ACR Aboriginal Programs Project
Program Template

Program Area:	5.0	Resource Stewardship
Sub Program:	5.2	Implementing Consultation Processes for Resource Access and Management
Template:	**5.2.5**	**Legal Principles Surrounding Consultation**
Sponsor(s)	*Fraser Milner Casgrain LLP*	

Objective

To provide an overview of legal principles relating to Aboriginal consultation on Crown land in Alberta for resource developers.

Description

Consultation is the process by which Aboriginal peoples are consulted regarding land use decisions that affect the exercise of Aboriginal or treaty rights or the enjoyment of Aboriginal title. Consultation is relevant for the resource developer as a failure to consult with Aboriginal peoples by the Crown may in certain circumstances impact upon licenses, leases or permits that are issued to resource developers under Crown authority. In other instances, a failure to consult with Aboriginal peoples can result in delays to project development.

There have been significant and ongoing developments in the law surrounding the duty to consult with Aboriginal peoples. It must be kept in mind that this remains an unsettled area of law, although the Supreme Court of Canada in judgments rendered in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 and *Mikisew Cree First Nation v. Canada*, [2005] S.C.J. No. 71 have provided further guidance and clarification of the legal principles associated with the duty to consult. These decisions specifically provided the Supreme Court of Canada with an opportunity to address the duty to consult with, and where appropriate, accommodate Aboriginal peoples. Given the importance of these decisions, they will be addressed in greater detail below.

Much of the recent law surrounding the duty to consult has arisen in British Columbia where, with the exception of the north-eastern part of the province, there are no treaties. Alberta, however, is covered by three treaties, numbered 6, 7 and 8. Treaties 6, 7 and 8 contain clauses extinguishing Aboriginal rights and title in exchange for treaty rights. Therefore, of particular relevance to Alberta is the application of the duty to consult as it relates to treaty rights. Treaty rights contained within Treaties 6, 7 and 8, include, for example, the right to reserve lands, and specific rights to hunt, fish and trap. The Supreme Court of Canada has also determined (*R. v. Badger* [1996] 1 S.C.R. 771) that the *Natural Resources Transfer Agreements* (appended to the *Constitution Act,* 1930) modified the Treaty 8 right to hunt in Alberta such that the treaty right

to hunt is for food only and not for commercial purposes but that the right extends to all "unoccupied Crown lands or lands to which the Indians may have a right of access". As the wording in Treaties 6 and 7 is similar to that contained in Treaty 8, it is presumed that this modification of the treaty right is also applicable to Treaties 6 and 7.

Therefore, it is important to recognize that the duty to consult in Alberta will primarily relate to treaty rights which may be exercised on reserve lands and "unoccupied Crown lands or lands to which the Indians may have a right of access". A recent important development relating to the duty to consult in respect to historical treaty rights arose in *Mikisew Cree First Nation v. Canada,* [2005] S.C.J. No. 71. The Supreme Court of Canada provided specific guidance as it relates to consultation pertaining to treaty rights in Alberta. Given the importance of this decision, it will be discussed in greater detail below.

Despite the relevance of treaty rights, this is not to suggest that Aboriginal rights will not also be claimed or found to exist (see for instance *Ahyasou v. Lund,* [1998] A.J. No. 1157 (Alta. Q.B.) where the Athabasca Tribal Council claim that exploration activity infringes both Aboriginal and treaty rights; and the decision of *R. v. Breaker,* [2000] A.J. No. 1317, where Judge Cioni of the Alberta Provincial Court found that a member of the Siksika First Nation (a signatory under Treaty 7) was exercising both Aboriginal and treaty rights in hunting for food and that his right to do so extended to unoccupied Crown lands.

Furthermore, although treaties 6, 7 and 8 contain clauses extinguishing Aboriginal rights and title in exchange for treaty rights, it should be noted that all Aboriginal peoples do not accept that these rights were extinguished. Therefore, claims for Aboriginal title may be asserted by those Aboriginal peoples who do not accept that their rights were extinguished by the treaties.

Sources of Consultation

It is important to understand that consultation obligations can arise from different sources, including those imposed by regulators. The primary sources are:

- Section 35, Constitution Act, 1982
- Statutory obligations
- Administrative law requirements

Section 35, *Constitution Act***, 1982**

The starting point for the duty to consult stems from the recognition and affirmation of the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada in the *Constitution Act, 1982* (the "*Constitution Act*"). Section 35 of the *Constitution Act* protects those Aboriginal and treaty rights of the Aboriginal peoples existing as of April 17, 1982 when the *Constitution Act* came into force.

The Supreme Court of Canada has spoken of the duty of consultation as a function of the Crown's role in justifying the infringement of an Aboriginal or treaty right. Despite the inclusion of Aboriginal and treaty rights in the *Constitution Act*, 1982, these rights are not absolute. Treaty and Aboriginal rights can be either extinguished or infringed provided that certain tests are met.

Infringement, as opposed to extinguishment, occurs where a government, either federal or provincial, acts in a way that is inconsistent with the exercise of the Aboriginal interest.

Aboriginal and treaty rights may be lawfully infringed by the Crown so long as the infringing act meets the Court's test of justification. The test for demonstrating justification of the infringement of an Aboriginal or treaty rights is a two-part test: first, the court must consider whether there has been a *prima facie* infringement of an Aboriginal or treaty right; and second, the court must consider whether any infringement is justified in the circumstances.

A body of law has developed at the Supreme Court of Canada level that provides that the Crown has a fiduciary obligation to consult with Aboriginal peoples as part of the justification process once an Aboriginal or treaty right has been established (See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1119; and *Delgamuukw v. The Queen,* [1997] 3 S.C.R. 1010).

In the decision of *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court addressed the issues of (1) whether the Crown has a duty to consult with and accommodate Aboriginal peoples prior to making decisions that might adversely affect their unproven Aboriginal rights and title claims; and (2) whether a company may owe an independent duty to consult with and accommodate a First Nation. The *Taku River v. British Columbia* decision also addressed the issue of consultation and particularly, the issue of the limits of the Crown's duty to consult. The following conclusions can be drawn from these decisions:

- The obligation to consult arises when the Crown has knowledge of the potential existence of the Aboriginal right or title and is contemplating action that may adversely affect those interests.
- The scope of the duty will be proportionate to (1) a preliminary assessment of the strength of the case supporting the asserted Aboriginal right or title and (2) the seriousness of the potentially adverse effect upon the right or title claimed.
- Even where "deep consultation" is required, where dealing with asserted but unproven rights, the Aboriginal groups do not have a veto over the uses of Crown land.
- The consultation process may indicate a need for accommodation, which requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns, and with competing societal concerns.
- Good faith in the consultation process is required on the part of both the Crown and the Aboriginal groups, who must not frustrate the Crown's reasonable good faith efforts to consult.
- The obligation to consult with and, where indicated, to accommodate Aboriginal concerns lies with the Crown alone. There is no independent legal obligation on third parties such as project proponents.
- Environmental assessment and regulatory processes that provide a meaningful opportunity to address the interests and concerns of Aboriginal people during project development can discharge the duty of the Crown to consult with, and where appropriate, accommodate the interests of Aboriginal people, even in those areas of Canada that are not subject to historical treaties or modern land claim agreements.

While the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River v. British Columbia* addressed the duty of consultation in the context of unproven aboriginal rights and title claims, the Supreme Court had the opportunity to examine

consultation and accommodation duties in the context of historical treaty rights in the decision of *Mikisew Cree First Nation v. Canada*. The Supreme Court continued to apply the principles that it had set forth in the *Haida* and *Taku River* decisions, but in the context of historical treaty rights in Alberta. The specific question in this case was whether or not the Crown had sufficiently consulted with the Mikisew Cree First Nation (a signatory to Treaty 8) before approving the construction of a winter road through Wood Buffalo National Park which, if implemented, would traverse the trap lines of 14 Mikisew families. In a unanimous decision written by Binnie J., the Supreme Court held that the Crown's consultation efforts in the particular instance were not sufficient and, more importantly, not honourable. The Supreme Court rejected an argument by the Crown that in approving the construction of the road, the Crown was simply exercising its treaty right to "take up" surrendered lands under the terms of the treaty and that, therefore, consultation with potentially-impacted First Nations was not required. The relevant portion of Treaty 8 reads as follows:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [emphasis added]

The Supreme Court specifically concluded as follows as it pertains to the Crown's duty to consult, and where appropriate, accommodate Aboriginal peoples:

- The Crown has a treaty right (which exists in some form in all of the numbered treaties) to "take up" surrendered lands for a variety of purposes with the effect that certain treaty First Nations will be precluded from exercising their rights to hunt, trap, or fish on those lands. However, the exercise of this treaty right by the Crown must be honourable and must involve a process of consultation with any Aboriginal group whose rights may be impacted.
- The Supreme Court confirmed that First Nations will not hold a veto power over a proposed project despite having a treaty right to be honourably consulted.
- When a project contemplates any potential impact on the treaty rights of a First Nation, the Crown is not automatically obligated to consult with every First Nation that happens to be a signatory to that particular treaty. The impact on potential treaty rights is to be ascertained "in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today."
- The duty to consult will always have both "informational and response components." Merely providing a standard package of information about a project (in the same form as that distributed to other interested stakeholders) or holding public open houses does not constitute sufficient consultation in the Aboriginal context.
- The Crown's duty of consultation in *any* instance must be undertaken "in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue" and the Crown must always ensure that the interests of aboriginal peoples "are seriously considered and, wherever possible, demonstrably

integrated into the proposed plan of action."

Thus, the Supreme Court of Canada has provided guidance and clarification, in its first significant pronouncements on the nature and context of the Crown's duty to consult with, and where appropriate, accommodate Aboriginal peoples prior to making decisions that might adversely impact Aboriginal or treaty rights.

Statutory obligations

The obligation to consult may also arise directly from legislation. For example, the *Indian Oil and Gas Act*, R.S.C. 1985, c.I-7, as amended, (which relates to Reserve Lands in Alberta) stipulates in section 6 as follows:

> 6(1) Minister to Consult – The Minister, in administering this Act, shall consult on a continuing basis, persons representative of the Indian bands mostly directly affected thereby.

Consultation obligations may also arise through administrative direction. Of particular relevance to the resource sector are directives issued by the National Energy Board (the "NEB"). While the NEB had issued a Memorandum of Guidance dated March 4, 2002 addressing consultation with Aboriginal peoples, this was withdrawn by letter dated August 3, 2005 as a result of the Supreme Court of Canada decisions in *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia*. The Memorandum of Guidance dated March 4, 2002, had required applicants to identify Aboriginal peoples that had an interest in the area and to also provide evidence that there had been adequate Crown consultation. However, in the letter dated August 3, 2005, the NEB indicated the following:

> The Board is committed to ensuring that appropriate consultation is carried out in respect of projects where there is a potential impact on the rights or interests of Aboriginal peoples. Where there is a potential for infringement of Aboriginal rights or interests in the area of the proposed project, applicants will be expected to meet the information requirements set out in the generic information request on consultation dated 3 April 2002 (copy attached) and the Filing Manual, which is available on the Board's Web site (neb-one.gc.ca). The Board will continue to require applicants to file information to identify any Aboriginal groups that may be affected by a proposed project, details of meetings with those individuals or groups, details of concerns expressed and the degree to which those concerns have been or will be addressed by the proponent. The Board may also require additional information in any process where there is a possibility of infringement of Aboriginal rights or interests.

As set forth in the August 3, 2005 letter, where there is potential for infringement of Aboriginal rights or interests, applicants will be expected to provide the information set out in the list dated April 3, 2002. This includes, *inter alia,* information by the company as to which Aboriginal groups have been contacted, the nature of any concerns raised by the group and whether the company is aware of any Crown consultation.

In addition the National Energy Board's Filing Manual released on April 29, 2004, provides guidance on the design and implementation of public consultation programs, and includes specific advice regarding consultation with Aboriginal communities.

The Alberta Energy and Utilities Board has also issued a guide (Guide 56) that requires that

consultation of affected parties be met when making applications. This guide essentially requires consultation with all "…parties whose rights may be directly and adversely affected by the nature and extent of the proposed application; and includes First Nations and Métis."

Administrative law requirements

As an interested and affected stakeholder, Aboriginal peoples may have a right to procedural fairness (including a right to be heard and consulted) as part of an administrative hearing where their interests are being considered. This would be the same right to procedural fairness or the right to be heard that any citizen is entitled to before an administrative tribunal whose rights are being affected.

Other developments

The Alberta government has also made it clear that there may be further developments to consultation requirements with Aboriginal groups. For instance, the Alberta government released an Aboriginal Policy Framework (the "APF"), dated September, 2000, entitled "Strengthening Relationships". The APF states that the government will:

> Where appropriate, consult affected Aboriginal people about proposed regulatory and development activities that may infringe existing treaty, NRTA or other constitutional rights.
>
> Work with affected Aboriginal Communities and industry to use existing mechanisms and, where necessary, develop new ones for appropriate consultation on resource development and land-use decisions and to identify opportunities to participate in the associated benefits.

Further, the Ministry of Aboriginal Affairs and Northern Development ("AAND") in its business plan referenced as 2003-06, at page 54, has stated that one of its strategic priorities is to improve consultation with Aboriginal groups in Alberta:

> Improved consultation policies, strategies and practices are desirable in the resource sector. Traditional use studies contribute to enhanced consultation regarding land use. AAND will advise, facilitate, and coordinate work with other Ministries to effectively manage this significant challenge on behalf of the Government of Alberta.

Finally, on May 16, 2005, the Alberta government released a consultation policy entitled "The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development". The purpose of the policy is to address the manner in which Alberta will consult with First Nations and to define the roles and responsibilities of all parties. The policy indicates that Alberta will consult with First Nations where land management and resource development on Provincial Crown land may infringe First Nations rights and traditional uses. The Alberta government has set forth the guiding principles in its policy:

- Consultation must be conducted in good faith.
- Alberta is responsible for managing the consultation process.
- Consultation will occur before decisions are made, where *land management and resource development* may infringe First Nations r*ights and traditional uses*.
- While each has very different roles, the consultation process requires the participation of

First Nations, the p*roject proponent* and Alberta.

- Alberta's consultation practices will be coordinated across departments.
- Parties are expected to provide relevant information, allowing adequate time for the other parties to review it.
- The nature of the consultation will depend on such factors and the extent of potential infringement, the communities affected, and the nature of the activities involved.
- Consultation should be conducted with the objective of avoiding infringement of First Nations *rights and traditional uses.* Where avoidance is not possible, consultation will be conducted with the goal of mitigating such infringement.
- Consultation will occur within applicable legislative and regulatory timelines.

The Alberta government also expects industry to engage in consultation based on respect, open communication and cooperation. Specifically, the following expectations of the project proponent are identified by the Alberta government:

- Provide early notification to Alberta and to First Nations before development is authorized to proceed, to ensure they are reasonably informed about the *project proponent's* proposed activities. Information should include short-term and long-range plans in the area.
- Discuss with First Nations when their proposed activities may infringe First Nations *rights and traditional uses*.
- Record and address issues or concerns identified by the First Nations and identify how infringements were avoided or mitigated.
- Upon request, make available to Alberta its documentation and other information related to consultation.
- Consider the circumstances of the project and avoid infringement of First Nations *rights and traditional uses*. Where avoidance is not possible, the *project proponent* is expected to make reasonable efforts to mitigate the infringement.
- Enter into dialogue with the First Nations regarding opportunities specific to an individual project toward achievement of a positive, sustainable outcome.

The Alberta government has also outlined at page 6 of its policy, the expectations of First Nations, which are not set forth herein.

1. Nature and scope of consultation

The nature and scope of the duty will vary with the circumstances. In the *Delgamuukw* decision, the Supreme Court of Canada set forth a spectrum analysis of consultation, with the degree of consultation required being a function of the nature of the right held and the extent and seriousness of the interference with that right. For instance, where the breach of the right is less serious or relatively minor, it will be no more than a duty to give notice, disclose information and discuss important decisions. In other cases, where there is a more significant breach of a right, deep consultation may be required aimed at finding a satisfactory solution. In certain circumstances, the consent of the First Nation may be required. In *Mikisew Cree First Nation v.*

Canada, the Supreme Court confirmed that the scope of consultation lies within a spectrum. It stated that every case must be approached individually. Each case must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The duty to consult will always have both informational and response components.

2. Practical implications

Despite the fact that private parties do not have a legal duty to consult (as set forth in *Haida Nation v. British Columbia)*, it is private companies that may bear the burden of the Crown's failure to consult or, where indicated, accommodate First Nations. In two recently decided cases *Blaney et al v. British Columbia (The Minister of Agriculture, Food and Fisheries, et al)*, 2005 BCSC 283 and *Betsiamites First Nation et al v. Kruger Inc. et* al, Superior Court of Quebec 500-17-022878-048, Canadian courts have applied the principles expressed by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* to enjoin private parties from conducting resource-based activities in areas subject to asserted but unproven Aboriginal rights and title. Despite the fact that the private parties' activities were authorized by their respective provincial governments, they were ordered not to act on those authorizations. These cases demonstrate that private parties must ensure that government adequately fulfills its duty to consult with, and where appropriate, accommodate Aboriginal groups who assert rights and title in areas of resource development. In addition, it is important for companies operating on Crown lands where Aboriginal and treaty rights are asserted or exist (including those lands often referred to as "traditional lands") to participate in a consultation process. A consultation process will identify the various stakeholders in the area and their specific concerns so that steps can be taken to address issues raised. **Consultation is a sound practice from a risk management perspective**. In addition, it can assist in identifying issues so that the company can ensure that the government is addressing issues and consulting adequately with Aboriginal groups.

3. Who should be consulted

It is not always clear as to who should be consulted as there may be overlapping claims to an area. The most prudent course is to engage in a consultation process with any First Nation, members of a First Nation or tribal council (speaking on behalf of members) who are claiming rights to the area.

4. Specific steps for project proponent to take

The Crown will be required to inform the First Nation of its plans in the area affected and provide a reasonable opportunity for input into those plans. In order to minimize risks and delays associated with the project, resource companies/project proponents should consider undertaking the following steps:

Understand Aboriginal interests

- Identify the various Aboriginal communities that exercise rights on or claim interests in the lands in question.
- Determine whether treaties or comprehensive land claim agreements have been concluded or land claims are being advanced in relation to the land, either through litigation or through the treaty negotiation process.

- Identify any agreement or memoranda of understanding between government and First Nations that apply to the proposed project area.

Know your obligations

- Review all provincial and federal statutes and regulations that are applicable to the lands and that contain consultation requirements.
- Be aware of when consultation is required by the regulators, with whom, and what specific information must be provided as part of the consultation requirements.
- Be aware of relevant provincial and federal policies that may impact decision-making processes regarding your project.
- Stay informed regarding evolving judicial consideration of consultation and compensation requirements to determine if the courts have imposed new requirements or provided greater direction regarding the fulfilment of existing requirements.

Develop productive relationships

- Invite each potentially affected Aboriginal community to meet as early in the project planning phase as is feasible.
- Discuss with these communities how they would like to be consulted regarding the project and what their information needs are.
- Consult with the appropriate representatives of the Aboriginal community. The appropriate representatives may be more difficult to identify when dealing with a Métis or non-status Aboriginal community as in some cases these communities may not have a recognized government structure, or an accepted elected or recognized hereditary leader.
- Understand and respect community protocols.
- Provide the Aboriginal communities with sufficient information that they will understand the nature of the project and its potential impact.
- Be respectful of Aboriginal communities' views.

If possible, negotiate an MOU

- Identify the company's objectives, both short-term and long-term.
- Identify possible opportunities for Aboriginal communities to be involved in the project. These may include involvement in the environmental or archaeological assessments and traditional land use studies, employment, business, or economic development opportunities.
- Understand any issues that the company is unable to address effectively, and make those limitations clear in discussion with the communities (e.g., the project proponent may have no ability to assist an Aboriginal community in addressing issues related to treaty negotiations).
- Attempt to make negotiation interest-based, rather than positional.

Protect project proponent's right.

- Document consultation efforts.
- Attempt to accommodate Aboriginal concerns and minimize impacts of the project on their rights.
- Ensure that the company carries through with its commitments to Aboriginal communities and to government decision-makers.
- Communicate effectively with government decision-makers about the company's consultation plans and processes.

General Applicability

This template was developed by Fraser Milner Casgrain LLP as an overview for resource companies on legal issues relating to Aboriginal consultation in Alberta.

Additional Information or Support

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