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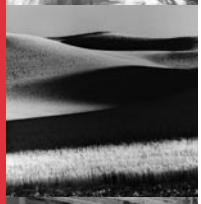
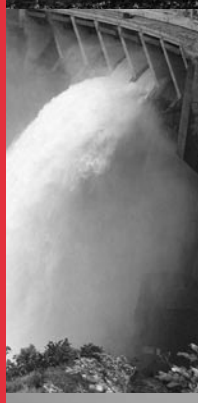

# CONSULTATION WITH ABORIGINAL PEOPLES IN THE ATHABASCA OIL SANDS REGION: IS IT MEETING THE CROWN'S LEGAL OBLIGATIONS?

Article by Monique Passelac-Ross and Verónica Potes

## Introduction

While the economic benefits of oil sands development are undoubtedly substantial, the environmental and social costs have been the subject of public debate for some time. As the pace of development has intensified over the past ten years, particularly in the Athabasca oil sands region, the largest of Alberta's three oil sands areas, concerns over these impacts have multiplied.[1]

Oil sands operations in the Athabasca region are located on lands traditionally and currently used by First Nation and Métis peoples. Consequently, any negative impacts of oil sands development are bound to affect particularly the local Aboriginal communities, whose members still use these traditional lands for both cultural and economic purposes. The environmental and social effects of intensive industrial development on their way of life, their culture and their health are not well understood and are only beginning to be documented.

There are approximately 16 First Nation communities with known traditional use sites and areas, as well as several Métis communities, within the Athabasca oil sands region.[2] The cumulative impacts of oil sands development, notably on the Athabasca River basin and on air quality, also affect Aboriginal communities in the Northwest Territories and in northern Saskatchewan. Aboriginal peoples have raised concerns about environmental and socio-economic impacts since the early days of oil sands development in the 1960s. Increasingly, they are framing these concerns in terms of potential infringements on their constitutionally protected Aboriginal and treaty rights.

First Nation communities living in the Athabasca oil sands region have rights that are guaranteed to them by Treaty 8, a treaty signed in 1899 between the Government of the Dominion of Canada and various Aboriginal peoples inhabiting what were at the time the Northwest Territories.[3] These rights were recognized and affirmed by subsection 35(1) of the *Constitution Act*, 1982. The Supreme Court of Canada (SCC) has developed jurisprudence confirming that Aboriginal and treaty rights can only be infringed by the Crown under strict conditions. Both the federal and provincial governments have a legal obligation to deal fairly and honourably with Aboriginal peoples. In the *Mikisew Cree* case, a case dealing with the rights guaranteed by Treaty 8, the SCC stated that "the honour of the Crown infuses every treaty and the performance of every treaty obligation."[4] Whenever Crown decisions or actions have the potential to adversely affect treaty rights, the Crown has a duty to consult potentially affected Aboriginal peoples, with the intention of accommodating or substantively addressing their concerns.

How is the Alberta government fulfilling its constitutional obligations to consult and accommodate Aboriginal peoples as it authorizes the development of oil sands resources in the Athabasca region? This article briefly reviews the Alberta government's current consultation policy and practices as they apply to oil sands development. It then assesses Alberta's

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## RÉSUMÉ

Si les bénéfices économiques du développement des sables bitumineux sont incontestables, les coûts sociaux et environnementaux sont devenus de plus en plus apparents. Les communautés autochtones affectées allègent que ces développements industriels portent atteinte à leurs droits ancestraux et issus de traités et que le gouvernement de l'Alberta est dans l'obligation de les consulter et de trouver des accommodements à leurs préoccupations. Cet article examine la politique albertaine de consultation avec les Autochtones et évalue si cette politique et sa mise en oeuvre sont conformes aux principes de consultation et d'accommodement articulés par la Cour suprême du Canada. Les auteurs concluent que la perspective albertaine est déficiente à plusieurs égards, notamment eu égard à la définition des droits des autochtones, au déclenchement du processus de consultation, à son contenu, aux participants, et à l'obligation d'accommodement.


consultation process in light of the key components of the Crown's duty to consult and accommodate outlined by the SCC.

We acknowledge that negotiations are ongoing between the five First Nations members of the Athabasca Tribal Council (ATC).[5] and the provincial government to develop a set of consultation guidelines which would apply specifically to all resource activities in the Athabasca oil sands region. The negotiations are led by a consultation committee, the Protocol Working Group, which is made up of government as well as First Nations representatives. Fundamental differences of opinion have arisen between government and First Nations representatives about the nature and scope of treaty rights and government's consultation obligations. These differences need to be resolved before further progress can be accomplished on these regional guidelines. In the absence of a regional process, the provincial-wide consultation process with First Nations described below applies to the development of oil sands projects. This article focuses on the current provincial consultation process with First Nations.

### Provincial Consultation Policy and Consultation Guidelines

The Alberta government adopted an Aboriginal consultation policy in May 2005. As its name indicates, the *First Nations Consultation Policy on Land Management and Resource Development* (the Consultation Policy or CP) only applies to First Nation communities, not to Métis communities.[6] In the CP, the government acknowledges that "some activities on provincial Crown lands affect existing treaty rights and other interests of First Nations in Alberta" and that it has "a duty to consult with First Nations where legislation, regulations or other actions infringe treaty rights".[7]

The stated objective of the CP is to avoid infringement of First Nations' "*Rights and Traditional Uses*", and when avoidance is not possible, to mitigate such infringement. The CP defines these terms as follows:

> "*Rights and Traditional Uses* includes 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."[8]

The Policy does not acknowledge the government's legal obligation to protect and accommodate the rights of Aboriginal peoples, nor does it refer to the ultimate purpose of reconciliation which, in the view of the SCC, the consultation process is designed to achieve.

Alberta views its role as "managing" the consultation process, and "where necessary", consulting directly with First Nations.[9] The CP states that consultation will occur in two ways: 1) through general consultation and relationship building; and 2) through project-specific consultation. General consultation is intended to build relationships by increasing the flow of information between parties and will occur for instance through information-sharing sessions. Project-specific consultation may involve direct consultation between government and First Nations on "major projects", but in most cases the Policy anticipates that the project proponent will engage directly in the consultation. The government 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. In cases where consultation is conducted by a project proponent, the government retains

the responsibility to determine if consultation has been adequate.

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".[10]

The government first developed a *Framework for Consultation Guidelines* (the Framework) in May 2006.[11] The Framework established a set of guiding principles with which the ministerial guidelines were to be consistent. Interestingly, this document goes one step further than the Consultation Policy by stating that, as a guiding concept for the implementation of the Policy, the guidelines are "intended as a means to support a process of consultation and an overarching objective of *reconciliation* rather than confrontation".[12] It also specifies that proponents that are engaged in project-specific consultation may identify avoidance, mitigation, or "accommodation" strategies to deal with the impacts of their projects on First Nations.[13]

Following the issuance of the Framework, the four government departments responsible for land management and resource development (Alberta Community Development, Alberta Energy, Alberta Environment, and Alberta Sustainable Resource Development) developed sector-specific *First Nations Consultation Guidelines on Resource Development and Land Management* (the Consultation Guidelines or Guidelines). The Guidelines came into effect on September 1, 2006.[14] The Guidelines go further than the Consultation Policy by stating in the Preamble that the government "has a duty to consult with First Nations where land management and resource development have *the potential to adversely impact*" their rights.[15]

The following statement sums up Alberta's view of consultation:

> "While Alberta has a duty to consult and is accountable for consultations undertaken with First Nations where legislation, regulations or other actions have the potential to adversely impact treaty rights, some aspects of consultation will be delegated to project proponents. This delegation will be carried out in the manner described in these Guidelines. It is Alberta's intention that these aspects of consultation delegated to proponents will be conducted within the existing regulatory framework and timelines."[16]

The Guidelines set out distinct approaches to consultation in relation to specific legislative and regulatory processes administered by each of the four departments. For the most part, they describe how those aspects of consultation which are "delegated" to project proponents will be carried out within each department. The role of government is: 1) to determine whether to delegate the responsibility for consultation to a proponent, and to assist the process by, for example, providing contact information, guidance and advice, establishing timeframes, etc.; 2) to review proponent-led consultation in order to assess whether it has been adequate; and 3) to make an informed decision relative to the potential adverse impacts of the project on First Nations' *Rights and Traditional Uses*. The government's decision will then be "conveyed in a timely manner to both the project proponent and the First Nations."[17] More generally, Alberta undertakes to monitor the implementation of the Guidelines and to assess their effectiveness on an annual basis to determine whether changes are required.

The government consulted industry as well as Aboriginal communities and organizations within the three treaty areas of Alberta during the development of both the Framework and the Consultation Guidelines. Even though the parties agreed on basic principles of consultation, disagreements persisted between the provincial government and the First Nations, notably with respect to the interpretation of the rights and interests protected by Treaty, the need to obtain consent from First Nations on certain decisions, the necessity of a separate consultation process as opposed to incorporating First Nation consultation within existing consultation processes, and the obligation to negotiate benefit sharing agreements or compensation agreements in relation to infringement of First Nations rights.

Soon after the Guidelines came into effect, on September 14, 2006, by unanimous resolution, the Assembly of Treaty Chiefs of Treaty No. 6, Treaty No. 7 and Treaty No. 8 representing the three major treaties in Alberta, rejected the government's *First Nations Consultation Policy on Land Management and Resource Development* in its entirety, including the Framework and the Consultation Guidelines.[18] The Chiefs stated that the government had adopted the CP without adequate consultation and consent of the Nations/ Tribes affected by this policy, and that it had implemented the Guidelines without the consent of the First Nations.

## Current Consultation at the Various Stages of Oil Sands Development

The oil sands development process moves through key stages and involves several government departments and regulatory boards.[19] For the purposes of this article,

we focus on the following five stages: 1) strategic land and resource planning; 2) disposition of mineral rights; 3) issuance of surface dispositions; 4) project specific environmental assessment and regulatory approvals; 5) project specific EUB review and approvals. To what extent does the government consult with potentially affected Aboriginal peoples at each of these stages? How do the departmental Consultation Guidelines envision such consultation to occur?

The following summarizes our findings with respect to each stage of the development process:

- **Strategic land and resource planning:** The need for a comprehensive land-use planning framework to address the cumulative environmental and social impacts of development is widely acknowledged. The existing regional land use plan for the Athabasca area was developed without any involvement of the affected Aboriginal communities.[20] The plan is outdated and needs to be revised. In late 2005, the government unveiled draft revisions of the existing plan along with a proposed oil sands strategy, which would give oil sands mining the highest priority within a defined mineable oil sands area.[21] These draft documents were widely criticized for lack of public consultation, and prompted the government to hold public consultations on the development of a vision and strategies for oil sands development.[22] Aboriginal peoples were invited to participate in both the public consultation process as well as a parallel Aboriginal consultation process. Final reports on these consultation processes were submitted to the Alberta government in June 2007.[23] The first recommendation of the Multistakeholder Committee in its "vision" for oil sands development is that it "honours the rights of First Nations and Métis". The outcome of these consultation processes on the provincial government's development plans is uncertain at this time.

- **Disposition of mineral rights:** Along with land and resource planning, the disposition of mineral rights is a key stage in strategic decision-making, one that is likely to have a significant impact on the rights of Aboriginal peoples on whose traditional territories the mineral resources are located, should these resources be developed.

  Alberta Energy is the department that disposes of oil sands rights. The department's Consultation Guidelines state as follows:

  > "Based on the understanding that the leasing of Crown mineral rights does not, in and of itself, adversely impact First Nations Rights and Traditional Uses, Alberta will not consult with First Nations prior to the disposition of Crown mineral rights, and First Nations consultations will not be a condition of acquiring or renewing mineral agreements."[24]

  The government's position is that consultation will occur when surface activities are actively planned and adverse effects might occur. As part of its general consultation, Alberta Energy undertakes to provide Aboriginal communities access to basic information on mineral resource activity through an interactive website. In addition, it will support the undertaking of traditional use studies.

  The Consultation Guidelines of the Department of Alberta Community Development (ACD) do refer to the Listing of significant historical resources as a potential tool to identify and protect significant traditional use sites.[25] Site-specific traditional use information "such as cabins and gravesites" may also be entered into the Land Status Automated System (LSAS) as Protective Notations, and may be attached as addenda to the public offering of mineral rights and result in Mineral Access restrictions on mineral agreements.[26] ACD will use the Listing or the LSAS as trigger mechanisms for proponent-required consultation with First Nations. Nevertheless, the protection offered by the Listing is limited, since it does not include "traditional use sites of a subsistence nature (e.g., hunting, trapping, fishing areas)" which are not considered historical resources.[27] In addition, the placing of traditional use sites as entries on the Listing necessitates data-sharing agreements between Aboriginal communities and ACD, and the negotiation of these agreements has proven to be problematic.

- **Issuance of surface dispositions:** The disposition of mineral rights does not grant companies the right to access the surface of the land. Holders of oil sands rights must also secure agreements that allow access to the lands under which oil sands are located. In the case of oil sands, most lands involved are provincial public lands. Surface dispositions to access public lands in the province (mineral surface leases) are granted by the Department of Sustainable Resource Development (SRD). SRD's Consultation Guidelines make no reference to oil sands development, only to conventional oil and gas development. However, as noted earlier, ACD's process of Listing of historical sites, to the extent that it is used to identify site-specific sites of significance to First Nations, would inform the Environmental Field Report required by SRD to issue surface dispositions.

- **Project-specific environmental assessment and regulatory approvals:** Alberta Environment (AENV) is responsible for the conduct of project-specific environmental impact assessments (EIA) and issues authorizations for a range of activities. AENV's Guidelines outline the way in which the department will incorporate First Nations consultation into the EIA process as well as into the regulatory approval process. In line with the basic thrust of the Consultation Guidelines, the intent is to 'delegate' the procedural aspects of consultation to project proponents. For instance, when an environmental assessment is required, it is the project proponent, not AENV, that will notify potentially affected First Nations of the department's decision to prepare a screening report, and send notice of the proposed terms of reference. AENV's role is to assess the need for First Nations consultation. If the department determines that consultation is required, AENV will ask project proponents to prepare a First Nations Consultation Plan. The Director will consider whether the consultation activities undertaken by a project proponent were adequate before issuing regulatory approvals or before making a decision that an EIA is deemed complete.

- **Project-specific EUB review and approval:** The Alberta Energy and Utilities Board (the EUB or the Board) plays a key role in approving or recommending the approval of all energy developments in the province. Under Directive 56, the Board has developed strict consultation requirements for project proponents whose proposals may "directly and adversely affect" persons, including First Nations and Métis.[28] Further, Directive 56 states that applicants are expected to comply with the provincial Consultation Policy with First Nations and the Consultation Guidelines, once these have been approved.[29]

  However, the accepted view is that, as a quasi-judicial body, the EUB does not itself have a constitutional "duty to consult" with Aboriginal peoples. The EUB's public consultation process is not affected by the Consultation Policy and the Guidelines. The CP simply 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".[30]

  Nevertheless, it is now clear that if the question is put before it, the EUB has the jurisdiction to decide whether the provincial government has fulfilled its consultation obligations with First Nations.[31]

  More importantly, when the Board exercises its statutory discretion and decides whether or not to approve applications, its decisions must not violate constitutionally protected rights such as Aboriginal or treaty rights.[32]

## Is Aboriginal Consultation on Oil Sands Development Meeting the Crown's Obligations?

In a previous paper, we noted that the Consultation Policy and the Framework lack a working concept of consultation, which may explain the contradictory wording of the documents when read together.[33] It appears that Alberta has failed to grasp the purposive approach to the duty to consult and to accommodate that informs the judicial doctrine.

As a duty stemming from constitutional rights, consultation is not simply a tool for decision-making, as the province seems to regard it, but an instrument for rights protection. This is not evident in the Policy or in the Guidelines.

Natural justice imposes a general duty of procedural fairness owed to those potentially impacted by a proposed government decision. It is regulated by general administrative law principles and its virtues go beyond law. The obligation to listen – and to act accordingly – is indeed good policy. By involving the incumbents, it improves the outcomes of decision-making, strengthens public support of government decisions and enhances democracy.

There are important distinctions, however, between this obligation of procedural fairness and the duty to consult and to accommodate Aboriginal peoples as outlined by the courts. The most fundamental difference may be their respective purposes: while the former is aimed at providing a fair forum to those affected by a government proposal, the latter is designed to advance the process of reconciliation between the Aboriginal and the settler societies in Canada.[34] Such purpose imposes a twofold duty that holds both procedural *and* substantive aspects.

As outlined below, the Alberta perspective on consultation is flawed in both the procedural and the substantive aspects of the duty depicted in the jurisprudence.

- Consultation with Aboriginal peoples requires specific processes tailored *for* and *with* Aboriginal peoples. So far, Alberta's attempts to consult with the First Nations have been limited and, when they have occurred, the province has not engaged the First Nations appropriately. The lack of a specific process between Aboriginal Peoples and the Crown prevents

a consideration of more substantive concerns. The Alberta approach brings together a wide range of stakeholders with no interest or capacity to even discuss fundamental issues that can only be dealt with by the Crown and the First Nations. In addition, the consultation process in Alberta seems subject to the time constraints of the energy industry. The province has shown little regard for flexibility in this regard. The information is highly technical and the interests at stake are multidimensional, and the timelines provided for discussion appear too tight.

- The Alberta perspective on consultation does not take the obligation to accommodate seriously. The duty to accommodate requires that the Crown amend its initial proposals so as to substantively address the legitimate concerns of the Aboriginal peoples potentially affected by those proposals. The probability of oil sands development impacting adversely on Aboriginal rights is high. The scope of substantive accommodation measures must be kept broad. This includes the "no go" option, particularly when the risk of a *de facto* extinguishment of Aboriginal rights is present. The duty to consult does not imply a veto power, but the overarching obligation to protect constitutional rights prevents the Crown from making decisions that may lead to the extinguishment of these rights in practice.

- The scope of consultation and accommodation is severely curtailed by the provincial government's understanding of the Aboriginal rights and interests at stake. The First Nations have rightly denounced the limiting definition of their rights and traditional uses that the province has adopted in the CP and the Guidelines.[35] Such unilateral definition of Aboriginal rights and uses, significantly reduces the scope of negotiations to the detriment of the supposed beneficiaries of the duty to consult. Nothing in the judicial doctrine suggests that the Crown has authority to unilaterally define or limit rights. In fact, the SCC tries to prevent such non honourable behaviour by tempering the Crown power with the duty to consult and accommodate.

- The provincial government perceives itself as a neutral broker of competing interests. Its lack of committed engagement fails to conform to the SCC's requirement of a two-way, good faith process between the Crown and the First Nations. The province states that some aspects of consultation will not be delegated, but does not clarify which they are. This detached approach to the duty increases the chances of the government being brought to court on allegations of breach of adequate consultation. This reduces the perceived benefits of consultation and accommodation in decreasing litigation.

- More importantly, by assuming a neutral-broker position, the provincial Crown circumvents its overarching obligation to respect and protect constitutional rights and attempts to delegate it to the industry. While it may make practical sense that proponents get involved at certain stages of the consultation process, the provincial government fails to acknowledge that according to the judicial doctrine, the Crown, not the industry, is the primary duty holder. It is the honour of the Crown that is at stake. A practical implication of this over-reliance on the industry is that available accommodation measures that may satisfy the legitimate concerns of the Aboriginal peoples are significantly limited. Indeed, consultations between the communities and the province usually bring up issues beyond the capacity, ability or nature of the project proponents; issues that the Crown is or should be able to address (including the "no go" option).

- Late engagement with the potentially affected Aboriginal peoples also limits the scope of accommodation. Alberta fails to engage the First Nations in the early stages of strategic decision-making. The provincial Crown might think that it is not required to consult at that stage, since no operational decisions with actual impacts are made at that time. However, as the Court has stated, failure to consult at the early stages where the Crown decides about future development prevents it from having a thorough understanding of the potential impacts on Aboriginal interests and, therefore, from devising appropriate amendments to its initial proposals. Consultation that occurs only at the later project-specific stage also prevents adequate consideration of the cumulative impacts of development.

- Furthermore, the Alberta approach provides no clear criteria for substantive accommodation. While the government retains the responsibility to determine whether proponent-led consultation has been "adequate", there is no indication of how adequacy will be assessed. This favors the kind of unstructured decision-making that the SCC has criticized. Moreover, it leaves too much leeway to decision makers who are already under increasing pressure to approve oil sands projects as a result of rising prices of oil.

## Conclusion

Alberta's approach to consultation and accommodation on oil sands development fails to comply with the fundamental tenets of the judicial doctrine on the topic. The ultimate objective of government obligations to Aboriginal peoples is to uphold their constitutionally protected rights. While the constitutional entrenchment of Aboriginal rights prevents their extinguishment, the economic-growth model of oil sands development threatens to *de facto* extinguish these rights. The impacts of growth (be they direct, indirect, cumulative or otherwise) have already, and continue to, result in a *de facto* impossibility to exercise Aboriginal and treaty rights. Eventually the province may well be held accountable for such preventable extinguishment of rights.

Before engaging in or authorizing any more activities, the province should launch a process to elaborate comprehensive land and resource use plans. Those plans, elaborated in consultation with Aboriginal peoples, would enable the early identification of potential *de facto* extinguishment of Aboriginal and treaty rights and would provide the bases for substantive and meaningful accommodation of these rights. In the meantime, the legality of any decisions taken by any agents of the Canadian State, be they the provincial government or the EUB is, at least, questionable.

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## Notes:

1. Numerous environmental and social impact concerns were presented to the government-appointed Multistakeholder Committee which held public consultations on oil sands development last year. For information on this public consultation process, see online: http://www.oilsandsconsultations.gov.ab.ca.
2. Alberta Oil Sands Consultations, Fact Sheet on Traditional Use Studies, online: http://www.oilsandsconsultations.gov.ab.ca.
3. For an analysis of the Aboriginal and treaty rights guaranteed under Treaty 8, see Monique M. Ross & Cheryl Y. Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap and Fish Under Treaty 8" (1998) 36:3 *Alta. L. Rev.* 645; Monique M. Passelac-Ross, *Aboriginal Peoples and Resource Development in Northern Alberta*, Occasional Paper #12 (Calgary: CIRL, 2003); and Monique M. Passelac-Ross, *The Trapping Rights of Aboriginal Peoples in Northern Alberta*, Occasional Paper #15 (Calgary: CIRL, 2005).
4. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 57.
5. The ATC is comprised of the Athabasca Chipewyan First Nation, the Chipewyan Prairie First Nation, the Fort McKay First Nation, the Fort McMurray No. 468 First Nation, and the Mikisew Cree First Nation.
6. *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (16 May 2005), online: http://www.aand.gov.ab.ca/PDFs/ConsultationPolicy_May16.pdf.
7. *Ibid.* at 2 and 4.
8. *Ibid.*, footnote 2, at 2.
9. *Ibid.* at 3 and 4.
10. *Ibid.* at 3.
11. *A Framework for Consultation Guidelines*, online: http://www.international.gov.ab.ca/579.cfm.
12. *Ibid.* at 2 (emphasis added).
13. *Ibid.* at 3. Accommodation is defined in Appendix A as follows: "Accommodation is the creation of a reasonable balance between the potential impact of a particular decision on a First Nation with the competing social concerns. In determining adequate accommodation, compromise is inherent to the reconciliation process."
14. *The Government of Alberta's First Nations Consultation Guidelines on Resource Development and Land Management*, online: http://www.aand.gov.ab.ca/AANDFlash/Files/Albertas_Consultation_Guidelines.pdf.
15. *Ibid.* at 1 (emphasis added). As noted earlier, the Policy states that the government must consult with First Nations when legislation, regulation or other actions *infringe* treaty rights. The Guidelines reflect the findings of the SCC in the *Haida* case that the duty to consult arises when the Crown "contemplates conduct that might adversely affect" an Aboriginal right: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida*], at para. 35.
16. *Ibid.* at 2. See also the Consultation Policy, *supra* note 6 at 4 and 5.
17. *Ibid.* at 4.
18. Assembly of Treaty Chiefs Resolution: 14-09-06/#003R.
19. For a thorough analysis of the legal framework for oil sands development, see Nickie Vlavianos, *The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis*, Occasional Paper #21 (Calgary: CIRL, 2007).
20. *Fort McMurray-Athabasca Oil Sands Subregional Integrated Resource Plan* (1996).
21. For Discussion, *Fort McMurray Mineable Oil Sands Integrated Resource Management Plan*, Draft (October 2005). For Discussion, Government of Alberta, *Mineable Oil Sands Strategy* (October 2005).
22. Alberta, News Release, "Government establishes group to guide consultation for oil sands environment and development policy" (20 December 2005).
23. Alberta, Oil Sands Consultations, *Multistakeholder Committee Final Report* (30 June 2007); Oil Sands Consultation, *Aboriginal Consultation Final Report* (30 June 2007), online: http://www.oilsandsconsultations.gov.ab.ca.
24. *Supra* note 14, Part III: The Department of Energy's First Nations Consultation Guidelines, at 8.
25. *Supra* note 14, Part II: Alberta Community Development Guidelines for First Nation Consultation on Resource Development and Land Management, at 8.
26. *Ibid.* at 16.
27. *Ibid.* at 10.
28. EUB Directive 056: *Energy Development Applications and Schedules, revised edition* (May 2007) (replacing Guide 56) at 5, online: http://www.eub.gov.ab.
29. *Ibid.* at 5-6.
30. Consultation Policy, *supra* note 6 at 5 (emphasis added).
31. This was recently confirmed with the enactment of amendments to the *Administrative Procedures and Jurisdiction Act*, S.A. 2006, c. A-3 and the *Designation of Constitutional Decision-Makers Regulation*, A.R. 69/2006.
32. *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 R.C.S. 159 at 185.
33. Verónica Potes, Monique Passelac-Ross & Nigel Bankes, *Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation Policy and Practice*, Alberta Energy Futures Project Working Paper 14 (Calgary: ISEEE, University of Calgary, June 2006), online: http://www.iseee.ca/images/pdf/ABEnergyFutures-14.pdf.
34. *Haida*, *supra* note 15, at para. 32.
35. The Treaty 8 First Nations of Alberta (T8FN) developed their own *First Nations Consultation Guidelines Framework* (June 2005). Appendix 1 of this document questions the definition of "traditional use" included in the CP and the Guidelines, suggesting that the government identifies traditional use practices in a site-specific/use specific manner, and by general reference to limited sustenance hunting, trapping, and fishing practices of First Nation peoples. The T8FN affirm their right to define "terms which are central to the collective identity of Treaty 8 peoples and integral to their culture".

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The environmental and social impacts of oil sands development are generally well documented. As the development intensifies, concerns over these impacts have multiplied. Because oil sands operations in the Athabasca region are located on lands traditionally and currently used by First Nation and Métis peoples, these impacts particularly affect the local Aboriginal communities. Aboriginal peoples have raised concerns about environmental and socio-economic impacts since the early days of oil sands development in the 1960s. Unfortunately, these effects are not well understood and are only beginning to be documented. The question this paper seeks to address is the following: how is Alberta fulfilling its constitutional obligations to consult and accommodate Aboriginal peoples in the oil sands development process?

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The Canadian Institute of Resources Law was incorporated in September 1979 to undertake and promote research, education and publication on the law relating to Canada's renewable and non-renewable natural resources.

The Institute was incorporated on the basis of a proposal prepared by a study team convened by the Faculty of Law at the University of Calgary. The Institute continues to work in close association with the Faculty of Law. It is managed by its own national Board of Directors and has a separate affiliation agreement with the University of Calgary.



THE BOARD