Aboriginal Consultation and the Energy Resource Development Process in Alberta

Prepared For: Centre for Constitutional Studies
In association with
Legal Education Society of Alberta
Constitutional Symposium

Presented by:
Kirk N. Lambrecht QC
Shores Jardine LLP
Edmonton, Alberta

For Presentation In:
Edmonton – October 4, 2013

Aboriginal Consultation and the Energy Resource Development Process in Alberta

Author: Kirk N. Lambrecht Q.C.[1]

Prepared For: Constitutional Law Symposium, 2013

Presented Jointly by
Legal Education Society of Alberta
and
Centre for Constitutional Studies at the University of Alberta

Kirk N. Lambrecht Q.C.
Shores Jardine LLP
Suite 2250, Bell Tower
10104- 103 Ave
Edmonton, Alberta
T5J 0H8

Tel 780 448 9275
Direct 780 702 4283
kirk@shoresjardine.com

[1] This essay is prepared by the author in accordance with the Code of Conduct of the Law Society of Alberta, which encourages lawyers to contribute to professional publications and education. It expresses the views of the author in his personal capacity, and any errors of fact, law or interpretation, and any errors of style, are solely those of the author alone in his personal capacity. All sources cited are in the public domain. No use has been made of information sheltered by solicitor-client or other privilege.

I wish to acknowledge Professor Nigel Bankes of the Faculty of Law of the University of Calgary, Assistant Professor Martin Olszynski, of the Faculty of Law, University of Calgary, Sheila Risbud, Manager of Regulatory Affairs, Teck Resources, Calgary, and Paula D. Hale, Fiona N. Vance and Aman Athwal, Associates with Shores Jardine LLP, Edmonton, who all took time to read and offer helpful comment on a draft of this essay.

"Alberta's management and development of provincial Crown lands and natural resources is subject to its legal and constitutional duty to consult First Nations and, where appropriate, accommodate their interests when Crown decisions may adversely impact their continued exercise of constitutionally protected Treaty rights."

The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013

INTRODUCTION

The law of Aboriginal consultation has a constitutional character which informs the exercise of Alberta's constitutional powers over lands and natural resource development. It is described by the Supreme Court of Canada as "a distinct and often complex constitutional process" which requires that the Crown consult on matters that may adversely affect Treaty and Aboriginal rights, and potentially accommodate those interests in the spirit of reconciliation.[1] The Supreme Court itself notes that the immediate result of the development of this law is that "government-Aboriginal consultation has become an important part of the resource development process."[2]

Both Alberta and Canada have adopted consultation policies which partially integrate Aboriginal consultation into the existing regulatory framework for resource development in Alberta. Alberta's 2005 *Policy* and 2007 *Guidelines* make it clear that Alberta's will delegate responsibilities to be exercised by project proponents during the resource development process, and clarify that: "[i]t is Alberta's intention that the activities delegated to Proponents will be conducted within the existing regulatory framework."[3] The 2005 *Policy* and 2007 *Guidelines* anticipate, but do not require, consultation by the Crown which would augment that delegated to and conducted by a proponent. In August of 2013 Alberta announced an updated *Policy* which maintains this basic approach, though it anticipates direct consultation by the Crown where there is a "potential" for significant or permanent impacts on Treaty rights.[4] Canada's 2011 *Guidelines* [5] also reflect the intent (which is stated in a *Cabinet Directive*) to integrate "Aboriginal/Crown consultations related to major resource projects into the overall regulatory process."[6]

Since Aboriginal consultation by the Crown is partially integrated with the resource development process, legislative reform in that process may affect Crown obligations which have a constitutional character. This essay reviews recent legislative and policy evolution affecting the resource development process in Alberta, with particular reference to those changes which may affect these obligations. Provincial legislation has been described as "significant and sweeping regulatory reform which, arguably, is unprecedented in Alberta's Energy Development history."[7]