
The Legal Duty to Consult and Accommodate

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Introduction

- Provincial context
 - The substantive promises of the treaties: to exercise the right to a livelihood
 - The tracts taken up clause
 - This presentation:
 - The tenets of the DCA according to the SCC
 - How Alberta is meeting the judicial requirements
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The Context: The Substantive Promise of *Sparrow*

- Indigenous rights will be taken seriously: no extinguishment, no infringement without serious justification
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The Source of Duty to C&A: From *Sparrow* to *Haida* and *Mikisew*

- The misinterpretation of *Sparrow*
 - *Haida* and *Taku River*: the honour of the Crown and reconciliation
 - Corollary: substantive duty, no mere procedural fairness
 - *Mikisew*: HofC infuses treaties implementation
 - In sum: stand-alone obligation stemming not from infringement of proven rights but from generic duty of honourable dealings
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The Trigger: Low Threshold

- Real or constructive knowledge
 - Potential existence of Aboriginal right
 - Probability of adverse effect of contemplated state action
 - Examples: land-use plans, regulation, issuance of mineral rights, issuance/transfer of licences, EIA processes
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The Content: Procedural and Substantive but Variable in Scope

- Guiding principle: substantially address the concerns of the consulted
 - Scope varies according to:
 - Degree of certainty of rights/strength of claim
 - Relative importance of right
 - Degree of potential for infringement
 - Concreteness of promises (treaties)
 - Level of consultation may be higher if rights enjoyment risks major threats
 - At any level, the duty is substantive and even at a lower one, there needs to be a serious attempt to minimize adverse impacts on rights
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The Substantive Component: The Obligation to Accommodate

- To be meaningful, consultation has to contemplate accommodation
 - Accommodation is the level of responsiveness of Crown to Indigenous concerns
 - Lower trigger: when process indicates need to amend contemplated action
 - Variable content: (just as in consultation)
 - Crown required to strike a balance of interests (in the absence of consent)
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Guiding Criteria for Accommodation: Take Rights Seriously!

- Incorporate the concerns of the Aboriginal Peoples and be able to demonstrate that such incorporation has actually occurred
 - Cause the *least* infringement
 - Give *priority* to Aboriginal interests
 - *Avoid* irreparable damage
 - Compensate
 - Recognize the Aboriginal preferred means to *exercise* their rights
 - Recognize that only demonstrably *compelling* and *substantial* objectives can trump Aboriginal rights
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Timing for Consultation

- Early so as to be meaningful
 - Different stages:
 - Broader policy and strategic decision-making
 - Operational stages
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Participants

- Again, consider purpose and distinguish stages
 - Strategic decisions
 - Duty bearer: The Crown (Federal and Provincial). All governmental institutions
 - Aboriginal peoples
 - Operational stages
 - The Crown and Aboriginal peoples
 - A role for industry. No direct duty bearer but beware of liability for negligence, breach of contract, dishonest dealing and perhaps trespass; and possible cancellation of permits/licenses
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Statutory Consultation Process: Guiding Principles

- Not just any other process, but accommodated to Aboriginal Peoples
 - Information requirements: gather all information required, provide all information gathered, in culturally sensitive format
 - Do not impose unreasonable time frames
 - Funding?
 - Consult on the process!
 - Non-discretionary decision-making process
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Alberta's Consultation Policy with First Nations

- Strengthening Relationships: the Aboriginal Policy Framework (2000)
 - First Nations Consultation Policy on Land Management and Resource Development (2005)
 - Consultation Guidelines (2006, updated 2007)
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Aboriginal Policy Framework

- Two stated goals:
 - Improve socio-economic opportunities for Aboriginal peoples;
 - Clarify roles and responsibilities of federal, provincial and Aboriginal governments
 - Commitment to “acknowledge and respect existing treaty and other constitutional rights of Aboriginal peoples in provincial legislation, policies, programs and services”
 - Commitment to, “where appropriate”, consult with Aboriginal people about proposed regulatory and development activities that may infringe their constitutional rights
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First Nations Consultation Policy (2005)

- Commitment to consult where “land management and resource development on provincial Crown land may infringe FNs rights and traditional uses”
 - Defines Alberta’s role in the process and sets out government’s expectations of FNs and industry
 - “Made-in-Alberta approach”
 - Emphasis: build better communications and relationships between FNs and government and FNs and industry
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Consultation Policy (cont'd)

- Guiding principles:
 - ❑ Alberta is responsible for “managing” the process
 - ❑ Objective: avoid infringement of FNs’ rights, or if not possible mitigate
 - ❑ Adequate time must be allowed to review relevant information
 - ❑ Consultation to occur within applicable legislative and regulatory guidelines
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Consultation Policy (cont'd)

- Consultation to occur in two ways:
 - General consultation and relationship building:
 - Information sharing sessions with FNs
 - Collect traditional use information (e.g., TUS)
 - Project-specific consultation:
 - Alberta expects project proponents to consult with FNs in most cases
 - Alberta responsible for determining if consultation carried out by proponent has been adequate
 - Alberta may consult directly with FNs where major projects are proposed
 - Alberta “may” report on consultation to independent regulators such as EUB or NRCB
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Departmental Consultation Guidelines (2006 and 2007)

- Provide more directions for implementing project-specific consultation
 - Part 1 outlines the generic components of consultation
 - Part 2 contains department-specific guidelines for the four key departments involved in resource development: Energy, Environment, SRD, and Tourism, Parks, Recreation & Culture
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Substantive Issues

- Alberta views itself as the owner and manager of provincial Crown lands and resources
 - Alberta considers that it is entitled to “take up” lands for development: a right under the treaties
 - Alberta recognizes “hunting, fishing and trapping rights”, but does not view these as rights to a livelihood
 - Alberta narrowly defines “rights and traditional uses” in the Policy
 - Alberta does not acknowledge the existence of traditional territories
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Context of the Duty and Alberta's Approach

- A stakeholder management approach rather than a rights-based approach: Alberta sees itself as an arbiter of competing interests
 - A procedural fairness approach rather than a constitutional duty to protect the rights of Aboriginal Peoples
 - General tone does not reflect a process of fair negotiation: e.g., Alberta lays out “its expectations” of FNs, including FNs initiating the dialogue and providing information to government upon request
 - The timing of consultation has been non-negotiable from the beginning: consultation is to occur “within applicable legislative and regulatory timelines”
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The Source of the Duty

- The Alberta Policy focuses on the potential infringement of rights as the source, not on the honour of the Crown and the overall objective of reconciliation



The Trigger of the Duty

- Focus on potential infringements excludes categories of decisions such as land use planning, enactment of laws and regulations
 - Policy and Guidelines acknowledge that consultation is required when legislation, regulation may adversely impact the rights, but modalities of such consultation have not been worked out
 - Focus on project-specific consultation does not allow consideration of cumulative impacts of multiple projects
 - Aboriginal consultations have taken place on the Land Use Framework, as part of the general consultation process
 - No consultation on disposition of mineral rights and forest tenures
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The Duty to Accommodate

- Not mentioned in Consultation Policy, only in the last update of the Guidelines (2007)
 - Described as “efforts to reconcile, adjust or adapt”, reflected in regulatory approvals, and based on proponents’ efforts to address FN’s concerns
 - Accommodation should be required at strategic levels, where the range of measures available to the Crown is broader
 - Scope of accommodation limited by the government’s understanding of Aboriginal rights and interests
 - Need to address justification of potential infringements, including avoiding irreparable damage, giving priority, compensating
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The Role of the Participants

- Alberta “manages” the process
 - Heavy reliance on industry, to which procedural duty is “delegated”
 - The ability of First Nations to handle and process numerous proposals and consultations with various project proponents is an issue: “capacity” funding by government helps, but is not sufficient
 - Role of the regulatory boards such as the ERCB (formerly EUB), AUC and NRCB?
 - No constitutional duty to consult owed
 - Authorized to decide if the government has fulfilled its consultation obligations
 - Decisions cannot infringe Aboriginal rights
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Consultation on the Consultation Process

- Alberta has held consultations with First Nations and Treaty organizations on both the Policy and the Guidelines (joint tables)
 - Areas of agreement, but key areas of disagreement remained, notably on substantive issues of treaty rights interpretation
 - The Chiefs of the three main treaties in Alberta rejected both the Policy and the Guidelines (2006)
 - Treaty 8 First Nations of Alberta developed its own Consultation Policy and Guidelines (2005)
 - Most of the First Nations in Alberta have developed their own consultation policies/protocols for use with industry proponents
 - Ongoing consultation between Aboriginal representatives and Alberta
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Conclusions

- An evolving process
 - Hampered by fundamental disagreements between Alberta and FNs: e.g., scope and nature of treaty rights, traditional territories, Crown's obligations
 - Too much emphasis on project-specific consultation
 - Too much reliance on industrial proponents
 - Too much emphasis on infringement and justification (Sparrow), not enough on honour of the Crown and reconciliation
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Consultation Guidelines with the Maori People (referred by Court in *Haida*)

- Gathering information to test policy proposals
 - Putting forward proposals that are not yet finalized
 - Seeking [Aboriginal Peoples] opinion on those proposals
 - Informing [Aboriginal Peoples] of all relevant information upon which those proposals are based
 - Not promoting but listening with an open mind to what [Aboriginal Peoples] have to say
 - Being prepared to alter the original proposal
 - Providing feedback both during the consultation process and after the decision process.
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