

Canadian Institute of Resources Law  
Institut canadien du droit des ressources

## **Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal?**

**Monique M. Passelac-Ross**  
Research Associate  
Canadian Institute of Resources Law

**Verónica Potes**  
LL.M. Student, Faculty of Law  
University of Calgary

**CIRL Occasional Paper #19**

May 2007

MFH 3353, University of Calgary, 2500 University Drive N.W., Calgary, Alberta, Canada T2N 1N4  
Tel: (403) 220-3200 Fax: (403) 282-6182 E-mail: [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca) Web: [www.cirl.ca](http://www.cirl.ca)

All rights reserved. No part of this paper may be reproduced in any form or by any means without permission in writing from the publisher: Canadian Institute of Resources Law, Murray Fraser Hall, Room 3353 (MFH 3353), University of Calgary, 2500 University Drive N.W., Calgary, Alberta, Canada, T2N 1N4

Copyright © 2007  
Canadian Institute of Resources Law  
Institut canadien du droit des ressources  
University of Calgary

Printed in Canada

## Canadian Institute of Resources Law

The Canadian Institute of Resources Law was incorporated in 1979 with a mandate to examine the legal aspects of both renewable and non-renewable resources. Its work falls into three interrelated areas: research, education, and publication.

The Institute has engaged in a wide variety of research projects, including studies on oil and gas, mining, forestry, water, electricity, the environment, aboriginal rights, surface rights, and the trade of Canada's natural resources.

The education function of the Institute is pursued by sponsoring conferences and short courses on particular topical aspects of resources law, and through teaching in the Faculty of Law at the University of Calgary.

The major publication of the Institute is its ongoing looseleaf service, the *Canada Energy Law Service*, published in association with Carswell. The results of other Institute research are published as books and discussion papers. Manuscripts submitted by outside authors are considered. The Institute publishes a quarterly newsletter, *Resources*.

The Institute is supported by the Alberta Law Foundation, the Government of Canada, and the private sector. The members of the Board of Directors are appointed by the Faculty of Law at the University of Calgary, the President of the University of Calgary, the Benchers of the Law Society of Alberta, the President of the Canadian Petroleum Law Foundation, and the Dean of Law at The University of Alberta. Additional members of the Board are elected by the appointed Directors.

All enquiries should be addressed to:

Information Resources Officer  
Canadian Institute of Resources Law  
Murray Fraser Hall, Room 3353 (MFH 3353)  
University of Calgary  
Calgary, Alberta, Canada T2N 1N4  
Telephone: (403) 220-3200  
Facsimile: (403) 282-6182  
E-mail: [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca)  
Website: [www.cirl.ca](http://www.cirl.ca)



## Institut canadien du droit des ressources

L'institut canadien du droit des ressources a été constitué en 1979 et a reçu pour mission d'étudier les aspects juridiques des ressources renouvelables et non renouvelables. Son travail porte sur trois domaines étroitement reliés entre eux, soit la recherche, l'enseignement et les publications.

L'institut a entrepris une vaste gamme de projets de recherche, notamment des études portant sur le pétrole et le gaz, l'exploitation des mines, l'exploitation forestière, les eaux, l'électricité, l'environnement, les droits des autochtones, les droits de surface et le commerce des ressources naturelles du Canada.

L'institut remplit ses fonctions éducatives en commanditant des conférences et des cours de courte durée sur des sujets d'actualité particuliers en droit des ressources et par le truchement de l'enseignement à la Faculté de droit de l'Université de Calgary.

La plus importante publication de l'institut est son service de publication continue à feuilles mobiles intitulé le *Canada Energy Law Service*, publié conjointement avec Carswell. L'institut publie également les résultats d'autres recherches sous forme de livres et de documents d'étude. Les manuscrits soumis par des auteurs de l'extérieur sont également considérés. L'institut publie un bulletin trimestriel intitulé *Resources*.

L'institut reçoit des subventions de la Alberta Law Foundation, du gouvernement du Canada et du secteur privé. Les membres du conseil d'administration sont nommés par la Faculté de droit de l'Université de Calgary, le recteur de l'Université de Calgary, les conseillers de la Law Society of Alberta, le président de la Canadian Petroleum Law Foundation et le doyen de la Faculté de droit de l'Université d'Alberta. D'autres membres sont élus par les membres du conseil nommés.

Toute demande de renseignement doit être adressée au:

Responsable de la documentation  
Institut canadien du droit des ressources  
Murray Fraser Hall, Room 3353 (MFH 3353)  
University of Calgary  
Calgary, Alberta, Canada T2N 1N4

Téléphone: (403) 220-3200

Facsimilé: (403) 282-6182

C. élec: [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca)

Website: [www.cirl.ca](http://www.cirl.ca)



## Executive Summary

The environmental and social impacts of oil sands development are generally well documented. As the development intensifies, concerns over these impacts have multiplied. Because oil sands operations in the Athabasca region are located on lands traditionally and currently used by First Nation and Métis peoples, these impacts particularly affect the local Aboriginal communities. Aboriginal peoples have expressed concerns about environmental and socio-economic impacts since the early days of oil sands development in the 1960s. Unfortunately, these impacts are not well understood and are only beginning to be documented.

The question this paper seeks to address is the following: how is Alberta fulfilling its constitutional obligations to consult and accommodate Aboriginal peoples in the oil sands development process? The jurisprudence on the government's "duty to consult and accommodate" has grown significantly in the past sixteen years, since the Supreme Court of Canada first mentioned the duty to consult as part of the justifiable infringement test developed in the *Sparrow* decision. The authors have offered a critical analysis of Alberta's consultation policy and practice with respect to conventional oil and gas development in a previous paper.\* This paper builds upon our earlier work and applies a similar analysis to oil sands development in the Athabasca region.

To begin with, we analyze key components of the Crown's duty to consult and accommodate as elaborated in a series of court decisions. The most fundamental difference between the obligation of procedural fairness and the duty to consult and to accommodate Aboriginal peoples is their respective purposes: while the former is aimed at providing a fair forum to those affected by a government proposal, the latter is designed to advance the process of reconciliation between the Aboriginal and the settler societies in Canada. We focus on three procedural aspects: the trigger of the duty, the participants in the process, and the content of the duty; as well as the primary substantive component: the duty to accommodate. We also identify the key elements which should guide the development of consultation and accommodation regimes.

We then examine the extent to which the Alberta government consults Aboriginal peoples with respect to oil sands development in the Athabasca region. Negotiations between the government and five First Nations on an Aboriginal consultation process specific to the Athabasca region are ongoing, and at the time of writing, a larger public consultation process on oil sands development is about to conclude. It is therefore difficult to provide a fair assessment of a rapidly evolving situation. Nevertheless, the

---

\* Verónica Potes, Monique Passelac-Ross & Nigel Banks, *Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation Policy and Practice*, Alberta Energy Futures Project Working Paper 14 (Calgary: ISEEE, University of Calgary, June 2006), online: <<http://www.iseee.ca/images/pdf/ABEnergyFutures-14.pdf>>.

province-wide First Nation consultation process developed by Alberta a few years ago provides the basis for the analysis. First, we introduce the *First Nations Consultation Policy on Land Management and Resource Development* and the Consultation Guidelines, which are intended to fulfill the government's obligations to consult First Nations whose rights may be adversely affected by resource development. Second, we discuss how the Alberta government consults Aboriginal communities at the following key stages in the oil sands development process: strategic land and resource planning; disposition of mineral rights; issuance of surface rights; project-specific environmental assessment and regulatory approvals; and project-specific EUB review and approval.

In the third section of the paper, we use the key judicial concepts of consultation outlined earlier to critically assess the current consultation process in the Athabasca region. We suggest that Alberta is failing in its duty to consult Aboriginal peoples in oil sands development. The government adopts a detached 'neutral arbiter' role toward consultation and accommodation against a more involved one in protecting Aboriginal rights and promoting intercultural reconciliation. Further, the government fails to grasp that the obligations are triggered at the early stages of strategic decision-making. We note that the Alberta government and the First Nations differ at a fundamental level on the purpose of consultation: for the former it is a tool for decision-making, for the latter it is a tool for rights protection. Further, there appears to be a fundamental difference of opinion between Alberta and the First Nations as to the nature and scope of the treaty and constitutional rights that need to be protected.

We conclude that the current consultation processes do not meet the high standards of conduct required by the Supreme Court, both in procedural and substantive terms. We suggest that, before engaging in or authorizing any more activities, the province should launch a process to elaborate comprehensive land and resource use plans which clearly identify the potential impacts, including the cumulative effects, of development on Aboriginal and treaty rights. Such plans would be subject to consultation with Aboriginal peoples and accommodation of their concerns, thereby preventing potential *de facto* extinguishments of their rights.

## **Acknowledgements**

This paper was prepared as part of a research project on key legal and policy issues in oil sands development funded by the Alberta Law Foundation. The generous support of the Alberta Law Foundation is gratefully acknowledged. Many individuals agreed to be interviewed for this research project, including Aboriginal, government and industry representatives, consultants, and legal experts. I would like to express my thanks to all of them for their contribution to this project. Particular thanks are due to Melody Lepine, George Poitras and Sherwin Shih of the Mikisew Cree First Nation, and to Blair Whenham of the Athabasca Chipewyan First Nation, who welcomed me in Fort McMurray and provided feedback on the draft report. I also wish to thank Karin Buss and Jim Tanner for their valuable assistance in the research and review of the document, as well as Professor Nigel Bankes and my colleague Nickie Vlavianos who offered useful comments on the final draft. Sue Parsons provided her usual expertise in editing and desktop publishing this paper.



## Table of Contents

<i>Executive Summary</i> .....	vii
<i>Acknowledgements</i> .....	ix
<b>1.0. Introduction</b> .....	1
<b>2.0. The Crown’s Duty to Consult and Accommodate: Key Judicial Components</b> .....	3
2.1. The Low Level Trigger of the Duty to Consult and to Accommodate .....	4
2.2. The Participants in the Process .....	10
2.2.1. The Duty Bearer: The Crown .....	10
2.2.2. The Aboriginal Peoples.....	11
2.2.3. Third Parties: A Role for Industry .....	12
2.3. The Variable Content of the Duty to Consult and to Accommodate.....	13
2.4. The Duty to Accommodate: The Substantive Corollary of Consultation.....	16
2.5. Consultation Requirements on the Development of a Consultation Process .....	20
<b>3.0. How are Aboriginal Peoples Consulted on Oil Sands Development?</b> .....	23
3.1. Provincial-Wide Consultation Policy and Consultation Guidelines .....	25
3.2. Aboriginal Consultation in the Athabasca Oil Sands Region .....	29
3.2.1. Strategic Land and Resource Planning .....	30
3.2.2. Disposition of Mineral Rights.....	34
3.2.3. Issuance of Surface Rights.....	36
3.2.4. Project-Specific Environmental Assessment and Regulatory Approvals.....	38
3.2.5. Project-Specific EUB Review and Approval.....	40
<b>4.0. Is Aboriginal Consultation on Oil Sands Development Meeting the Crown’s Obligations</b> .....	43
4.1. The Trigger .....	45
4.2. The Participants .....	46
4.3. The Content.....	47
4.4. The Duty to Accommodate.....	48
4.5. Consultation on the Development of the Consultation Process.....	49

**5.0. Conclusion.....50**

*CIRL Publications.....53*

## 1.0. Introduction

Alberta's massive oil sands deposits are found in three geological regions: Athabasca, Cold Lake and Peace River. Government documents track the development of oil sands projects by regions: the Wood Buffalo Region, the Cold Lake Region and the Peace River Region.<sup>1</sup> The Wood Buffalo Region, with Fort McMurray as its population centre, overlaps essentially with the geological Athabasca region, where all surface mining and many of the *in situ* developments are concentrated. The focus of this paper is on oil sands development in the Wood Buffalo or Athabasca Region, as it is the region that has experienced the longest and most extensive development to date. It is where most government and industry initiatives designed to address socio-economic and environmental issues have been launched.

The environmental and social impacts of oil sands development are generally well documented. As the development intensifies, concerns over these impacts have multiplied.<sup>2</sup> Because oil sands operations in the Athabasca region are located on lands traditionally and currently used by First Nation and Métis peoples, these impacts particularly affect the local Aboriginal communities. There are approximately 16 First Nation communities with known traditional use sites and areas, as well as several Métis communities, within the Athabasca region.<sup>3</sup> The cumulative impacts of oil sands development, notably on the Athabasca River and on air quality, are widespread and also affect Aboriginal communities in the Northwest Territories and Saskatchewan. Aboriginal peoples have raised concerns about environmental and socio-economic

---

<sup>1</sup> See Alberta Employment, Immigration and Industry, *Oil Sands Industry Update* (December 2006).

<sup>2</sup> See in particular the Pembina Institute's series of publications, online: <<http://www.pembina.org>>, Gail MacCrimmon & Thomas Marr-Laing, *Patchwork Policy, Fragmented Forests: In-situ oil sands, industrial development, and the ecological integrity of Alberta's boreal forest* (May 2000); Dan Woynillowicz, Chris Severson-Baker & Marlo Reynolds, *Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush* (November 2005); Dan Woynillowicz & Chris Severson-Baker, *Down to the Last Drop – The Athabasca River and Oilsands* (March 2006); Mary Griffiths, Amy Taylor & Dan Woynillowicz, *Troubled Waters, Troubling Trends – Technology and Policy Options to Reduce Water Use in Oil and Oil Sands Development in Alberta* (May 2006); Richard Schneider & Simon Dyer, *Death by a Thousand Cuts: Impacts of In Situ Oil Sands Development on Alberta's Boreal Forest* (The Pembina Institute/CPAWS, August 2006); Peggy Holroyd, Simon Dyer & Dan Woynillowicz, *Haste Makes Waste* (April 2007). See also Hugh McCullum, *Fuelling Fortress America: A Report on the Athabasca Tar Sands and U.S. Demands for Canada's Energy* (Canadian Center for Policy Alternatives, Parkland Institute & Polar Institute, March 2006).

<sup>3</sup> Alberta Oil Sands Consultations, *Fact Sheet on Traditional Use Studies*, online: <<http://www.oilsandsconsultation.gov.ab.ca>>.

impacts since the early days of oil sands development in the 1960s. Unfortunately, these effects are not well understood and are only beginning to be documented.<sup>4</sup>

Some of the concerns of Aboriginal communities were addressed early on by the oil sands companies.<sup>5</sup> Over the years, and in particular since the late 1990s, the private sector and government have developed various initiatives and entered into agreements that have allowed Aboriginal communities to both identify their concerns about the potential impacts of proposed development and to obtain certain economic benefits from oil sands operations.<sup>6</sup> However, the pace and scale of development in the past several years has been such that some Aboriginal communities are questioning whether the negative environmental and socio-economic impacts of development outweigh their positive impacts. These questions are increasingly framed in terms of the impacts of oil sands development on their constitutionally protected Aboriginal and treaty rights.<sup>7</sup>

The question this paper seeks to address is the following: how is Alberta fulfilling its constitutional obligations to consult and accommodate Aboriginal peoples in the oil sands development process? Are the current consultation processes “adequate and legal” from the standpoint of affected Aboriginal communities?<sup>8</sup> The jurisprudence on the government’s “duty to consult and accommodate” has grown significantly in the past sixteen years, since the Supreme Court of Canada first mentioned the duty to consult as part of the justifiable infringement test developed in the *Sparrow* decision.<sup>9</sup> The authors have offered a critical analysis of Alberta’s consultation policy and practice with respect

---

<sup>4</sup> See James Tanner, Cormack Gates & Bertha Ganter, *Some Effects of Oil Sands Development on the Traditional Economy of Fort McKay* (Fort McKay, AB: Fort McKay Industry Relations Corporation, 2001); James N. Tanner, *Why Labour Works: The Valuation of Subsistence Economies* (Ph.D. Thesis, University of Calgary, Resources and Environment Program, 2004).

<sup>5</sup> An article by Solange DeSantis, in the June 2002 *Report on Business Magazine*, describes Syncrude’s efforts since 1974 to develop aboriginal involvement programs which from a government and industry’s perspective are described as successful. The employment programs have provided income to a portion of the communities, but they have failed to address the larger environmental and socio-economic problems experienced by the communities at large.

<sup>6</sup> Some of these initiatives are referred to in Section 3.0 of this report: see *infra* note 95.

<sup>7</sup> For an analysis of the Aboriginal and treaty rights of these communities, see Monique M. Passelac-Ross, *Aboriginal Peoples and Resource Development in Northern Alberta*, CIRL Occasional Paper #12 (Calgary: Canadian Institute of Resources Law, 2003), and Monique M. Passelac-Ross, *The Trapping Rights of Aboriginal Peoples in Northern Alberta*, CIRL Occasional Paper #15 (Calgary: Canadian Institute of Resources Law, 2005).

<sup>8</sup> These are the terms used by the government-appointed Multistakeholder Committee conducting consultation in the oil sands area, in its Options Paper: Strategy 1 is to “ensure *adequate and legal* First Nations and Métis consultation for all current, future and proposed oil sands development”. See Alberta, *Multistakeholder Committee – Phase II Proposed Options for Strategies and Actions – For Discussion/Feedback*, 7 March 2007 at 1, online: <<http://www.oilsandsconsultation.gov.ab.ca>>.

<sup>9</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

to oil and gas development in general in a previous paper.<sup>10</sup> This paper builds upon our earlier work and applies a similar analysis to oil sands development in the Athabasca region.

Part 2 analyzes key components of the Crown's duty to consult and accommodate as outlined by the courts, notably the trigger, the participants in the process, the content of the duty, the duty to accommodate, and the way in which the consultation process should be developed. Section 3.0 examines how Aboriginal peoples are being consulted on oil sands development in the Athabasca region. Negotiations on a consultation process specific to the Athabasca region are ongoing, and it is difficult to provide a fair assessment of a rapidly evolving situation. Nevertheless, the province-wide First Nation consultation process applies for lack of an alternative process, and it provides the basis for the analysis. Finally, Section 4.0 uses the key judicial concepts of consultation outlined in Section 2.0 to assess the consultation process occurring in the Athabasca region. It suggests the need for improvement to the current situation.

## 2.0. The Crown's Duty to Consult and Accommodate: Key Judicial Components

Consultation is not an entirely new legal concept. Natural justice imposes a general duty of procedural fairness owed to those potentially impacted by a proposed government decision. It is regulated by general administrative law principles and its virtues go beyond law. The obligation to listen – and to act accordingly – is indeed good policy. By involving the incumbents, it improves the outcomes of decision-making, strengthens public support of government decisions and enhances democracy.

There are important distinctions however, between this obligation of procedural fairness and the duty to consult and to accommodate Aboriginal peoples as outlined by the courts. The most fundamental difference may be their respective purposes: while the former is aimed at providing a fair forum to those affected by a government proposal, the latter, the Supreme Court says, is designed to advance the process of reconciliation between the Aboriginal and the settler societies in Canada.<sup>11</sup> Such purpose imposes a twofold duty that holds both procedural and substantive aspects. As Justice Finch of the British Columbia Court of Appeal puts it in *Halfway River*, distinguishing

---

<sup>10</sup> Verónica Potes, Monique Passelac-Ross & Nigel Bankes, *Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation Policy and Practice*, Alberta Energy Futures Project Working Paper 14, June 2006, online: <<http://www.iseee.ca/whatsnew/reports/reports.html>>.

<sup>11</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [hereinafter *Haida*] at para. 32.

between adequate notice as a requirement of procedural fairness and adequate consultation:

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.<sup>12</sup>

This section focuses on three procedural aspects: the trigger of the duty, the participants in the process, and the content of the duty; and the primary substantive component: the duty to accommodate, as elaborated in a series of court decisions. Finally, it identifies the key elements which should guide the development of consultation and accommodation regimes.

## **2.1. The Low Level Trigger of the Duty to Consult and to Accommodate**

The decisions of the Supreme Court confirm that the Crown always has a duty to consult in its dealings with Aboriginal peoples and to deal with them honourably and fairly. Accordingly, the doctrine sets the trigger of the duty at a very low level:

The foundation of the duty in the Crown's honour and the goal of reconciliation suggest[s] that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.<sup>13</sup>

The Court's language suggests a broad range of situations triggering the duty. "The potential existence of a right" explicitly refers to unproven – yet credible – claims.<sup>14</sup> Mere "contemplation" of conduct that "might" adversely affect Aboriginal rights even provides for situations with the potential to impact on rights, absent actual impacts. Similarly, reference to "constructive" and not just actual knowledge, as an indicator of whether the Crown shall call for a consultation process, confirms the intention of the Court to expand the universe of triggering situations beyond the obvious. The duty requires reasonable diligence from the Crown in anticipating the potential effects of its actions and the consultation obligations deriving therefrom.

---

<sup>12</sup> *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.) [hereinafter *Halfway River*] at para. 160.

<sup>13</sup> *Haida*, *supra* note 11 at para. 35.

<sup>14</sup> In spite of the practical problems posed by uncertainty about the actual content of a claimed right "it will frequently be possible to reach an idea of the asserted rights and of their strength", McLachlin says. *Haida*, *ibid.* at para. 36.

*Mikisew*<sup>15</sup> further elaborates on how the duty of honourable dealings infuses treaty interpretation beyond the written text. The relevance of the decision lies both in the limitations it imposes on the government’s power to take up lands and in its liberal and generous approach to the trigger of the duty to consult and to accommodate.

The ‘tracts taken-up clause’ included in numbered treaties such as Treaty 8 confers on the Crown the power to take up treaty lands for various purposes.<sup>16</sup> In *Mikisew*, the federal government contended that its proposal to build a road on treaty lands did not require consultation nor accommodation as it was a mere exercise of the power contemplated in Treaty 8. The Court rejected this defense invoking the overarching principles of the honour of the Crown and reconciliation to impose an obligation to consult, even in cases of recognized Crown power to limit Aboriginal rights.

The Crown has a treaty right to “take up” surrendered lands for regional transportation purposes, but the Crown is nevertheless under the obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew “in good faith and with the intention of substantially addressing” Mikisew concerns.<sup>17</sup>

In addition, *Mikisew* furthers the idea of the trigger set at a low level as outlined in *Haida*. The federal government had alleged that no consultation duties were owed once it decided to move the alignment of the proposed road outside of reserve lands. The Federal Court, Trial Division quashed the government’s decision to go ahead with the road. On appeal, Alberta successfully alleged that the government’s decision to open the road was not an infringement of rights but rather the exercise of the power provided by the ‘tracts taken up’ clause. Instead, the Supreme Court found that “taking up” lands pursuant to treaties is *nonetheless* subject to the high standard of conduct required by the honour of the Crown. Further, the Court held that the clear, established and demonstrably adverse impacts on the Mikisew hunting and trapping rights in the lands *adjacent* to the new alignment proposed kept those duties intact. According to *Mikisew*, the range of foreseeable impacts that trigger the duty to consult include potential indirect, large and

---

<sup>15</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69 [hereinafter *Mikisew*].

<sup>16</sup> In the case of Treaty 8, the clause 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”. *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, etc.* (Ottawa: Queen’s Printer, 1966).

<sup>17</sup> *Mikisew*, *supra* note 15 at para. 55. See also paras. 56 and 57.

cumulative impacts, as well as qualitative and quantitative effects; and, in general, impacts on the continuity of the exercise of rights.<sup>18</sup>

In sum, the honour of the Crown and the process of reconciliation call for a high standard of conduct in the assessment of whether the duty is triggered. The guiding principle is stated in *Delgamuukw*, and ratified in *Haida* and *Mikisew*: “there is always a duty of consultation”.<sup>19</sup> The court recognizes that such liberal mandate imposes a considerable burden on the Crown, but nothing less is owed to constitutionally protected interests. In any case, administrative inconveniences are not valid defences to exonerate the Crown from its obligations to consult (and to accommodate).

For the purposes of this paper, we shall discuss in more depth two implications of the low level trigger: (1) that consultation is due at the strategic stages of policy making, and (2) that the very development of a consultation process is itself subject to consultation and accommodation.<sup>20</sup>

### *Consultation in Strategic Decision-Making*

*Haida* distinguished between the issuance and renewal of Tree Farm Licences (TFL), at which time the terms and conditions of licences and the total logging allowed are set (the strategic level) on the one hand, and the implementation of the TFL through cutting permits and approvals of forest plans (the operational level) on the other hand. The Court held that consultation – and accommodation – was required at both stages. In this case, the provincial government argued that consultation was not due at the early stage of granting a TFL as no actual impacts on the substance of rights derive from merely granting licences. The Chief Justice rejected this defence:

I conclude that the province has a duty to consult and perhaps accommodate on TFL decisions. The TFL decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. [...] The licensee develops the technical information based upon which the allowable annual cut (AAC) is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.<sup>21</sup>

Indeed, consultation only at the operational stage is not meaningful. To put it bluntly, at this stage, the questions asked by the consultation process are ‘how’ to carry out a given

---

<sup>18</sup> See *Mikisew*, *supra* note 15 at paras. 15, 44, 47, 55.

<sup>19</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*] at para. 168.

<sup>20</sup> This second implication is discussed further in Section 2.5 of this paper.

<sup>21</sup> *Haida*, *supra* note 11 at para. 76.

proposal, instead of ‘whether’ the proposal itself should be allowed and how it should be formulated.

Also, consultation at the strategic levels of decision-making is grounded on the principle that a foreseeable impact need only be potential rather than actual to trigger consultation and accommodation.

In *Huu-Ay-Aht*, the First Nation sought a Court declaration that the Crown was required to adequately consult and accommodate in deciding upon forestry tenures, including initiatives such as the Forest and Range Agreement (FRA) program. While the Huu-ay-aht alleged that the Crown had failed to engage them in a proper consultation process, the Crown had argued that it was premature to hold any consultation on its FRA program.<sup>22</sup> The Crown interpreted *Haida’s* statement that consultation should precede the granting or renewal of a licence as excluding a policy strategy such as the FRA program which allegedly did not imply any *specific* conduct that might affect Aboriginal interests. For the Crown, general continuing forest operations were “insufficient and too broad to trigger the duty”.<sup>23</sup> The Court found that the specificity of the infringement was irrelevant to trigger the duty, rather, mere contemplation of an infringement – coupled with the knowledge of a claim – gives rise to the obligation.<sup>24</sup>

Similarly, in *Dene Tha’*,<sup>25</sup> the Federal Court of Canada elaborated on how strategic planning was a component of the duty’s trigger as “contemplated conduct that can affect indigenous rights”. In this case, the Court found that the Crown’s failure to include the First Nation in the discussions of a Cooperation Plan on the regulatory and environmental review processes for the proposed Mackenzie Gas Pipeline was a breach of the government’s consultation and accommodation duties. It grounded its finding in the fact that the Cooperation Plan, although not written in a mandatory manner, specified “a road map, which intended to *do* something”, and as such it was “an essential feature of the construction of MGP” (emphasis in the original).<sup>26</sup> With regard to the timing, the Court held that the duty had arisen “at the earliest some time during the contemplation of the

---

<sup>22</sup> *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)* (2005), B.C.S.C. 1121 [hereinafter *Huu-Ay-Aht*].

<sup>23</sup> *Ibid.* at para. 109.

<sup>24</sup> *Ibid.* at para. 112. The decision also rejected Crown’s allegations that the FRA program was not formally a ‘decision’ leading to consultation obligations, invoking case law against “pedantic or overly restrictive interpretation” of what constitutes such a ‘decision’: at para. 99.

<sup>25</sup> *Dene Tha’ First Nation v. Canada*, [2006] F.C.J. No. 1677, [2007] 1 C.N.L.R. 1 [hereinafter *Dene Tha’*].

<sup>26</sup> *Ibid.* at paras. 100, 107-108. The Court concluded that although by itself the cooperation plan conferred no rights, it set up the means by which a whole process will be managed. It is a process by which the rights of the Dene Tha’ will be affected. Thus it required consultation. At para. 108.

Cooperation Plan.”<sup>27</sup> Failure to consult the Dene Tha’ resulted in a failure to consider their concerns in the environmental and regulatory processes contemplated for the pipeline.<sup>28</sup>

The low level trigger not only provides a solid basis for extending the duty to decisions at the strategic level, it also deals with the issue of consultation and accommodation as continuing obligations over time. In *Mikisew*, the Crown alleged that Treaty 8, signed in 1899, constituted in and of itself a process of consultation and accommodation. These allegations certainly bring upfront the issue of the validity of long-term plans *upon Aboriginal rights* whose exercise is already challenged by the encroachment of ancestral lands.

In any case, that consultation and accommodation have taken place at the strategic level does not imply a comprehensive ‘go ahead’ for activities at the operational stage. The Crown has ongoing obligations to consult and accommodate along the permitting stage. Certainly, future consultations and accommodations at operational levels will benefit from knowledge developed in earlier processes at the strategic level, but these themselves do not discharge such ongoing obligations.

To summarize, the language of the trigger and *Haida*’s statement regarding the early inclusion of Aboriginal concerns at the strategic level imply a heavy burden on the Crown in assessing and complying with its consultation and accommodation obligations. As we have seen, provided that the Crown has knowledge of a claim (or a right) and of potential infringement of Aboriginal or treaty rights, policy making is also subject to a consultation and accommodation process with the Aboriginal incumbents.

### *Illustrative List of Possible Triggering Crown Decisions or Actions*

The range of decisions subject to a process of consultation and accommodation is ample. The following is an illustrative but not exhaustive list of possible triggering events:

- Policy making concerning plans to use and manage land and resources;
- Determination of consultation and accommodation procedures;
- Development of laws (Acts and regulations) concerning:

---

<sup>27</sup> *Ibid.* at para 102.

<sup>28</sup> The Court particularly noted two concerns: the enforceability of the federal review process’ conclusions *vis à vis* the Alberta portion of the pipeline (the “Connecting Facilities” to be operated and owned by Nova Gas Transmission Limited) and the absence of funding to be able to engage in meaningful consultation. *Ibid.* at para. 114.

- fisheries (*Sparrow, Marshall*),<sup>29</sup> wildlife, game;
- land use;
- the use, extraction, exploitation, disposition and conservation of natural resources, such as timber, water, oil, gas, minerals;
- the environment and its physical elements, air, water, soil, forests; and
- the establishment of protected areas, parks, etc.;
- Decisions regarding implementation of the above such as:
  - Planning, development and use of land (including private lands, *Hupacasath*);<sup>30</sup>
  - Issuance, replacement, transfer and renewal of licenses to use resources both renewable (in *Haida*, a Tree Farm License; in *Marshall*, fishing quotas/licences; in *Liidlii Kue*, a land use permit; in *Halfway River*, a cutting permit)<sup>31</sup> and non renewable (a mining lease in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*; oil and gas, oil sands);<sup>32</sup>
  - Land sales (*Musqueam*);<sup>33</sup>
  - Environmental assessment processes (*Taku River, Dene Tha'*);<sup>34</sup>
  - Authorization, amendment and renewal of project proposals; and
  - Decisions regarding the implementation of policies and authorized projects (operational plans, allowable annual cut, catch quotas, production increments); opening and use of roads (*Mikisew*).

---

<sup>29</sup> *R. v. Sparrow*, *supra* note 9; *R. v. Marshall (Marshall 1)*, [1999] 3 S.C.R. 456; *R. v. Marshall (Marshall 2)*, [1999] 3 S.C.R. 533.

<sup>30</sup> *Hupacasath First Nation v. British Columbia*, [2005] B.C.S.C. 1712.

<sup>31</sup> *Haida*, *supra* note 11; *Marshall*, *supra* note 29; *Halfway River*, *supra* note 12; *Liidlii Kue First Nation v. Canada (Attorney General)*, [2000] 4 C.N.L.R. 123 (F.C.T.D.).

<sup>32</sup> *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] O.J. No. 3140 (Ont. Sup. Ct. J.).

<sup>33</sup> *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* (2005), 37 B.C.L.R. (4th) 309 (B.C.C.A.).

<sup>34</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Dene Tha'*, *supra* note 25.

## 2.2. The Participants in the Process

### 2.2.1. The Duty Bearer: The Crown

The Crown – understood in the most general terms – is burdened by the duty to consult and to accommodate. This includes the Crown in right of Canada and the Provinces as well.<sup>35</sup> Court references to the “Crown” as the duty-bearer are all-embracing and not confined to a particular form of governmental institution.

#### *The Role of Regulatory Boards*

Governments often entrust the regulation of aspects of the oil and gas and other resource industries to regulatory boards such as Alberta’s Energy and Utilities Board (EUB) or Canada’s National Energy Board (NEB). When Aboriginal participants raise claims of inadequate Aboriginal consultation by the Crown, these regulatory tribunals are faced with two questions: (1) does the Board itself owe a duty to consult, and (2) if the Board does not itself have a duty to consult, does it have the jurisdiction to decide whether or not the Crown has fulfilled its consultation obligations, before making a decision on a project that may have an impact on aboriginal or treaty rights?

These questions were discussed in more detail in a previous paper.<sup>36</sup> Briefly put, in the case of quasi-judicial tribunals such as the NEB and the EUB, the answer to the first question is most likely negative.<sup>37</sup> These boards do not themselves owe a duty to consult to Aboriginal peoples. The answer to the second question, based on the Supreme Court decision in *Paul*, is that if a tribunal has the jurisdiction to interpret or decide questions of law, then “the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of section 35 or any other relevant constitutional provision.”<sup>38</sup> Given that the EUB clearly has the jurisdiction to decide matters of law, it must also have the authority and the duty to decide questions pertaining to the interpretation and application of section 35, when they are relevant and properly put before the Board.

---

<sup>35</sup> The *Natural Resources Transfer Agreements* (NRTAs) placed Alberta and the two other Prairie provinces in the same position as the original provinces of Confederation. These agreements are incorporated into the Constitution under s. 1 of the *Constitution Act, 1930*: R.S.C. 1985, App. II, No. 25 and No. 26.

<sup>36</sup> *Supra* note 10.

<sup>37</sup> See *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. at 183; *Saulteau First Nations v. British Columbia (Oil and Gas Commission)*, [2004] 4 C.N.L.R. 284, aff’d [2004] 4 C.N.L.R. 340.

<sup>38</sup> *Paul v. British Columbia (Forest Appeal Commission)*, [2003] 2 S.C.R. 585.

The EUB's jurisdiction to determine questions of constitutional law was recently confirmed with the enactment of the *Administrative Procedures and Jurisdiction Act* and the *Designation of Constitutional Decision-Makers Regulation*.<sup>39</sup> It is now clear that if the question is put before it, the EUB has the jurisdiction to decide whether the provincial government has fulfilled its consultation obligation. The Board can refer the constitutional question to a court.

Further, and perhaps most importantly, the Supreme Court has repeatedly stated that all administrative boards must exercise their discretion in accordance with the Constitution of Canada, including subsection 35(1) and the *Charter*.<sup>40</sup> The decisions of the EUB cannot violate constitutionally protected rights, notably Aboriginal or treaty rights.

## 2.2.2. *The Aboriginal Peoples*

The consultation (and accommodation) process must include *all* Aboriginal peoples potentially impacted by a proposed government decision. It is the Crown's obligation to anticipate who will be potentially impacted by its proposals. Resource-intensive activities such as oil sands exploitation affect areas well beyond those activities' immediate area of impact.<sup>41</sup> Again, a liberal approach to the trigger of the duty, as discussed above, calls for a special diligence to acknowledge the communities that may be indirectly affected by development.

While Aboriginal peoples are undoubtedly the beneficiaries of the government's duties, "consultation is a two-way street".<sup>42</sup> The courts have asked government to make every reasonable effort to inform and to provide an opportunity to First Nations to consult. The Crown is under an obligation to provide all necessary information to the Aboriginal peoples in a timely way so that they have an opportunity to express their interests and concerns.<sup>43</sup> To proceed otherwise would ignore reality: First Nations have limited resources and capacities to tackle highly complex technical issues.

---

<sup>39</sup> *Administrative Procedures and Jurisdiction Act*, S. A. 2006, c. A-3, and *Designation of Constitutional Decision-Makers Regulation*, A.R. 69/2006.

<sup>40</sup> See Nickie Vlavianos, "Alberta's Energy and Utilities Board and the Constitution of Canada" (2005) 43 *Alta. L. Rev.* 369 at 379-381. In the 1994 *Hydro-Quebec* case, the Supreme Court stated that administrative boards must exercise their discretion "in accordance with the dictates of the Constitution, including s. 35(1)": *supra* note 37 at 185.

<sup>41</sup> Aboriginal communities in the Northwest Territories have warned against the threats that oil sands operations pose on water sustainability in downstream regions.

<sup>42</sup> *Cheslatta Carrier Nation v. British Columbia*, [1998] 3 C.N.L.R. 1 (B.C.S.C.) at 21.

<sup>43</sup> *Halfway River*, *supra* note 12 at para. 161.

On the other hand, there is on the part of First Nations a “reciprocal onus to carry their end of the consultation, to make their concerns known, to respond to the government’s attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution.”<sup>44</sup> First Nations must not frustrate the Crown’s reasonable good faith attempts, not should they take unreasonable positions to thwart the government from making decisions or acting in cases where agreement is not reached.<sup>45</sup> Refusal to meet or participate as well as setting unreasonable conditions frustrates the process.<sup>46</sup>

The courts call upon both parties to engage in a good faith process of consultation where sharp dealing is not permitted and agreement is not necessarily required.<sup>47</sup>

### **2.2.3. Third Parties: A Role for Industry**

In *Haida*, the Supreme Court established that third parties do not owe legal duties of consultation and accommodation since these obligations are grounded in the honour of the Crown.<sup>48</sup> However they may be liable to Aboriginal peoples under the general law of the land including negligence, breach of contract, dishonest dealing<sup>49</sup> and perhaps trespass.<sup>50</sup> In addition, and by analogy with the rules of general administrative law that apply to decisions that do not comply with the requirements of procedural fairness, there may be some risk that the validity of tenures issued by the Crown without proper consultation and accommodation may be void.

Government can delegate to industry procedural aspects of the duty to consult, and the negotiation of mitigation measures, at the operative phase of development. Most governments require resource companies to meet and consult with Aboriginal peoples when their activities occur within the traditional territories of First Nations and may

---

<sup>44</sup> *Mikisew*, *supra* note 15 at para. 65.

<sup>45</sup> *Haida*, *supra* note 11 at para. 42.

<sup>46</sup> *Halfway River*, *supra* note 12 at para. 161.

<sup>47</sup> *Haida*, *supra* note 11 at para. 42. In *Taku River*, the Court found on the basis of several factors that the duty to consult had been fulfilled: the incumbent First Nation was at the heart of decisions to set up a steering group to deal with Aboriginal issues; the information and analysis were clearly shaped by the Aboriginal concerns; more than one extension of statutory limitations had been granted; and the concerns of the Aboriginal peoples were well understood and had been meaningfully discussed, *Taku River*, *supra* note 34 at para. 41.

<sup>48</sup> *Haida*, *ibid.* at para. 53.

<sup>49</sup> *Ibid.* at para. 56.

<sup>50</sup> The authors thank Prof. Nigel Bankes for pointing out the possibility of trespass allegations against third parties that fail to consult with First Nations prior to engaging in activities in ancestral lands.

affect their rights. This is often a key condition for obtaining the necessary licences and permits to operate. Further, as a matter of good policy, industry should consider identifying the First Nations that may foreseeably be impacted by their operations and engaging in early consultation with them. Indeed, it might be in the best interest of the company to assess potential risks involving Aboriginal rights, *before* acquiring land or resource rights or engaging in a project or program. Carpenter and Feldberg, for example, advise that industry should make use of existing public information already available from public records, including earlier litigation and regulatory proceedings, to help identify Aboriginal peoples with whom a proponent will need to consult.<sup>51</sup> And while more direct input will come from the First Nations themselves, this prior scan of available information may help in deciding whether to pursue a project or program and, if so, to define a strategy for approaching the relevant First Nations.

Notwithstanding the practical conveniences identified here, the Crown must always keep in mind that it bears the legal duty to consult and to accommodate as outlined by the Supreme Court. While it makes perfect sense that procedural aspects of consultation be coordinated with industry while government assesses whether or not a project or program can proceed, the substantive obligation to amend a proposed action or decision in order to incorporate the concerns of the Aboriginal peoples lies ultimately on the Crown.

In contemplating the role of industry in a consultation and accommodation process, two distinctions are important to make: (1) the stage of the process where participation by industry is desirable and possibly even required; and (2) the type of decision at stake. Resource companies most often consult Aboriginal peoples in relation to a proposed resource development project. As discussed earlier, consultation should occur at an earlier stage, before land use planning decisions are made and resource rights are allocated. Decisions at the strategic level fall squarely within the scope of government actions that trigger the duty. At this stage, the role of industry, if any, will be much more limited.

### **2.3. The Variable Content of the Duty to Consult and to Accommodate**

From a purposive standpoint, that the duty to consult is founded in the honour of the Crown and is aimed at facilitating reconciliation implies a high standard of conduct by the State. Thus, as opposed to the administrative duty of procedural fairness, this duty is more accurately depicted as an obligation *to consult and to accommodate*, as found in *Haida*. It should have “the intention of substantially addressing the concerns of the

---

<sup>51</sup> A.W. (Sandy) Carpenter & Peter D. Feldberg, “An Introduction to the Use of Publicly Available Information in Assessing and Managing Aboriginal Risk” (2006) 44 Alta. L. Rev. 65 at 10.

Aboriginal peoples.”<sup>52</sup> This requires that the decision-maker be prepared to *amend its initial proposals* according to the findings and information received during the process. Good faith on both sides is required, sharp dealing is not permitted, but mere hard bargaining is acceptable. As stated by the Federal Court in *Dene Tha’*, “the goal of consultation is not to be narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and title.”<sup>53</sup>

While consultation is always required as an obligation of fair dealing, the Court has also recognized that the degree and thoroughness of the process is variable. The extent and content of the duty along a spectrum is determined by three key elements:

- The strength of the claim to title or the right;
- The degree of significance (importance) of the right; and
- The seriousness of the potential adverse effect on the right.

In general, at the highest end of the spectrum the duty is satisfied by deep consultation and on occasion, the consent of the First Nation involved; at the lowest level the obligation is met through talking together for mutual understanding. While *Delgamuukw* is the authority for situations involving proven Aboriginal title,<sup>54</sup> *Haida* and *Taku River* are the seminal decisions regarding rights claimed but not yet proven. In any case, *Haida* furthered the idea that the duty to consult is governed by the context:

At the one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. [...] At the other end [...] lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. [...] Between these two extremes [...] will lie other situations.<sup>55</sup>

*Mikisew* and *Dene Tha’* elaborated on the variables that determine the content of the duty to consult. In *Mikisew*, the Court found that the content of the duty was dictated by

---

<sup>52</sup> *Delgamuukw*, *supra* note 19 at para. 168

<sup>53</sup> *Dene Tha’*, *supra* note 25 at para. 82.

<sup>54</sup> “... When the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.” *Delgamuukw*, *supra* note 19 at para. 168. The decision did not uphold the land title alleged in the case, however, it developed these criteria to guide consultation in cases involving proven rights.

<sup>55</sup> *Haida*, *supra* note 11 at paras. 43-45.

the specificity of the treaty promises made (obligations to provide specific supplies or resources leave little space for consultation), and the seriousness of the impact of a proposed action (more serious impacts will call for more stringent consultation processes). In this case, the Court held that consultation was owed at the lower end of the spectrum given that the rights were “expressly subject to the ‘taking up’ limitation”.<sup>56</sup> Conversely, *Dene Tha’* found that the duty was owed at the highest level.<sup>57</sup> The Court held that the First Nation had “unique concerns stemming from its unique position” on the proposed Cooperation Plan to manage the Mackenzie pipeline. Some of these concerns relate to the environmental and regulatory processes, including: the composition of the review panel, the terms of reference, the enforceability of the panel’s recommendations in Alberta, and the funding needs to ensure meaningful consultation. Other concerns relate to the proposed project itself: “effects on employment, skill levels training and requirements and other matters directly affecting the lives of the Dene Tha’”.<sup>58</sup>

While the location along the spectrum is important, what matters most are probably the obligations that each location entails. In *Mikisew*, the Crown obligations included duties to:

- provide notice and information about the project addressing what the Crown knew or believed to be Mikisew interests and anticipated impacts on those interests;
- conduct a process tailored to the First Nation participation need;
- solicit and listen carefully to Mikisew concerns; and
- attempt to minimize adverse impacts on Mikisew rights.<sup>59</sup>

Interestingly, *Mikisew* demands more than what *Haida* prescribes for the lower end of the spectrum. While in *Haida* the lower end of the spectrum calls for “giving notice, disclosing information and discussing any issues raised in response to the notice”,<sup>60</sup> in *Mikisew* it requires an attempt to minimize adverse impacts.<sup>61</sup> For Binnie J. in the latter

---

<sup>56</sup> *Mikisew*, *supra* note 15 at para. 64. The Court’s analysis of the context found that: (1) the rights at stake were certain and determined (let us recall that the case involved treaty rights); (2) the ‘taking up’ clause posed a strong limitation on the rights; and (3) the impacts were clear, established and demonstrably adverse. The ‘taking up’ power seems to have been the determinant factor in locating the duty in this case.

<sup>57</sup> *Dene Tha’*, *supra* note 25 at 111 and 115.

<sup>58</sup> *Ibid.* at 107.

<sup>59</sup> See Nigel Bankes, “Mikisew Cree and the Lands Taken Up Clause of the Numbered Treaties” (Fall 2005/Winter 2006) 92/93 Resources.

<sup>60</sup> *Haida*, *supra* note 11 at para. 43.

<sup>61</sup> *Mikisew*, *supra* note 15 at para. 64.

case, this attempt is what differentiates a frustration-venting process from a meaningful consultation endeavour.

This leads us to the core issues of how substantive the duty is and what are its prospects in advancing Aboriginal interests.

#### **2.4. The Duty to Accommodate: The Substantive Corollary of Consultation**

The Supreme Court sets a very low threshold for consultation: there is always a duty to consult when Aboriginal rights are at stake. The Court has been more cautious with respect to the substantive obligation to accommodate. From *Haida* to *Mikisew*, the Court has insisted that consultation will not always lead to accommodation, but only if required. However, there are good reasons to suggest that the duty to accommodate is also triggered at a low level and just as with consultation, it is the scope and content that vary along a spectrum.<sup>62</sup>

The purpose of “substantively addressing the concerns of the Aboriginal peoples” is directly related to both the source and ultimate objective of the duty to consult: the general obligation of the Crown to deal fairly with Aboriginal peoples and the process of reconciliation. Consultation with Aboriginal peoples is not intended to be just another exercise of procedural fairness, although the procedural safeguards of natural justice and general administrative law might aid the Crown in fulfilling its obligation.<sup>63</sup> In any case, the Court confirms that the Crown has an obligation to respond to the Aboriginal concerns raised in the consultation process.

The duty to accommodate represents the responsiveness owed by the Crown to the Aboriginal concerns identified during the consultation process. When the process suggests the need to amend government policy or proposals, the stage of accommodation is reached, says the Supreme Court in *Haida*.

The Court’s choice of language in depicting the duty to accommodate as arising *if required* or *if appropriate* should be interpreted in the light of the stated purposes of the duty. Although almost implausible, there might be cases where the Aboriginal peoples are entirely satisfied with a given proposal; in these cases, where no amendments are required to the Crown’s proposed action, the process will not lead to a phase of accommodation. However, the prospects of this scenario are almost non-existent. More often than not, legitimate concerns will arise that require changes to or even the dismissal

---

<sup>62</sup> See Verónica Potes, “The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?” (2006) 17 J.E.L.P. 27.

<sup>63</sup> *Haida*, *supra* note 11 at para. 41.

of the whole proposal. The correct mindset of the Crown in any consultation process should be to expect that its duty to accommodate will arise in most situations.<sup>64</sup>

This makes it clearer than what differentiates a section 35 derived consultation process, even at the lower end of the spectrum, from the common law of procedural fairness – the former cannot be severed from its substantive component of accommodation. In this sense the duty to consult and to accommodate can be better understood as an obligation on the Crown *to incorporate the concerns of the Aboriginal peoples and to be able to demonstrate that such incorporation has actually occurred*. *Mikisew* insisted on this even in situations at the so-called lower end of the spectrum. Otherwise, the process will be merely a forum for “blowing off” steam” as opposed to a *meaningful* consultation endeavour.<sup>65</sup>

With regard to the scope and content of the duty to accommodate, the Court also prefers a spectrum of possibilities, depending on the context, just as with consultation. In cases of rights claimed but not yet established, at the high end of the spectrum where there is a strong *prima facie* claim and significant adverse impacts expected, accommodation may imply “taking steps to avoid irreparable harm or to minimize the effects of infringement ...”;<sup>66</sup> a weaker claim involving a limited right and minor potential for infringement will only impose obligations to “discuss any issues raised in response to the notice.”<sup>67</sup>

*Delgamuukw* suggests that full consent of the Aboriginal peoples may be required with regard to regulations in relation to fishing and hunting in Aboriginal lands.<sup>68</sup> In *Haida*, the Court confirmed but offered no explanation about why such consent would be appropriate only in cases of established rights and then, *by no means in every case*.<sup>69</sup> Meanwhile, the general rule is that the Crown does not have an obligation to come to an agreement with the consulted, at least pending settlement or final proof of a claim.<sup>70</sup>

Does this mean that just any ‘balance of interests’ will fulfill the Crown’s obligation? Not exactly. Nothing suggests that the Court has issued a blank check to the Crown when prescribing a ‘balance of societal interests’ as the measure for accommodation. In fact,

---

<sup>64</sup> This is what Justice Binnie is probably thinking when he insists that “consultation that excludes from the outset any form of accommodation would be meaningless”: *Mikisew*, *supra* note 15 at para. 54

<sup>65</sup> *Ibid.* at para. 54.

<sup>66</sup> *Haida*, *supra* note 11 at para. 47.

<sup>67</sup> *Ibid.* at paras. 43-45.

<sup>68</sup> *Delgamuukw*, *supra* note 19 at para. 168.

<sup>69</sup> *Haida*, *supra* note 11 at para. 48.

<sup>70</sup> *Haida*, *Taku* and *Mikisew*.

*Haida* insists on the *preservation* of the Aboriginal interest as the guiding principle of the process of consultation.<sup>71</sup>

Furthermore, for the sake of coherence, the Crown's regulatory and legislative powers need to be understood within the more general doctrine on the protection owed to section 35 rights and the consequent limits to State power in general, which arguably informs the emerging duty to accommodate. This interpretation is more consistent with the *Sparrow* promise to take Aboriginal rights seriously than a free license to weigh competing interests.

A purposive reading of *Sparrow* shows that the universe of accommodating measures available to the Crown is significantly limited by its obligations to cause the least infringement possible, to give priority to Aboriginal interests, to avoid irreparable damage, to compensate, to recognize the Aboriginal preferred means of exercising their rights, etc. and to recognize that only demonstrably compelling and substantial objectives can trump Aboriginal or treaty rights.

In situations involving Aboriginal title, the trust-like relationship with Aboriginal peoples might demand their consent given that the holders' rights include the right to choose to what ends a piece of land can be put, as *Delgamuukw* established.<sup>72</sup>

*Gladstone* also provides a useful example of how the priority principle can inform the conduct of the Crown in fulfilling its obligation to accommodate in a fisheries case.<sup>73</sup> Such priority can be manifested in the objectives of a particular regulatory scheme, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, the level of accommodation of different aboriginal rights in a particular fishery (food *versus* commercial rights, for example) relative to the importance of fishery in the economic and material well-being of the bands, and the criteria for allocating commercial licenses amongst different users.<sup>74</sup>

With regard to the recognition of the 'preferred means of exercising a right', the chambers judge in *Halfway River* held that due attention to the holistic perspective of Aboriginal peoples suggests indeed a high standard:

The Ministry of Forest and Canfor argue that Halfway has the rest of the Tusdzu area in which to enjoy the preferred means of exercising its rights. This again ignores the holistic perspective of Halfway. Their preferred means are to exercise their rights to hunt, trap and fish in an unspoiled

---

<sup>71</sup> *Haida*, *supra* note 11 at paras. 38, 44, 47. See Gordon Christie, "Developing Case Law, the Future of Consultation and Accommodation" (2006) 39:1 U.B.C. L. Rev. 139.

<sup>72</sup> *Delgamuukw*, *supra* note 19 at para. 168.

<sup>73</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*].

<sup>74</sup> *Ibid.* at para. 62. Emphasis added.

wilderness in close proximity to their reserve lands. In that sense, the approval of CP212 denies Halfway the preferred means of exercising its rights.<sup>75</sup>

Similarly in *Mikisew*, Justice Binnie found that it could not be correct to argue, as the federal Crown did, that a prohibition on hunting close to the reserve “would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometers distant across the province”.<sup>76</sup>

As mentioned before the Court has not set out a consistent set of principles for accommodation and these must be extracted from the broader doctrine on section 35. The Court seems to prefer a case by case approach to assess what measures amount to reasonable accommodation required by the consultation process.

In *Musqueam*,<sup>77</sup> the First Nation challenged a sale of lands by the British Columbia provincial government to third parties. The BC Court of Appeal found against the Crown on procedural grounds: late consultation was meaningless as the core contested decision had already been taken without the First Nation’s engagement, thus curtailing the possibilities of adequate accommodation of the Indigenous concerns.<sup>78</sup> However, Hall J.A. went on to suggest possible measures that would otherwise comply with the obligation to accommodate in the context of land use conflicts. Such measures include sharing of mineral and timber resources, employment agreements, setting aside land for treaty negotiations and even monetary compensation.<sup>79</sup>

Again, *Huu-Ay-Aht* is interesting in the way it assesses the interconnectedness between the process of consultation, and its outcome, accommodation. The decision dealt with two basic criteria of the duty: good faith and willingness to accommodate. With regard to the latter, the Court found that accommodation is a function of the strength of the claim and the degree of infringement. In this respect, Dillon J. deplored that the accommodation arrangements proposed in the Forest and Range Agreement program disregard the strength of the claim of aboriginal title and rights, the amount of timber or

---

<sup>75</sup> *Halfway River*, *supra* note 12 at para. 114. It must be noted however that the decision of the Court of Appeal found that this was an overstatement and construed “preferred means” as the methods or modes of hunting or fishing employed and not as an area or the nature of the area. In any case, what we want to raise here is the indicia of standard setting.

<sup>76</sup> *Mikisew*, *supra* note 15 at para. 45.

<sup>77</sup> *Musqueam*, *supra* note 33.

<sup>78</sup> *Ibid.* at para. 95.

<sup>79</sup> *Ibid.* at paras. 97-98.

timber harvesting in the First Nation's territory, or the seriousness of the potential infringement of title and rights.<sup>80</sup>

## 2.5. Consultation Requirements on the Development of a Consultation Process

Some decisions suggest that the development of a consultation process is itself subject to consultation. Indeed, the Courts have been encouraging the parties to work on setting up an appropriate process and avoid litigation. This is not only implicit in the low level trigger; it was also explicitly stated in the *Gitxsan* case. There, Tysoe J. recalled that “[th]e first step of a consultation process is to discuss the process itself”.<sup>81</sup>

Justice Tysoe's push for a concerted process (starting with the process itself) is based on the courts' insistence that reconciliation should be furthered through negotiation rather than litigation. In this sense, *Haida* encouraged governments to set up “regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.”<sup>82</sup> Justice Binnie referred to the finding in *Adams* that governments “may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights [...] in the absence of some explicit guidance to decision-makers”.<sup>83</sup>

Ultimately, the courts are willing to honour a structured non-discretionary regime with explicit guidance to decision-makers but they have been reluctant to prescribe a particular process. Indeed, the Crown is in a better position to design a process that meets its consultation and accommodation duties. But the courts have raised issues that need be considered in assuming this task.

Establishing a process is not an end in itself and does not itself fulfill the obligation. What matters is that in any given case, the Crown embarks on a process that adequately addresses the particularities of the situation. Obviously, the Crown will target efficiency. However administrative convenience alone is not an acceptable rationale for a flawed process. As stated in *Huu-Ay-Aht*:

---

<sup>80</sup> *Huu-Ay-Aht*, *supra* note 22 at 20.

<sup>81</sup> *Gitxsan First Nation v. British Columbia (Minister of Forests)*, [2003] 2 C.N.L.R. 142, [2004] B.C.J. No. 2714, B.C.S.C. 1734 at para. 8.

<sup>82</sup> *Haida*, *supra* note 11 at para. 51.

<sup>83</sup> *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 54.

The Crown is obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made.<sup>84</sup>

What is required is a reasonable process. However, reasonableness is a relative concept. As pointed out by Gordon Christie, *Gitxsan* made this clear.<sup>85</sup> Tysoe J. found that allocating funds to First Nations in compensation for the economic component of all infringements over a five year period made perfect business sense to the Crown. However, he also acknowledged that from the Gitanyow standpoint, it made perfect sense to reject an arrangement where the amount of the payment [was] established in advance, but the degree and nature of the infringements of Aboriginal interests over the five year period [was] not known.<sup>86</sup> Tysoe did not attempt to solve this conflict but encouraged the parties to negotiate this and other outstanding issues through a process of give and take. A purposive approach to the duty to consult and to accommodate that upholds the *Sparrow* substantive promise, however, signals that in such give and take, constitutionally protected interests should prevail over other non protected interests.

In addition, a purposive approach that prevents a one-size-fits-all process of consultation and accommodation certainly implies extra diligence for the Crown. Among other things, it needs to take into account the specificity of each First Nation. In this regard, *Huu-Ay-Aht* questioned the adequacy of a Forest and Range Agreement program that the BC Crown devised to deal with the conflicts over forest activities in lands claimed by different First Nations.

The individual nature of the consultation is apparent from the requirement to consult and seek accommodation that is “proportional to the potential soundness of the claim for Aboriginal title and rights” (*Haida Nation* (2002) at para. 51). The requirement to approach each case individually is key here when the government has attempted to impose an overall policy upon all Aboriginal groups based upon population and seeks to justify this imposition by an assertion that this policy promotes equality and fairness to each Aboriginal person. This is not the criteria established by the courts and does not afford the individual consideration required to fulfill the duty as described by McLaughlin C.J.C. ...<sup>87</sup>

Further, an adequate scheme should prescribe consultation processes that recognize that First Nations are not just another stakeholder taking part in a public participation process. This point emerges from *Mikisew* where the Court criticized the inappropriateness of the treatment accorded to the First Nation by the federal government in that case:

---

<sup>84</sup> *Huu-Ay-Aht*, *supra* note 22 at para. 113.

<sup>85</sup> Christie, *supra* note 71.

<sup>86</sup> *Gitxsan*, *supra* note 81 at paras. 53-54.

<sup>87</sup> *Huu-Ay-Aht*, *supra* note 22 at para. 116.

... [M]ost of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested stakeholders.<sup>88</sup>

The obligation is an obligation to *engage with* the First Nation through a *distinct* consultation process. There is a difference between adequate notice as a requirement of procedural fairness and adequate consultation. Adequate notice per se does not discharge the duty to consult in cases involving Aboriginal peoples. Adequate consultation imposes:

a positive obligation to reasonably ensure *that [they] are provided* with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, *and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated* into the proposed plan of action.<sup>89</sup>

That is because the process must represent “the good faith effort of the Crown (reciprocated by the First Nation) to attempt to reconcile its sovereignty with pre-existing claims of rights or title by the First Nation”, as stated in *Dene Tha'*.<sup>90</sup> In consequence, consultation cannot be taken as meaningful if it is inadvertent or *de facto*.<sup>91</sup>

Regarding the information aspects of the process, the test is purposive both from the perspective of the Crown and the First Nation. Thus the government must:

- *gather* full information as to the First Nation's views on the proposed decision or activity, including sufficient information on the Aboriginal practices, values or rights that may be impacted in order that the government is able to make a decision that minimizes impacts on those rights; and
- *provide* the necessary information to the Aboriginal peoples, such as:
  - complete information on the proposed decision or activity to allow the Aboriginal peoples to make an informed assessment of the project's impact on their territories and rights, including its effect on them and others. Complete information may include all studies which have shown the possible impacts of a proposal on the environment, wildlife habitat, waters, etc. (*Halfway River*);<sup>92</sup>
  - information in a format that Aboriginal peoples can understand (engineering reports or other scientific data have to be provided in a format that is easily

---

<sup>88</sup> *Mikisew*, *supra* note 15 at para. 9.

<sup>89</sup> *Halfway River*, *supra* note 12 at para. 160.

<sup>90</sup> *Dene Tha'*, *supra* note 25 at para. 113.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Supra* note 12.

understood and not overly technical); and

- information that is specific to the Aboriginal or treaty rights that may be impacted and not just general information distributed to the public at large (*Mikisew*).

A tailored process should not impose unreasonable time frames upon Aboriginal peoples. In *Taku River*, the process regarded as adequate by the Court lasted three years. A fixed rule regarding the time length of the process is impractical. However, the provincial governments will have to strike a fair balance between the time required by Aboriginal peoples to process the information according to their capacities and cultural requirements, and that required by industry.

The Courts have not imposed a specific obligation to fund Aboriginal participation in consultation processes. However, in *Taku River*, one of the considerations that led the court to find that an appropriate consultation and accommodation process had taken place was the provision of funds for Aboriginal participation. Further, *Dene Tha'* emphasizes funding for participation as a legitimate concern of the Aboriginal peoples. All this suggests that the availability of funding will be one factor that a court will take into account when assessing the adequacy of the consultation process. This seems entirely appropriate given that First Nations will frequently lack the resources and capacities to participate meaningfully in highly technical processes without some capacity building.

### **3.0. How are Aboriginal Peoples Consulted on Oil Sands Development?**

This section examines the scope and extent of consultations occurring with Aboriginal peoples at key stages in the oil sands development process, from strategic planning to the approval of individual projects by the EUB.

There exist several initiatives in the Athabasca region in which Aboriginal peoples are involved as one of several “stakeholders” (e.g., the Cumulative Environmental Management Association or CEMA).<sup>93</sup> These multi-stakeholder processes are not

---

<sup>93</sup> Steven Kennett’s paper, entitled *Closing the Performance Gap: The Challenge for Cumulative Effects Management in Alberta’s Oil Sands Region*, CIRL Occasional Paper #18 (Calgary: Canadian Institute of Resources Law, 2007), reviews the CEMA process, which was designed to address the cumulative effects of large oil sands development in the Athabasca region. Two of the five First Nations comprising the ATC, the Athabasca Chipewyan First Nation and the Mikisew Cree First Nation, have recently withdrawn from CEMA. Their concerns relate to CEMA’s refusal to adopt a culturally sensitive process for TEK and the assessment of traditional land use, as well as to CEMA’s lack of progress in protecting the environment, after seven years of studies and meetings. See CBC News, “First Nation pulls out of oilsands watchdog group”, 6 March 2007.

designed to address the potential impacts of development on Aboriginal or treaty rights. Rather, their purpose is to provide a fair forum for those that may be affected by government actions or decisions to raise their concerns. They may fulfill obligations of procedural fairness, but they do not fulfill the Crown's constitutional duty to consult and accommodate Aboriginal peoples.

In addition, oil sands companies have entered into agreements with individual Aboriginal communities and with the Athabasca Tribal Council, comprised of five First Nation communities.<sup>94</sup> One of the most significant industry-First Nations initiatives is the Athabasca Tribal Council/Athabasca Resource Developers (ATC/ARD) which seeks to ensure that First Nations people take part in and benefit from industrial development.<sup>95</sup> Further, the ATC, the federal and provincial government, and several developers have been negotiating a long-term benefits agreement for several years. An agreement in principle was reached in April 2004 and approved by the Agenda and Priorities Committee of Cabinet. The agreement contemplates the development of Crown consultation processes with the federal and provincial Crowns. The so-called "Radke Report" states that conclusion of the final agreement is subject to negotiations on a trust fund which would "provide First Nations with compensation for irreparable impacts of development on their aboriginal and treaty rights".<sup>96</sup>

The focus of this analysis is on Alberta's *First Nations Consultation Policy on Land Management and Resource Development* and the Consultation Guidelines, which are specifically designed to fulfill the government's obligations to consult First Nations whose rights may be adversely affected by resource development. First, the Policy and Guidelines are introduced. The Guidelines are then analyzed in more detail to find out how they address potential impacts of development on Aboriginal and treaty rights at various stages in the oil sands development process. The section on strategic land and resource planning also discusses one 'public' consultation process pertaining to oil sands development. This process allows for Aboriginal involvement in public consultations

---

<sup>94</sup> The ATC is comprised of the Athabasca Chipewyan First Nation, the Chipewyan Prairie First Nation, the Fort McKay First Nation, the Fort McMurray No. 468 First Nation, and the Mikisew Cree First Nation.

<sup>95</sup> The ATC and resource developers signed a Capacity Building Agreement in 1999, followed by agreements with the federal, provincial and municipal governments. The ATC/ARD All Parties Core Agreement signed in 2003 provides funding for Industry Relations Corporations (IRCs) to help the five First Nations members of the ATC to deal with challenges and opportunities of industrial development in the Wood Buffalo region. The Agreement also provided for industry funding of the Métis-Industry Consultation Office (MICA) (MICA was dissolved in late 2005). See Alberta Economic Development, *Oil Sands Industry Update* (December 2005) at 24 -25.

<sup>96</sup> Government of Alberta, *Investing in Our Future: Responding to the Rapid Growth of Oil Sands Development*, Final Report, 29 December 2006, at 135, online: <<http://www.gov.ab.ca/oilsandsreport>>, [hereinafter Radke Report].

while also acknowledging that there is a need for a separate and parallel process to address the First Nations' specific consultation rights pursuant to their treaty rights.

At the outset, it should be noted that negotiations are ongoing between the five First Nations members of the ATC and the provincial government to develop separate Crown Consultation Guidelines which would apply specifically to all resource activities in the Athabasca oil sands region. The negotiations are led by a consultation committee, known as the Protocol Working Group, involving representatives of Alberta Environment, Energy, Sustainable Resource Development, Community Development and Aboriginal and Northern Development (AAND) as well as the five ATC First Nations. The parties have adopted terms of reference and a process to define the roles, work plans and jurisdictions of the parties. According to the Radke Report dated December 2006, "it appears that good progress is being made in the development of guidelines specific to the oil sands region."<sup>97</sup> However, personal interviews conducted with First Nations and government representatives in the Spring of 2007 indicate that progress is slow and negotiations appear to be stalling. Fundamental differences of opinion have arisen between government and First Nations about the nature and scope of treaty rights and government's constitutional obligations. These differences need to be settled before agreement can be reached on the guidelines. Meanwhile, some First Nations are developing their own set of Consultation Guidelines.

While regional consultation guidelines are still being negotiated, the following analysis focuses on the provincial-wide Consultation Policy and Consultation Guidelines which currently apply to the oil sands development process.<sup>98</sup>

### 3.1. Provincial-Wide Consultation Policy and Consultation Guidelines

Alberta first issued an Aboriginal consultation policy in May 2005. As its name indicates, the *First Nations Consultation Policy on Land Management and Resource Development* (hereinafter the Consultation Policy or CP) sets out a consultation policy applicable to First Nation communities only, not to Métis communities.<sup>99</sup> The foundation for this policy is the government's recognition that "some activities on provincial Crown lands affect existing treaty rights and other interests of First Nations in Alberta".<sup>100</sup> The

---

<sup>97</sup> *Ibid.* at 134.

<sup>98</sup> From the point of view of the First Nations, the Guidelines do not apply, since they have been rejected by the Assembly of Treaty Chiefs. See *infra* note 113 and accompanying text.

<sup>99</sup> *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development*, 16 May 2005, online: <[http://www.aand.gov.ab.ca/PDFs/ConsultationPolicy\\_May16.pdf](http://www.aand.gov.ab.ca/PDFs/ConsultationPolicy_May16.pdf)>.

<sup>100</sup> *Ibid.* at 2.

government acknowledges that it has “a duty to consult with First Nations where legislation, regulations or other actions infringe treaty rights”.<sup>101</sup>

The stated objective of the Consultation Policy is to avoid infringement of First Nations *Rights and Traditional Uses*,<sup>102</sup> and when avoidance is not possible, to mitigate such infringement. Alberta describes its role as ‘managing’ the consultation process, and ‘where necessary’, consulting directly with First Nations.<sup>103</sup> Consultation is to occur in two ways: through general consultation and relationship building, and through project-specific consultation.

The CP stated that Alberta would develop Consultation Guidelines to address how consultation should occur “in relation to specific activities such as exploration, resource extraction, and management of forests, fish and wildlife.”<sup>104</sup> The government first adopted a *Framework for Consultation Guidelines*, which established basic principles and guiding concepts for implementing consultation processes.<sup>105</sup> This was followed by the *First Nations Consultation Guidelines on Resource Development and Land Management* (hereinafter the Consultation Guidelines or Guidelines), which came into effect on September 1, 2006.<sup>106</sup> The Guidelines set out distinct approaches to consultation in relation to specific legislative and regulatory processes administered by each of the following four departments: Alberta Community Development, Alberta Energy, Alberta Environment, and Alberta Sustainable Resource Development. The following statement encapsulates Alberta’s view of consultation:

While Alberta has a duty to consult and is accountable for consultations undertaken with First Nations where legislation, regulations or other actions have the potential to adversely impact treaty rights, some aspects of consultation will be delegated to project proponents. This delegation will be carried out in the manner described in these Guidelines. It is Alberta’s intention that these aspects of consultation delegated to proponents will be conducted within the existing regulatory framework and timelines.<sup>107</sup>

---

<sup>101</sup> *Ibid.* at 4.

<sup>102</sup> *Ibid.* The Policy states: “*Rights and Traditional Uses* include uses of public lands such as burial grounds, gathering sites, and historic or ceremonial locations, and existing constitutionally protected rights to hunt, trap and fish and does not refer to proprietary interests in the land”: footnote 2 at 2.

<sup>103</sup> *Ibid.* at 3 and 4.

<sup>104</sup> *Ibid.* at 3.

<sup>105</sup> A *Framework for Consultation Guidelines* is available online: <[http://www.aand.gov.ab.ca/AANDFlash/Files/Framework\\_May\\_19\\_2006](http://www.aand.gov.ab.ca/AANDFlash/Files/Framework_May_19_2006)>.

<sup>106</sup> *The Government of Alberta’s First Nations Consultation Guidelines on Resource Development and Land Management* are available online: <[http://www.aand.gov.ab.ca/AANDFlash/Files/Albertas\\_Consultation\\_Guidelines.pdf](http://www.aand.gov.ab.ca/AANDFlash/Files/Albertas_Consultation_Guidelines.pdf)>.

<sup>107</sup> *Ibid.* at 2. See also CP at 4 and 5.

For the most part, the Guidelines describe how those aspects of consultation which are “delegated” to project proponents will be carried out within each of the four departments. As described in the Guidelines, the role of government is: 1) to determine whether to delegate the responsibility for consultation to a proponent, and to assist the process by e.g., providing contact information, guidance and advice, establishing timeframes, etc.; 2) to review proponent-led consultation in order to assess whether it has been adequate; and 3) to make an informed decision relative to the potential adverse impacts of the project on *First Nations Rights and Traditional Uses*. The government’s decision will then be “conveyed in a timely manner to both the project proponent and the First Nations.”<sup>108</sup> More generally, Alberta undertakes to monitor the implementation of the Guidelines and to assess their effectiveness on an annual basis to determine whether changes are required.

Following the release of the CP in 2005, the government sought to consult Aboriginal communities and organizations within the three Treaty areas of Alberta on the drafting of the Guidelines. The Treaty 8 First Nations of Alberta (T8FN), an organization that is the collective voice of First Nations communities within Treaty 8 (where most of Alberta’s oil sands regions including the Athabasca region are located), defined its own approach to consultation. Throughout 2005, T8FN developed a First Nations Consultation Policy (March 2005) and a First Nations Consultation Guidelines Framework (June 2005), outlining T8FN’s policy and consultation principles.

The T8FN Consultation Guidelines Framework brought to the Joint Alberta-Treaty 8 Working Table affirms that it “captures the broadest possibilities for achieving honourable, lawful and meaningful consultation with industry and governments with respect to land and resource development in Treaty 8 (Alberta)”.<sup>109</sup> The document sets out some basic principles, including the Crown’s obligation to consult when First Nations assert “livelihood interests within the Treaty 8 lands” which may be affected by resource development. It also lists basic consultation guidelines elements. Among these basic elements, the following are listed: an express acknowledgement by government of the First Nations rights as the starting point of consultation; the provision of sufficient information to the First Nations, including on cumulative impacts of development proposals; an acknowledgement of the priority of First Nations’ interests; fair compensation for impacts that have not been minimized; and preparation of a Mitigation, Accommodation and Compensation (MAC) Plan which will be binding on the Crown and third parties.

For the T8FN, the three phases of consultation include: pre-consultation, public regulatory processes, and First Nations-specific processes. The Framework differentiates

---

<sup>108</sup> *Ibid.* at 4.

<sup>109</sup> Treaty 8 First Nations of Alberta, *First Nations Consultation Guidelines Framework*, 27 June 2005.

between public regulatory processes, in which First Nations are entitled to take part but which “do not represent First Nations consultation, since they are not directed to First Nations’ issues, interests and concerns”, and First Nations-specific processes. The latter involve both two-way consultation between First Nations and the Crown, and three-way consultation with First Nations, the Crown and industry.<sup>110</sup>

The T8FN’s Framework contains two appendices which present the T8FN’s position on “traditional use” and on the treaty relationship with the Crown. In Appendix 1, the T8FN question the definition of “traditional use” included in the CP and the Guidelines, suggesting that the government identifies traditional use practices in a site-specific/use specific manner, and by general reference to limited sustenance hunting, trapping and fishing practices of First Nation peoples. The T8FN affirm their right to define “terms which are central to the collective identity of Treaty 8 peoples and integral to their culture”. Traditional use is defined as follows:

[...] The term ‘traditional use’ is used by First Nation governments to refer to land and resource-use practices which are central to the identity and integral to the culture of Treaty 8 First Nation peoples. These land and resource-use practices reflect the spiritual, cultural, political, social and material relationships between Treaty 8 First Nation peoples, and the lands and resources within these areas identified within Treaty 8. The spiritual, cultural, political, social and material relationships between Treaty 8 peoples and these lands and resources constitute their “culture” and are central aspects of the collective/individual identity of Treaty 8 peoples [...]

Appendix 2 addresses the treaty relationship existing between the Crown and First Nations. It asserts that Treaty 8 included a commitment to protect the “livelihood interests” of the signatories of the treaty, with “livelihood” understood not only as earning a living, but also as including broader cultural meanings related to a way of life. This commitment has not been fulfilled by the federal government and the livelihood rights are being infringed by the provincial government, without justification. T8FN and the federal government are currently engaged in bilateral negotiations on issues of governance, and are seeking to develop a mutual understanding of the nature and scope of treaty livelihood rights and interests. The provincial government has agreed to participate in these negotiations.

The provincial government and Treaty 8 representatives met over a period of several months to discuss their respective positions with respect to consultation and to find common approaches and areas of agreement. Although the two parties agreed on some basic principles of consultation, fundamental disagreements continued to surface. Common approaches and areas of disagreement are summarized in a document entitled “Treaty 8 First Nations and Government of Alberta Framework Comparison: Working Together to Find Common Ground”.<sup>111</sup> This document notes in particular that

---

<sup>110</sup> *Ibid.* at 6.

<sup>111</sup> Draft 04/09/06.

disagreements persisted about: the interpretation of the rights and interests protected by Treaty 8, the need to obtain consent from First Nations on certain decisions, the necessity of a separate consultation process as opposed to incorporating First Nation consultation within existing public consultation processes, and the obligation to negotiate benefit sharing agreements or compensation agreements in relation to infringement of First Nations rights.

The position of the Alberta government was that areas of disagreement should not hinder the progress made in the development of a Framework of Consultation and the Guidelines. For their part, the Treaty 8 Chiefs believed that unless the diverging views were resolved, it would not be possible for the parties to agree to a Consultation Framework and Guidelines. The government issued the *Framework for Consultation Guidelines* in May 2006, and the Consultation Guidelines came into force on September 1, 2006.<sup>112</sup> On September 14, 2006, by unanimous resolution the Assembly of Treaty Chiefs of Treaty No. 6, Treaty No. 7 and Treaty No. 8 representing the three major treaties in Alberta, rejected the government's *First Nations Consultation Policy on Land Management and Resource Development* in its entirety including the Framework and the Consultation Guidelines.<sup>113</sup> The Chiefs stated that the government has adopted the CP without adequate consultation and consent of the Nations/Tribes affected by this policy, and that it had implemented the Guidelines without the consent of the First Nations.

### **3.2. Aboriginal Consultation in the Athabasca Oil Sands Region**

How is the Alberta government consulting these First Nations that are potentially affected by oil sands development? A companion paper in this oil sands research project provides a detailed overview of the legislative and regulatory framework for oil sands development in Alberta.<sup>114</sup> The five stages that we focus on in the following paragraphs are:

- strategic land and resource planning;
- disposition of mineral rights;
- issuance of surface rights;
- project-specific environmental assessment and regulatory approvals; and

---

<sup>112</sup> *Supra* notes 104 and 105.

<sup>113</sup> Assembly of Treaty Chiefs Resolution 14-09-06/#003R.

<sup>114</sup> Nickie Vlavianos, *Oil Sands Development in Alberta: A Complex Regulatory Framework*, (forthcoming).

- project-specific EUB review and approval.

The discussion briefly summarizes the key features of each of these five stages. Reference is made to Nickie Vlavianos' paper for a more thorough analysis of each stage of development.

### **3.2.1. Strategic Land and Resource Planning**

As discussed in Section 2.0 of this paper, the courts have stated in several cases that Aboriginal consultation should occur at the strategic level, as well at the operational level or on a project-by-project basis. The provincial *Framework for Consultation Guidelines* promised that "Alberta will proceed with important initiatives such as traditional use studies and the meaningful involvement of First Nations in land and resource planning as a tool to identify and avoid or mitigate potential impacts on First Nations Rights and Traditional Uses or to accommodate those rights and traditional uses in Alberta's decision-making"<sup>115</sup> How are Aboriginal communities consulted on strategic land and resource planning, particularly with respect to oil sands development?

The following paragraphs review three governmental initiatives in relation to land and resource planning in order to answer these questions. These are:

- the Land-use Framework (LUF);
- the Mineable Oil Sands Strategy (MOSS) and Fort McMurray Oil Sands Integrated Resource Management Plan (IRP); and
- the Oil Sands Consultation Group and Multistakeholder Committee (MSC).

#### *Land-use Framework (LUF)*

The Consultation Guidelines developed by Alberta Sustainable Resource Development (SRD) include a section on land management, stating that "Lands Division is committed to consult with First Nations regarding strategic level planning and operational landscape level initiatives that may adversely impact First Nations Rights and Traditional Uses".<sup>116</sup> It lists general consultation criteria dealing with assessment, notification, procedures. However, SRD's Guidelines do not set out explicitly the legal and regulatory framework within which such initiatives may fit, nor do they specify the way in which Aboriginal peoples may be consulted on the current land use planning initiatives.

---

<sup>115</sup> *Supra* note 105 at 2.

<sup>116</sup> Consultation Guidelines, *supra* note 106, Part V: Alberta Sustainable Resource Development Guidelines for First Nation Consultation on Resource Development and Land Management at 3.

Meanwhile, the government has launched a cross-ministry initiative, the Land-use Framework (LUF), which is designed to address a wide range of land management issues at the provincial level. LUF is to provide provincial-level direction and guidance for land-use planning and management and balance competing demands on lands and resources. The provincial government has identified completion of the LUF as one of its priorities as a way of managing growth pressures. In the Fall of 2006, the government held consultations with representatives of several “focus groups”, including Aboriginal communities. Following these consultations, a cross-sector forum involving 152 representatives, including from Aboriginal communities, was held in October 2006.

A three-page Summary Report prepared by Alberta Aboriginal Affairs and Northern Development (AAND) on Aboriginal input into the LUF states that even though “the LUF is expected to be a policy document and not directly infringe any First Nations treaty rights” Alberta encourages First Nations to fully participate in consultations on the LUF.<sup>117</sup> The report acknowledges that the timing of the invitation to participate in the consultations was poor and “may have impeded the ability or readiness of First Nations to participate.”<sup>118</sup>

### *Mineable Oil Sands Strategy (MOSS) and Fort McMurray Oil Sands Integrated Resource Management Plan (IRP)*

Two other strategic level land and resource planning initiatives need to be mentioned, as they are directly relevant to oil sands development in the Athabasca region. In October 2005, shortly after the Consultation Policy was released, and while the Framework for Consultation Guidelines and the Guidelines were being developed, Alberta published a draft *Mineable Oil Sands Strategy (MOSS)*<sup>119</sup> along with a draft *Fort McMurray Oil Sands Integrated Resource Management Plan (IRP)*.<sup>120</sup> The MOSS drew the boundaries of a mineable oil sands area, within which it was proposed that oil sands mining be given the highest priority.

For its part, the draft IRP was to connect the MOSS to the surrounding area and was presented as providing “a comprehensive integrated approach to the management of

---

<sup>117</sup> Alberta, *Aboriginal Input on the Provincial Land Use Framework Initiative, Summary Report*, prepared by Alberta Aboriginal Affairs and Northern Development, November 2006, at 3, online: <[http://www.srd.gov.ab.ca/srem/landuseframework/pdf/Aboriginal\\_LUF.pdf](http://www.srd.gov.ab.ca/srem/landuseframework/pdf/Aboriginal_LUF.pdf)>.

<sup>118</sup> *Ibid.* at 3. Aboriginal consultation consisted of one meeting with representatives of Treaty 8, and one letter sent by the Grand Chief of T8FN to the Minister of AAND. The First Nations raised key issues of cultural and economic sustainability and called for a class Environmental Impact Assessment to assess the cumulative impacts of heavy oil, infrastructure and industrial development as a basis for the LUF.

<sup>119</sup> For Discussion, Government of Alberta, *Mineable Oil Sands Strategy*, October 2005.

<sup>120</sup> Fort McMurray Mineable Oil Sands Integrated Resource Management Plan, Draft, October 2005.

public lands and resources”.<sup>121</sup> The draft IRP acknowledged that one area of change in the plan was a shift of priority within the mineable oil sands area. Oil sands exploration and development was identified as a permitted use within all of the resource management areas making up the planning area. With respect to Traditional Use (s. 3.14), the draft IRP stated as follows: “the impact of oil sands development on traditional use, particularly hunting, trapping and fishing by First Nation members and Métis, is more substantial than in areas in which conventional oil and gas development predominates. *In some cases, the opportunity to carry out these activities have [sic] been or will be impacted over portions of the study area for an extended period of time during mining and until reclamation is completed*” [emphasis added]. The document acknowledged that it was essential for government to adopt effective consultation processes with Aboriginal peoples in the study area.

Along with the publication of these two draft documents, the government announced that it would hold an open house and four “stakeholder workshops” in Fort McMurray.<sup>122</sup> Given the significance of the land and resource development issues these documents dealt with, and the lack of proper public consultation, this announcement was not well received by the public. Public opposition resulted in the government establishing an Oil Sands Consultation Group, with the mission to recommend a suitable consultation process for oil sands development.<sup>123</sup> The MOSS and draft IRP are currently on hold (May 2007), until the government receives recommendations resulting from the public consultation process described next.

### *Oil Sands Consultation Group and Multistakeholder Committee (MSC)*

The above-mentioned Oil Sands Consultation Group (the Group) recommended that the province use a hybrid multistakeholder and panel model to consult the public on oil sands development.<sup>124</sup> Given the pace of oil sands development, the Group urged the government to move quickly and to complete the consultation process by June 2007.

With respect to First Nations, the Group acknowledged the existence of both the provincial Consultation Policy and ongoing consultation processes between the Province and the five First Nations members of the ATC. It recommended that the public

---

<sup>121</sup> *Ibid.* at 6.

<sup>122</sup> Alberta, News Release, 26 October 2005: *Mineable Oil Sands Strategy Consultation*.

<sup>123</sup> Alberta, News Release, 20 December 2005: *Government establishes group to guide consultation for oil sands environment and development policy*.

<sup>124</sup> *Oil Sands Consultation Group Final Report and Recommendations*, submitted to Ministers of Energy, Environment, and Sustainable Resource Development, 31 March 2006, online: <<http://www.environment.gov.ab.ca/info/library/7645.pdf>>.

consultation process be structured so as not to prejudice the consultation rights of First Nations, stating:

As Albertans, First Nations ought to have an opportunity to participate in the recommended public consultation process if they so desire. Participation by First Nations in the public process is separate and parallel to the First Nations' specific consultation rights regarding their aboriginal and treaty rights and interests.<sup>125</sup>

The government accepted the Group's recommendations and established a 19-member Multistakeholder Committee (MSC) with a mandate to hold a series of open information meetings in various locations throughout the province.<sup>126</sup> The consultation process involves two phases. In the first phase, the MSC developed recommendation on a Vision and a set of Principles to guide future oil sands development, based on the input received from participants in public meetings and written submissions.<sup>127</sup> During the second phase II, the MSC will develop policy recommendations on how to implement the vision and principles. The MSC is due to submit its final recommendations to government in June 2007.

For the purposes of that second phase, the MSC issued an Options Paper proposing a set of strategies and actions for the long-term management of oil sands in Alberta, based on the nine Vision elements and the Principles identified in its Interim Report.<sup>128</sup> With respect to Vision 1, which is entitled 'Honours Rights of First Nations and Métis', the proposed strategy is to 'ensure *adequate* and *legal* First Nations and Métis consultation for all current, future and proposed oil sands development' (emphasis added). However, among the actions listed to implement this strategy, the members of the MSC *disagree* on the following:

- Action 1.6: Prior to Government of Alberta (GOA) decisions on making land available for oil sands development, consult First Nations and Métis Communities;

---

<sup>125</sup> *Ibid.* at 10.

<sup>126</sup> Alberta, News Release, 31 August 2006: *Multistakeholder committee to begin oil sands consultation throughout Alberta*. The MSC comprises representatives from provincial, federal and local governments (8), First Nations and Métis (4), industry (3) and environmental organizations (3).

<sup>127</sup> Alberta, *Oil Sands Consultation – Multistakeholder Committee Interim Report*, 30 November 2006, online: <[http://www.oilsandsconsultation.gov.ab.ca/P1\\_interim\\_report.html](http://www.oilsandsconsultation.gov.ab.ca/P1_interim_report.html)>. A Panel of the MSC held meetings in seven communities in Alberta and received 298 written submissions from interested parties both within and outside of Alberta. First Nation communities in Saskatchewan (e.g., Meadow Lake Tribal Council, Fond Du Lac First Nations) and the Northwest Territories (e.g., the Deninu Kue First Nation) also sent written submissions to the MSC.

<sup>128</sup> Alberta, *Multistakeholder Committee – Phase II Proposed Options for Strategies and Actions – For Discussion/Feedback*, 7 March 2007, online: <<http://www.oilsandsconsultation.gov.ab.ca>>.

- Action 1.7: Ensure land is returned to First Nations and Métis use and that compensation for lost uses is made;
- Action 1.8: Implement and respect traditional land use strategies;
- Action 1.10: Develop integrated land management plans for the oil sands regions with participation of First Nations and Métis in order to address potential impacts on rights and traditional uses; and
- Action 1.12: Undertake a cumulative infringements study in the oil sands regions to determine impacts of oil sands development on rights and traditional uses.

As discussed further in Section 4.0 of this paper, the lack of agreement amongst the members of the MSC on such fundamental principles of consultation with Aboriginal peoples underlines the inadequacy of using a public consultation process to address issues of Aboriginal and treaty rights.

However, during Phase II of the oil sands consultation process, the government is also conducting a parallel process of consultation with both First Nations and Métis, to “focus on identifying and addressing concerns related to adverse impacts by the proposed strategies and action plans on the rights of First Nations and of Métis peoples”.<sup>129</sup> This parallel consultation process is led by an Aboriginal Consultation Interdepartmental Committee (ACIC), comprised of representatives from key government departments. The ACIC has held six consultation sessions with representatives from various Aboriginal communities and will hold a final “validation session” on May 30, 2007. The ACIC will submit a compilation of First Nations concerns and recommendations for oil sands development directly to the Oil Sands Assistant Deputy Ministers Committee. Similar to the MSC process, the deadline for completion of the Aboriginal consultation process and for submission of the ACIC report to government (June 2007) is extremely tight, making the prospect of a meaningful consultation process with Aboriginal peoples unrealistic.

### **3.2.2. Disposition of Mineral Rights**

The disposition of mineral rights is potentially the most significant stage in the energy development process. Along with land and resource planning, it is a key stage in strategic decision-making, one that is likely to have a significant impact on the rights of Aboriginal peoples on whose traditional territories the mineral resources are located, should these resources be developed.

---

<sup>129</sup> The Aboriginal Consultation Plan and the ACIC Terms of Reference are found online: <<http://www.oilsandsconsultation.gov.ab.ca>>.

In Alberta, the government owns the majority (81%) of oil and gas resources. In the oil sands area, the province owns 97% of the mineral rights. Only 3% are privately owned or owned by the federal government on behalf of First Nations or in national parks. The government disposes of oil sands rights through an entirely discretionary process and without any form of public participation.<sup>130</sup> Landowners or occupants of the surface of lands involved are not directly informed of the upcoming sale of subsurface rights, nor are they consulted on the sale. Notices of public offerings are posted on Alberta Energy's website, but their technical nature does not allow for surface landowners and the public at large to be adequately informed. Opportunities for public input exist *after* the disposition of the mineral rights, notably at the stage of review and approval of oil sands projects by the EUB, but these opportunities may occur too late in the development process.

How is the Alberta government proposing to consult with potentially affected Aboriginal peoples at this critical stage in the oil sands development process? Alberta Energy's Consultation Guidelines specifically state that:

Based on the understanding that the leasing of Crown mineral rights does not, in and of itself, adversely impact First Nations Rights and Traditional Uses, Alberta will not consult with First Nations prior to the disposition of Crown mineral rights, and First Nations consultations will not be a condition of acquiring or renewing mineral agreements.<sup>131</sup>

The rationale provided is that "mineral dispositions do not grant the right of access to the land", and further, that many tenure agreements expire without any exploration or development activities occurring on the surface. Consequently, the government deems it more efficient and effective to undertake consultation at the stage of resource development "where surface activity is being actively planned and adverse impacts might occur."<sup>132</sup> However, Alberta Energy acknowledges the need to better inform the First Nations of potentially upcoming developments:

Although the leasing of Crown mineral rights does not, in and of itself, adversely impact First Nation Rights and Traditional Uses, the Department recognizes that potential surface activities associated with the exploration and development of mineral resources might adversely impact these rights or traditional uses.

---

<sup>130</sup> See Nickie Vlavianos, *Public Participation and the Disposition of Oil and Gas Rights in Alberta* (2007) 17:3 J.E.L.P. (forthcoming); Vlavianos, *supra* note 114.

<sup>131</sup> *Consultation Guidelines*, *supra* note 106, Part III: The Department of Energy's First Nations Consultation Guidelines, at 8.

<sup>132</sup> *Ibid.*

Therefore, the Department will provide information to both industry and First Nations in preparation for discussions that may ensue regarding surface activities, which are regulated by other branches of government.<sup>133</sup>

An interactive website called the “Aboriginal Community Link”, which is available exclusively to Aboriginal communities, provides access to basic information on mineral resource activity in Alberta. Information on the link includes mineral ownership, access restrictions, active mineral agreements and lands posted for public offerings. Alberta Energy is to fund a consultation manager to provide training to Aboriginal communities on how to use the website.<sup>134</sup>

Further, Alberta Energy agrees “to reserve specified undisposed Crown mineral rights from further dispositions until a treaty land entitlement settlement is reached”, and to keep Crown mineral agreement holders who may be affected by the transfer of mineral rights from the province to Canada apprised of the process.<sup>135</sup> The Department also undertakes, subject to an agreement to share data, to enter site-specific traditional use information in the surface portion of the Land Status Automated System (LSAS) as Protective Notations. The data may be attached to the public offering of Crown mineral rights.<sup>136</sup> A major difficulty with the entering of traditional use information on government systems is government’s desire to obtain copyright of the data, which has deterred certain Aboriginal communities from sharing the information.

Finally, Alberta Energy’s Consultation Guidelines state that the department will consult First Nations in situations where “major Department Policies or new initiatives are proposed”, and “where Alberta’s assessment of the initiative indicates the province should engage in consultation with First Nations.”<sup>137</sup> However, the Guidelines do not elaborate on what these major policies or new initiatives may be.

### **3.2.3. Issuance of Surface Rights**

The disposition of mineral rights does not grant the right to access the surface of the land. Holders of oil sands rights must also secure agreements that allow access to the surface under which oil sands are located. In the case of oil sands, most of the surface is provincial public land. Surface dispositions to public lands in the province (mineral

---

<sup>133</sup> *Ibid.* at 2.

<sup>134</sup> Interview with Cole Pederson, Director, Aboriginal Consultation, Alberta Energy, 8 February 2007. It appears that the system is not working properly, as a result of the department’s insistence on limiting the participation of consultants in the training process.

<sup>135</sup> *Consultations Guidelines*, *supra* note 106 at 6.

<sup>136</sup> *Ibid.* at 5.

<sup>137</sup> *Ibid.* at 7.

surface leases) are granted by the Department of Sustainable Resource Development (SRD) pursuant to the *Public Lands Act* and regulations.<sup>138</sup> As is the case with the disposition of subsurface mineral rights by Alberta Energy, the issuance of surface rights does not require any public consultation process.

In addition to SRD, Alberta Community Development (ACD) plays a role in directing land surface development as a result of its mandate to preserve and protect historical resources pursuant to the *Historical Resources Act*.<sup>139</sup> When a proposed activity is likely to alter, damage or destroy an historic resource, ACD may require a Historical Resources Impact Assessment (HRIA) and mitigation studies pursuant to section 37 of the Act. The *Listing of Significant Historical Sites and Areas* (the Listing) and/or the Land Status Automated System (LSAS) are used to identify where an HRIA may be required. A developer must then obtain from the department a *Historical Resources Act* Clearance Letter to proceed with development.

Do the departmental Consultation Guidelines provide for consultation with the Aboriginal peoples before surface development is authorized on their traditional lands?

SRD's Consultation Guidelines are divided into sections dealing with the various mandates of the department, specifically: forest management, forest protection, land management, conventional oil and gas, fish and wildlife. The Guidelines make no reference to oil sands development despite the fact that SRD's decisions about surface access have potentially significant impacts on the use of these surface land by Aboriginal peoples. It appears that Alberta Environment has been designated as the lead ministry to coordinate Aboriginal consultation for oil sands projects.<sup>140</sup>

ACD's Guidelines acknowledge the department's responsibility to protect sites of importance to First Nations. ACD undertakes to consult with First Nations when sites of central significance to First Nations and traditional use sites may be adversely affected by resource development or decisions made by ACD. ACD will use traditional use information shared by First Nations to enter such sites in both the Public and the Restricted versions of the Listing. It will also work with SRD to request that significant traditional use locations on the Listing receive notation in the Land Status Automated System (LSAS).<sup>141</sup> As noted in the preceding section, First Nations are often reluctant to

---

<sup>138</sup> To date, the area of land that has been leased to oil sands companies amounts to approximately 48,973 square kilometres. According to government documents, this leaves close to 67% of possible oil sands areas still available for exploration and leasing. Alberta, Oil Sands Consultations, *Oil Sands Tenure and Alberta's Oil Sands*, online: <<http://www.oilsandsconsultation.gov.ab.ca>>.

<sup>139</sup> R.S.A. 2000, c. H-9.

<sup>140</sup> Interview with Andy Masiuk, Senior Advisor on Aboriginal Consultation, SRD, 14 February 2007.

<sup>141</sup> *Consultation Guidelines*, *supra* note 106, Part II: Alberta Community Development Guidelines for First Nation Consultation on Resource Development and Land Management, at 8. ACD uses the Listing notably to inform the Environmental Field Report (EFR) required by SRD for the issuance of surface

accept the terms of data sharing agreements with government departments, which are unable to access critical traditional use information.

ACD's Guidelines provide a list of types of traditional use sites, such as cabins, trails, battlegrounds, sundance grounds, medicine wheels, sweat lodge sites, burial sites, culturally modified trees, etc, which may qualify as historical resources sites. However, the document notes that "given the mandate and expertise of the Ministry, traditional use sites of a subsistence nature (e.g., hunting, trapping, fishing areas) will not be considered historical resources by ACD".<sup>142</sup> This limits the usefulness of the Listing process to distinctly identified sites. As pointed out by the Treaty 8 First Nations of Alberta, this site specific/use specific approach to "traditional use" does not reflect the broader understanding of this term by First Nations peoples.<sup>143</sup>

### **3.2.4. Project-Specific Environmental Assessment and Regulatory Approvals**

Under the *Environmental Protection and Enhancement Act* (EPEA) and the *Water Act*,<sup>144</sup> Alberta Environment (AENV) is responsible for the conduct of environmental impact assessments (EIA) and issues authorizations for a range of activities as mandated by the Acts.<sup>145</sup> The overall purpose of these is to minimize and mitigate, as well as monitor, the environmental impacts of industrial activities.

AENV's Consultation Guidelines apply to the following projects: large-scale industrial projects; large-scale water diversion or wastewater projects; projects requiring

---

dispositions, and to review Oil Sands Exploration dispositions applications sent by SRD to the Historical Resources Management Branch for review.

<sup>142</sup> *Ibid.* at 10.

<sup>143</sup> See *supra* note 109 and accompanying text.

<sup>144</sup> EPEA, R.S.A. 2000, c. E-12 and *Water Act*, R.S.A. 2000, c. W-3.

<sup>145</sup> The federal government also has jurisdiction to undertake environmental assessments of projects that require federal approvals. The two levels of government have entered into an agreement, the *Canada-Alberta Agreement for Environmental Assessment Cooperation* (2005), which allows the parties to conduct a single environmental assessment, and if public hearings are conducted, to appoint a joint panel to conduct a joint review. Under Aboriginal considerations, the agreement simply states that Aboriginal peoples whose reserve lands or current use of traditional lands and resources may be affected by a project will be notified in writing about opportunities for involvement in accordance with s. 10 of the Agreement, which deals with public involvement. Canadian Environmental Assessment Agency, *Canada-Alberta Agreement on Environmental Assessment Cooperation* (2005), online: <<http://www.ceaa.acee.gc.ca>>. For a review of the federal role in the environmental assessment of oil sands projects, see Vlavianos, *supra* note 114.

an EIA; and projects in close proximity to Indian reserves.<sup>146</sup> Most oil sands projects fit under one or several of these categories of projects triggering First Nations consultation.

AENV's Guidelines outline the way in which the department will incorporate First Nations consultation into the EIA process as well as into the regulatory approval process under *EPEA* and the *Water Act*. In line with the basic thrust of the Consultation Guidelines, the intent is to 'delegate' the procedural aspects of consultation to project proponents. For instance, when an environmental assessment is required, it is the project proponent, not AENV, that notifies potentially affected First Nations of the department's decision to prepare a screening report, and sends notice of the proposed terms of reference. AENV's role is to assess the need for First Nations' consultation. If the department determines that consultation is required, AENV will ask project proponents to prepare a First Nations Consultation Plan. The Director will consider whether the consultation activities undertaken by a project proponent were adequate before issuing regulatory approvals or before making a decision that an EIA is deemed complete.

It is noteworthy that the Guidelines do not apply to projects which were already initiated prior to September 2006. For this reason, none of the major oil sands projects that have been subject to an EIA and were approved by the EUB or a Joint Panel in the past few months have been subject to Aboriginal consultation under the new Guidelines.<sup>147</sup> Before the adoption of the Guidelines, proponents of major oil sands projects were already required to identify historical resources and traditional land uses and to consult with potentially affected First Nations to determine their concerns regarding the impacts of their proposal and identify possible mitigation strategies. However, this industry-First Nations consultation process was not designed to address the potential impacts of projects on the constitutional rights of the affected First Nation peoples.

As mentioned above, ACD's Guidelines also apply in the context of an EIA, notably relative to historical resources. ACD reviews the terms of reference of an EIA and may require proponents to identify sites of traditional uses and to document the concerns of Aboriginal peoples with respect to impacts of these sites, as well as mitigation strategies. The information is submitted as part of the HRIA report. The proponent will need to receive a *Historical Resources Act* Clearance Letter or Mitigation Requirements before obtaining an approval from the EUB.

---

<sup>146</sup> *Consultation Guidelines, supra* note 106, Part IV: Alberta Environment First Nations Consultation Guidelines (Regulatory Authorizations and Environmental Impact Assessments) at 1.

<sup>147</sup> The major projects are: Suncor Energy Inc.'s Steepbank Mine and Voyageur Upgrader (approved November 2006), Albion Sands Energy Inc.'s Muskeg River Mine (approved December 2006), Imperial Oil Resources Ventures Ltd.'s Kearl Oil Sands Mine (approved February 2007).

### 3.2.5. Project-Specific EUB Review and Approval

The Alberta Energy and Utilities Board (the EUB or the Board) plays a key role in approving or recommending the approval of all energy developments in the province including oil sands mining and *in situ* operations, processing plants and pipelines. Pursuant to section 3 of the *Energy Resources Conservation Act*,<sup>148</sup> the Board must consider whether a particular project is in the public interest, taking into account its social, economic and environmental effects, before approving or rejecting it. The public interest test is a highly discretionary test, and the Act does not specify any order of priority to the factors listed. The Board considers “traditional land use and traditional ecological knowledge” as only one of a long list of matters in its determination of whether a project is in the public interest.<sup>149</sup>

As discussed in Section 2.0, the accepted view is that, as a quasi-judicial body, the EUB does not itself owe an obligation to consult with Aboriginal peoples. However, it is also clear that when the Board exercises its statutory discretion in deciding whether or not to approve applications, its decisions must not violate constitutionally protected rights such as Aboriginal or treaty rights.

Under Directive 56, the Board has developed strict consultation requirements for project proponents whose proposals may “directly and adversely affect” persons, including First Nations and Métis.<sup>150</sup> Oil sands companies normally engage in lengthy consultations with potentially affected Aboriginal communities and for the most part manage to negotiate agreements with these communities prior to submitting their applications to the Board. The EUB’s public consultation process is not affected by the provincial First Nations Consultation Policy (CP) and the Consultation Guidelines. The CP simply states that “when a decision is to be made by an independent decision-maker such as the Alberta Energy and Utilities Board or the Natural Resources Conservation Board, Alberta *may* report on consultation to the relevant decision-maker” [emphasis added].<sup>151</sup> Directive 56 states that applicants will be expected to comply with the Consultation Guidelines once these have been approved.<sup>152</sup>

In the past few years, Aboriginal communities (First Nations and Métis) whose traditional territories are affected by oil sands development have made submissions to the

---

<sup>148</sup> R.S.A. 2000, c. E-10.

<sup>149</sup> See the discussion of the public interest test in Vlavianos, *supra* note 114, under Alberta’s Energy and Utilities Board Issues with respect to the EUB.

<sup>150</sup> EUB Directive 056: Energy Development Applications and Schedules (replacing Guide 56), revised edition 1 May 2007, at 5 online: <<http://www.eub.gov.ab>>.

<sup>151</sup> Consultation Policy, *supra* note 99 at 5.

<sup>152</sup> *Supra* note 150 at 5. Note that this statement has not been modified in the revised edition of 1 May 2007, even though the Consultation Guidelines came into effect in September 2006.

EUB or to jointly appointed federal-provincial review panels.<sup>153</sup> In the Athabasca region, the interveners have mostly involved the Mikisew Cree First Nation (MCFN), the Athabasca Chipewyan First Nation (ACFN), the Fort McKay First Nation (FMFN) and the Wood Buffalo First Nation (WBFN),<sup>154</sup> and in the Cold Lake region, the Frog Lake First Nation (FLFN) and the Kehewin Cree Nation (KCN). The majority of the concerns identified by these Aboriginal communities have centered on the environmental and socio-economic effects of the proposed projects on their traditional lands and ways of life. Impacts on groundwater and surface water, land, fish and wildlife, and traditional land-use patterns have been foremost in the minds of Aboriginal peoples.<sup>155</sup> Adverse impacts on health associated with emissions are also of increasing concern to the First Nations. In the Athabasca region, the MCFN, ACFN and Fort McKay First Nation have stated their concerns with CEMA's lack of progress and its inability to recommend thresholds and limits for the mitigation of environmental impacts.

---

<sup>153</sup> See, for example, TrueNorth Energy Corporation application to construct and operate an oil sands mine and cogeneration plant in the Fort McMurray area, EUB Decision 2002-089, 30 October 2002; Canadian Natural Resources Limited Applications for New and Amended Primary Recovery Schemes and Well Licences, Lindbergh Sector, Cold Lake Oil Sands Area, EUB Decision 2003-13, 11 February 2003; Canadian Natural Resources Limited, Application for an Oil Sands Mines, Bitumen Extraction Plant, and Bitumen Upgrading Plant in the Fort McMurray Area, Joint Panel Report and EUB Decision 2004-005, 27 January 2004; Shell Canada Limited, Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration Plant, and Water Pipeline in the Fort McMurray Area, EUB Decision 2004-009, 5 February 2004; Suncor Energy Inc., Application for Expansion of an Oil Sands Mine and a Bitumen Upgrading Facility in the Fort McMurray Area, EUB Decision 2006-112, 14 November 2006; Albion Sands Energy Inc. Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine Fort McMurray, Joint Panel Report and EUB Decision 2006-128, 21 December 2006; Imperial Oil Resources Ventures Limited Application for an Oil Sands and Bitumen Processing Facility (Kearl Oil Sands) Fort McMurray Area, Joint Panel Report and EUB Decision 2007-013, 27 February 2007.

<sup>154</sup> The WBFN have made repeated requests in various hearings to be consulted similarly to other First Nations groups, but face a unique challenge in that the Government of Canada does not recognize this band as falling under the *Indian Act*.

<sup>155</sup> In the past few years, the MCFN and the ACFN in particular have expressed concerns about the impacts of proposed development on the quantity and quality of water in the Athabasca River. The MCFN has stated that their traditional way of life is dependent on adequate flow of water in the Athabasca River as their community is dependent on the river for food and transportation, amongst other things and low flows could potentially limit access to medicinal plants/herbs, spiritual and cultural sites and trapping and hunting areas. These communities have wanted that water withdrawals from the Athabasca River be limited and have been concerned about CEMA's lack of progress towards defining In-stream Flow Needs (IFN). In the most recent EUB's review of Imperial's Kearl Project in November 2006, these two First Nations and the Fort McKay First Nation stated their views that a draft IFN and Water Management Framework jointly prepared by AENV/DFO was not sufficiently protective of the river and should be revised to be truly precautionary. The three Alberta First Nations were joined by the Deninu Kue First Nation from the Northwest Territories stating its concerns over cumulative impacts on water and stating the need to protect the Athabasca and Mackenzie River watersheds.

In some cases, Aboriginal communities have raised the issue of the need for a separate consultation process based on the impact of proposals on their constitutional rights. In the 2003 review of CNRL's Lindbergh Project in the Cold Lake region, the FLFN/KCN submitted that as the project may affect their treaty rights, the Crown had a constitutional obligation to consult them on the decision to approve the project.<sup>156</sup> The FLFN/KCN requested the Board to either engage itself in the constitutionally required consultation with them, or to suspend its decision on the application until the government of Alberta had fulfilled its obligation. The Board stated that under its legislation, the Board was not itself permitted to engage in constitutional consultation. The only consultation requirements applicable were those contained in the EUB's governing legislation and Guide 56 (now Directive 56). CNRL had complied with these requirements, therefore the Board decided not to suspend its proceedings on the application until further consultation with the Crown had taken place.

The issue of Aboriginal consultation was raised again during the 2004 review of another CNRL project, the Horizon project in the Athabasca region. The MCFN argued that they were entitled to be consulted separate and apart from the public consultation process. MCFN asked the Joint Panel to confirm that their treaty rights existed in preference to any licence or approval that may be issued by government, and to rule on whether Alberta and Canada had carried out their constitutional consultation obligations. In their view, the absence of adequate, meaningful consultation with the MCFN required the Panel to assume that the public interest test had not been met.<sup>157</sup> The federal government stated that its constitutional consultation obligation only arose "when it took actions that directly affected First Nations." Before issuing the required authorizations, the Department of Fisheries and Oceans (DFO), as the responsible authority, would consider whether sufficient consultation had taken place. For its part, Alberta argued that the EUB did not have the authority to decide constitutional issues and felt that the courts would be a more appropriate venue for this matter. The Panel declined to confirm that MCFN's treaty rights exist in preference to any licence or approval, and stated that it did not have sufficient evidence to decide whether an infringement of treaty rights would occur, and if so whether it could be justified. It also stated that MCFN was afforded all the consultation opportunities under the *Canada-Alberta Agreement for Environmental Assessment Cooperation*.<sup>158</sup>

---

<sup>156</sup> Canadian Natural Resources Limited Applications for New and Amended Primary Recovery Schemes and Well Licences Lindbergh Sector, Cold Lake Oil Sands Area, EUB Decision 2003-013, 11 February 2003, under s. 2.2 at 4-7.

<sup>157</sup> Canadian Natural Resources Limited, Application for an Oil Sands Mines, Bitumen Extraction Plant, and Bitumen Upgrading Plant in the Fort McMurray Area, Joint Panel Report and EUB Decision 2004-005, 27 January 2004, at 86.

<sup>158</sup> *Ibid.* at 88-89.

In all the above-listed decisions, the EUB or the Joint Review Panel concluded that the projects were “in the public interest” and that the applicants had taken appropriate measures to consult all potentially affected residents and First Nations communities. Additionally, in most cases, agreements between First Nations communities and the applicants were signed prior to submission of the application to the EUB, with the result that the affected First Nations did not object to the projects.

In the context of the most recent reviews of oil sands projects (e.g., the Muskeg River Mine and Kearl Oil Sands Project), some of the affected First Nations signed Non-Assertion of Rights Agreements with the government prior to the review of applications by the EUB or Joint Review Panels.<sup>159</sup> In these agreements, the First Nations assert their treaty and constitutional rights and their belief that the projects infringe upon their rights. The parties acknowledge that the EUB has the jurisdiction to rule on constitutional issues in relation to projects before it,<sup>160</sup> but agree that the hearings should proceed without EUB rulings on infringement, justification or consultation on treaty rights. The First Nations therefore agree not to assert their rights in the proceedings before the EUB or the Joint Panel and not to assert that government has a fiduciary duty, duty of honour or constitutional duty to consult them. The First Nations agree that they will confine their requests to the Board in relation to consultation to the scope of consultation as defined by the terms of reference of the EIA, EUB’s Directive 56 and the *Canada-Alberta Agreement for Environmental Assessment Cooperation* (2005).<sup>161</sup> However, the Non-Assertion of Rights Agreements allow the parties to pursue a declaration or determination of their constitutional rights in court or in other forums or proceedings.

#### **4.0. Is Aboriginal Consultation on Oil Sands Development Meeting the Crown’s Obligations?**

As noted, we concluded in a previous paper that the government of Alberta’s efforts to establish a framework of consultation with First Nations in the province were lacking in several respects.<sup>162</sup> The Consultation Policy and Guidelines do not meet the high standards of conduct required by the Supreme Court, both in procedural and substantive terms. The province of Alberta adopts a detached ‘neutral arbiter’ role toward consultation and accommodation against a more involved one in protecting Aboriginal rights and promoting intercultural reconciliation. This is evidenced in the province’s

---

<sup>159</sup> With respect to Imperial Oil’s Kearl Oil Sands Project, the MCKN, ACFN and FMFN all signed such agreements. These are available online: <[http://www.ceaa.gc.ca/050/ear\\_paneldoclist\\_e.cfm?CEAR\\_ID=16237](http://www.ceaa.gc.ca/050/ear_paneldoclist_e.cfm?CEAR_ID=16237)>.

<sup>160</sup> As confirmed by the *Designation of Constitutional Decision-Makers Regulation*, A.R. 69/2006. See discussion in Section 2.2.1 of this paper.

<sup>161</sup> *Supra* note 145.

<sup>162</sup> Potes, Passelac-Ross & Bankes, *supra* note 10 at 34-39.

delegation of its duties to consult and to accommodate to project proponents. Notwithstanding the practical convenience of involving the proponents in the processes of consulting and accommodating, the province fails to acknowledge not only that the prime duty holder is bound by a broader obligation to honourably protect rights recognized and affirmed by the Constitution. It also fails to grasp that the obligations are triggered at the early stages of strategic decision-making where, as mentioned above, the involvement of third parties, particularly proponents of development activities, contradicts the idea that meaningful consultation and accommodation imply a willingness on the part of the Crown to change its initial proposal.

These critiques are still valid for the provincial initiatives with regard to consultation for oil sands development discussed above. This section follows the same thematic organization as Section 2.0 and compares the province's practice of consultation and accommodation with Aboriginal peoples on the development of oil sands projects with the doctrinal concepts.

The discussion in Section 3.0 shows that the Alberta government and the First Nations differ at a fundamental level on the purpose of consultation: for the former it is a tool for decision-making, for the latter it is a tool for rights protection. Further, there appears to be a fundamental difference of opinion between Alberta and the First Nations as to the nature and scope of the treaty and constitutional rights that need to be protected.

The purpose of Alberta's Consultation Policy and Guidelines is to establish a process of consultation when land management and resource development may adversely impact the treaty rights and other interests of First Nations. The Alberta government defines First Nations *Rights and Traditional Uses* as including 'uses of public lands such as burial grounds, gathering sites, and historic and ceremonial locations, and existing constitutionally protected rights to hunt, trap and fish', specifying that this "does not refer to any proprietary interests in the land".<sup>163</sup> This narrow definition of treaty rights is contested by at least the Treaty 8 First Nations of Alberta (T8FN), as discussed in Section 3.0. The T8FN maintain that traditional use refers to land and resource-use practices that are central to their identity and culture, and affirm their right to define this term. They point out that the government identifies traditional use practices in a site specific/use specific manner and by reference to limited sustenance hunting, trapping and fishing practices. For the T8FN, Treaty 8 included a commitment to protect their 'livelihood interests', rights which include an economic right to participate in resource development. They assert that the First Nations interests should be given priority over the competing interests of third parties in particular resources. T8FN request that the consultation framework be expanded in response to their asserted livelihood interests.

---

<sup>163</sup> See *supra* note 94 at 2.

Until they are resolved in a government-to-government negotiation process, such as the one T8FN is engaged in with the federal government,<sup>164</sup> these fundamental disagreements will hinder progress towards the negotiation of consultation guidelines between the ATC and Alberta for the Athabasca region. The outright rejection of the Consultation Policy and Consultation Guidelines by the Chiefs of Alberta illustrates the danger of government pushing consultation forward without a common understanding by both parties of the fundamental purpose of the consultation process.

#### 4.1. The Trigger

The judicial doctrine calls for a wide range of decisions to be subject to consultation and accommodation. The Court has rightly called for a liberal conception of ‘decisions’ to include even broad policy proposals. The guiding principle is that of ‘constructive knowledge’ in assessing whether the duty to consult and to accommodate is triggered. Strategic decision-making is subject to this duty not only because of the expected impacts but also, and probably more importantly, because it is at this stage that the concerns of the First Nations can be more meaningfully accommodated.

Such early consultation has not occurred in Alberta with regard to oil sands development. Indeed, no strategic land and resource planning has yet taken place in anticipation of massive developments, and this is probably the greatest failure of the Crown in protecting the constitutional rights of Aboriginal peoples. In general, the government’s perception that strategic level decisions or initiatives (e.g., the LUF, the issuance of mineral rights) do not in and of themselves adversely impact Aboriginal and treaty rights guides the provincial government’s reluctance to consult with and accommodate Aboriginal peoples in strategic decision-making. This view, we have seen, is untenable under the judicial doctrine.

The documents reviewed in Section 3.0 show no evidence of the provincial government willing to discuss the fundamental question: should oil sands development take place given the impacts on legally protected Aboriginal interests, and if so, how can such development accommodate the requirements of rights recognition and affirmation and reconciliation? Indeed, neither the proposed MOSS, which delineates the boundaries for the areas where oil sands mining is to be given priority, nor the draft IRP, which allegedly contains a comprehensive approach to land and resources management, had any Aboriginal participation in spite of the latter acknowledging the substantial impacts of oil sands development on First Nations and Métis rights and the need for consultation.

---

<sup>164</sup> Federal-Treaty 8 Bilateral Negotiations for Treaty Implementation and Treaty-based Governance (Treaty 8 Bilateral Process). The process was started in 1998 with a Declaration of Intent by Treaty 8 First Nations of Alberta and Canada, stating that both parties wanted to discuss their respective understanding of the Treaty relationship, Treaty rights and Treaty implementation.

In other land and resource use initiatives such as the LUF, attempts to consult with First Nations have to date been limited and inadequate (sending out letters of invitation to participate in sessions through the same modalities used for stakeholders, as opposed to the meaningful and purposive engagement the doctrine calls for). The government itself acknowledged that the timing of this initiative was poor, and that First Nations were unable to participate meaningfully in that process as a result of a flurry of concurrent policy developments in the area of consultation.

The MSC consultation process on strategic long term objectives for oil sands development, which is not a specific and purposive process to incorporate Aboriginal concerns, is also failing as an Aboriginal consultation process. The ‘public’ consultation process cannot address properly the protection of Aboriginal and treaty rights, which the MSC is in no position to deal with. As noted in Section 3.0, the MSC members could not reach agreement on specific actions that would address key concerns of the First Nations (including adequate consultation prior to any decision on land dispositions for oil sands development). This illustrates how inappropriate it is for a multistakeholder process to develop recommendations to government touching upon constitutional rights and government’s obligations towards Aboriginal peoples. At the same time, the parallel Aboriginal consultation process designed to specifically address potential impacts of oil sands development on treaty and constitutional rights has been hindered by inadequate short timelines. Aboriginal representatives have complained that the deadline for completion of this process (June 2007) is much too short to allow for a meaningful consultation process to take place with Aboriginal communities. Some First Nations have asked for a moratorium on future oil sands projects approvals until the concerns of the First Nations are properly addressed.

Ultimately, consultation and accommodation on oil sands development is only taking place at the operational level, and on a project-by-project basis. A project by project approval fails to consider the cumulative impacts of oil sands development, a fact that has been deplored by many and that precludes proper accommodation of Aboriginal rights and interests.

## **4.2. The Participants**

Given that consultation at the strategic level remains inadequate, the importance of adequate consultation at the operational level increases. The ultimate decision-maker at this stage is the EUB which has consistently insisted that it does not have a duty to consult and to accommodate due to its quasi-judicial nature.

Nevertheless, it is clear that the spirit of the judicial doctrine is that no decision-making that may impact Aboriginal rights may take place without a proper process aimed at incorporating the incumbent First Nations’ concerns. Thus, it is the Province of Alberta’s obligation to make sure that such process takes place and, we argue, it is the

Board's obligation, as yet another manifestation of the Crown, to refrain from approving an application where a consultation process with affected Aboriginal peoples has not occurred, as well as to assess whether an alleged consultation process has been meaningful under the doctrinal terms.

As mentioned, the EUB has avoided the issue of Aboriginal consultation. Since the *Administrative Procedure Act* was amended in 2005, the Board has not had the opportunity to revise its position.<sup>165</sup> We suggest that the Board's decisions might be subject to challenge in the Courts on the basis of absence or inadequacy of consultation and accommodation processes with affected Aboriginal peoples.

With regard to its role in conducting consultation, the provincial government insists on seeing itself as a 'neutral referee' or 'project manager'. Granted, the Guidelines state that there are some aspects of consultation that will not be delegated, but they do not further elaborate on the aspects that the province cannot delegate. Instead, and in sync with its broader Consultation Policy and Framework, the Alberta Crown emphasizes its obligation to determine whether the processes conducted by the third party, the project proponents, have been adequate. This perception, we insist, violates the principles set out by the judicial doctrine, particularly the requirement of a two-way, good faith engagement between the Crown and the First Nations aimed at adequately incorporating the concerns of the latter toward rights protection and reconciliation. The provincial government has yet to explain how such ultimate purposes of rights protection and reconciliation can be achieved by the industry and without the direct involvement of the duty bearer. Moreover, we suggest that the Aboriginal peoples are entitled to legitimately refuse to engage in consultation processes delegated to third parties, absent the Crown.

In addition, the public consultation initiatives that the provincial government has launched (such as the LUF or the MSC process) are flawed in terms of the duty owed to Aboriginal peoples in that they treat the latter as yet another 'stakeholder'. As a result concerns on constitutionally protected rights are diffused among just any other interest of the rest of the society. This leads us to the next issue.

### **4.3. The Content**

The multistakeholder approach seems ill suited to adequately consult with Aboriginal peoples. As evidenced in the MSC report, the most substantive concerns tend to be left aside in such processes. This contrasts with the courts' views that even the lower level of consultation must be aimed at addressing and incorporating Aboriginal concerns. In fact, the lack of agreement among the MSC members on actions that would address the substantive concerns of the First Nations, confirms the obligation of the provincial

---

<sup>165</sup> See *supra* note 39.

government to embark on a specific process of consultation and accommodation with, and only with, the First Nations.

Certainly, the level of consultation and accommodation prior to decision-making on oil sands development should be high. The draft IRP acknowledged that the impacts of oil sands development are more substantial than those of conventional oil and gas activities. Indeed, the certainty of the rights to be impacted, the degree of importance of these rights to the First Nations and the seriousness of the potential adverse effects place consultation at the high end of the spectrum as the courts indicated in *Dene Tha'* and *Mikisew*. These cases suggest that the guiding principle informing the level of engagement with and responsiveness to Aboriginal concerns should be the continued exercise of Aboriginal and treaty rights in the areas impacted. The effects of oil sands development on the sustainability of land and aquatic ecosystems are arguably a major and legitimate concern of First Nations, within and outside the province, potentially impacted by this development.

More generally, the provincial government must keep in mind what the Supreme Court has said about the proper attitude required to fulfill the honour of the Crown: willingness to change its proposed course of action in the light of the results of the process. This takes us to the most substantive aspect of the duty: the extent of the accommodation owed.

#### **4.4. The Duty to Accommodate**

As we have insisted in our work on these issues, the duty to consult and to accommodate differs from the duty of procedural fairness in that the former has a substantive component. While the courts have usually discussed the procedural aspects, they have increasingly indicated their intention to address the outcome of the consultation process.

Meaningful consultation, the case law indicates, implies keeping available the widest array of accommodations possible. Thus, consultation at the strategic level is not mere good policy but a matter of legal obligation. In this sense, we have seen how the Alberta approach to consultation with First Nations in general is flawed. This failure is also evident in oil sands decision making.

Indeed, the prospects of oil sands development not only severely curtailing the exercise of Aboriginal rights, but also causing a *de facto* extinguishment of these rights, imply that as a matter of accommodation, the province should be willing to recognize that operations shall not take place, at least in certain areas. While accommodation may not imply a veto power for the First Nations, the obligation to protect rights and to ensure

their continued exercise does imply a duty to refrain from authorizing activities that will compromise their continued exercise.<sup>166</sup>

In order to adequately accommodate Aboriginal and treaty rights, the provincial Crown needs to understand their scope and nature. This, we argue, is the starting point of the consultation process: how can the Crown propose any accommodation measure if it does not know the extent of the rights to be accommodated? The Crown cannot second-guess the scope of indigenous rights or define what traditional use is. The T8FN have already made clear their objections to the Crown's definition of traditional use and have rightly stated their right to define the terms to describe 'collective identity' and 'culture'. To date, the province has avoided discussion on the most fundamental issues and has favoured a project-based approach to consultation and accommodation and delegation of duties to third parties.

We cannot suggest any specific accommodation measures as it is only through a specific consultation process with individual First Nations that such measures shall be identified. However, in order to have a clearer picture of how Aboriginal concerns can be addressed and incorporated in decision-making, we recommend that the province start with distinguishing between stages of decision-making. Arguably, the accommodation measures at the strategic levels will be substantively different from those at the operational stages. The actual implementation of the principles of priority of s. 35 rights, least infringement possible, recognition of preferred means of exercising rights, compensation, and balance of interests, will be reflected differently in the final decisions at different stages of decision-making. The providers of the accommodation measures will also vary; we expect a more direct involvement of project proponents in discussing and carrying out these accommodation measures at the operational level.

#### **4.5. Consultation on the Development of the Consultation Process**

As underlined, the Alberta government fails to correctly understand the extent and purpose of its consultation and accommodation duties. Justice Tysoe's call for an agreement on the consultation process is compromised by Alberta's reluctance to acknowledge that the duty to consult and to accommodate is more than just another tool

---

<sup>166</sup> The United Nations Human Rights Committee has held that State actions constitute human rights violations when they fail to acknowledge the negative cumulative impacts of development activities on the Indigenous Peoples' continued enjoyment of their way of life and culture. See *Lubicon Lake Band v. Canada* (1990), U.N.C.H.R., CCPR/C/38/D/167/1984, online: United Nations Treaty Bodies Database <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/c316bb134879a76fc125696f0053d379?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c316bb134879a76fc125696f0053d379?Opendocument)>; and *Länsman et al. v. Finland* (1996), U.N.C.H.R., CCPR/C/58/D/671/1995, online: United Nations Treaty Bodies Database, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/67b455218cbd622d80256714005cfdad?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/67b455218cbd622d80256714005cfdad?Opendocument)>.

of decision-making. It is actually a means to fulfill the Crown's overall obligation to protect constitutional rights and to foster reconciliation.

The Crown's consultation obligation is not fulfilled simply by inserting Aboriginal consultation into existing public consultation processes. The T8FN have identified this approach as an area of disagreement. We have already stated that the MSC Options Paper has identified areas of disagreement on fundamental issues, and noted that this is the result of mixing an Aboriginal consultation process with a public consultation process which proceeds on different bases.

What the Courts require is a reasonable process. Such a process should not impose unreasonable time frames upon Aboriginal peoples. We suggest that the government's insistence on developing consultation processes within extremely short timelines (e.g., the MSC on oil sands development) and on conducting project-specific consultation "within the existing regulatory framework and timelines" is unreasonable. Aboriginal communities have neither the capacity, nor the time (nor in most cases the funding) to adequately respond to the multiplicity of consultation demands which the provincial government is placing on them. The timelines imposed by government are dictated by the pace of oil sands development. As stated above, the seriousness of the impacts of multiple oil sands development and the prospects of a *de facto* extinguishment of constitutionally protected rights dictate a fundamental shift in the provincial approach to developing a meaningful consultation process with Aboriginal peoples.

## 5.0. Conclusion

Alberta is failing in its duty to consult Aboriginal peoples in oil sands development. The province does not distinguish between an obligation to consult and to accommodate to protect Aboriginal rights and a general obligation of procedural fairness. As a result, the framework for consultation that the province has developed is flawed in procedural and substantive aspects, including the following:

- The province perceives itself as a neutral broker of competing interests rather than a guarantor of rights. The province treats Aboriginal interests protected by the Constitution just as another societal interest;
- The province has not put in place, nor does it seem to envisage a process of consultation and accommodation separate and distinct from the participation processes open to the general public. Thus, so far, attempts to consult with First Nations have been limited and inadequate to meaningfully engage the latter, let alone envisage substantial accommodations of the concerns they have made public through alternate avenues;

- The Alberta notion of consultation does not require the engagement of First Nations in the early stages of strategic decision-making, although due diligence as required by the doctrine on the duty's trigger requires otherwise. This limits considerably the options of the First Nations in informing State decisions and in having their rights adequately protected;
- At the operational level, the project-by-project basis for consultation and accommodation fails to address cumulative impacts of concurring activities;
- The province relies overly on industry in the discharge of its constitutional duties. By doing so, Alberta overlooks the scope of its obligation to engage directly with Aboriginal peoples and fails to acknowledge that the role of industry is limited to operational stages and even then, the Crown remains the ultimate duty bearer. Given the EUB's reluctance to acknowledge consultation obligations, the result is limited government involvement to the detriment of the Crown's honour and, more importantly, the constitutional rights involved and the ultimate purpose of reconciliation;
- Alberta's notion of consultation provides no criteria on substantive accommodation to decision-makers, thus leaving ample room for unstructured discretion. In the absence of such criteria, the expected economic gains from oil sands exploitation are a strong incentive to public officials to overlook the magnitude of the detrimental effects on Aboriginal constitutional rights; and
- By defining concepts such as 'traditional uses', 'culture', 'identity', which in itself exceeds the Crown's authority, the province curtails significantly the scope of consultation and the universe of accommodation measures.

Aboriginal engagement at the strategic level of decision-making over land and resources is certainly required. Although the obligation to consult has been constructed in reactive terms, the Crown should take a more proactive approach regarding consultation and accommodation of Aboriginal interests. As we have insisted before,<sup>167</sup> the ultimate objective of government obligations to Aboriginal peoples is to uphold their protected rights. While the constitutional entrenchment of Aboriginal rights prevents their extinguishment, the economic-growth model of development threatens to *de facto* extinguish these rights. The impacts of growth, (be they direct, indirect, cumulative or otherwise) have already and continue to result in a *de facto* impossibility to exercise Aboriginal and treaty rights protected by subsection 35(1). Eventually the province would be held accountable for such preventable extinguishment of rights.

Thus, we argue that, before engaging in or authorizing any more activities, the province should launch a process to elaborate comprehensive land and resource use

---

<sup>167</sup> Potes, Passelac-Ross & Bankes, *supra* note 10.

plans. Those plans, elaborated in consultation with Aboriginal peoples, would provide early warnings of potential *de facto* extinguishment of Aboriginal and treaty rights and would provide the bases for substantive and meaningful accommodation. The honour of the Crown imposes on government an obligation to develop land and resource management plans which clearly identify the potential impacts, including the cumulative effects, of development on Aboriginal and treaty rights, and are thus subject to consultation with Aboriginal peoples and accommodation of their concerns. Arguably, *de facto* extinguishment of Aboriginal or treaty rights, that is, the impossibility to continue exercising the substance of such rights, is linked to the lack of consideration of the cumulative impacts of growth activities on the land base. Comprehensive plans, which anticipate and address the effects of land and resource development, offer the possibility of preventing such potential extinguishments.

The provincial government has publicly admitted that it was caught unaware by the environmental and social impacts caused by the pace and scale of oil sands development. Aboriginal peoples on whose traditional territories this development occurs have been promised an “adequate” consultation process. However, the government’s reluctance to slow down the pace of oil sands development in the face of major negative impacts on Aboriginal and treaty rights in and of itself precludes the development of a proper consultation process with Aboriginal peoples in the oil sands area. Time will tell if the current negotiations between Alberta and Aboriginal peoples (both First Nations and Métis) will eventually result in a consultation process that is acceptable to the Aboriginal parties, meets the honour of the Crown and advances the objective of reconciliation between the Aboriginal and non-Aboriginal societies.

# CIRL Publications

## Occasional Papers

- Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal?** **\$15.00 sc**  
2007 52 pp.  
Occasional Paper #19  
*Monique M. Passelac-Ross and Verónica Potes*
- Closing the Performance Gap: The Challenge for Cumulative Effects Management in Alberta's Athabasca Oil Sands Region** **\$20.00 sc**  
2007 61 pp.  
Occasional Paper #18  
*Steven A. Kennett*
- Integrated Landscape Management in Canada: Getting from Here to There** **\$15.00 sc**  
2006 49 pp.  
Occasional Paper #17  
*Steven A. Kennett*
- Wildlife Corridors and the Three Sisters Decision: Lessons and Recommendations for Implementing NRCB Project Approvals** **\$15.00 sc**  
(Free online) 2005 33 pp.  
Occasional Paper #16  
*Steven A. Kennett*
- The Trapping Rights of Aboriginal Peoples in Northern Alberta** **\$20.00 sc**  
(Free online) 2005 79 pp.  
Occasional Paper #15  
*Monique M. Passelac-Ross*
- Spinning Wheels in the Castle: A Lost Decade for Sustainability in Southwestern Alberta** **\$15.00 sc**  
(Free online) 2003 59 pp.  
Occasional Paper #14  
*Steven A. Kennett*
- Oil Sands, Carbon Sinks and Emissions Offsets: Towards a Legal and Policy Framework** **\$15.00 sc**  
(Free online) 2003 24 pp.  
Occasional Paper #13  
*Steven A. Kennett*
- Aboriginal Peoples and Resource Development in Northern Alberta** **\$15.00 sc**  
(Free online) 2003 32 pp.  
Occasional Paper #12  
*Monique M. Passelac-Ross*
- Integrated Resource Management in Alberta: Past, Present and Benchmarks for the Future** **\$15.00 sc**  
(Free online) 2002 35 pp.  
Occasional Paper #11  
*Steven A. Kennett*
- Legal and Institutional Responses to Conflicts Involving the Oil and Gas and Forestry Sectors** **\$15.00 sc**  
(Free online) 2002 38 pp.  
Occasional Paper #10  
*Monique M. Passelac-Ross*
- The Evolution of Wildlife Law in Canada** **\$15.00 sc**  
(Free online) 2000 73 pp.  
Occasional Paper #9  
*John Donihee*
- Towards a New Paradigm for Cumulative Effects Management** **\$15.00 sc**  
(Free online) 1999 53 pp.  
Occasional Paper #8  
*Steven A. Kennett*
- Recent Developments in Oil and Gas Law** **\$15.00 sc**  
(Free online) 1999 68 pp.  
Occasional Paper #7  
*Nigel Bankes*
- Resource Developments on Traditional Lands: The Duty to Consult** **\$10.00 sc**  
(Free online) 1999 26 pp.  
Occasional Paper #6  
*Cheryl Sharvit, Michael Robinson and Monique M. Passelac-Ross*
- In Search of Public Land Law in Alberta** **\$15.00 sc**  
(Free online) 1998 56 pp.  
Occasional Paper #5  
*Steven A. Kennett and Monique M. Passelac-Ross*

**New Directions for Public Land Law**

*Steven A. Kennett*

**\$15.00 sc**  
(Free online) 1998 51 pp.  
Occasional Paper #4

**Towards Sustainable Private Woodlots in Alberta**

*Monique M. Passelac-Ross*

**\$10.00 sc**  
(Free online) 1997 25 pp.  
Occasional Paper #3

**A History of Forest Legislation in Canada 1867-1996**

*Monique M. Passelac-Ross*

**\$15.00 sc**  
(Free online) 1997 50 pp.  
Occasional Paper #2

**Pipeline Jurisdiction in Canada: The Case of NOVA Gas Transmission Ltd.**

*Steven A. Kennett*

**\$15.00 sc**  
(Free online) 1996 45 pp.  
Occasional Paper #1

## Canadian Wildlife Law Project Papers

**Wildlife Management Beyond Wildlife Laws**

*Arlene J. Kwasniak*

**\$10.00 sc**  
2006 27 pp.  
Wildlife Law Paper #7

**Wildlife Stewardship**

*Arlene J. Kwasniak*

**\$10.00 sc**  
2006 19 pp.  
Wildlife Law Paper #6

**Legal and Economic Tools and Other Incentives to Achieve Wildlife Goals**

*Arlene J. Kwasniak*

**\$10.00 sc**  
2006 25 pp.  
Wildlife Law Paper #5

**Wildlife and the Canadian Constitution**

*Priscilla Kennedy and John Donihee*

**\$10.00 sc**  
2006 14 pp.  
Wildlife Law Paper #4

**Overview of Provincial Wildlife Laws**

*Monique M. Passelac-Ross*

**\$15.00 sc**  
2006 35 pp.  
Wildlife Law Paper #3

**Enforcing Wildlife Law**

*Arlene J. Kwasniak*

**\$10.00 sc**  
2006 19 pp.  
Wildlife Law Paper #2

**International Wildlife Law**

*Nigel Bankes*

**\$20.00 sc**  
2006 50 pp.  
Wildlife Law Paper #1

## Human Rights and Resource Development Project Papers

**The Potential Application of Human Rights Law to Oil and Gas Development in Alberta: A Synopsis**

*Nickie Vlavianos*

**\$20.00 sc**  
2006 70 pp.  
Human Rights Paper #5

**Protecting Environmental and Health Rights in Africa: Mechanisms for Enforcement**

*Ibironke Odumosu*

**\$20.00 sc**  
2006 78 pp.  
Human Rights Paper #4

**Albertans' Concerns about Health Impacts and Oil and Gas Development: A Summary**

*Nickie Vlavianos*

**\$10.00 sc**  
2006 16 pp.  
Human Rights Paper #3

**How Human Rights Laws Work in Alberta and Canada**

*Linda MacKay-Panos*

**\$15.00 sc**  
(Free online) 2005 48 pp.  
Human Rights Paper #2

**Health, Human Rights and Resource Development in Alberta:**

Current and Emerging Law

*Nickie Vlavianos*

**\$15.00 sc**  
(Free online) 2003 35 pp.  
Human Rights Paper #1

**Books and Reports**

**Environmental Agreements in Canada:** Aboriginal Participation, EIA  
Follow-Up and Environmental Management of Major Projects

*Ciaran O'Faircheallaigh*

**\$35.00 sc**  
2006 217 pp.  
ISBN-13 978-0-919269-50-7

**A Guide to Impact and Benefits Agreements**

*Steven A. Kennett*

**\$35.00 sc**  
1999 120 pp.  
ISBN-13 978-0-919269-48-4

**Local Benefits from Mineral Development:** The Law Applicable in the  
Northwest Territories

*Janet M. Keeping*

**\$35.00 sc**  
1999 122 pp.  
ISBN-13 978-0-919269-47-7

**Agricultural Law in Canada 1867-1995:** With particular reference to  
Saskatchewan

*Marjorie L. Benson*

**\$35.00 sc**  
1996 192 pp.  
ISBN-13 978-0-919269-43-9

**Forest Management in Canada**

*Monique Ross*

**\$20.00 sc**  
1995 388 pp.  
ISBN-13 978-0-919269-42-2

**Comprehensive Land Claims Agreements of the Northwest  
Territories:** Implications for Land and Water Management

*Magdalena A.K. Muir*

**\$30.00 sc**  
1994 152 pp.  
ISBN-13 978-0-919269-44-6

**Canadian Law of Mining**

*Barry J. Barton*

**\$20.00 hc**  
1993 522 pp.  
ISBN-13 978-0-919269-39-2

**A Citizen's Guide to the Regulation of Alberta's Energy Utilities**

*Janet Keeping*

**\$5.00 sc**  
1993 75 pp.  
ISBN-13 978-0-919269-40-8

**Environmental Protection:** Its Implications for the Canadian Forest Sector  
Management

*Monique Ross and J. Owen Saunders*

**\$5.00 sc**  
1993 175 pp.  
ISBN-13 978-0-919269-34-7

**Energy Conservation Legislation for Building Design and  
Construction**

*Adrian J. Bradbrook*

**\$5.00 sc**  
1992 87 pp.  
ISBN-13 978-0-919269-36-1

**Managing Interjurisdictional Waters in Canada:** A Constitutional  
Analysis

*Steven A. Kennett*

**\$5.00 sc**  
1991 238 pp.  
ISBN-13 978-0-919269-31-6

**Security of Title in Canadian Water Rights**

*Alastair R. Lucas*

**\$5.00 sc**  
1990 102 pp.  
ISBN-13 978-0-919269-22-4

**Toxic Water Pollution in Canada:** Regulatory Principles for Reduction  
and Elimination with Emphasis on Canadian Federal and Ontario Law

*Paul Muldoon and Marcia Valiante*

**\$5.00 sc**  
1989 117 pp.  
ISBN-13 978-0-919269-26-2

**The Offshore Petroleum Regimes of Canada and Australia**

*Constance D. Hunt*

**\$5.00 sc**  
1989 169 pp.  
ISBN-13 978-0-919269-29-3

**Interjurisdictional Issues in Canadian Water Management**

*J. Owen Saunders*

**\$5.00 sc**  
1988 130 pp.  
ISBN-13 978-0-919269-27-9

**Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights**

*Richard H. Bartlett*

**\$30.00 sc**  
1988 237 pp.  
ISBN-13 978-0-919269-23-1

**A Reference Guide to Mining Legislation in Canada**

*Barry Barton, Barbara Roulston and Nancy Strantz*

**\$5.00 sc**  
Second Edition – 1988 123 pp.  
ISBN-13 978-0-919269-25-5

## C o n f e r e n c e P r o c e e d i n g s

**Resource Development and the Mackenzie Valley Resource Management Act: The New Regime**

*John Donihee (Contributing Editor), Jeff Gilmour and Doug Burch*

**\$20.00 sc**  
2000 281 pp.  
ISBN-13 978-0-919269-49-1

**Mineral Exploration and Mine Development in Nunavut: Working with the New Regulatory Regime**

*Michael J. Hardin and John Donihee, eds.*

**\$15.00 sc**  
1998 160 pp.  
ISBN-13 978-0-919269-46-0

**Disposition of Natural Resources: Options and Issues for Northern Lands**

*Monique M. Ross and J. Owen Saunders, eds.*

**\$10.00 sc**  
1997 282 pp.  
ISBN-13 978-0-919269-45-3

**Law and Process in Environmental Management**

*Steven A. Kennett, ed.*

**\$10.00 hc**  
1993 422 pp.  
ISBN-13 978-0-919269-41-5  
*Sixth Institute Conference on Natural Resources Law*

**Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts**

*Monique Ross and J. Owen Saunders, eds.*

**\$10.00 hc**  
1992 431 pp.  
ISBN-13 978-0-919269-35-4  
*Fifth Institute Conference on Natural Resources Law*

**Public Disposition of Natural Resources**

*Nigel Bankes and J. Owen Saunders, eds.*

**\$5.00 hc**  
1985 366 pp.  
ISBN-13 978-0-919269-14-9  
*First Institute Conference on Natural Resources Law*

## D i s c u s s i o n P a p e r s

**Alberta's Wetlands: Legal Incentives and Obstacles to Their Conservation**

*Darcy M. Tkachuk*

**\$5.00 sc**  
1993 38 pp.  
ISBN-13 978-0-919269-37-8

**Instream Flow Protection and Alberta's Water Resources Act: Legal Constraints and Considerations for Reform**

*Steven J. Ferner*

**\$10.00 sc**  
(Free online) 1992 44 pp.  
ISBN-13 978-0-919269-38-5

**Successor Liability for Environmental Damage**

*Terry R. Davis*

**\$5.00 sc**  
(Free online) 1989 46 pp.  
ISBN-13 978-0-919269-30-9

**Surrounding Circumstances and Custom: Extrinsic Evidence in the Interpretation of Oil and Gas Industry Agreements in Alberta**

*David E. Hardy*

**\$5.00 sc**  
(Free online) 1989 36 pp.

## Working Papers

### **Liability for Drilling- and Production-Source Oil Pollution in the Canadian Offshore**

*Christian G. Yoder*

**\$5.00 sc**

1986 84 pp.  
ISBN-13 978-0-919269-20-0  
Working Paper #12

### **A Guide to Appearing Before the Surface Rights Board of Alberta**

*Barry Barton and Barbara Roulston*

**\$5.00 sc**

Second Edition - 1986 124 pp.  
ISBN-13 978-0-919269-19-4  
Working Paper #11

### **Crown Timber Rights in Alberta**

*N.D. Bankes*

**\$5.00 sc**

1986 128 pp.  
ISBN-13 978-0-919269-17-0  
Working Paper #10

### **The Canadian Regulation of Offshore Installations**

*Christian G. Yoder*

**\$5.00 sc**

1985 116 pp.  
ISBN-13 978-0-919269-18-7  
Working Paper #9

### **Oil and Gas Conservation on Canada Lands**

*Owen L. Anderson*

**\$5.00 sc**

1985 122 pp.  
ISBN-13 978-0-919269-16-3  
Working Paper #7

### **The Assignment and Registration of Crown Mineral Interests with Particular Reference to the *Canada Oil and Gas Act***

*N.D. Bankes*

**\$5.00 sc**

1985 126 pp.  
ISBN-13 978-0-919269-11-8  
Working Paper #5

### **The International Legal Context of Petroleum Operations in Canadian Arctic Waters**

*Ian Townsend Gault*

**\$5.00 sc**

1983 76 pp.  
ISBN-13 978-0-919269-10-1  
Working Paper #4

### **Liability for Drilling- and Production-Source Oil Pollution in the Canadian Offshore**

*Christian G. Yoder*

**\$5.00 sc**

1986 84 pp.  
ISBN-13 978-0-919269-20-0  
Working Paper #12

### **Canadian Electricity Exports: Legal and Regulatory Issues**

*Alastair R. Lucas and J. Owen Saunders*

**\$5.00 sc**

1983 42 pp.  
ISBN-13 978-0-919269-09-5  
Working Paper #3

## Other Publications

**Resources:** The Newsletter of the Canadian Institute of Resources Law

**Free online**

Quarterly  
ISSN 0714-6918

**Annual Report**

**Free sc**

## Available from Carswell

### Canada Energy Law Services

Canada Energy Law Service (Federal) · 2 vols. · 0-88820-409-4 (Publication #20154)

Canada Energy Law Service (Alberta) · 1 vol. · 0-88820-410-8 (Publication #20162)

Canada Energy Law Service (Full Service) · 3 vols. · (Publication #20146)

### Order from:

Carswell  
Thomson Professional Publishing  
One Corporate Plaza  
2075 Kennedy Road  
Toronto, Ontario M1T 3V4  
Canada

### For more information, call Customer Relations:

(Toll Free Canada & US) 1.800.387.5164

(Toronto & Int'l) 416.609.3800

(Toll Free Canada) Fax: 1.877.750.9041

Fax: 416.298.5082

Customer Relations: [customerrelations@carswell.com](mailto:customerrelations@carswell.com)

Website: [www.carswell.com](http://www.carswell.com)

Website Inquiries: [comments@carswell.com](mailto:comments@carswell.com)

## CIRL Order Information

All book order enquiries should be directed to:

Canadian Institute of Resources Law  
Murray Fraser Hall, Room 3353 (MFH 3353)  
University of Calgary  
Calgary, Alberta, Canada T2N 1N4  
Tel 403.220.3200; Fax 403.282.6182  
E-mail [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca) Website [www.cirl.ca](http://www.cirl.ca)

### **Business Hours**

0830 to 1630 (MST except MDT April-October)

### **Discount Policy for Bookstores and Book Wholesalers**

20% on 1 to 4 books

40% on 5 or more books

### **GST**

All Canadian orders are subject to the 6% Goods and Services Tax (GST). If GST exempt, please indicate in writing. CIRL's GST Registration No. 11883 3508 RT

### **Payment Terms**

Net 60 days.

- Payment or numbered, authorized purchase order must accompany all orders.
- MasterCard or Visa account number with expiry date will be accepted.

### **Shipping**

Please allow two to four weeks for delivery.

### **Return Policy**

(Applies ONLY to bookstores and book wholesalers.)

All books may be returned for credit within one year of the invoice date, provided that they are in a clean and resaleable condition. Please write for permission to return books and supply original invoice numbers and discounts. Returns must be shipped prepaid. Defective books are replaceable at no charge.

### **Please note:**

- All books are softcover unless otherwise noted
- All prices are subject to change without notice
- Make cheque or money order payable to the *University of Calgary*

# CIRL Order Form

## Method of Payment

Payment or purchase order must accompany order.  
Please make cheques payable to **University of Calgary**

- Cheque       Money Order  
 Visa       MasterCard

Please return completed order form to:

**Canadian Institute of Resources Law**  
 MFH 3353, University of Calgary  
 Calgary, Alberta, Canada T2N 1N4  
 Tel 403.220-3200; Fax 403.282.6182  
 E-mail [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca);  
 Website [www.cirl.ca](http://www.cirl.ca)

Credit Card Number \_\_\_\_\_  
 Expiry Date \_\_\_\_\_  
 Cardholder Name \_\_\_\_\_  
 Daytime Telephone \_\_\_\_\_

Name \_\_\_\_\_  
 Company Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_ Province/State \_\_\_\_\_  
 Postal/Zip Code \_\_\_\_\_ Country \_\_\_\_\_

Please send me the following books

Title	Quantity	Price	Subtotal
<b>Subtotal</b>			
<b>Add Shipping and Handling*</b>			
<b>Add 6% GST for orders placed in Canada</b> (CIRL GST No. 11883 3508 RT )			
<b>Total</b> (All prices subject to change without notice)			

**\*Add Shipping and Handling**

Within Canada: first book \$5.00; each additional book \$2.00  
Outside Canada: first book \$10.00; each additional book \$4.00

May 2007