


Recognizing our Legal Duty to Consult: Government of Alberta's First Nation Consultation Guidelines

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Outline

- Broad Legal Context
- Alberta First Nations
- First Nations Consultation
 - GOA Approach
 - Policy
 - Guidelines
- Case study – Interim Management Framework for the Muskeg River
- Next Steps

THREE TRIGGERS FOR CONSULTATION

- Infringement (*Sparrow* Test);
- Asserted rights (*Haida/Taku*); and
- Taking up of lands (*Mikisew Cree First Nations v. Canada et al*)

THE “*SPARROW*” TEST

- What Constitutes Infringement of a Right?
- Is the limitation unreasonable?
- Does the regulation impose undue hardship?
- Denial of a preferred means of exercising the right?

SPARROW TEST (continued)

- JUSTIFICATION OF INFRINGEMENT
- Valid objective (i.e. resource conservation)
- Uphold the honour of the Crown
 - Priority allocation of resources to aboriginal peoples;
 - Minimal infringement;
 - Compensation; and
 - Consultation

HAIDA and TAKU

- Obligation to Consult arises:
 - Knowledge of potential existence of aboriginal right; and
 - Conduct might adversely affect rights.

HAIDA and *TAKU* (continued)

- Scope and Duty of consultation is proportional to the strength of claim and potential impact of proposed activity;
- Source is Honour of Crown;
- Objective is reconciliation of interests and minimization of impact on aboriginal rights or asserted rights;

HAIDA and *TAKU* (continued)

- Consultation must be conducted in good faith;
- Agreement is not necessary;
- No veto;
- First Nations must articulate their asserted rights with specificity;
- Consultation should occur as early as possible;

HAIDA and *TAKU* (continued)

- Accommodation should occur if appropriate;
- Consultation is a Crown obligation;
- Procedural aspects of consultation may be delegated; and
- Not required to develop a separate consultation process.

TAKING UP OF LANDS

- *Mikisew Cree First Nation v. Canada, Copps, Thebacha Road Society et al*
- Released November 24, 2005
- Unanimous decision

The Facts

- Canada approved a 118 km winter road in Wood Buffalo National Park, which passed through Mikisew's Reserve.
- Mikisew objected to road approval.

TREATY 8

COMPETING INTERESTS

- First Nations have a right to hunt, fish and trap for food .

vs.

- Canada and Alberta have a right to take up lands from time to time for settlement, mining, lumbering, etc. (“Taking Up Clause”)

MIKISEW APPROACH

- Consultation is the road to reconciliation.
(50), (63)
- There is a freestanding duty of consultation which flows from the honour of the Crown. It is independent of the duty of consultation which is a component of the *Sparrow* justification.
(33)

MIKISEW APPROACH

- The duty of consultation flowing from the honour of the Crown is a procedural treaty right and there is no link to fiduciary duties. (51), (57)
- The Crown has a treaty right to take up lands (31) and the taking up does not infringe a treaty right (32). The Crown has an obligation to inform itself of the impact the project will have on treaty rights and communicate that to First Nations.

MIKISEW APPROACH

- “Other purposes” in the taking up clause of the treaty should be interpreted broadly. (24), (60)
- The trigger threshold for the duty of consultation is slight – might adversely affect treaty rights (34), is there the potential for adverse impacts on treaty rights? (64)
- The content of the duty of consultation is variable.

MIKISEW APPROACH

- There must be notice to the First Nation, engagement with them including:
 - a) information about the project;
 - b) the Crown's knowledge of the impact on those interests; and
 - c) the Crown's view of potential adverse impacts on those interests. The Crown must solicit and listen carefully to First Nations concerns and attempt to minimize impact on treaty rights. (64)

MIKISEW APPROACH

- The First Nation must carry out their end of the consultation, make their interests known, respond to the Crown's attempt to meet their concerns and suggestions and try to reach some mutually satisfactory solution. (65)
- There is no First Nation veto. (66)
- The treaty right (e.g. hunting) is linked to hunting in that First Nation's traditional territory. (47)

ALBERTA'S RESPONSE

- May 16, 2005
Government of Alberta's First Nations
Consultation Policy on Land Management
and Resource Development
- September 1, 2006
Guidelines Released
- 2007 – Guideline update

ALBERTA FIRST NATIONS

- 44 First Nations
- Treaty 6, 7, and 8
- Involved and interested
- Diverse
 - Capacity
 - Organizational
 - Financial
 - Interests

CONTEXT FOR ACTION

- Change in the legal framework
- Motivation to:
 - Manage natural resources while recognizing First Nations' rights
 - Communicate better
 - Build stronger relationships

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GOA APPROACH

- Involves multiple ministries:
 - Environment
 - Sustainable Resource Development
 - Tourism, Parks, Recreation and Culture
 - Energy
 - Infrastructure
- Coordinated by International, Intergovernmental and Aboriginal Relations

CONSULTATION POLICY

- Commitment to consultation
 - Land management and resource development
 - Provincial Crown land
 - Infringe on First Nations *Rights and Traditional Uses*
 - Project specific
- Guiding principles
- Roles and responsibilities


CONSULTATION GUIDELINES

Action	Responsible Party		
	A	P	FN
Determine need	✓		
Id potentially affected FN	✓		
Notification		✓	
Response			✓
Meet	✓	✓	✓
Avoid or minimize impacts		✓	
Assessment of adequacy	✓		

THE MUSKEG RIVER

- A major tributary of the Athabasca River
- Underlain by mineable Oil sands
- Watershed is being rapidly developed
- Appropriate management and planning prior to development

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CONSULTATION

- June 2007 5 FN directly affected by development on the Muskeg River notified
- Regularly Scheduled Meetings between IRC Directors and AENV staff continue
- Technical Review of the report by FN

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HIGHLIGHTS

- Early engagement with FN
- Shared consultation record (SPAR Chart)
- Agreement to move forward in collaborative process
- Briefings to FN Leadership

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NEXT STEPS

- Traditional use information
- Métis consultation
- Consultation on Alberta policy initiatives
- Prioritization of consultation
- Cumulative effects

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FINAL THOUGHTS

- Relationship with First Nations
- Process in transition

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