TRCA is the lead on engagement.

Table 1: Examples for Determining Engagement Lead

Legislation	Trigger for Engagement	PROPONENT		
		TRCA	Municipality	Provincial/Federal Governments
EA Act/ CO Class EA	Environmental Assessment	TRCA	TBD at project onset	TBD at project onset
OWRA/ EPA	Discharge or water taking requiring provincial approval (ECA or PTTW)	TRCA, if requested by Ministry of Environment	TBD at project onset	TBD at project onset

Legislation	Trigger for Engagement	PROPONENT		
		TRCA	Municipality	Provincial/Federal Governments
Funeral, Burial and Cremation Services Act	Identification of ancestral human remains	TRCA	TBD at project onset	TBD at project onset

Occasionally, TRCA may also be asked to take the lead on engagement when there are works by a municipality or a developer on TRCA-owned land that triggers engagement, or when one of TRCA’s projects requires a *Planning Act* application and the municipality requests that TRCA conduct the engagement.

THE PROCESS OF ENGAGEMENT

DETERMINING WHICH NATIONS, CONFEDERACIES, AND COUNCILS SHOULD BE ENGAGED

TRCA will determine which nations, confederacies, and councils should be contacted based on understandings of:

- Traditional territories
- Aboriginal and Treaty rights (established or asserted)
- Potential impact of the project on Aboriginal and Treaty rights
- Additional information provided by the Crown

TRCA’s Archaeology Resource Management Services will identify the nations, confederacies, and councils that may be affected by the project, and seek confirmation from the provincial Ministry or federal department responsible for the regulatory approval required for the undertaking. TRCA will contact the Ontario Ministry of Aboriginal Affairs (MAA) and Aboriginal Affairs and Northern Development Canada (AANDC) prior to the start of a project for advice as to which communities may have an interest in a project. These government agencies can also provide up-to-date information related to land claims and specific treaties.

GIVING NOTICE

Prior to the commencement of a TRCA project, TRCA will give notice to nations, confederacies, and councils about the project as required by the relevant legislation. The notification will provide sufficient information for communities to assess a project’s potential impact on their Aboriginal and/or treaty rights. The notification will also ask nations, confederacies, and councils to inform TRCA in writing whether or not a project will impact their Aboriginal and/or treaty rights, and in what ways.

TRCA will give initial notice by mail, personal delivery, or email, as requested. If the nations, confederacies, and councils do not respond, TRCA may follow up to ensure that the original correspondence was received.

EXPRESSION OF INTEREST

If a nation, confederacy, or council expresses interest in a project, TRCA and the leadership or designated contact of the nation, confederacy, or council may meet to discuss the project, identify issues related to the impact on the Aboriginal and treaty rights, and discuss potential mitigation measures that may address the concerns expressed and impacts identified. In general, communication will begin in writing, and discussions may lead to phone conversations and/or in-person meetings when required.

Where an interested nation, confederacy, or council raises objections and then declines to participate, TRCA will seek advice from the Provincial or Federal government as appropriate. TRCA will continue to plan and implement the project consistent with legal requirements while continuing efforts to obtain input from the nation, confederacy, or council. TRCA will consider using a neutral third party to re-start discussions.

EXTENT OF ENGAGEMENT

Appropriate engagement will vary depending on the context. In most cases, engagement will include:

- Providing information about the project in a timely way,
- Seeking input on impacts of the project,
- Considering the input, and
- Designing appropriate, reasonable and cost effective mitigation of potential impacts.

TRCA's Archaeology Resource Management Services will determine the extent of engagement for the project in consultation with TRCA staff, any third party proponent, and the potentially impacted nations, confederacies, and councils.

The extent of engagement with each nation confederacy, and council will vary depending on the strength of the right or claim and the seriousness of the impact of the proposed project on the right or claim of the nation, confederacy, and council.

FUNDING

For projects where engagement will occur, the associated costs of TRCA's Archaeology Resource Management Services department must be incorporated into each project's budget, to be determined in discussion with TRCA's Archaeology Resource Management Services.

TRCA will not pay application fees to nations, confederacies, or councils for engagement. However, under special circumstances TRCA may cover (depending on available funding) modest, ordinary expenses such as travel and meals.

EMERGENCY SITUATIONS

Should a situation arise that could reasonably be considered an emergency involving danger to property or to human health or safety, TRCA may proceed to address the emergency as necessary. If an Environmental Assessment is required following the emergency works to determine a long term solution, engagement will occur as required by the *Environmental Assessment Act*.

ELEVATION OF MATTERS IN DISPUTE

TRCA will work cooperatively with nations, confederacies, or councils to resolve disputes. Should a dispute arise during the engagement process, TRCA will discuss the nature of the

dispute with the nation, confederacy, or council's contact for engagement and attempt, in good faith, to reach a resolution that is agreeable to each party. Should TRCA and the nation, confederacy, or council's contact be unable to reach an agreement, TRCA will elevate the matter within its organization and make available the Chair of the TRCA Directors' Committee (the CEO) to the Chief, traditional Chiefs' Council, or President of the Métis Community Council, as appropriate to attempt to resolve the matter. Representatives of the nation, confederacy, or council may also choose to make a delegation to TRCA's Board. Where these efforts do not resolve a dispute, TRCA may seek to resolve a dispute through the use of a mediator. Where collaborative efforts do not achieve a resolution, the matter will be referred to the Crown

RECORD OF ENGAGEMENT

TRCA will keep detailed records respecting the process, including all correspondence, records of telephone conversations, e-mails, minutes and attendees of all meetings. This record of engagement will be included in the relevant reports, as may be required by the regulator. Nations, confederacies, or councils may share traditional knowledge with TRCA. In general, traditional knowledge refers to indigenous knowledge systems that have been developed and maintained over time. The TRCA will respect the policies and requests of the nation, confederacy, or council regarding the use of traditional knowledge. If a nation, confederacy, or council consents to share its traditional knowledge with the TRCA for the purpose of including in a project document submitted to the regulator, they should be informed that any portion of that knowledge that forms part of project documents may be made public and may be subject to the *Freedom of Information and Protection of Privacy Act*.

APPENDIX A: GLOSSARY OF TERMS

The following glossary terms apply to these Guidelines:

Aboriginal Peoples

As defined by the Ministry of Aboriginal Affairs (2013), Aboriginal Peoples is the collective name for the original people of North America and their descendants. The Canadian Constitution (the *Constitution Act, 1982*) recognizes three groups of Aboriginal peoples — Indians (commonly referred to as First Nations), Métis and Inuit. These are three separate peoples with unique heritages, languages, cultural practices and spiritual beliefs (Ministry of Aboriginal Affairs, 2013).

Wherever possible, TRCA refers to nations, councils or confederacies throughout this document. The term Aboriginal is used where it is part of a name of a government agency, or legal right or term in the Canadian Constitution, case law or statutes.

Aboriginal Rights

As defined by the Ministry of Aboriginal Affairs (2013), Aboriginal rights are collective rights, based on Aboriginal occupation and use of lands and customs, traditions and practices that make Aboriginal societies distinctive. For an activity to be an Aboriginal right, it must be an element of a practice, custom or tradition which is integral to the distinctive culture of the Aboriginal community claiming the right.

For First Nations communities: the activity must have existed at the time of first contact with Europeans. For Métis communities: the activity must have existed prior to the time of effective European control in an area.

In both instances, the current practice, custom or tradition must have continuity with the historic practice, custom or tradition, and it must remain integral to the community's culture. Present-day activities may be exercised in a modern way. Aboriginal rights are protected by section 35 (1) of the *Constitution Act, 1982*.

Aboriginal Title

As defined by the Ministry of Aboriginal Affairs (2013), Aboriginal title is a type of Aboriginal right. Aboriginal title is the Aboriginal society's ongoing collective right to use and occupy (subject to certain restrictions) those lands that they used and occupied exclusively at the time the Crown assumed sovereignty over those lands. For Aboriginal title to be established:

- an Aboriginal community needs to have occupied the lands prior to the Crown asserting sovereignty over the lands
- continuity must exist between present and pre-sovereignty occupation
- the occupation must have been exclusive at the time the Crown asserted sovereignty over those lands

Aboriginal rights or title may be modified or surrendered through treaties. The impact of a treaty on Aboriginal rights or title will depend on the interpretation of the particular treaty.

Crown

As defined by the Ministry of Aboriginal Affairs (2013), in Canada, and in other Commonwealth countries, which recognize the same Queen as the formal head of state, the state (or government) is commonly referred to as "the Crown." In Ontario, the Crown refers to the Ontario and Federal governments.

Duty to Consult

As defined by the Ministry of Aboriginal Affairs (2013), the Supreme Court of Canada has determined that the constitutional protection accorded Aboriginal rights and treaty rights under section 35 of the *Constitution Act, 1982* requires the Crown to consult with Aboriginal people when it has knowledge of an existing or asserted Aboriginal or treaty right and contemplates conduct that may adversely affect the right in question. The Supreme Court of Canada has further determined that third parties do not owe a duty to consult Aboriginal people. The Crown may delegate "procedural aspects" of Aboriginal consultation to third parties through legislation and associated regulations, guidelines and policies.

Engagement

Engagement refers to the "procedural aspects" of the Duty to Consult that the Provincial or Federal Crown may delegate to TRCA. The depth of engagement will vary depending on the strength of the right or claim and the seriousness of the impact of the proposed project on the right or claim.

Treaty

As defined by the Ministry of Aboriginal Affairs (2013), a treaty is an agreement made between the Crown and First Nations with the intention of creating mutually binding obligations, which would be solemnly respected.

Treaty Rights

As defined by the Ministry of Aboriginal Affairs (2013), Treaty rights are the specific rights of Aboriginal peoples embodied in the treaties they entered into with Crown governments (initially France and Britain, then Canada after Confederation). Generally, historic treaties are in writing. Courts have found that oral promises can also form part of a treaty and give rise to treaty rights. Some of the matters that treaty rights often relate to include:

- creating a reserve
- paying out money
- the right of Aboriginal communities to hunt, fish and trap subject to the terms of the treaty

Existing treaty rights are protected under section 35 of the *Constitution Act, 1982*.