

Aboriginal Consultation and the Energy Resource Development Process in Alberta

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“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