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# Aboriginal Issues Related to Heavy Oil Refining

Insight Information's 2<sup>nd</sup> Annual Conference on

## **Heavy Oil Refining Business Case & Environmental Sustainability**

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**John Olynyk**

VANCOUVER ▼

CALGARY ▼

YELLOWKNIFE ▼



WESTERN CANADIAN ▼ BUSINESS LAW

# INTRODUCTION

- ▶ origins of consultation obligations
- ▶ Alberta's First Nations Consultation Guidelines
- ▶ Federal Interim Guidelines
- ▶ challenges for developers
- ▶ how developers are responding

# ORIGINS OF CONSULTATION OBLIGATION

## *Sparrow, 1990*

- ▶ aboriginal right to fish raised as defence to regulatory offence
- ▶ decision recognized continued existence of common law aboriginal right to fish
- ▶ recognized government's ability to regulate exercise of right to fish in public interest
- ▶ government must be able to justify infringement

# ORIGINS OF CONSULTATION OBLIGATION

## *Sparrow*, 1990

- ▶ test for determining whether infringement is justified:
  - *valid and compelling legislative objective*
  - *minimal impairment of aboriginal right*
  - *accommodation of aboriginal right*
  - *consultation with aboriginal group*

# ORIGINS OF CONSULTATION OBLIGATION

## *Badger*, 1996

- ▶ Alberta treaty hunting rights case
- ▶ extended *Sparrow* justification test to treaty rights
- ▶ confirmed that government may regulate exercise of treaty rights, but must justify infringements in accordance with *Sparrow* test, including consultation

# ORIGINS OF CONSULTATION OBLIGATION

## *Delgamuukw*, 1997

- ▶ aboriginal title decision
- ▶ established requirements for proof of aboriginal title
- ▶ infringement of aboriginal title permissible if justified based on *Sparrow* test
- ▶ consultation “always required”

# ORIGINS OF CONSULTATION OBLIGATION

## *Haida Nation and Taku River Tlingit, 2004*

- ▶ consultation obligations in relation to effects of resource development on asserted rights
- ▶ key points:
  - *government's obligation to consult triggered when government knows about likely rights and contemplates decision that may affect them*
  - *rights do not have to have been legally recognized in court decision or treaty*

# ORIGINS OF CONSULTATION OBLIGATION

## *Haida Nation and Taku River Tlingit, 2004*

▶ key points:

- *duty to consult and accommodate rests solely with the Crown – founded in honour of Crown*
- *governments can design reasonable processes for consultation with First Nations*
- *separate process not needed*
- *governments can delegate “procedural aspects” of consultation to developers*



# ORIGINS OF CONSULTATION OBLIGATION

## *Haida Nation and Taku River Tlingit, 2004*

### ▶ key points:

- *sliding scale of consultation, depending on strength of claim – notification to “deep consultation”*
- *Crown’s duty to accommodate asserted rights may be triggered*
- *governments can establish reasonable timelines for consultation*
- *consent of First Nations not needed – no veto*

# ORIGINS OF CONSULTATION OBLIGATION

## *Mikisew Cree, 2005*

- ▶ extended *Haida Nation* into treaty context
- ▶ government must consult when making land use decisions that will affect exercise of treaty rights
- ▶ duty to consult is tied to lands traditionally and currently used by the First Nation

# ORIGINS OF CONSULTATION OBLIGATION

## *Powley* decision (2003):

- ▶ Métis rights raised as defence to charge
- ▶ Métis rights have constitutional protection
- ▶ Métis rights are context-specific
- ▶ Métis rights are collective rights — held by community, not by individuals
- ▶ Crown may regulate exercise of Métis rights but must meet test of justification

# ORIGINS OF CONSULTATION OBLIGATION

- ▶ similarities to *Sparrow* case
  - *constitutionally protected hunting right; governments must consult with aboriginal community to ensure limitations are justified*
- ▶ *Sparrow* led to extension of duty to consult to land use decision-making
  - *confirmed in Haida Nation and Taku River Tlingit cases*
- ▶ *Sparrow + Powley + Haida Nation* = duty to consult and accommodate where Crown land use decisions affect Métis rights

# IMPLICATIONS FOR DEVELOPERS

Although duty to consult rests with government, developers are directly affected:

- ▶ government regulatory decisions can affect exercise of aboriginal and treaty rights
- ▶ government tenures and approvals granted without adequate consultation are legally vulnerable
  - *tenures and approvals can be and have been declared invalid*

# GOVERNMENT RESPONSES

## Alberta:

- ▶ “First Nations Consultation Guidelines on Land Management and Resource Development” (2006)

## Canada:

- ▶ “Aboriginal Consultation and Accommodation – Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult” (2008)

# ALBERTA CONSULTATION GUIDELINES

- ▶ first put in place in 2006, amended in 2007
- ▶ recognize Crown's duty to consult
- ▶ delegates actual consultation work to developers
- ▶ department-specific requirements set out for AENV, SRD, Energy and ATPRC
- ▶ Guidelines do not apply to ERCB
  - *D56 continues to apply for ERCB applications*

# ALBERTA CONSULTATION GUIDELINES

## Process:

- ▶ assessment and notification
  - *GOA reviews developer's application and tells developer who to notify*
  - *based on traditional land use info, previous discussions with First Nations, other information sources*
- ▶ consultation procedures
  - *notification*
  - *plain language summaries*
  - *meetings where required*
  - *developers should "be aware of" First Nations' own consultation protocols*



# ALBERTA CONSULTATION GUIDELINES

## Process:

- ▶ First Nation responses
  - *must respond within 21 days*
  - *no response = deemed to have no concerns*
  - *responses must clearly identify potential adverse impact on rights and traditional uses*
- ▶ determining adequacy of consultation
  - *Alberta assesses adequacy of efforts*
  - *may check with First Nations*
  - *developers can be required to undertake further consultations*

# ALBERTA CONSULTATION GUIDELINES

## Challenges with Consultation Guidelines:

- ▶ role of Alberta
  - *some First Nations have expressed concerns with extent of delegation of consultation activities to industry*
  - *Beaver Lake Cree Nation court case*
- ▶ determining who to consult with
  - *inconsistent direction from departments*
  - *overlapping traditional territories*
  - *non-recognized communities*

# ALBERTA CONSULTATION GUIDELINES

## Challenges with Consultation Guidelines:

- ▶ capacity for consultation
  - *First Nation communities requesting capacity funding for consultation*
  - *Alberta providing some funding but not enough*
  - *developers being asked to provide funding*
- ▶ addressing non-project specific concerns
  - *land use concerns*
  - *cumulative impacts*
- ▶ traditional use studies
  - *need to make better use of existing information*

# ALBERTA CONSULTATION GUIDELINES

## Challenges with Consultation Guidelines:

- ▶ lack of First Nation support
  - *many First Nations insisting on own processes*
- ▶ Métis communities
  - *Consultation Guidelines don't apply*
  - *separate process underway*
- ▶ relationship between ERCB and departments
  - *assessing adequacy of consultation efforts*
  - *screening letters of objection*

# FEDERAL INTERIM GUIDELINES

- ▶ interdepartmental committee formed in 2004 following *Haida Nation* and *Taku River Tlingit* decisions
- ▶ Interim Guidelines released in February
  - *further work to be done on:*
    - scope of duty to consult
    - who is the Crown
    - capacity of government and communities to consult
    - relationship to statutory and treaty consultation obligations

# FEDERAL INTERIM GUIDELINES

- ▶ recognize Canada's duty to consult and accommodate
- ▶ recognize ability to delegate procedural aspects to developers
  - *industry consultations can assist Canada in discharging its duty to consult*
  - *final responsibility rests with Crown*
- ▶ provide direction to departments on:
  - *getting organized to consult*
  - *legal, financial and human resources considerations*

# FEDERAL INTERIM GUIDELINES

## Process:

- ▶ detailed instructions to government decision-makers on procedural steps
- ▶ process:
  - *pre-consultation analysis and planning*
  - *consultation process*
  - *accommodation*
  - *implementation, monitoring and follow-up*

# FEDERAL INTERIM GUIDELINES

## Potential challenges

- ▶ no experience with Interim Guidelines
- ▶ role of developers
  - *no mention of off-loading, but no guidance either*
- ▶ potentially long internal process
- ▶ but: limited federal role in most projects
  - *DFO, Transport Canada*



# CONSULTATION CHALLENGES

## Current challenges for developers:

- ▶ who to consult with
- ▶ First Nation buy-in to government processes
- ▶ capacity building
- ▶ traditional lands and overlapping claims
- ▶ Métis and non-status groups
- ▶ engaging governments

# INDUSTRY STRATEGIES

**Developers are taking pro-active steps to address project risks associated with aboriginal consultation by:**

- ▶ identifying potentially affected aboriginal communities
- ▶ building relationships
- ▶ working with governments to scope consultation needs
- ▶ addressing issues and opportunities related to projects
- ▶ negotiating consultation process agreements
- ▶ negotiating benefits agreements

# INDUSTRY STRATEGIES

## Consultation protocols:

- ▶ aboriginal communities are developing own consultation process expectations
- ▶ consultation protocols with industry provide clarity as to processes and standards of consultation
- ▶ address consultation procedures, TEK protection and use, capacity funding, process for addressing concerns

# INDUSTRY STRATEGIES

## Impact benefit agreements:

- ▶ reduce project risks by addressing concerns and building support
- ▶ typical contents:
  - *environmental mitigation measures*
  - *jobs and contract opportunities*
  - *ongoing consultation and communication*
  - *financial contributions*
  - *non-opposition to project*
  - *dispute resolution processes*

# INDUSTRY STRATEGIES

## Legal considerations:

- ▶ binding agreements vs. MOUs
- ▶ non-recognition of rights and traditional territory
- ▶ are you contracting with the right party
  - *who has authority to speak for community on aboriginal and treaty rights issues*
- ▶ internal approvals
  - *band council approval vs. community votes*
- ▶ consequences of interventions
- ▶ disclosure and use of agreement
  - *regulators, third parties, court proceedings*

**Calgary**

3700, 205-5th Avenue SW  
Bow Valley Square 2  
Calgary, Alberta  
Canada T2P 2V7  
Telephone 403.269.6900  
Facsimile 403.269.9494

**Vancouver**

1600 Cathedral Place  
925 West Georgia Street  
Vancouver, British Columbia  
Canada V6C 3L2  
Telephone 604.685.3456  
Facsimile 604.669.1620

**Yellowknife**

P.O. Box 818  
200, 4915 - 48 Street  
Yellowknife, NWT  
Canada X1A 2N6  
Telephone 867.669.5500  
Toll Free 1.888.465.7608  
Facsimile 867.920.2206

**John Olynyk**

**(403) 781 9472**

**[jolynyk@lawsonlundell.com](mailto:jolynyk@lawsonlundell.com)**

