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i s e e e



Oil and Gas Development and the Crown's
Duty to Consult: A Critical Analysis of
Alberta's Consultation Policy and Practice

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PREFACE

The energy sector has been a dominant factor in Alberta's development and growth over the last half-century. The large capital investments and operating expenditures associated with finding and producing oil and gas have directly provided a major stimulus to the economy. But the indirect and induced impacts have been equally important. The development of many other industries supplying inputs to the energy sector, the generation of substantial export and government revenues, and the stimulus for large inflows of people have resulted in large 'multiplier' effects. In combination, these have also played a major role in shaping Alberta's 'character' which is generally distinguished by its highly educated, adjustable and entrepreneurial labour force, low unemployment and high labour force participation rates, strong work ethic and sense of self reliance, and its optimistic outlook.

In recent years the energy sector has become even more dominant and has increasingly made Alberta a key driver of the national economy. In a world with a rapidly growing demand for energy, having one of the largest concentrations of energy resources in the world might seem to translate into an assured, prosperous future. There is clearly huge potential associated with unconventional oil and gas, coal, remaining conventional resources and with alternative and renewable energy. However, translating this potential into reality will be daunting. Increasing constraints related to resource access, environmental impacts, infrastructure requirements, and availability of highly qualified people need to be addressed. Other challenges include the massive long-term investments in developing and implementing new technologies and making the right changes in the policy and regulatory framework. Indeed, the fact that relatively few nations have managed to convert resource wealth into high standards of societal welfare is a useful reminder of the magnitude of the challenges.

Alberta is in many respects at a crossroads. On the one hand complacency will almost certainly mean a dimming of the province's long-term prosperity. Declines in the conventional oil and gas sector will significantly dampen growth and prosperity. There are no other sectors of the province's economic base that could realistically expand sufficiently to offset significant declines in the dominant energy sector. On the other hand, visionary, strategic investments today can unlock non-conventional and other energy resources critical to securing a strong and prosperous long-term, sustainable future for the province.

It is in this context that ISEEE has undertaken a series of papers focused on Alberta's energy futures. The intent is to take a longer term look at the challenges, opportunities and choices and what they mean for Alberta's future.

**Oil and Gas Development and the Crown's
Duty to Consult: A Critical Analysis of
Alberta's Consultation Policy and Practice**

Submitted to
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the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.¹

1. Introduction

The Crown's duty to consult Aboriginal peoples before making decisions in relation to projects that may affect them or their traditional territories is unique. While the duty is no doubt related to the general duty of fairness owed by government decision-makers to those who may potentially suffer the negative impacts of resource development projects, the duty to consult has distinctive features. Arguably, the most salient difference lies in the purpose of the two duties.

The duty of fairness aims to provide a forum to a person potentially affected by a given decision so that his/her concerns can be heard and taken into account before the final decision is made. It is a procedural duty forming part of general administrative law. Its virtues go beyond law since commentators argue that listening to those affected should improve the outcomes of decision-making and enhance democracy. On the other hand, the Supreme Court of Canada tells us that the duty to consult Aboriginal peoples is designed to foster reconciliation between the Aboriginal and Non-Aboriginal societies. The duty is directly linked to constitutionally protected rights and has both a procedural (consultation) and a substantive (accommodation) aspect.

Most of the case law involving the duty to consult and to accommodate Aboriginal rights comes to us from British Columbia. This is likely because the majority of the First Nations in BC never entered into treaties with the Crown and therefore much of the province remains subject to claims of unextinguished aboriginal title. By contrast, all lands within Alberta fall within the so-called "numbered treaties" (notably Treaties 6, 7 and 8). The province of Alberta interprets the numbered treaties as having effected a surrender of the lands and resources by their aboriginal "owners" but it also recognizes that the tribes still hold certain rights including the rights to fish, hunt and trap in traditional territories. The treaties however provide that these rights are subject to certain regulatory and geographical limitations leading the province to argue that the so-called *tracts taken-up clause* enables it to take up tracts of lands "from time to time for settlement, mining, lumbering, trading and other purposes"² thereby allowing it to dedicate traditional territories to a variety of resource development purposes notwithstanding the constitutional protection apparently afforded to Aboriginal and treaty rights by section 35 of the *Constitution Act, 1982*. Recent developments in the duty to consult suggest that the province's power to "take up lands" is not an absolute and

¹ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69.

² *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, etc.* (Ottawa: Queen's Printer, 1966).

unfettered power but is subject to both the substantive and procedural aspects of the duty to consult.

This paper seeks to explore how the duty to consult operates within the treaty context of Alberta. It explores how the BC cases apply within a treaty province and seeks to assess provincial guidelines against the judicially developed disciplines of consultation and accommodation.

Section 2 of the paper provides an analysis of the evolution of the judicial doctrine on the duty to consult and to accommodate Aboriginal and treaty rights beginning with the *Sparrow* decision in 1990 through to the *Mikisew Cree* decision in 2005. The paper acknowledges that the judicial elaboration of the duty to consult remains a work in progress. While the procedural aspects of the duty are better elaborated, the substantive component remains vague. The obligations imposed on the Crown are demanding and the Courts have insisted on the need to establish structured non-discretionary regimes of consultation and accommodation.

Section 3 of the paper reviews Alberta's approach to consultation with First Nations and the current process to define a policy on this issue. It also briefly explores the extent to which Aboriginal people are consulted in the oil and gas development process.

Finally, Section 4 uses the doctrinal principles discussed in Section 2 to assess Alberta's policy and practice of consultation with Aboriginal peoples. It suggests that Alberta's proposals are very basic and general, and require further elaboration in order to satisfy the judicially developed standards. In particular, the proposals need to be more precise and explicit about the role and involvement of the Crown in fulfilling its general duty of fair dealing with Aboriginal peoples.

2. The Judicial Doctrine on the Duty to Consult and Accommodate

2.1 The context of the legal duty to consult Aboriginal peoples: the substantive promise of *Sparrow*

Subsection 35(1) of the *Constitution Act, 1982* provides that "the existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed". While this constitutional statement set a landmark in the modern understanding of Aboriginal rights, it required (as it probably still does) further elaboration to become fully operational.

The Supreme Court of Canada first elaborated on the significance, interpretation and implications of this provision in its decision in *R. v. Sparrow*.³ The decision remains important and several aspects of this decision require discussion here.

First, the court stated that the “recognition and affirmation” of Aboriginal rights recognizes that Canada’s aboriginal peoples were living here with a distinctive way of life (including their culture and legal systems) prior to the Europeans’ arrival.

Second, the Court emphasised that section 35 represents “the culmination of a long and difficult struggle in the political forum and the courts” but also provides “a solid ... base upon which subsequent negotiations can take place”⁴ thereby recognizing that the relationship between Non-Aboriginal and Aboriginal societies is part of an ongoing process rather than a settled matter.

Third, the decision developed criteria to guide dealings between the Crown and Aboriginal peoples. The Court stated that section 35 should be construed in a purposive way through a generous and liberal interpretation of its wording,⁵ avoiding “sharp dealing” by the Crown. Among other things, this means that the interpretive approach must be flexible and contemporary “so as to permit [the rights] evolution over time”⁶ and must be culturally sensitive.⁷

Fourth, the Court noted that while section 35 rights were not absolute, their constitutional status required government to justify any infringement of those rights. In procedural terms, this means that the validity of government actions is no longer presumed and that the State bears the onus of justifying its actions whenever protected aboriginal interests are at stake.⁸ In substantive terms, it holds the Crown to the promise to take Aboriginal rights seriously.⁹

Fifth, the Court established the basic elements of a justification test¹⁰ which the court clearly intended to be a burdensome restraint on governmental action rather than a

³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*]. In this case, the defendant, Mr. Sparrow, was accused of fishing with a net that exceeded the statutory length. Without denying the facts, Mr. Sparrow alleged that he was exercising a constitutional right to fish not subject to the regulations invoked against him.

⁴ *Sparrow* at para. 53.

⁵ *Ibid.* at para. 56.

⁶ *Ibid.* at para. 27.

⁷ *Ibid.* at para. 40.

⁸ *Ibid.* at paras. 62 and 64.

⁹ *Ibid.* at para. 65.

¹⁰ The test has two parts: The first part inquires (1.1) whether there is a valid legislative objective to support the infringing action (para. 71) and (1.2) whether such objective upholds the honour of the Crown, (para. 75). The second part asks (2.1) whether there has been as little infringement as possible in order to effect the desired result; (2.2) whether fair compensation is available in a situation of expropriation; and (2.3) whether the aboriginal group in question has been consulted with respect to the

qualified licence to infringe rights. The court mentioned the duty to consult as part of this justification test but did not further expound upon the content of that duty.¹¹

Although the Court first mentioned the duty to consult in the context of the justification of infringements of Aboriginal or treaty rights, later cases suggest that it cannot be so confined. Indeed the court has emphasized in *Haida* and *Mikisew Cree* that the duty forms a core precept for attaining the overall goal of reconciliation. Through consultation, section 35 rights are no longer merely *shields against* government infringements but are also *swords that may require* government action.¹² Moreover, consultation has the potential to transform these rights into *bridges* of intercultural understanding.

For now, let us just summarize the substantive promise contained in *Sparrow*:

Actual commitment to reconciliation between the Canadian non Aboriginal and Aboriginal societies requires that Aboriginal rights be taken seriously.

2.2 The source of the duty to consult (and to accommodate): from *Sparrow* to *Haida* and *Mikisew*

As suggested above, the context within which the duty to consult was originally articulated in *Sparrow* led some provincial governments to argue that the duty to consult was *only* triggered where there was an actual infringement of a *proven* right protected by section 35.¹³ This narrow interpretation ignored a more proactive role for consultation: that of actually avoiding rights infringements even where the existence and content of those rights had yet to be proven.

In *Haida*,¹⁴ the Supreme Court rejected the narrow interpretation. The court stated that the duty was owed even in the absence of a proven right or its actual infringement since the obligation's source is the honour of the Crown.

decisions to be made. (para. 82) The decision offered examples of what would amount to a "valid" objective: conservation and management of a natural resource and in general, compelling and substantial objectives, would be valid; however the public interest would not be, as it is too vague, broad and unworkable.

¹¹ Other than stating that Aboriginal peoples would expect to be informed about the determination of the regulatory scheme in situations where their rights could be affected: *Sparrow*, *supra* note 3 at 82.

¹² See Nigel Bankes, "Mikisew Cree and the Lands Taken Up Clause of the Numbered Treaties" (Fall 2005/Winter 2006) 92/93 Resources.

¹³ *Ibid.* at 2.

¹⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [hereinafter *Haida*]. The Haida Nation challenged the replacement and transfer of a Tree Farm License (TFL) issued by the province of BC to a forestry firm, arguing that the provincial government had failed to fulfill its duties to consult with them. The Haida have long been claiming the lands where the license has been issued.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples¹⁵

This statement locates the duty to consult in the broad and ample context of reconciliation rather than the narrower context of justification of infringements. Thus framed, the duty is tied to the broader duty of honourable dealing that arises from the Crown's assertion of sovereignty.

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown".¹⁶

*Mikisew*¹⁷ further elaborated on how the duty of honourable dealing infuses treaty interpretation and that treaties include implicit procedural rights in addition to substantive entitlements.

... the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to *Mikisew* procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the *Mikisew* could have established that the winter road breached the Crown's *substantive* treaty obligations as well.¹⁸

This was an important clarification since it served to undermine the province's argument in that case that the "tracts taken up clause"¹⁹ of the numbered treaties authorized the

¹⁵ *Ibid.* at para. 16.

¹⁶ *Ibid.* at para. 17.

¹⁷ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69 [hereinafter *Mikisew*]. The *Mikisew Cree First Nation* objected to the construction of a winter road on grounds of significant impacts on its treaty rights to trap and hunt. Neither the road nor its realignment was the subject of consultations with the First Nation. The provincial Crown argued that the "tracts-taken up clause" in Treaty 8 provided it with a defense on the grounds that by exercising its "right" to "take up" land, it could not be infringing the treaty.

¹⁸ *Ibid.* at para. 57.

¹⁹ The text of the clause reads: "And Her Majesty the Queen HEREBY AGREEES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered ... subject to such regulations as may from time to time be made by the Government

province to do just that (*i.e.* “take up” and dispose of land for any one of a number of developmental purposes) and to do it without consulting Aboriginal peoples who might be affected by that “taking up”. The Supreme Court unequivocally rejected that defense holding that the overarching principles of the honour of the Crown and reconciliation impose an obligation to consult even in cases of recognized Crown powers to limit Aboriginal rights. In other words, even powers recognized and contemplated by the treaty should be exercised *honourably*²⁰ and should be constrained by the duty to consult.

In sum,

the source of the duty to consult (and to accommodate) is the honour of the Crown, which is always at stake in its dealings with Aboriginal peoples. So located, the duty to consult is a stand-alone obligation stemming not from infringement of rights (proven or alleged), but from a broader duty of fair dealing.

2.3 The trigger for 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. But what, precisely, is the trigger for the duty to consult? In *Haida*, the Court proposed a low threshold:

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.²¹

There are at least three reasons for thinking that this is low threshold. First, the court uses the term “*constructive*” knowledge. This is a more extensive concept than real or actual knowledge since it encompasses the additional knowledge that the Crown would have acquired had it undertaken appropriate, reasonable and diligent inquiries. Second, the duty is triggered by knowledge of the “*potential*” existence of a right or title, and third, the duty is triggered by merely “*contemplating*” conduct that “*might*” affect the right.

The court recognizes that such a low threshold will impose a considerable burden on the Crown but the Court insists that administrative inconvenience cannot be used as a defence to exonerate it from the obligation to consult (and to accommodate).²² In

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. *Report of Commissioners for Treaty No. 8* (1899) at 12.

²⁰ *Mikisew*, *supra* note 17 at para. 31.

²¹ *Haida*, *supra* note 14 at para. 35.

²² *Mikisew*, *supra* note 17 at para. 50. Moreover, the Court dismissed an alleged absolute trade-off effect of Treaty 8 stating that “First Nations [payed] dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price” (para. 52).

Mikisew for example the Court rejected the Crown's defense that it owed no duty to consultation once it decided to move the road alignment outside of reserve lands. Instead, the Court found that the clear, established and demonstrably adverse impacts on the continued exercise of the Mikisew hunting and trapping rights in the lands adjacent to the new alignment kept those duties alive.²³ Potential indirect, larger and cumulative impacts on Aboriginal rights, qualitative as well as quantitative effects, and impacts on the continuity of the exercise of the rights, all trigger the duty to consult.²⁴ Remote and insubstantial impacts do not.²⁵

But, while there is little flexibility in the trigger, the variable content of the duty, once triggered, offers,²⁶ as we shall see in the next section, considerable flexibility. For now, let us just restate that:

The duty to consult (and to accommodate) is triggered once the Crown has knowledge of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

2.4 The variable content of the duty to consult

As discussed above, the duty to consult differs from the general obligation of procedural fairness. Its source (the honour of the Crown) and its purpose (reconciliation) are unique. The duty to consult does not aim merely at providing a fair forum to those potentially affected by an administrative decision, it also aims to protect the exercise and continuity of rights recognized and affirmed in the Constitution.

Initial decisions on consultation emphasized its procedural aspects²⁷ but since *Delgamuukw*,²⁸ the duty has been increasingly construed in substantive terms. Indeed, the Supreme Court has found that consultation "is not simply [a process] of giving the [First

²³ According to a draft environmental assessment report cited in the decision, detrimental effects on hunting and trapping rights would include: diminution in quantity of the Mikisew harvest of wildlife, decline in the more lucrative or rare species of furbearers, fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching linked to motor vehicle access to the area and increased wildlife mortality (para. 44). Also, the case stresses the need to appreciate the impacts not in absolute terms, but relative to the specific Mikisew reality: 14 trappers and 100 hunters adversely affected may not seem so dramatic, Binnie argues, unless considered in the context of a small northern community of relatively few families (para. 3). Finally, the decision seems to acknowledge the relevance of indirect impacts on Aboriginal traditional lifestyle. Indeed, the decision recalls a cultural objection to the road by the Mikisew that links its detrimental effects on hunting and trapping to the abandonment of the traditional lifestyle by Aboriginal youngsters (para. 15).

²⁴ See *Mikisew*, *supra* note 17 at paras. 44, 47, 55.

²⁵ *Ibid.* at para. 55.

²⁶ *Ibid.* at para. 34.

²⁷ *Sparrow*, *supra* note 3; *Nikal*, [1996] 1 S.C.R. 1013, (*sub nom. Canada v. Nikal*) at para. 110.

²⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*]. The Houses of *Delgamuukw* and *Haaxw* and other *Gitksan* and *Wet'suwet'en* Houses claimed for Aboriginal title over portions of lands in BC.

Nation] an opportunity to blow off steam.”²⁹ Rather, it should have “the intention of substantially addressing the concerns of the aboriginal peoples”.³⁰ This does not confer necessarily a veto power on the First Nations but it does require that the decision-maker is prepared to amend its initial proposals according to the findings and information received during the process.³¹ Good faith on both sides is required, sharp dealing is not permitted, but mere hard bargaining is acceptable.³²

While consultation may always be required as an obligation of fair dealing, the Courts have also recognized that the degree and thoroughness of the process will vary. As we shall see, the degree of certainty of the rights, the level of expected impact on the rights as well as the context, all determine the content of the duty to consult and locate its position at a specific point along a spectrum of possible requirements.³³ In general, at the highest level the duty is satisfied by deep consultation with (and, on occasions, the consent of) the First Nation involved.³⁴ At the lowest level the obligation is met through talking together for mutual understanding.³⁵

Delgamuukw is the leading authority for those cases where there is a proven Aboriginal title.

... 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.³⁶

Haida and *Taku River*³⁷ are the seminal decisions with respect to claimed (but not proven) aboriginal rights and title and *Haida* in particular further expanded upon the idea of a spectrum:

²⁹ *Mikisew*, *supra* note 17 at para. 54.

³⁰ *Delgamuukw*, *supra* note 28 at para. 168.

³¹ *Haida*, *supra* note 14 at paras. 45, 46.

³² *Ibid.* at para. 42.

³³ It must be noted that “in all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances”: *Haida*, para. 41 Also, in all cases a flexible approach will be used so that the level of consultation may change as the process proceeds and new information merits such change. *Ibid.* at para. 45.

³⁴ *Delgamuukw*, *supra* note 28 at para. 168.

³⁵ *Haida*, *supra* note 14 at para. 43.

³⁶ *Delgamuukw*, *supra* note 28 at para. 168.

³⁷ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 [hereinafter *Taku River*]. The Taku River Tlingit First Nation objected to a plan to build a road through a portion of its traditional territory, and sought that the governmental decision authorizing it be quashed. The Court found that the Crown owed a duty to consult and to accommodate to the First Nation whose claimed lands were to be affected, even in the absence of a proven title.

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.³⁸

This passage identifies three key elements for determining where a proposed action or decision fits along the spectrum:

- The strength of the claim to title.
- The degree of significance (importance) of the right.
- The degree of potential for infringement.

In *Taku River*, the Court applied this guide and found that the First Nation's claim was relatively strong and therefore entitled to something significantly deeper than minimum consultation. The court also held that the First Nation was entitled to a degree of responsiveness to its concerns that amounted to accommodation.³⁹ But the Court also found that the Crown had discharged its duty to consult in that case.⁴⁰

Mikisew expands on the idea that the content of the duty to consult is also influenced by context.⁴¹ Variables that determine the content of the duty in the context of treaties include:

- The specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on Aboriginal peoples with respect to identified resources, the role of consultation may be quite limited.⁴²
- The seriousness of the impact of the Crown's proposed action. The more serious the impact the more important the role of consultation.

³⁸ *Haida*, *supra* note 14 at paras. 43-45.

³⁹ *Taku River*, *supra* note 37 at para. 32.

⁴⁰ Through measures that included full participation of First Nation representatives in the project committee, input of First Nations in studies related to the project, funding provided Aboriginal participation, extension of timeframes, etc.

⁴¹ *Mikisew*, *supra* note 17 at para. 63.

⁴² *Mikisew*, *supra* note 17 at para. 63.

- The history of dealings between the Crown and the particular First Nation. In *Mikisew* the court noted that Treaty 8 provides a framework to manage the continuing changes in land use foreseen in 1899, and these changes require consultation.

Applying these ideas in *Mikisew* the Court found that: (1) the rights at stake (treaty rights to hunt and trap) were certain and determined, (2) the taking up clause imposed a strong limitation on the treaty rights at issue⁴³ and (3) the impacts were clear, established and demonstrably adverse to the continued exercise of hunting and trapping rights.⁴⁴ The Court concluded that the level of consultation owed in the case fell to the lower end of the spectrum.⁴⁵

In practical terms, however, what matters most are the duties that correspond to the different places on the spectrum.⁴⁶ In *Mikisew*, the low end of the spectrum gave rise to the following duties:

- To provide notice;
- To conduct a process tailored to the First Nation participation needs;
- To provide information about the project addressing what the Crown knew or believed to be Mikisew interests and anticipated impacts on those interests;
- To solicit and listen carefully to Mikisew concerns; and
- To attempt to minimize adverse impacts on Mikisew rights.⁴⁷

Of these four requirements the first three are procedural while only the last suggests something more substantive. This leads us to one of the most contentious elements of the doctrine on consultation: its substantive component, the duty to accommodate.

But now, let us just summarize to the effect that:

⁴³ *Ibid.* at para. 64.

⁴⁴ *Ibid.* at para. 55. See also paras. 44 to 48.

⁴⁵ Note that the taking up limitation seems to have been the determinant factor for locating the duty in this case.

⁴⁶ Indeed, the case law is inconsistent regarding the location and the concomitant obligations. This proves not only the difficulty in providing a fixed rule for locating the duty, but also the convenience of a contextual approach, as the Court has recognized.

⁴⁷ See Bankes, *supra* note 12 at 6.

the content of the duty to consult (and to accommodate) is variable and depends on the significance of the right at stake (proven or alleged) and the degree of expected impact on that right.

2.5 The duty to accommodate: the substantive corollary of consultation

As we have seen, the 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. Indeed, from *Haida* to *Mikisew*, the Court has insisted that consultation will not always lead to accommodation, but only if required. In *Haida*, the duty to accommodate was depicted as a stage in the process of consultation that applies when the process suggests the need to amend government policy or proposals.⁴⁸ In other words, accommodation represents the responsiveness owed by the Crown to the Aboriginal concerns identified during the consultation process. And, just as in consultation, the content of the duty to accommodate (that is, the *level* of responsiveness) will vary, according to the circumstances.

The circumstances, therefore, are key to understanding when the obligation to accommodate arises and what adequate accommodation measures are required. Regarding the first question, the Supreme Court has insisted that accommodation is owed “if appropriate” or “if required”. Obviously, the requirements for accommodation, if any, will only arise if identified during the consultation process. Indeed, one of the practical objectives of the process of consultation is to acknowledge the concerns of the Aboriginal peoples and to respond to them satisfactorily. In that sense, accommodation will always be required when consultation identifies legitimate concerns that may be resolved through changes to proposed action or policy. Only in the hypothetical case that no concerns arise, say because the First Nation is satisfied with the government proposal, will there be no need for accommodation. Thus, just as in the case of consultation, the duty to accommodate is triggered at a low threshold.

But to continue the parallel, just as in the case of consultation, it is the *content* of the duty to accommodate that varies along a spectrum. At one end of the spectrum the duty may even include consent as *Delgamuukw* anticipates in the case of established title.⁴⁹ Thus, in the case of a strong *prima facie* claim coupled with significant adverse impacts, measures of accommodation should seek to avoid irreparable harm and to minimize the effects of infringement.⁵⁰ Whereas, a weak claim coupled with a limited right and a minor potential for infringement may only require the Crown to “*discuss any issues raised in response to the notice*”.⁵¹ But, as *Mikisew* reminds us, even at the lower end of

⁴⁸ *Haida*, *supra* note 14 at para. 47.

⁴⁹ *Delgamuukw*, *supra* note 28 at para. 168. Some cases may require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

⁵⁰ *Haida*, *supra* note 14 at para. 47.

⁵¹ *Ibid.* at para. 43.

the spectrum, accommodation should not be excluded from the outset, for otherwise the process would not be meaningful.⁵²

Indeed, as noted at the beginning of this paper, it is the substantive accommodation aspect of the combined duty to consult and accommodate that distinguishes this duty from the administrative obligation of procedural fairness. This substantive component imposes an obligation on government *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.⁵³

This does not imply, as the Court has also insisted, that Aboriginal peoples have a veto power. Indeed, the consent referred to in *Delgamuukw*, will only be required in cases of established rights and even then not in every case.⁵⁴ Ultimately, the duty to accommodate demands a balancing of competing interests,⁵⁵ and, absent an agreement, the Crown must perform this task,⁵⁶ but its discretion is limited by its obligation to demonstrably incorporate Aboriginal concerns.

In *Taku River* where the Court imposed, as we have seen, a level of responsiveness tantamount to accommodation the Court concluded that this was discharged through a series of measures including allocation of funding for wildlife monitoring programs, establishment of mitigation strategies and provision for future consideration of outstanding broader concerns. Other cases provide additional examples of accommodation measures. In *Musqueam* for example possible accommodation measures in the context of land use conflicts include sharing of mineral and timber resources, employment agreements, money, and setting aside land for treaty negotiations.⁵⁷ *Mikisew* suggests that changes in the road alignment or construction might be regarded as accommodation.⁵⁸

⁵² *Mikisew*, *supra* note 17 at para. 54.

⁵³ While Binnie does not go as far as recognizing that accommodation is always owed, he argues against excluding it from the outset. Indeed, the latter would imply a mere frustration-venting process. *Ibid.* at para. 54.

⁵⁴ *Haida*, *supra* note 14 at para. 48.

⁵⁵ [A]ccommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. *Taku River*, *supra* note 37 at para. 2.

⁵⁶ *Ibid.* at para. 42; *Haida*, *supra* note 14 at para. 42.

⁵⁷ *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* (2005), 37 B.C.L.R. (4th) 309 (B.C.C.A.) [hereinafter *Musqueam*] at paras. 97 and 98. In this case, the *Musqueam* demanded B.C. to stop the sale of lands to a third party until the Band had been adequately consulted. The provincial government argued that it had done so and had offered an accommodation that was rejected by the Band.

⁵⁸ *Mikisew*, *supra* note 17 at para. 66.

Finally, and notwithstanding the Court's insistence in *Haida* that there is no necessary connection between the duty to consult and proven infringement, the principles of the *Sparrow* doctrine of justification should also inform the processes of consultation and accommodation. That is so because, ultimately, the *Sparrow* promise is that Aboriginal rights and interests are to be taken seriously. In *Delgamuukw*, for example, the Court found that consultation in cases involving aboriginal title was a form of fiduciary obligation articulated in relation to a particular feature of title: the holders' right to choose to what ends a piece of land can be put.⁵⁹ That is why in some cases, the Court stated, the accommodation required is consent, and even if that will be a rare case *Sparrow* suggests that in deciding among the universe of accommodating measures, the Crown is expected to cause the least infringement possible, to give priority to Aboriginal interests, to avoid irreparable damage, to compensate, to recognize the Aboriginal preferred means to exercise their rights, etc and to recognize that only demonstrably *compelling and substantial* objectives can trump Aboriginal rights.

These connections between the duty to consult and other aspects of the *Sparrow* justification criteria are as yet poorly developed in the case law but the *Gladstone*⁶⁰ decision provides a useful example of how the priority principle may inform the duty to consult and to accommodate in a fisheries case.

This right (to priority) is at once both procedural and substantive; at the stage of justification the government must demonstrate both that *the process by which it allocated the resource and the actual allocation* of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.⁶¹ (emphasis added)

In sum,

the duty to accommodate arises when the process calls for amendments of the government proposal and is satisfied by the demonstrable incorporation of Aboriginal concerns in the final decision, along a spectrum.

2.6 The timing for consultation

When must the Crown consult? Here, the key word is *early*. Early consultation is required so that the First Nation has the broadest opportunity to influence the proposed decision and to have the widest array of its preferred accommodation measures considered. What will amount to early consultation will vary with the context.

Actions pursuant to the implementation of plans or projects which have the potential to cause detrimental impacts on Aboriginal rights will require consultation and

⁵⁹ *Delgamuukw*, *supra* note 28 at para. 168.

⁶⁰ *R. v. Gladstone* (1996), 1 S.C.R [hereinafter *Gladstone*].

⁶¹ *Ibid.* at para. 62.

accommodation *before* a decision on these actions is taken. Otherwise, consultation is meaningless. Indeed, in *Mikisew*, the trial judge suggested that when decisions have essentially been made, meetings cannot be seen as conducted with the genuine intention of allowing Aboriginal concerns to be integrated with the proposals.⁶²

The decision in *Musqueam* provides a slightly different example. In this case, the provincial government engaged in negotiations with the University of British Columbia for the sale of lands claimed by the Musqueam Band without consulting the First Nation. After complaints by the Musqueam, the provincial Crown made an offer as a way of “accommodation” which the Band rejected. Hall J. found that the alleged consultation and accommodation process was meaningless as the core contested decision had already been taken without the First Nation’s engagement.⁶³ In this case, late consultation was not only an affront to the Musqueam but the effect of delay was to limit the possibilities for adequate accommodation of Aboriginal concerns.

Early consultation with Aboriginal peoples also needs to take place when the broader policy and strategic issues are discussed and decided. In *Haida*, the Crown had been consulting the First Nation prior to issuing cutting permits but did not consult prior to approving a transfer of the Tree Farm Licence. Upon finding that decisions on these licences “reflect strategic planning for utilization of the resources which may have serious impacts on Aboriginal rights” the Court concluded that consultation must take place at the stage of granting or renewing licences, and not only at the operational stages.⁶⁴

Hence, consultation and accommodation must take place both at the strategic planning stage, where fundamental decisions regarding the future of land and resources are taken, as well as at the operational stages where those decisions are implemented. Obviously, the issues and the accommodation measures to be discussed, just as the processes themselves, will vary according to the stage.

But early consultation alone will not suffice to discharge the Crown of its obligations. The key concepts here are “ongoing process” and “always”. Similarly, “early” does not mean so far back in time that there is no connection between the consultation exercise and current events. In *Mikisew*, the Court dismissed the Provincial Crown’s argument that umbrella consultation had already occurred back in 1899 when Treaty 8 was signed, and that no further consultation processes were required.

Any government action, emanating from whichever source, be it parliament or executive body, which may affect an Aboriginal right, proven or alleged, is subject to consultation

⁶² *Mikisew*, *supra* note 17 at para. 67.

⁶³ *Musqueam*, *supra* note 57 at para. 95.

⁶⁴ The Crown had argued that “through past consultations with the Haida, the province has taken various steps to mitigate the effects of harvesting ...”, but, while recognizing this, the Court insisted that those measures and policies could not be substituted for consultation *with respect to the decision to replace* the contested licence and the setting of the licence’s terms and conditions. *Haida*, *supra* note 14 at para. 78.

(and accommodation) with Aboriginal peoples. The fact that the universe of possibilities is so ample stems from the duty of honourable dealings already discussed. It is possible to suggest an illustrative rather than exhaustive list of such triggering events:

- Development of laws (Acts and regulations) concerning
 - fisheries (*Sparrow*), 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
 - the establishment of protected areas, parks, etc.
- Decisions regarding management of the above such as
 - Natural resources planning strategies and policies
 - Planning, development and use of land (including private lands, *Hupacasath*)
 - Issuance, replacement, transfer and renewal of licenses to use resources both renewable (in *Haida*, Tree Farm Licenses) and non renewable (oil and gas, oil sands)
 - Land sales (*Musqueam*)
 - Environmental assessment processes (*Taku River*)
 - Authorization, amendment and renewal of project proposals
 - Decisions regarding the implementation of policies and authorized projects (operational plans, allowable annual cut and catch, production increments)
 - Opening and use of roads (*Mikisew*).

Based on the above, we can conclude that:

Consultation must occur early in the decision-making process in order to be meaningful, to allow for significant influence of Aboriginal views in the decision and to afford them the widest array of accommodating options possible. Furthermore, the process of consultation should be ongoing where appropriate to the type of decision.

2.7 The participants in the process

a. *The duty bearer: the Crown*

The Crown, both at the federal and provincial level, is burdened by the duty to consult and to accommodate. The obligation stems from the Crown's general duty of honourable dealings toward Aboriginal peoples which is in turn grounded in the Crown's assertion of sovereignty. Since this assertion of sovereignty predated the Union, and given that the provincial title to public lands is subject "to any interest other than that of the Province", it follows that the Crown in right of the provinces is also subject to the duty to consult where the exercise of governmental direction or authority may affect the constitutionally protected rights of Aboriginal peoples. The Natural Resources Transfer Agreements place Alberta and the two other prairie provinces in the same position as the original provinces of Confederation.⁶⁵

Finally, it bears emphasizing that references to the "Crown" as the duty-bearer are all-embracing and not confined to a particular form of governmental institution. A more thorough discussion of this point, as well as its practical implications for regulatory tribunals, is found in Section 2.9.

b. *The beneficiaries: Aboriginal peoples*

The processes of consultation (and accommodation) must include all Aboriginal peoples potentially impacted by a proposed government decision.

While Aboriginal peoples are undoubtedly the beneficiaries of the government's duties reviewed here, consultation is a two-way street. The Court's decisions 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.⁶⁶

First Nations hold 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."⁶⁷ However, this obligation is subject to the opportunity to consider the information provided by the Crown.⁶⁸ To proceed otherwise would ignore reality: First Nations have limited resources and capacities to tackle highly complex technical issues.

⁶⁵ Bankes, *supra* note 12 at 7.

⁶⁶ *Haida*, *supra* note 14 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 37 at para. 41.

⁶⁷ *Mikisew*, *supra* note 17 at para. 65.

⁶⁸ *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645 (B.C.C.A.) [hereinafter *Halfway*] at para. 161.

On the other hand, First Nations must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where agreement is not reached.⁶⁹ Refusal to meet or participate as well as setting unreasonable conditions frustrates the process.⁷⁰

c. Third parties: a role for the industry

The Supreme Court in *Haida* established that third parties do not owe legal duties of consultation and accommodation since these obligations are grounded in the honour of the Crown.⁷¹ However they may be liable to Aboriginal peoples under the general law of the land including negligence, breach of contract, dishonest dealing and perhaps trespass.⁷² 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 must be at least some risk that the validity of tenures that have been issued by the Crown without proper consultation and accommodation may be challenged.

Government can delegate procedural aspects of the duty to consult. In most cases, government requires companies to engage in consultation processes with Aboriginal peoples when their activities occur within the traditional territories of First Nations. 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 a land position 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.⁷³ 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.

2.8 Statutory consultation processes: guiding principles

The Supreme Court has insisted that reconciliation should be furthered through negotiation rather than litigation but it has been reluctant to prescribe a particular process. Instead, in *Haida*, for example, it encouraged governments to set up "regulatory schemes

⁶⁹ *Haida*, *supra* note 14 at para. 42.

⁷⁰ *Halfway*, *supra* note 68 at para. 161.

⁷¹ *Haida*, *supra* note 14 at para. 53.

⁷² *Ibid.* at para. 56. The Court does not mention trespass.

⁷³ A.W. (Sandy) Carpenter & Peter D. Feldberg, *An Introduction To the Use of Publicly Available Information in Assessing and Managing Aboriginal Risks*, online: <http://www.fasken.com/WEB/FMDWEB SITE.NSF/AllDoc/5E8215BD33582B708525702700713908/> April 4, 2006 at 10 and scheduled for publication in the Alberta Law Review.

to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.”⁷⁴ What the Court would apparently like to see is a structured non-discretionary regime with explicit guidance to decision-makers.⁷⁵

Such a scheme should prescribe consultation processes that recognize that First Nations are not just another stakeholder taking part in a public participation process.⁷⁶ 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.

... [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.⁷⁷

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.⁷⁸ 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.⁷⁹

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

⁷⁴ *Haida*, *supra* note 14 para. 51.

⁷⁵ The 2002 BC Provincial Policy for Consultation with First Nations was recognized as an effort toward such a regulatory scheme.

⁷⁶ *Mikisew*, *supra* note 17 at para. 64.

⁷⁷ *Ibid.* at para. 9.

⁷⁸ *Halfway*, *supra* note 68 at para. 159.

⁷⁹ *Halfway* at para. 160, emphasis supplied. Also *Hupacasath First Nation v. British Columbia*, [2005] B.C.S.C. 1712, where the fact that the Hupacasath did not make representations to the Crown did not limit the duty.

rights that may be impacted in order that the government is able to make a decision that minimizes impacts on those rights;⁸⁰ 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 on the environment, wildlife habitat, waters, etc. *Jack, Cheslatta, Ryan v. BC (Minister of Forests, District Manager), Halfway*;
 - 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 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*.

But consultation is not limited to information gathering and provision. It is instead an iterative process. As stated in the Guide for Consultation with Maori (1998) cited by the Supreme Court in *Haida*:

It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback ... Genuine consultation means a process that involves:

- 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

⁸⁰ Eagle, Nation to Nation, The Law of Consultation and Accommodation. Surrey, 2005, at 4-9, citing *Jack* and *Halfway*.

- Providing feedback both during the consultation process and after the decision process.⁸¹

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 industries and development.

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. 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.

In sum,

a structured non-discretionary regime that would satisfy the Courts shall include both procedural elements that take into account the Aboriginal difference as well as substantive criteria to guide an actual accommodation of Aboriginal concerns in the government decision. Both the process and the outcome must have as a guiding concept the preservation of Aboriginal rights and interests in a way that upholds the honour of the Crown.

2.9 The duty to consult and the role of regulatory tribunals

Governments frequently elect to regulate aspects of the oil and gas and other resource industries through regulatory boards such as Alberta's Energy and Utilities Board or Canada's National Energy Board. While there is some room for thinking that the internal organization of government should be constitutionally irrelevant when it comes to the overall assessment of whether or not a legal duty, such as the duty to consult, has been fulfilled⁸² it is apparent that the duty to consult poses at least two difficult questions for regulatory tribunals. The questions may be stated as follows: (1) does the Board itself owe a duty to consult, and (2) even if the Board does not itself have a duty to consult, does the Board have the jurisdiction (and duty if asked) to decide whether or not the Crown has fulfilled its consultation obligations before making a decision or recommendation on a project that may have an impact on aboriginal or treaty rights?

⁸¹ *Haida*, *supra* note 14 at para. 46.

⁸² Nigel Bankes, "Regulatory Tribunals and Aboriginal Consultation" (Spring 2003) 82 Resources.

The Supreme Court tackled the first question in a case involving the National Energy Board, a Board which has certain well-defined quasi-judicial responsibilities. There the Court found that the quasi-judicial duty of a statutory tribunal to make decisions on project approvals based upon a record of evidence was inconsistent with an obligation of loyalty which lies at the heart of a fiduciary relationship (which was then thought to be an important basis of the duty to consult).⁸³ The Court therefore held that the NEB had no duty to consult prior to making its decision. On the other hand, in the *Saulteau* case involving BC's Oil and Gas Commission, the BC Supreme Court found that, unlike the NEB, the Commission was not a quasi-judicial body but an agent of the government and therefore "had fiduciary and constitutional obligations to engage in good faith consultation with the [First Nation]."⁸⁴ The court further stated: "The Commission ... [as the body established to provide a unified approval process for oil and gas development in BC] is also expressly charged by the Act with the duty to respect the Crown's obligations to aboriginal peoples".

In the case of Alberta the EUB is more likely to be classified in the same manner as the NEB rather than the BC Oil and Gas Commission.

The Court has treated the second question as part of a more general inquiry as to the jurisdiction and duty of administrative tribunals to apply the Constitution, including the Charter of Rights and Freedoms.⁸⁵ One leading case is *Paul*.⁸⁶ There the Court stated that:

While there are distinctions between administrative tribunals and courts, both are part of the system of justice. Viewed properly, then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals. It is therefore incoherent to distinguish administrative tribunals from provincial courts for the purpose of deciding which subjects they may consider on the basis that only the latter are part of the unitary system of justice.⁸⁷

This does not mean that every administrative body will have the power to decide on constitutional matters, including Aboriginal rights. *Paul* relies on the *Martin* test which asks whether the empowering legislation *implicitly* or *explicitly* grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, then "the tribunal will be

⁸³ *Quebec (Attorney General) v. Canada (National Energy Board)* (1994), 1 S.C.R. at 183.

⁸⁴ *Saulteau First Nations v. British Columbia (Oil and Gas Commission)*, [2004] B.C.J. No. 128, at para. 138.

⁸⁵ For a discussion on the Alberta EUB's constitutional jurisdiction, see Nickie Vlavianos, "Alberta's Energy and Utilities Board and the Constitution of Canada" (2005) 43:2 Alta. L. Rev. 369.

⁸⁶ *Paul v. British Columbia (Forest Appeal Commission)*, [2003] 2 S.C.R. 585, 2003 S.C.C. 55 [hereinafter *Paul*]. In this case, the BC Ministry of Forestry had seized logs in the possession of Mr. Paul, alleging violation of the Forest Practices Code. Mr. Paul argued in his defense that the regulatory prohibition did not apply to him as a holder of an aboriginal right to cut timber for house modification.

⁸⁷ *Ibid.* at para. 22.

presumed to have the concomitant jurisdiction to interpret or decide that question in light of section 35 or any other relevant constitutional provision.”⁸⁸

Since the Alberta Energy and Utilities Board (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.⁸⁹

While this seems reasonably clear, the EUB has been reluctant to this point to accept that it has a responsibility to pass upon these matters. We return to this point in Section 3.2.

3. Alberta’s Aboriginal Consultation Policy and Practice

We now turn to examine Alberta’s policy on consultation and we shall then examine that policy in light of the requirements of the case law.

3.1 What is Alberta’s policy on Aboriginal consultation?

By contrast with the province of British Columbia, which developed its first Aboriginal consultation policy in 1998 in the wake of the *Delgamuukw* decision,⁹⁰ Alberta did not issue its first formal and specific policy on Aboriginal consultation until May 2005. The policy, entitled *First Nations Consultation Policy on Land Management and Resource Development*, provides broad guidance on First Nations consultation on land and resource development.⁹¹ The policy pre-dates the Supreme Court’s decision in *Mikisew Cree*.

Aboriginal Policy Framework (2000)

The consultation policy follows in the steps of the provincial government’s *Aboriginal Policy Framework* (hereinafter the Aboriginal Policy) released in 2000, in which the government first committed to consult with Aboriginal people about proposed regulatory and development activities.⁹² In that document, the provincial government stated its

⁸⁸ *Ibid.* at para. 40.

⁸⁹ Vlavianos, *supra* note 85 at 381. The author suggested that this may change with the proclamation of the *Administrative Procedures Amendment Act*, 2005. The Act is now proclaimed, and the EUB has in fact been designated by regulation as one of the decision-makers that has jurisdiction to determine questions of constitutional law (*Designation of Constitutional Decision-Makers Regulation*, A.R. 69/2006).

⁹⁰ *Supra* note 28.

⁹¹ Government of Alberta. *The Government of Alberta’s First Nations Consultation Policy on Land Management and Resource Development*, May 16, 2005

⁹² *Strengthening Relationships: The Government of Alberta’s Aboriginal Policy Framework*, September 2000, at 18.

commitment to meeting all of its treaty, constitutional and legal obligations respecting the use of public lands including the rights to hunt, fish and trap on public lands, as provided for in the various treaties, as well as in the 1930 NRTA. The government undertook to “acknowledge and respect the existing treaty and other constitutional rights of Aboriginal people in provincial legislation, policies, programs and services”.⁹³ With respect to consultation, the 2000 policy stated that the Government of Alberta will, “where appropriate, consult affected Aboriginal people about proposed regulatory and development activities that may infringe existing treaty, NRTA or other constitutional rights”.⁹⁴

While the government stated its intention to consult Aboriginal peoples on resource development, the basis and nature of the duty to consult remained unclear. The Aboriginal Policy asserted that it is the government’s role, “not the role of industry”, to consult with affected Aboriginal peoples where constitutional rights may be infringed.⁹⁵ This represented an acknowledgement that the obligation to consult Aboriginal peoples rests squarely on the government’s shoulders but the policy also envisioned a strong role for industry in the consultation process. Thus the government promoted a ‘good neighbour’ approach to consultation based on respect, open communication and cooperation and expected proponents of resource developments to consult with potentially affected communities and people. The policy encouraged Aboriginal communities and industry to enter into a good faith dialogue. The Aboriginal Policy stated that the government would work with communities and industry to use existing mechanisms and develop new ones to consult appropriately on resource development and land use decisions.

Government of Alberta’s First Nations Consultation Policy on Land Management and Resource Development (2005) (hereinafter the Consultation Policy or CP)

The Consultation Policy (CP) fulfills the government’s commitment from the Aboriginal Policy Framework to develop consultation processes for land and resource management decisions that may infringe Aboriginal or treaty rights (referred to in the policy as “Rights and Traditional Uses”).⁹⁶ The CP outlines a “made-in-Alberta policy approach that seeks to improve working relationships throughout the province” and that benefits all Albertans.⁹⁷ It emphasises building better communications and strong relationships not only between government and First Nations, but also between industry and First Nations. This approach is to be consistently applied by all government departments involved in

⁹³ *Ibid.* at 17.

⁹⁴ *Ibid.* at 18.

⁹⁵ *Ibid.* at 17.

⁹⁶ *Consultation Policy*, *supra* note 91: “Rights and Traditional Uses” are defined as including “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).

⁹⁷ *Ibid.* at 2.

land and resource management.⁹⁸ The CP defines Alberta's role in the consultation process and sets out Alberta's expectations of First Nations and industry. The government will review, and if necessary amend, the Policy four years after its implementation.

Interestingly, the CP makes no reference to court decisions that have elaborated on the Crown's duty to consult, nor does it acknowledge the government's legal obligation to protect and accommodate the rights of Aboriginal peoples, or the ultimate purpose of reconciliation which the consultation process is designed to achieve. Instead, it simply states that: "Alberta will consult with First Nations where Land Management and Resource Development on provincial Crown land may infringe First Nations Rights and Traditional Uses."

In order to achieve "meaningful consultation", the Policy sets out the following guiding principles:

- consultation must be conducted in good faith;
- Alberta is responsible for managing the consultation process;
- consultation will occur before decisions are made, where land management and resource development may infringe First Nations Rights and Traditional Uses;
- the consultation process requires the participation of First Nations, the project proponent and Alberta;
- the consultation practices will be coordinated across departments;
- parties must provide relevant information and allow adequate time for the other parties to review it;
- the nature of the consultation will depend on the extent of potential infringement, the communities affected and the nature of the activities involved;
- the objective is to avoid infringement of First Nations Rights and Traditional Uses, and where avoidance is not possible, to mitigate such infringement;
- consultation will occur within applicable legislative and regulatory timelines.

Alberta sees its role as "managing" the consultation process, and "where necessary", consulting directly with First Nations. The government "acknowledges it has a duty to consult with First Nations where legislation, regulations or other actions infringe treaty

⁹⁸ "Land Management and Resource Development" is defined as "activities arising from dispositions or decisions involving forestry, energy, and water, fish and wildlife management": *Consultation Policy, supra* note 91, footnote 1.

rights”.⁹⁹ This seems to imply that not only land and resource management decisions, but also resource legislation that may adversely affect treaty rights will be the subject of consultation with First Nations. However, the Policy does not elaborate on this and it is difficult to see how consultation on the framing of legislation and regulations and more strategic level policy issues fits within either of the two consultation modes outlined in the policy and discussed in the following paragraphs.

The CP contemplates that consultation will occur in two ways: 1) through a general consultation and relation building process; and 2) through project-specific consultation.

General consultation is intended to build relationships, increase the flow of information between parties, and avoid or mitigate adverse impacts of First Nations’ rights and uses. For example, the government will initiate or attend information-sharing sessions with First Nations, work with First Nations to identify how traditional uses of the land may be affected by land and resource development (in particular through traditional use studies), and identify with First Nations practical arrangements to implement the Policy and the subsequent Consultation Guidelines.

Project-specific consultation may involve direct consultation between government and First Nations on “major projects”, but in most cases the policy envisages that it is the project proponent who will engage directly in the consultation. Alberta will determine whether it should engage directly in project-specific assessment, based on available information about the proposed activity and the First Nations in the area. When consultation is conducted by a project proponent, the government will retain the responsibility to determine if consultation has been adequate.

In those cases where consultation is undertaken directly by the government, a lead Ministry will be in charge of the process, “keeping in mind applicable industry and regulatory timelines and the need for informed understanding among the parties.”¹⁰⁰ This suggests that the length of time allocated to consultation is non-negotiable. The process will include gathering the necessary information from industry and First Nations, assessing the potential for infringement of the rights, and facilitating discussions between proponents and First Nations. The ministry will maintain a record of the consultation process. Statutory decision-makers are expected to “fully consider the views of industry and the First Nation” and to consider methods to avoid, mitigate or address potential infringements.¹⁰¹ The lead ministry will also advise First Nations and industry of the outcome of the consultation.

The CP 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”.¹⁰² In light of

⁹⁹ *Ibid.* at 4.

¹⁰⁰ *Ibid.* at 4 and 5.

¹⁰¹ *Ibid.* at 5.

¹⁰² *Ibid.* at 5.

the discussion above (see Section 2.9) of the role of regulatory tribunals in the context of consultation two observations are in order. First, and consistently with the *Hydro Quebec* decision, this suggests that the province takes the view that these boards do not themselves owe a duty to consult. Second, the policy perhaps suggests that the province does recognize that there is some basis (although the policy itself uses the permissive “may”) for thinking that either or both of these tribunals may have a legal duty to satisfy itself that the Crown has fulfilled its consultation obligations before the board issues (or recommends the issuance of¹⁰³) a regulatory approval that may impair an aboriginal or treaty right. Since the board cannot itself generate the evidence that might form the basis for such an assessment it follows that the relevant evidence must be adduced either: (1) by the project proponent or applicant for the regulatory approval, or (2) by the Crown.

The CP outlines Alberta’s expectations of industry as well as Alberta’s expectations of First Nations. The government “expects” First Nations to indicate whether they wish to be consulted, and to communicate and work in good faith with government and industry. This includes identifying practical arrangements for consultation, identifying rights and traditional uses which may be infringed, raising concerns, providing alternate solutions or approaches, initiating sessions to increase government and industry’s awareness of their rights and uses, providing documentation and information to Alberta and sharing traditional use information with government and industry to inform the decision-making process.

Framework for Consultation Guidelines (Draft, 2005)

The Consultation Policy is a broad statement of principles that sets out in general terms the way in which the provincial government anticipates that the consultation process will unfold. More specific consultation processes are left to be defined in departmental Consultation Guidelines, which will detail how consultation “should occur in relation to specific activities such as exploration, resource extraction, and management of forests, fish and wildlife”.¹⁰⁴ The Alberta government, in consultation with First Nations and industry is currently (early 2006) developing a *Framework for Consultation Guidelines*, which is designed to “establish the principles with which all Guidelines are required to be consistent”.¹⁰⁵ The government expects the departmental Guidelines to be finalized in 2006.

The draft Framework for Consultation Guidelines is a general document that seeks to identify how an Alberta Vision for successful consultation can be achieved. It defines three guiding concepts for the consultation process: effective, efficient, and built in collaboration with First Nations and industry partners. An “*effective*” process is described as one that takes into account First Nations rights and uses of the land “so as to support

¹⁰³ In many cases the actual licence or other authorization is actually issued by the Lieutenant Governor in Council rather than the Board; the Board’s recommendation is however a condition precedent to the licence, etc.

¹⁰⁴ *Ibid.* at 3.

¹⁰⁵ *A Framework for Consultation Guidelines*, Draft for Discussion, December 20, 2005.

the process of reconciliation”. This is the first mention of the term “reconciliation” in the provincial government’s consultation policy documents. An “*efficient*” process is one that ensures that the energy and resources of all involved in consultation processes are focused on the most important projects, applications or decisions. This is justified by the limited capacity to manage consultation and the amount of activity in Alberta. Finally, in order to be successful, the process must be built through *partnerships* with First Nations and industry partners.

The Framework enumerates a list of programs, activities and mechanisms that form a “basic toolkit” for developing the consultation processes. These include:

1. building relationships with First Nations and industry;
2. capacity building within government and First Nations;
3. the completion of traditional use studies;
4. land and resource management planning, in which First Nations would be involved and which would precede the issuance of dispositions and approval of applications;
5. regional tables involving First Nations and resource developers, and government as participant or facilitator;
6. First Nation-specific consultation for site-specific issues and concerns not addressed at regional tables;
7. education of both government and First Nations as to each other’s decision-making processes and cultures;
8. First Nations economic partnership initiative (FNEPI) (this initiative is not part of the Policy implementation but is seen as necessary to ensure its success).

Similar to the Consultation Policy, the Framework reiterates how the government sees its own as well as the roles of industry and First Nations both with respect to the general consultation process and project-specific consultation. The general consultation process will use the programs and mechanisms listed in the “toolkit”. As to the project-specific consultation, the Framework provides a few additional details. Thus, “major projects” for which Alberta will consult directly with First Nations are defined as those for which an environmental impact assessment is required and which require a multiplicity of approvals from boards and decision-makers. The Framework states that the Guidelines will establish a distinct process for First Nations consultation within the existing approval processes. The government states its intention to consult with First Nations about the potential impact of regulatory changes or new developments on their rights. With respect to particular projects, as indicated in the Policy, the government will assess their potential to adversely affect First Nations’ rights and uses and advise First Nations and proponents

of the outcome of its assessment. However, if First Nations indicate that they wish to be consulted, they will have a chance to review Alberta's assessment of the potential impacts and to communicate their concerns to Alberta. To the extent that Alberta identifies a potential for adverse impacts, proponents may be required to engage the affected First Nation in a dialogue to ascertain the adverse impacts and develop strategies to avoid or mitigate them.

In general this document still lacks the level of specificity necessary to assess its "effectiveness" or to assess how meaningful the consultation process will be in practice.

Starting in 2003, the provincial government has provided funding to enhance the consultation process. First, Alberta has established a fund to support the completion of "traditional use studies" in a number of First Nations communities across the province. The federal government (INAC and the Canadian Forest Service), the provincial government and the oil and gas and forestry industries are involved in this initiative. In addition, the government has dedicated financial resources (\$4 million/year) for relationship and "capacity-building" initiatives, both within government and in First Nation communities. This includes information-sharing sessions with First Nations, cultural awareness training for government staff, and the hiring of consultation teams in key departments. Funding is also allocated directly to First Nations who apply for capacity-building funds to develop their internal capacity to engage in consultation processes.

3.2 Does provincial legislation require consultation with Aboriginal peoples with respect to oil and gas developments?

In Alberta, the development of oil and gas resources on provincial (Crown) lands requires the issuance of subsurface and surface rights as well as various approvals and permits by different government departments. The key actors in the process are the Departments of Energy, Sustainable Resource Development, and Environment, and the Alberta Energy and Utilities Board (EUB or Board). The main stages of the development process and the approvals required at each stage are outlined below:

- exploration activities to determine geological conditions underlying the surface of land or water: exploration approvals, licences and permits are issued pursuant to the *Exploration Regulation*;¹⁰⁶
- acquisition of sub-surface minerals rights: petroleum and natural gas leases or licences are issued pursuant to the *Mines and Minerals Act*¹⁰⁷ and the *Petroleum and Natural Gas Tenure Regulation*;¹⁰⁸

¹⁰⁶ *Exploration Regulation*, A.R. 214/98.

¹⁰⁷ *Mines and Minerals Act*, R.S.A. 2000, c. M-17.

¹⁰⁸ *Petroleum and Natural Gas Tenure Regulation*, A.R. 263/97.

- acquisition of surface rights: mineral surface leases are required for the construction of wells and production facilities, licences of occupation for road access, and pipeline agreements for pipeline rights-of-way. These dispositions are issued pursuant to the *Dispositions and Fees Regulation*¹⁰⁹ under the *Public Lands Act*;
- drilling of wells: authorized by a well licence issued by the EUB under the *Oil and Gas Conservation Act* and regulations and various Information Letters, Guides and Directives developed by the Board;
- construction and operation of production and processing facilities (*e.g.* wellsites, access roads, processing plants, pipelines): these all require approvals and licences from the EUB pursuant to various statutes and regulations, notably the *Oil and Gas Conservation Regulations*¹¹⁰ as well as numerous Information Letters, Guides and Directives developed by the Board. The most important of these is Directive 056;¹¹¹
- environmental approvals are also required from Alberta Environment pursuant to the *Environmental Protection and Enhancement Act* (EPEA)¹¹² and the *Water Act*.¹¹³ These are designed to regulate the potential environmental impacts of operations on the air, water and land, and apply at various stages of operations (construction and decommissioning of facilities, suspension and abandonment of wells, land reclamation and remediation). In addition, selected oil and gas developments are subject to an environmental assessment (EA) process under EPEA. This process is described further below.

Currently, there are no specific requirements for *consultation with potentially affected Aboriginal communities* in any of the statutes pursuant to which oil and gas resources are disposed of and developed.¹¹⁴ There are, however, some legislative requirements for *public notification and consultation*, which may be and have been used by Aboriginal communities to bring their concerns to the attention of decision-makers and regulators. The following paragraphs identify some of these statutory requirements. All of these apply at the project review and approval stage; none apply at the time government disposes of subsurface or surface rights.

¹⁰⁹ *Dispositions and Fees Regulation*, A.R. 54/2000.

¹¹⁰ *Oil and Gas Conservation Regulations*, A.R. 151/87.

¹¹¹ *EUB Directive 056: Energy Development Applications and Schedules* (September 2005). The Directive replaces Guide 56 (October 2003).

¹¹² *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

¹¹³ *Water Act*, R.S.A. 2000, c. W-3.

¹¹⁴ One exception concerns the Métis: the *Exploration Regulation* requires the consent of the Settlement Council and the Métis Settlements General Council before exploration activities are conducted on land within the boundaries of a Métis Settlement: s. 4(1)(h).

There are no *statutory* requirements for applicants to consult the public or affected parties before filing their applications. However, public consultation is required under guidelines developed jointly by the EUB and Alberta Environment.¹¹⁵ The Board has stated that the public consultation requirements (now termed “participant involvement”) outlined in Directive 56 are minimum requirements that in some circumstances should be exceeded. The directive itself indicates that these requirements “apply to personal consultation and notification with all potentially directly and adversely affected persons, including First Nations and Métis”.¹¹⁶ The Board seeks to ensure that people’s concerns are properly addressed and resolved through discussion and conflict resolution between proponents and the public, well before the submission of applications and prior to public hearings. Indeed, the Board’s objectives are to eliminate the need for public hearings through early negotiation and consultation. The Board also expects industry applicants to continue involving the public throughout the life of the project.

Since many of the critical decisions in the context of oil and gas industry are made by or on the recommendation of the EUB it is important to consider the statutory framework which governs how persons affected may bring their concerns to the Board’s attention and how First Nations may or may not be able to use these provisions. A key part of the analysis turns on section 26 of the *Energy Resources Conservation Act* which provides that:

26(2) ... if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person

- (a) notice of the application,
- (b) a reasonable opportunity of learning the facts bearing on the application [...]
- (c) a reasonable opportunity to furnish evidence relevant to the application [...]
- (d) [...] an opportunity of cross-examination [...]
- (e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

¹¹⁵ *ERCB and Alberta Environment IL 89-4: Public Involvement in the Development of Energy Resources* (22 June 1989). The Informational Letter was replaced by *Guide 56: Energy Development Applications and Schedules*, first issued in 2003 and re-issued in 2005 as *EUB Directive 056*.

¹¹⁶ *EUB Directive 056, ibid.* at 5. The Directive refers to the 2005 Aboriginal Consultation Policy and states that applicants will be expected to comply with departmental Consultation Guidelines, once these guidelines have been drafted.

Three recent decisions, all of which were appealed to the Alberta Court of Appeal, suggest that First Nations may experience some difficulty in bringing themselves within the EUB's standing rules. In all three cases, the EUB had concluded that the First Nations had not established standing, because they had either failed to establish that they had a legally recognized interest, or they had not established the potential for direct and adverse impacts. The Court of Appeal granted leave to appeal stating that:

Natural resource development can impact or potentially impact on treaty rights. The law is unsettled and rapidly developing. It is not clear how the common law regime regarding infringement of treaty rights and justification for infringement, as set out in *R. v. Sparrow* [...] interacts with the statutory roadmap that governs the Board's actions. There is no case law directly on point. It will benefit not only the parties to the present appeal, but also other First Nations communities and those involved in the oil and gas industry to clarify the process to be used in order to identify and address treaty rights and constitutional issues.¹¹⁷

Ultimately, the only appeal heard by the Court of Appeal was that of the Dene Tha' First Nation.¹¹⁸ The Court dismissed the appeal. The Court's analysis emphasised that the standing provision of the ERCA has two branches, a legal test, and a factual test. In order to satisfy the legal test, a person claiming the right to notice and to intervene has to demonstrate some legally-recognized interest. The Court ruled as follows:

Satisfaction of the first test, some legally-recognized interest, was pretty well conceded on this appeal. [...] Obviously, a constitutional, a legal, or an equitable interest would suffice.

Though some of the counsel at some stages seem to have thought that the Board had found no legally-recognized interest here, that is not how we read the two Board decisions.[...] Though there is some ambiguity in the January 16 decision, we see none at all in the April 15 decision. Still less do we read the Board as saying that it had no jurisdiction to ask such a question (about a legally-recognized interest).¹¹⁹

The Court seems to have dismissed the appeal on the second branch on the basis that since this was a factual test the standard of review was high (*i.e.* the standard of patent unreasonableness even though the court does not explicitly canvass this test¹²⁰). Since the

¹¹⁷ *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, [2003] A.J. No. 1582 (December 11, 2003) at para. 4.

¹¹⁸ *Dene Tha' First Nation v. Alberta Energy and Utilities Board et al.*, 2005 A.B.C.A. 68 (February 16, 2005). The other appeals were discontinued.

¹¹⁹ *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, *ibid.* at para. 4.

¹²⁰ Either that or the Court was simply saying that this was a purely factual issue and as such completely beyond the jurisdiction of the Court: see para. 15.

record suggested that the First Nation had not led evidence to link the impact of the proposed project to the rights or interests claimed by the First Nation there was no basis on which the Court of Appeal could intervene.

It bears emphasising that the rules on both the burden and the onus of proof differ significantly between the EUB's statutory rules on standing and the law of consultation. In the case of the EUB rules the onus will be on the First Nation to establish standing and the *Dene Tha'* case demonstrates that the First Nation clearly has an evidentiary burden to discharge relating to the nexus between the proposed project and asserted treaty or aboriginal rights. By contrast the law of consultation imposes the onus on the Crown (and it is not just an evidentiary onus but a constitutional obligation) and the trigger for obliging the Crown to consult is low.

The Court in *Dene Tha'* also declined to address the issue of whether the Crown has a duty to consult those with Aboriginal or treaty rights, holding that the issue was not really raised before the Board or as part of the leave to appeal application:

We do not and cannot decide whether the Crown in Right of the province has or had a duty to consult here, or whether it in fact consulted sufficiently or at all, There is no leave to raise either such question on appeal, neither arises from these proceedings, the Board did not rule upon them, and it had no cause to, on this record.¹²¹

In its decisions, the EUB has not acknowledged that Aboriginal peoples are entitled to a distinct consultation process. When Aboriginal groups have raised issues of Aboriginal or treaty rights and infringements of these rights, the Board has stated that it does not have the jurisdiction to deal with such issues.¹²² The Board has accepted that different consultation techniques may be needed to accommodate cultural differences and the unique political structure of Aboriginal groups. But it has refused to consider First Nations claims that the land use information collected by a company on the cumulative effects of its proposal on a First Nation community was insufficient to satisfy the Board's requirements for consultation. In a 2003 decision, the Board stated that it was "not required to decide the question of what the First Nations did or did not cede to the Crown by way of treaty."¹²³

¹²¹ *Ibid.* at para. 33.

¹²² The EUB's position, as stated in several of its decisions, is discussed in Nigel Banks, "Regulatory Tribunals and Aboriginal Consultation" (2003) 82 Resources 1; Monique M. Ross, "The Dene Tha' Consultation Pilot Project: An 'Appropriate Consultation Process' with First Nations?" (2001) 76 Resources 1.

¹²³ *EUB Decision 2003-013: Canadian Natural Resources Ltd. Applications for New and Amended Primary Recovery Schemes and Well Licences, Lindbergh Sector, Cold Lake Oil Sands Area* (7 February 2003) at 7.

The EUB justifies many of its decisions by stating that the proponent has complied with the consultation requirements contained in its legislation and in Directive 56. While this may be true this can only be part of a complete answer since compliance with the Directive does not itself establish that the Crown has fulfilled its consultation obligations.

*Environmental Protection and Enhancement Act (EPEA)*¹²⁴

Other public consultation provisions are found in the *Environmental Protection and Enhancement Act* (EPEA). Section 2 states that the purpose of the Act is to support and promote the protection, enhancement and wise use of the environment, and in particular to make available opportunities “for citizens to provide advice on decisions affecting the environment” (2(g)).

The Act sets out the Environmental Assessment Process. Pursuant to subsection 40(d), one of the purposes of the environmental assessment process is to provide for the involvement of the public, proponents, the Government and Government agencies in the review of proposed activities. Thus, any person who is directly affected by a proposal may submit a written statement of concern to the Director setting out the person’s concerns with respect to the proposed activity. The Director must give due consideration to all statements of concern that have been submitted, when deciding whether a further assessment of a proposed activity is required (s. 46). If an environmental impact assessment report is required, the public has an opportunity to submit comments on the terms of reference.

Many conventional oil and gas developments (*e.g.* oil and gas wells, sweet gas processing plants, small pipelines) are exempted from an EA.¹²⁵ The only facilities for which an EA is mandatory are sour gas processing plants that exceed a certain emission level, oil refineries and large transmission lines.¹²⁶ Other facilities, such as pipelines and smaller transmission lines may be subject to a full EA review if the Director of Environmental Assessment determines that such a review is required.

The above-mentioned provisions for public consultation do not address the special rights of First Nations that may be adversely affected by the environmental impacts of land and resource development to be directly consulted. However, for those projects that are subject to a full EA, the terms of reference of the EIA report that proponents must prepare typically include documentation of Aboriginal uses of lands and resources (*e.g.* description of fishing, hunting, cultural and traditional uses, documentation of Aboriginal concerns about impacts on historical resources and traditional land uses, and mitigation measures to address these impacts). Affected First Nations have been able to identify some of their concerns about proposed developments through such EIA processes. But

¹²⁴ *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 2(g).

¹²⁵ *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, A.R. 111/93, Schedule 2(a)(e).

¹²⁶ *Ibid.*, Schedule 1(n) and (q).

that said, and as noted above, no EA is required for the vast majority of energy developments. Further, this consultation process is not specific to First Nations, nor is it based upon a recognition of Aboriginal or treaty rights. Aboriginal consultation occurs as part of the public consultation process, and it is mostly as potentially affected “stakeholders” that First Nations participate in these processes.

In sum, Alberta’s oil and gas and environmental legislation and practice does afford an opportunity for affected interests to articulate their concerns and to be “consulted”. However, these opportunities exist as part of general law and as part of operationalizing ideas of procedural fairness. The legislations and the processes it provides for are not a response to the legal duty to consult Aboriginal peoples. Furthermore there is at least some evidence that First Nations find it difficult to bring themselves within the formal standing rules for bringing their concerns to the attention of the relevant decision makers.

4. Does Alberta’s Consultation Policy Meet the Crown’s Duty to Consult as Outlined by the Courts?

We are now in a position to assess Alberta’s current policy and practice in light of Section 2 of this paper. We will follow the thematic organization of Section 2.

Some preliminary words on formal aspects of the Alberta policy are required. Both the First Nations Consultation Policy on Land Management and Resource Development and the Draft Framework for Consultation Guidelines lack a working concept of consultation. This may help to explain the lack of structure and the, at times contradictory, wording of the two documents when read together. As a result, it is not evident that the Alberta government has grasped the purposive approach to the duty to consult and to accommodate Aboriginal rights and interests that informs the judicial doctrine.

4.1 The context of the duty to consult and to accommodate Aboriginal rights: how Alberta approaches the substantive promise of *Sparrow*

In general, the courts have called upon governments to take Aboriginal rights seriously. The duty to consult and to accommodate is not a mere derivation of the administrative duty of procedural fairness but it is oriented towards a particular outcome: the protection of substantive rights and the interests those rights protect, all of which should further the ultimate goal of reconciliation.

Therefore, a broad criticism of the current Alberta policy and practice is that it resembles more “stakeholder management” rather than the “rights-based” approach called for by the Courts. A stakeholder management approach is an “approach to communications and the management of relationships” designed to create economic value for a given firm or entity. On the other hand a “rights-based” approach considers that in the end development

must deliver “greater freedom and enjoyment of rights”.¹²⁷ The former is procedural and provides practical tools of great value to improve relations with traditionally marginal actors. It prescribes more inclusive processes; it calls for trust-building and “win-win” solutions to conflicts. The latter, however, is purposive and provides criteria for principled decision-making. Cases of conflict of social visions (as in development in areas of Aboriginal interest) are best managed through a rights-based approach if, as the Courts suggest, reconciliation is the ultimate objective.

As a consequence, by considering itself a neutral arbiter of conflicting interests (those of industry and First Nations), the provincial Crown fails to understand its responsibilities as protector of rights and as a party to the trust-like relationship *with* Aboriginal peoples, as envisioned in *Sparrow*. Similarly, by considering Aboriginal peoples as just any other stakeholder Alberta fails to recognize their different, and preferential, status as constitutional rights-holders. In addition, neutral arbitration of conflict blurs the importance of accommodation as the substantive component of consultation. It fails to consider that responsiveness toward the findings of the process may require modifications to the initial proposal and even a duty to refrain from action. Arguably, such a neutral approach fails to take *rights* seriously. Neutrality is what we expect from the courts; accommodation is what the courts expect of government.

4.2 The source of the duty to consult (and to accommodate): from *Sparrow* to *Haida* and *Mikisew*

The Courts have stated that the source of the duty to consult (and to accommodate) is the honour of the Crown, which is always at stake in dealings with Aboriginal peoples. So located, the duty to consult is a stand-alone obligation stemming not from infringement of rights (proven or alleged), but from a broader duty of fair dealing.

The Alberta consultation policy, however, is based on the notion of *infringement* of Aboriginal or treaty rights. This misstates the legal basis for its duty to consult and thereby narrows both the scope of the duty as well as the range of outcomes that truly accommodate aboriginal interests.

The section of the proposed Framework for Consultation Guidelines on the “Guiding Concepts for Implementation” illustrates how the failure to acknowledge the underlying source of the duty may unduly constrain the process. That section of the policy calls for a process that is effective, efficient and built in collaboration with the partners (First Nations and industry). While these aims may be desirable, care must be taken not to impose restrictions to the consultation and accommodation processes that contradict the judicially stated purpose of these duties. If consultation is to occur only “for projects, applications or decisions *that truly need our attention*”¹²⁸ (emphasis added), there is a

¹²⁷ For a practical review of this contrast see Richard Boele *et al.*, “Shell, Nigeria and the Ogoni: A Study in Unsustainable Development: II. Corporate Social Responsibility and ‘Stakeholder Management’ versus a Rights-Based Approach to Sustainable Development” (2001) 9 Sustainable Development 121.

¹²⁸ *A Framework for Consultation Guidelines*, *supra* note 105.

risk that there will be no consultation in situations that may merit consultation and accommodation from the perspective of those who are the intended beneficiaries of the duty. Elsewhere the Courts have emphasized that the aboriginal perspective truly matters and we can infer from this that *who* decides and *how* that which needs attention will be important. It seems clear from the case law that this cannot be a unilateral and non-reviewable prerogative of the Crown.¹²⁹ Similarly, efficiency is of course a legitimate objective but it cannot be an end in itself and efficiency cannot be pursued at the expense of the ultimate goal of reconciliation; and as we have seen the Court has said that the administrative burden of consultation will not provide a defence to breach of the duty.¹³⁰

4.3 The trigger of the duty to consult (and to accommodate) and the variable content of the duty

The duty to consult (and to accommodate) has a low threshold: once the Crown has knowledge of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect that interest the Crown has a duty to consult. But the content of the duty to consult (and to accommodate) is variable and depends on the significance of the right at stake (proven or alleged) and the degree of expected impact on the right.

However, as we suggested in the last section, Alberta's policy of tying the duty to potential rights infringements effectively proposes a higher trigger for consultation thereby excluding categories of decisions from the duty to consult that would otherwise be caught by the duty. Examples might include land use planning procedures and consultation procedures associated with the enactment of laws and regulations, neither of which falls readily within the province's two fold typology of general consultation and project-specific consultation.

The Supreme Court has criticized procedures that confine consultation to the operational stages rather than extending the duty to the more strategic stages of general planning. There is much to be said for taking this broader view. For example, consultation at a strategic level may do a better job of taking account of cumulative effects and may also allow consideration of a broader set of accommodation measures. Seen in this light the decision in the December draft Framework to consult First Nations on the development of land management plans must be welcomed although the modalities of this still need to be worked out.

The Consultation Policy acknowledges that there may be a duty to consult on legislation and regulations but again the modalities of this still have to be worked out as does its application to the *existing* regulatory and legislative framework.

¹²⁹ Indeed, in *Mikisew*, one of the defences of the Crown was that, in its view, the impacts were minor (a minor road, only 14 trappers and 100 hunters affected, enough territory left for hunting and trapping in other areas). *Mikisew*, *supra* note 17 at para. 3.

¹³⁰ Indeed, in light of recent court cases, a unilateral restriction of the scope of decisions which require consultation, can prove by and large, inefficient as it may lead to extensive litigation.

4.4 The duty to accommodate: how does Alberta approach it?

According to the Courts, the duty to accommodate arises when consultation leads to proposals to amend government proposals; the duty is satisfied by the demonstrable incorporation of Aboriginal concerns in the final decision.

The Consultation Policy fails to address explicitly the concept of accommodation. Neither the Policy nor the Draft Framework mention the term and there is scarcely a mention of the outcome of the consultation process. This suggests a procedural approach rather than the purposive approach mandated by the doctrine. Indeed, the policy documents do not announce that the government will be prepared to modify its proposed course of action in light of the results of the consultation processes. At most, the CP mentions that the views of First Nations will be “considered” in the decision, along with those of industry. As for the Framework, it simply instructs decision-makers to consider and document methods to avoid, mitigate, or address potential rights’ infringements.

Indeed the policy documents seem to suggest that accommodation is a task for third parties. The guidelines for project specific consultation state that industry along with First Nations will “develop practical strategies to avoid or mitigate the impact, such as changing the location or timing of the project”.¹³¹ This approach effectively limits the scope of accommodation measures to those that the industry is able and willing to consider and offer. The policy does not engage with the whole range of measures available to the Crown through its regulatory and decision-making functions and as discussed in *Haida* and *Taku River*.

Finally, the documents do not discuss the *Sparrow*-based concepts that form an integral part of a principled approach to justifying infringements and which (as we have argued above) also inform ideas of accommodation: *i.e.* the importance of compelling and substantial objectives; the least infringement possible of Aboriginal interests; the avoidance of irreparable damage; the provision of compensation; the recognition of Aboriginal preferred means to exercise their rights; and the recognition of priority of access to traditional resources.

4.5 The role of the participants

The Court has stated that the duty to consult and to accommodate Aboriginal rights and interests, cannot be delegated. The rationale for this is that the source of the duty is the honour of the Crown. Procedural aspects of consultation, however, can be delegated to third parties.

In the draft documents, Alberta relies heavily on industry and largely assumes a facilitating function. This approach is no doubt informed by conceptualizing consultation as an exercise of “stakeholder management” but as we have stated, and consistently with

¹³¹ Draft Framework, *supra* note 105 at 6.

the case law, a rights-centered approach demands of the Crown a major involvement. Conceptualizing government as a neutral facilitator of conflicts fails to grasp the essence of the Crown's role in the consultation process: that of protector of Aboriginal rights. The Crown is expected to be an active participant – in addition to facilitator – of the process so as to ensure that the Aboriginal peoples are engaged and their concerns substantively addressed. While the participation of industry will be desirable at some stages and for certain aspects of the consultation process the duties of industry can never extend to the protection of aboriginal interests. That must remain the responsibility of the Crown. The interests of the industry will not always be compatible with the recognition and affirmation of Aboriginal rights and that incompatibility or conflict will limit industry's willingness and capacity to accommodate Aboriginal concerns. Thus, the Crown can only discharge its obligations through its own active involvement.

Indeed, in order to protect those interests and at the same time reconcile them with the interests of the non-Aboriginal society, the Crown has to gather information about the possible effects of its proposed actions, engage the First Nations in the discussion of these actions, provide them with information, receive feedback, provide feedback, make proposals, be prepared to amend (and actually amend) those proposals, etc. The Crown undoubtedly needs industry to cooperate in this process (how else can the government generate alternatives for consideration?) but it cannot leave the whole process to industry. Furthermore, in other cases part of the range of accommodation possibilities (e.g. strategic-level planning initiatives) will be available only to the Crown (because they represent peculiarly government functions) and not to industry.

4.6 Statutory consultation processes: guiding principles

In its decision in *Haida* the Court called upon the Crown to establish a structured non-discretionary regulatory regime to facilitate the consultation process. Alberta recognizes the need for a distinct process for First Nations in the context of project-specific consultation although it also proposes to do so “along existing regulatory procedures”. These existing procedures need to be reviewed in light of the Court's guidance.

For example, a timeframe adequate to Aboriginal peoples must take into account their internal decision-making procedures, the seasons for hunting, trapping and other cultural activities, the actual capacities of the group to process information and respond, etc. By contrast, while the Policy indicates that parties providing information are expected to allow adequate time for review by other parties, it also states that consultation will occur within applicable legislative and regulatory timelines. Similarly, the Policy indicates that project-specific consultation should be accomplished within applicable industry and regulatory timelines but also acknowledges the need for informed understanding. In the oil and gas development process, these timelines are often extremely short. A seismic line is approved in a matter of a few days, and a well licence may be issued within a few weeks. The time frame between the acquisition of subsurface mineral rights, drilling and production may only be a matter of months in a competitive drainage situation. It may be unrealistic from a First Nation perspective to confine the consultation process within such tight deadlines.

The Alberta government has acknowledged the need to prepare the field for consultation. As mentioned earlier, it recognizes that capacity building, traditional use studies, education on both sides (Crown and First Nations) will be instrumental to establishing a trusting relationship that is fundamental for better consultation processes.

As for the actual process of consultation, Alberta needs to emphasize that the type of process required is one that is meaningful *to* Aboriginal peoples. Including this criterion in the policy and elaborating on it could help the province devise consultation and accommodation processes that satisfy the honour of the Crown.

Alberta could also provide a stronger structure for its framework for consultation accompanied by a set of criteria for assessing the process itself as well as outcomes. This would serve to provide guidance to those responsible for the consultation process as well as the regulatory boards. It will also be important to identify and support the resources needed to implement a meaningful consultation policy.

The current policy will require additional and significant work to become the kind of “structured non-discretionary regime” that the Courts are calling for. Indeed, substantive consultation and accommodation may prove to be a difficult task in the Alberta context, where traditional ways of life along with environmental concerns are in constant conflict with the activities of extractive industries. However, the Courts have called for reconciliation and have recognized that the preferred means to achieve reconciliation is through negotiation. It is the responsibility of the Alberta government now to engage in a process to determine the rules of the processes in a way consistent with the doctrine, that is, pursuant to honouring rights.

5. Future Research Needs on Key Aboriginal Consultation Issues

While this paper has provided an overview of the state of the judicial doctrine on the duty to consult and to accommodate Aboriginal rights and interests and how it should inform policy and practice in Alberta, there are still outstanding issues that require further research. These include:

- Aboriginal consultation issues in oil sands exploitation, where both the scale of development and ongoing negotiations between Aboriginal groups, government and industry justify an in-depth analysis.
- Consultation and accommodation in other jurisdictions (*e.g.* BC) to determine how these jurisdictions have incorporated Aboriginal consultation regimes in their legislation and regulations.
- A multidisciplinary inquiry to assess the opportunities and shortcomings of different approaches to consultation and accommodation, such as the stakeholder

and the rights-based approach, through the lens of respect of Aboriginal difference.