

Canadian Institute of Resources Law  
Institut canadien du droit des ressources

**Alberta First Nations Consultation  
& Accommodation Handbook –  
Updated to 2016**

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CIRL Occasional Paper #53

March 2016

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## **Executive Summary**

This is an Update to our *Alberta First Nations Consultation & Accommodation Handbook* published on March 30, 2014 as CIRL Occasional Paper #44 (Handbook). The Handbook was a critical assessment of Alberta's approach to satisfying the Crown's duty to consult and accommodate aboriginal people in Alberta under *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* (Consultation Policy). In the Handbook we reviewed the Consultation Policy, associated legislation and draft Corporate Guidelines as they existed at March 30, 2014.

In this Update, we analyze the finalized guidelines, *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management* (July 28, 2014) (Guidelines) together with relevant developments since March 30, 2014.

## **Acknowledgements**

This report was prepared as part of a research project, “Alberta First Nations Consultation & Accommodation Handbook – Updated to 2016”, funded by the Alberta Law Foundation. The generous support of the Foundation is gratefully acknowledged. The author would like to acknowledge the support of the co-author of the original Handbook Monique Passelac-Ross, colleagues at the Canadian Institute of Resources Law and the Law Faculty at the University of Calgary. Any errors or omissions are the responsibility of the author alone.



## List of Abbreviations and Defined Terms

|                              |  |
|------------------------------|--|
| 2005 Consultation Policy     | <i>The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development</i>                                     |
| ACO                          | Aboriginal Consultation Office in the Alberta Department of Indigenous Relations   |
| AEP                          | Alberta Environment and Parks  |
| AER                          | Alberta Energy Regulator   |
| ALSA                         | <i>Alberta Land Stewardship Act</i>  |
| CIRL                         | Canadian Institute of Resources Law  |
| Consultation Policy          | <i>The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013</i>                           |
| Corporate Guidelines         | <i>Draft Government of Alberta's Corporate Guidelines for First Nations Consultation Activities with Draft Consultation Matrix (2013)</i>            |
| <i>Dover/Brion</i>           | <i>Dover Operating Corporation, Application for a Bitumen Recovery Scheme Athabasca Oil Sands Area, AER Decision 2013 ABAER 014 (August 6, 2013)</i> |
| Draft Guidelines             | <i>The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (May 9, 2014)</i>               |
| EIAs                         | Environmental Impact Assessments   |
| EPEA                         | <i>Environmental Protection and Enhancement Act</i>  |
| ERCB                         | Energy Resources Conservation Board  |
| ESRD                         | Alberta Environment and Sustainable Resource Development Ministry  |
| First Consultation Direction | Aboriginal Consultation Direction (November 2013)  |
| GoA                          | Government of Alberta  |
| Guidelines                   | <i>The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (July 28, 2014)</i>             |

|                               |  |
|-------------------------------|--|
| Handbook                      | <i>Alberta First Nations Consultation &amp; Accommodation Handbook</i> (CIRL Occasional Paper #44)   |
| HRA                           | <i>Historical Resources Act</i>  |
| IBA                           | Industry and First Nation Agreements compensating First Nations for the impacts on their communities in return for negating objections to the project. |
| JOP#1                         | Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (December 10, 2014)  |
| JOP#2                         | Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (June 10, 2015)  |
| LARP                          | Lower Athabasca Regional Plan (2012)   |
| <i>Levy Act</i>               | <i>Aboriginal Consultation Levy Act</i>  |
| MGA                           | <i>Municipal Government Act</i>  |
| NQCL                          | Notice of Question of Constitutional Law   |
| <i>NRTA</i>                   | <i>Natural Resources Transfer Agreement, 1930</i>  |
| Old Guidelines                | <i>Alberta's First Nations Consultation Guidelines on Land Management and Resource Development</i> (November 14, 2007)                                 |
| <i>PLAR</i>                   | <i>PLAR Approvals and Authorizations Administrative Procedures</i> (2014)  |
| REDA                          | <i>Responsible Energy Development Act</i>  |
| Second Consultation Direction | Aboriginal Consultation Direction (October 31, 2014)   |
| SOC                           | Statement of Concern   |
| TFA                           | Temporary Field Authorizations   |
| TLU                           | Traditional Land Use Studies   |
| TPR                           | Alberta Tourism, Parks and Recreation Ministry   |
| <i>UNDRIP</i>                 | <i>United Nations Declaration on the Rights of Indigenous Peoples</i>  |

## Introduction to Update

On July 28, 2014 Alberta released *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (July 28, 2014)* (Guidelines).<sup>1</sup> With the release of the Guidelines, Alberta's updated First Nations Consultation Policy is substantially complete.<sup>2</sup>

This Updated Handbook will discuss Alberta's approach to fulfilling the Crown's duty to consult and accommodate First Nations in Alberta, based on the current Consultation Policy as modified by the Guidelines, legislation and other policy documents.

### *Terminology*

Indigenous people living in Canada prefer the name for themselves in their language and are indifferent to the Canadian name accorded to them in English or French. Collectively describing the peoples involved can be a problem. Section 35(2) of the *Constitution Act, 1982* defines "aboriginal peoples" or "des peuples autochtones" as including "Indian, Inuit and Métis peoples".<sup>3</sup> For some people, the use of "aboriginal" connotes primitive<sup>4</sup> and thus many people refer to First Nations as a referent to Indian and Inuit peoples with the Métis being separate.<sup>5</sup> The use of "Indigenous peoples", as a collective referent in Canada, is a more recent development derived from the *United Nations Declaration on the Rights of Indigenous People (2007) (UNDRIP)*<sup>6</sup> as evidenced by the recent renaming of the provincial Department of Indigenous Relations and the federal Department of Indigenous

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<sup>1</sup> *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management* (28 July 2014) [Guidelines], online: <[http://www.aboriginal.alberta.ca/documents/First\\_Nations\\_Consultation\\_Guidelines\\_LNRD.pdf](http://www.aboriginal.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf)>.

<sup>2</sup> This triggered the six-month limitation period for judicial review under Alberta's Rules of Court (Alta Reg 124/2010, s 3.15(1)) and we understand that at least one Alberta First Nation has launched a judicial review lawsuit. The Athabasca Cree First Nation has launched a lawsuit on January 15, 2015 with respect to the constitutionality of the Alberta Consultation Office, online: <<http://norj.ca/2015/01/acfn-files-lawsuit-against-albertas-new-aboriginal-consultation-office/>>.

<sup>3</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The French version, "Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada" is equally authoritative under s 57 of the *Constitution Act, 1982*. Canadian legislation, regulations and cases are available online: <[canlii.org](http://canlii.org)>.

<sup>4</sup> Thomas Isaac, "The Power of Constitutional Language: The Case Against Using 'Aboriginal Peoples' as a Referent for First Nations" (1993-1994) 19 *Queen's LJ* 415. See also Department of Justice Policy on legislation, online: <<http://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p12.html>>.

<sup>5</sup> Canada's constitution is the only written constitution in the world that affords constitutional rights to the descendants of the intermarrying of Indigenous and settler populations.

<sup>6</sup> *United Nations Declaration on the Rights of Indigenous People: Resolution*, GA RES/61/295, UNGAOR, 61st Sess Supp No 49 [UNDRIP], online: <[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)>. Indigenous Peoples UN Fact Sheet, online: <[http://www.un.org/esa/socdev/unpfii/documents/5session\\_fact\\_sheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_fact_sheet1.pdf)>, and the definition in International Work Group for Indigenous Affairs, online: <<http://www.iwgia.org/culture-and-identity/identification-of-indigenous-peoples>>. The use of "Indigenous peoples living in a [territory]" is often used intentionally to reflect their status as a subjects of international law.

and Northern Affairs.<sup>7</sup> As Alberta's Consultation Policy uses the phrase "First Nations" and that term will be used in this paper.

## Background

On May 6, 2005, Alberta released *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (2005 Consultation Policy)<sup>8</sup> as an attempt to fulfill its obligations to First Nations under the Crown's duty to consult and accommodate First Nations. Based on a distributed model, wherein Ministries were charged with consultation in their areas of jurisdiction and the particulars for government ministries underwent various iterations until they were finalized in the release of *Alberta's First Nations Consultation Guidelines on Land Management and Resource Development* (November 14, 2007) (Old Guidelines).<sup>9</sup>

On August 16, 2013, the 2005 Consultation Policy was replaced with *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* (Consultation Policy).<sup>10</sup> The Consultation Policy was intended to coincide with the creation of the single Alberta Energy Regulator (AER) under of *Responsible Energy Development Act* (REDA)<sup>11</sup> passed on June 4, 2013 and declared effective June 17, 2013.<sup>12</sup> The Consultation Policy referenced *Draft Government of Alberta's Corporate Guidelines for First Nations Consultation Activities* (Corporate Guidelines)<sup>13</sup> which included a *Draft Consultation Matrix*<sup>14</sup> that classified activities according to Alberta's assessment of their relative potential impact on Treaty rights and "traditional uses". The final Corporate Guidelines were to be negotiated with Alberta First Nations and industry, but in the interim, the Old Guidelines would still apply.

In March of 2014, the Canadian Institute of Resources Law (CIRL) published the *Alberta*

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<sup>7</sup> Formerly the Department of Aboriginal Relations by a 2 February 2016 Order in Council 28/216, online: <[http://www.qp.alberta.ca/documents/orders/Orders\\_in\\_Council/2016/216/2016\\_028.pdf](http://www.qp.alberta.ca/documents/orders/Orders_in_Council/2016/216/2016_028.pdf)> and the former Department of Aboriginal Affairs and Northern Development on 4 November 2015, online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=docs&doc=mog-ag-eng.htm>>.

<sup>8</sup> *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (2005) [2005 Consultation Policy], online: <[http://www.aboriginal.alberta.ca/documents/2005\\_Policy\\_and\\_Guidelines.pdf?0.47115096426568925](http://www.aboriginal.alberta.ca/documents/2005_Policy_and_Guidelines.pdf?0.47115096426568925)>.

<sup>9</sup> *Alberta's First Nations Consultation Guidelines on Land Management and Resource Development* (14 November 2007) [Old Guidelines], online: <[http://www.aboriginal.alberta.ca/documents/First\\_Nations\\_Consultation\\_Guidelines\\_LM\\_RD.pdf?0.7191066259983927](http://www.aboriginal.alberta.ca/documents/First_Nations_Consultation_Guidelines_LM_RD.pdf?0.7191066259983927)>.

<sup>10</sup> *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* [Consultation Policy], online: <<http://www.aboriginal.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf?0.5944778234697878>>.

<sup>11</sup> *Responsible Energy Development Act*, SA 2012, c R-17.3 [REDA].

<sup>12</sup> The Consultation Policy released on 16 August 2013 had the date of 3 June 2013.

<sup>13</sup> *Draft Government of Alberta's Corporate Guidelines for First Nations Consultation Activities* [Corporate Guidelines], online: <<http://www.aboriginal.alberta.ca/documents/GoACorpGuidelines-FNConsultation-2013.pdf>>.

<sup>14</sup> *Draft Consultation Matrix*, online: <<http://www.aboriginal.alberta.ca/documents/GoAMatrix-FNConsultation-2013.pdf>>.

*First Nations Consultation & Accommodation Handbook (Occasional Paper #44)* (Handbook).<sup>15</sup> The Handbook was a critical assessment of Alberta's Consultation Policy, the draft Corporate Guidelines, the attendant legislation – *Aboriginal Consultation Levy Act (Levy Act)*,<sup>16</sup> section 21 of REDA and the new *Aboriginal Consultation Office (ACO)* within Alberta's Indigenous Relations Ministry.<sup>17</sup> This assessment was based on a doctrinal analysis of relevant domestic and international law, First Nations' advice to governments from documents and the results of a one day roundtable discussion hosted by CIRL with representatives from all three Treaty Areas in the province participating, and a comparative review of consultation policies in other Canadian jurisdictions. The Guidelines had not been finalized and we relied upon the existing draft Corporate Guidelines for our analysis.

We concluded that the new Consultation Policy offered some conceptual improvements such as the centralization of First Nation Consultation in the ACO and a possible consultation levy on resource companies. There were notable failures, including:

- the arbitrary process of developing the new policy;
- the continued misunderstanding of the governing Treaties;
- the rigid conception of consultation and the short deadlines in the draft Corporate Guideline's *Draft Consultation Matrix*; and
- the lack of any mechanism, aside from litigation, for First Nations to influence or challenge the government's assessment of the adequacy of consultation or accommodation.

We noted that the AER was statutorily barred in section 21 of REDA from considering the adequacy of Crown consultation with aboriginal peoples.<sup>18</sup> However, as a designated constitutional decision maker by the regulations under the *Administrative Procedures and Jurisdiction Act*<sup>19</sup> the AER had jurisdiction to consider "all questions of constitutional law" and must act constitutionally in rendering its decisions. It has an obligation to consider First Nation constitutional claims for breach of aboriginal and treaty rights. The AER has to date continued Alberta's historical record of energy regulators avoiding consideration of First Nation constitutional issues, most notably in the first Decision of the AER in the

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<sup>15</sup> David Laidlaw & Monique Passelac-Ross, *Alberta First Nations Consultation & Accommodation Handbook*, Occasional Paper #44 (Calgary: CIRL, 2014) [Handbook], online: <<http://dspace.ucalgary.ca/jspui/bitstream/1880/50216/1/ConsultationHandbookOP44.pdf>> The Consultation Policy is included in the Handbook as Appendix 2 at 62-71, Corporate Guidelines are Appendix 2A at 72-76 and *Draft Consultation Matrix* as Appendix 2B at 77.

<sup>16</sup> *Aboriginal Consultation Levy Act*, SA 2013, c A-1.2 [*Levy Act*].

<sup>17</sup> REDA, *supra* note 11.

<sup>18</sup> *Ibid*, s 21 of REDA reads:

**Crown consultation with aboriginal peoples**

21 The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.

<sup>19</sup> *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3. The relevant regulation is Schedule 1 under s 2 of the *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006.

*Dover/Brion* approval released August 6, 2013.<sup>20</sup>

In short, we concluded that Alberta's Consultation Policy did not provide a mechanism for meaningful consultation with First Nations as required by the courts. We canvassed consultation policies in all other Canadian jurisdictions to suggest best practices from other jurisdictions. This was intended to inform future negotiations particularly on the Corporate Guidelines but also with a view to the promised annual amendments to the Consultation Policy and Corporate Guidelines generally.

The Handbook was widely distributed to First Nations, law libraries and persons in Alberta's Government.<sup>21</sup>

### **Developments Since March 30, 2014**

Alberta's consultation with Indigenous peoples living in Alberta is in continual flux:

- On May 9, 2014, Alberta replaced the Corporate Guidelines with a draft of *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (May 9, 2014)* (Draft Guidelines).<sup>22</sup> This was open for public comment for 40 days until June 19, 2014. On July 28, 2014, Alberta released the final Guidelines. There were a few significant changes but the structure of the Guidelines was faithful to the Draft Guidelines.
- The interface between the ACO processes and the AER remains problematic. The AER was subject to an initial Aboriginal Consultation Direction (First Consultation Direction) under section 67 of REDA on November 26, 2013<sup>23</sup> from the Minister of Energy. The First Consultation Direction was repealed and replaced by an Aboriginal Consultation Direction on October 31, 2014 (Second Consultation

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<sup>20</sup> The AER, *Dover Operating Corporation, Application for a Bitumen Recovery Scheme Athabasca Oil Sands Area*, AER Decision 2013 ABAER 014, 6 August 2013. Also known as the *Brion Decision*. [*Dover/Brion*], online at: <<http://www.aer.ca/documents/decisions/2013/2013-ABAER-014.pdf>>. Leave to Appeal was granted by the Alberta Court of Appeal in *Fort McKay First Nation v Alberta Energy Regulator*, 2013 ABCA 355 (CanLII) but an out of court settlement was reached prior to hearing the appeal.

<sup>21</sup> The Handbook was cited by the Edmonton Chamber of Commerce saying the best practices component should be considered by Alberta, online: <<http://www.abchamber.ca/files/420.pdf>> and in the Intervener Factums filed by Fort McKay First Nation, online: <[http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/35379/FM120\\_Intervener\\_Fort-McKay-First-Nation.pdf](http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/35379/FM120_Intervener_Fort-McKay-First-Nation.pdf)> and Blood Tribe, Beaver Lake Cree Nation, Ermineskin Cree Nation, Siksika Nation and Whitefish Lake First Nation #128, online: <[http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/35379/FM110\\_Intervenors\\_Blood-Tribe-et-al.pdf](http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/35379/FM110_Intervenors_Blood-Tribe-et-al.pdf)> in *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] 2 SCR 447, 2014 SCC 48.

<sup>22</sup> *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management* (9 May 2014) [Draft Guidelines], online: <[http://www.aboriginal.alberta.ca/documents/GoAGuidelines-FNConsultation\\_LNRM-Draft.pdf](http://www.aboriginal.alberta.ca/documents/GoAGuidelines-FNConsultation_LNRM-Draft.pdf)>.

<sup>23</sup> Appendix 6 in the Handbook, Aboriginal Consultation Direction, Minister of Energy [First Consultation Direction], online: <[http://www.energy.gov.ab.ca/Org/pdfs/MO141\\_2013woSignature.pdf](http://www.energy.gov.ab.ca/Org/pdfs/MO141_2013woSignature.pdf)>.

Direction)<sup>24</sup> jointly issued by the Minister of Energy and Minister of the Environment and Sustainable Resource Development. There are no other Directions to the AER.

- Pursuant to the Second Consultation Direction, a Joint Operating Procedures for First Nations Consultation on Energy Resource Activities document for the ACO and AER was released in December 10, 2014 (JOP#1)<sup>25</sup> only to be replaced by a revised Joint Operating Procedure on June 10, 2015 (JOP#2).<sup>26</sup>
- The *Levy Act* passed on May 15, 2013<sup>27</sup> has yet to be proclaimed in force. Proclamation was to occur after consultation with First Nations and Industry on the regulations that amplified the short *Levy Act*. Those deadlines have been continually extended<sup>28</sup> and reports say they have been extended indefinitely.<sup>29</sup> Former Premier James Prentice, in his capacity as Aboriginal Affairs Minister, had written to the Saddle Lake Cree First Nation on March 16, 2015 to say that “proclamation and implementation of the *Levy Act* is no longer being contemplated by Alberta.”<sup>30</sup>
- A New Democratic Party majority government was elected on May 5, 2015 and the new government’s 8 point election platform with respect to aboriginal issues<sup>31</sup> includes:

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<sup>24</sup> Aboriginal Consultation Direction, Minister of Energy and Minister of Environment and Sustainable Resource Development (31 October 2014) [Second Consultation Direction], online: <<http://www.energy.gov.ab.ca/Org/pdfs/MOAboriginalConsultationDirection.pdf>>.

<sup>25</sup> Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (10 December 2014) [JOP#1], online: <<https://web.archive.org/web/20150326114922/http://www.aer.ca/documents/actregs/JointOperatingProcedures.pdf>>.

<sup>26</sup> Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (10 June 2015) [JOP#2], online: <<http://www.aer.ca/documents/actregs/JointOperatingProcedures.pdf>>.

<sup>27</sup> Handbook at 16; see also Handbook, Section 3.4.2.

<sup>28</sup> “The original implementation timeframe for *Levy Act* was to begin levy collection on January 2, 2015 with distribution to First Nations on April 1st, 2015. The new extended implementation timeframe was to begin levy collection on April 1, 2015 with distribution to First Nations by July 1, 2015.” From ACO Letter dated 28 July 2014, online: <<http://www.landman.ca/pdf/2014/AB%20Aboriginal%20Consultation%20Levy%20Act.pdf>>.

<sup>29</sup> “Jessica Johnson of Alberta Aboriginal Affairs said the government has suspended part of the consultation office program – a levy on industry that would be used to fund aboriginal consultation and hearing participation. “The levy is on hold and the aboriginal consultation office will continue working with First Nations as we carry out our annual review of the policy to enable them to participate more meaningfully in the consultation process.” Bob Weber, “Alberta Band sues province for not consulting it on pipeline project”, *CTV News* (16 January 2015), online: <<http://www.ctvnews.ca/canada/alberta-band-sues-province-for-not-consulting-it-on-pipeline-project-1.2191628>>.

<sup>30</sup> Online: <[http://www.saddlelake.ca/noflash/wp-content/uploads/2015/04/AB\\_Response\\_Consultation\\_Policy\\_Levy\\_Act\\_Letter\\_from\\_Prentice\\_March\\_16\\_2015.pdf](http://www.saddlelake.ca/noflash/wp-content/uploads/2015/04/AB_Response_Consultation_Policy_Levy_Act_Letter_from_Prentice_March_16_2015.pdf)>.

<sup>31</sup> The election platform, online: <[http://d3n8a8pro7vhm.cloudfront.net/themes/5538f80701925b5033000001/attachments/original/1431112969/Alberta\\_NDP\\_Platform\\_2015.pdf?1431112969](http://d3n8a8pro7vhm.cloudfront.net/themes/5538f80701925b5033000001/attachments/original/1431112969/Alberta_NDP_Platform_2015.pdf?1431112969)>. The Aboriginal component is at 20.

5.28 We will repeal Bill 22, [*Levy Act*] which was passed without consulting First Nation groups and imposes requirements on First Nations Bands not required of other business arrangements. We will work collaboratively and respectfully with our province's First Nations to replace this legislation.<sup>32</sup>

This has been confirmed by the Alberta's Justice Minister, Kathleen Ganley, in a speech to Treaty 6 chiefs on July 29, 2015. The government is consulting with First Nations and the timing of replacement legislation is not known.<sup>33</sup>

- The Métis Nation of Alberta have been calling for a separate consultation policy since 2008,<sup>34</sup> and a Métis Consultation Policy was promised by the Government in late January of 2013.<sup>35</sup> This was under negotiation at the time of the release of the Handbook<sup>36</sup> but has not yet been released in any form. The ACO advises that it “has put in place an internal process to guide consultation with Métis communities on a case-by-case basis where there is a credible assertion of Métis Aboriginal rights.”<sup>37</sup> We are given to understand that a new Métis Consultation Policy will be presented in the near future.
- The Premier of Alberta, James Prentice, announced reconsideration of Alberta's existing Consultation Policy in the fall of 2014 with little details and no timelines.<sup>38</sup>
- The new NDP Government headed by Rachel Notley had outlined an 8 point election platform with respect to aboriginal issues including:

(5.21) We will implement the 2007 United Nations Declaration on the Rights of Indigenous Peoples, and build it into provincial law.

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<sup>32</sup> *Ibid*, Reid Southwick, “What NDP's victory means for Alberta's relations with aboriginals”, *Calgary Herald* (9 May 2015), online: <<http://calgaryherald.com/news/politics/what-ndps-victory-means-for-albertas-relations-with-aboriginals>>. A “repeal” of an unproclaimed act is unnecessary.

<sup>33</sup> Darcy Henton, “Aboriginal Relations minister vows repeal of controversial consultation bill”, *Calgary Herald* (29 July 2015), online: <<http://calgaryherald.com/news/politics/aboriginal-relations-minister-vows-repeal-of-controversial-consultation-bill>>.

<sup>34</sup> The Métis Nation of Alberta released *Policy Guidelines Regarding the Duty to Consult and Accommodate Métis Aboriginal Rights and Interests in Alberta* (July 2009), online: <[https://docs.neb-one.gc.ca/LL-ENG/llisapi.dll/fetch/2000/90464/90552/384192/620327/624910/702548/780561/D136%2D5%2D18\\_%2D\\_Metis\\_Nation\\_of\\_Alberta\\_%2D\\_Regions\\_4\\_and\\_6\\_%2D\\_Written\\_Evidence\\_%2D\\_Appendix\\_I\\_%2D\\_A2K8K7.pdf?nodeid=780710&vernum=1](https://docs.neb-one.gc.ca/LL-ENG/llisapi.dll/fetch/2000/90464/90552/384192/620327/624910/702548/780561/D136%2D5%2D18_%2D_Metis_Nation_of_Alberta_%2D_Regions_4_and_6_%2D_Written_Evidence_%2D_Appendix_I_%2D_A2K8K7.pdf?nodeid=780710&vernum=1)>.

<sup>35</sup> Shari Narine, “Government to work with Métis, industry on consultation policy”, *Alberta Sweetgrass* 20:3 (2013), online: <<http://www.ammsa.com/publications/alberta-sweetgrass/government-work-métis-industry-consultation-policy>>.

<sup>36</sup> The *Consultation Policy* applies only to First Nations. There is a separate process under negotiation with Métis Settlements. From notes on the authors file.

<sup>37</sup> In the Frequently Asked Questions (FAQ) of the Aboriginal Relations ACO website, online: <<http://www.aboriginal.alberta.ca/573.cfm>> it says that “[a]ny policy developed with Métis will be consistent with [the Consultation Policy].”

<sup>38</sup> Bob Weber, “Premier Prentice says he'll revisit contentious Alberta aboriginal policies”, *Globe and Mail* (14 October 2014), online: <<http://www.theglobeandmail.com/news/politics/premier-prentice-says-hell-revisit-contentious-alberta-aboriginal-policies/article20952031/>>. Elise Stolte, “Prentice announces new talks with First Nations”, *Edmonton Journal* (10 November 2015), online: <<http://www.edmontonjournal.com/search/Prentice+announces+talks+with+First+Nations/10370135/story.html>>.



...  
 (5.23) We will work with Alberta Indigenous Peoples to build a relationship of trust and ensure respectful consultation.

Premier Notley, in a July 7, 2105 letter, directed her Ministers to “conduct a review, including budget implications, of your Ministry’s polices, programs and legislation that may require changes based on the principles of the UN Declaration “of the Rights of Indigenous People” by February 1, 2016.<sup>39</sup>

We understand that the current Government of Alberta will be undertaking a re-consideration of the existing Consultation Policy, but there is little public information as to when that will occur.

## Changes in the Law Relating to Consultation

Since the release of the Handbook on March 30, 2014, there have been no significant changes to the law relating consultation and accommodation of First Nations in Alberta. The constitutional framework of aboriginal rights supporting the doctrine of the Crown’s duty to consult and accommodate aboriginal peoples has changed. The combination of the 2014 Supreme Court of Canada’s decisions in *Tsilhqot’in Nation v British Columbia*<sup>40</sup> and *Grassy Narrows First Nation v Ontario (Natural Resources)*<sup>41</sup> have removed the interjurisdictional barrier between the Federal and Provincial governments. The doctrines of aboriginal rights developed from *R v Sparrow*<sup>42</sup> applies to both Provincial and Federal legislation within their respective heads of power.<sup>43</sup> This does not mean that the Provincial government has legislative jurisdiction over “Indians, and Lands reserved for the Indians” which is reserved for the Federal government in section 91(24) of the *Constitution Act, 1867*.<sup>44</sup> In addition, section 88 of the *Indian Act*<sup>45</sup> incorporates provincial legislation “[s]ubject to the terms of any treaty” as federal legislation in the absence of specific valid federal legislation. The constitutional implications of these decisions are still being developed.

## Sources of Alberta’s Approach to Consultation

This Updated Handbook is a critical summary of Alberta’s approach to satisfying the Alberta Crown’s duty to consult and accommodate First Nations. Alberta’s approach flows from the:

- Consultation Policy – included in this Updated Handbook as Appendix A;
- Guidelines – Appendix B;

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<sup>39</sup> Online: <<http://aboriginal.alberta.ca/documents/Premier-Notley-Letter-Cabinet-Ministers.pdf>>.

<sup>40</sup> [2014] 2 SCR 257, 2014 SCC 44 [*Tsilhqot’in Nation*].

<sup>41</sup> [2014] 2 SCR 447, 2014 SCC 48 [*Grassy Narrows*].

<sup>42</sup> [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*]. See Handbook, Part 1.

<sup>43</sup> *Tsilhqot’in Nation*, *supra* note 40 at 150-152.

<sup>44</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 in RSC 1985, App II, No 5.

<sup>45</sup> RSC 1985, c I-5.

- Second Consultation Direction – Appendix C;
- JOP#2 – Appendix D; and
- REDA.

The Draft Guideline’s Glossary is attached as Appendix 1 for reference.

We will focus on the interpretation of these policy documents. As to actual practice of First Nation consultation in Alberta – these aspects are beyond this Update and the Handbook. We do note the loss of trust engendered by the previous government in developing the Policy and the scepticism expressed at CIRL’s First Nation Roundtable as to the government interpretation of these policies in any consultations.<sup>46</sup>

The AER has continued the longstanding policy of strictly interpreting its mandate to confine itself to matters where “person[s] may be directly and adversely affected by an application.”<sup>47</sup> The AER regulations, Rules of Procedure, Directives and decisions outline a limited geographical area where persons with legal interests are directly and adversely affected by an application. First Nations, public interest groups and environmental groups often do not qualify under the AER’s interpretation.<sup>48</sup>

### Using this Update

This Update is intended to be a standalone assessment, but the Handbook will be referenced with respect to our analysis of the law on First Nation consultation and accommodation. The Handbook is available in print from CIRL or free online.<sup>49</sup>

In this Update, we will use “Policy” to refer to the Consultation Policy, Guidelines and other policy documents collectively. We will refer to the Consultation Policy, Guidelines, and other policy documents by their names. This Update will track the organization of the Guidelines with our more substantive commentary under *italicized* headings.

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<sup>46</sup> Handbook, see footnote 173.

<sup>47</sup> REDA, s 32 outlines the requirements for a written Statement of Concern (SOC) as a precondition for the AER to consider objections in the bulk of its application. The validity of that SOC is governed by the applicable Directives for the application that contain a limited “area of concern”.

<sup>48</sup> Nigel Banks, “Directly and Adversely Affected: The Actual Practice of the Alberta Energy Regulator”, *ABLawg.ca* (3 June 2014). See also Nickie Vlavianos, *The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis*, Occasional Paper #21 (Calgary: CIRL, 2007).

<sup>49</sup> Online: <<http://dspace.ucalgary.ca/jspui/bitstream/1880/50216/1/ConsultationHandbookOP44.pdf>>.

## Alberta's First Nations Consultation Policy & Guidelines

### 1. Introduction

The Introduction in the Guidelines recite the release of the Consultation Policy and state that the Guidelines, as of July 28, 2014 are intended to replace the Old Guidelines for future consultations. Alberta asserts that the Guidelines “are intended to be responsive to operational needs and informed by best practices” and promises to “review the Guidelines annually and will engage with First Nations, industry, and government ministries when doing so.”<sup>1</sup> There is no public information about these reviews.

#### Two Processes

All First Nation consultation processes are governed by the Consultation Policy and:

- those undertaken prior to July 28, 2014 will be governed by the Old Guidelines; and
- after July 28, 2015 by the Guidelines.<sup>2</sup>

The AER has determined that they do not have the jurisdiction to consider the adequacy of First Nation consultation after June 17, 2013.<sup>3</sup>

#### *Methodology to Interpret Guidelines*

There is no one piece of legislation regarding aboriginal consultation in Alberta, let alone a regulatory scheme as advocated in *Haida Nation v British Columbia (Minister of Forests)*.<sup>4</sup> The only Alberta legislation specifically on aboriginal consultation are:

- REDA's section 21 that removed the AER's jurisdiction to consider the adequacy of crown consultation;<sup>5</sup>
- REDA's section 67 authorizing Ministerial Directives which gives rise to the Second Consultation Direction and JOP#2;
- the defunct *Levy Act*; and
- *First Nations Sacred Ceremonial Objects Repatriation Act*.<sup>6</sup>

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<sup>1</sup> Guidelines at 1.

<sup>2</sup> Consultation Policy at 10. The 2005 Consultation Policy did not apply after 16 August 2013.

<sup>3</sup> *Dover/Brion*, *supra* note 20 at 31 referencing an unpublished Letter Decision of 23 May 2013. See: Nigel Bankes, “Constitutional Questions and the Alberta Energy Regulator”, *ABlawg.ca* (24 October 2013), online: <<http://ablawg.ca/2013/10/24/constitutional-questions-and-the-alberta-energy-regulator/>>.

<sup>4</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at 51 [*Haida*].

<sup>5</sup> See Handbook, Sections 3.5.1 to 3.5.3. See also *supra* footnote 18.

<sup>6</sup> *First Nations Sacred Ceremonial Objects Repatriation Act*, RSA 2000, c F-14. First Nations can make application to repatriate a sacred ceremonial object, as defined in s 1(d), with s 2(3) requiring consultation with the affected First Nation prior to repatriation.

There are no regulations regarding aboriginal consultation. Depending on how a Court interprets them, the Second Consultation Direction and JOP#2 may qualify as regulations, despite their form.

The Consultation Policy and Guidelines qualify as “soft law” as described by Lorne Sossin and Charles W. Smith in their paper “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government.”<sup>7</sup> They are statements of government policy intended to constrain or guide public servants in the exercise of their discretion. As we noted in the Handbook<sup>8</sup> the Supreme Court of Canada said in *Haida* that “a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.”<sup>9</sup> Subsequently every jurisdiction in Canada has used some form of policy instrument.

### **Expanded Application of Guidelines**

The Consultation Policy described the role of the *Corporate Guidelines*,

“[t]o provide all parties to the consultation process with increased clarity and direction, and to ensure that consultation is meaningful, Alberta will adopt .... Guidelines and operational guidelines that will:

- Develop a range of Crown-monitoring activities for delegated consultation;
- Clarify specific information required from First Nations on projects and initiatives;
- Coordinate consultation by working with Canada and provincial governments;
- Reflect the needs of proponents and First Nations as well as specific ministry mandates and regulatory processes; and
- Guide the development of consultation matrices to identify triggers, project scope, and depth of consultation, and address the range of projects and initiatives and their potential to impact Treaty rights and traditional uses.”<sup>10</sup>

The Guidelines have gone well beyond this description.

The Consultation Policy explicitly subordinates the Guidelines in the event of discrepancies between them.<sup>11</sup> The Consultation Policy also subordinates First Nation generated consultation requirements for proponents wishing to consult with them [First Nation Consultation Protocols]. The Consultation Policy encourages proponents to be aware of these Protocols but proponents need not follow them and in the event of a conflict between the Policy and a First Nation Consultation Protocol the Consultation

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<sup>7</sup> Lorne Sossin & Charles W Smith, “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts In Regulating Government” (2003) 40 Alta L Rev 867 at 869.

<sup>8</sup> Handbook, Section 1.1.6

<sup>9</sup> *Haida supra* note 53 at para 51.

<sup>10</sup> Consultation Policy at 9-10.

<sup>11</sup> Consultation Policy at 10.

Policy will prevail.<sup>12</sup> It should be noted that proponents may have business reasons to respect a First Nation Consultation Protocol.<sup>13</sup> The Consultation Policy does allow Consultation Process Agreements to be negotiated between Alberta and First Nations, but no such agreements have been reached.<sup>14</sup> We will not consider First Nation Protocols or Consultation Process Agreements in this Update.<sup>15</sup>

However, the Guidelines are issued under the Consultation Policy, and we will consider the Guidelines as an extension of the Consultation Policy absent any explicit contradiction. This is consistent with the *Driedger Principle* of modern statutory interpretation.<sup>16</sup> As in the Handbook, we will continue the use of legal methodologies to assess the Guidelines in this Update.<sup>17</sup>

### ***Drafting Consistency***

The Corporate Guidelines were 6 pages long, including the Draft Consultation Process Matrix. The Guidelines are now 25 pages long including, the three Sector Specific Appendices and Glossary. Generally speaking the Guidelines are a better product and exhibit a drafting consistency that is welcome.<sup>18</sup>

The Guidelines have been renamed “Aboriginal Consultation Guidelines” as opposed to “Corporate Guidelines”, and presumably, the references in the Consultation Policy to the Corporate Guidelines will be to the Guidelines. The Guidelines now incorporate the old Draft Consultation Process Matrix by providing new “Sector-Specific Consultation Matrices” in Appendices A, B and C to the Guidelines. We understand that there will be no other matrices forthcoming.

### **Glossary**

The Corporate Guidelines did not include a glossary. The Draft Guidelines did and they included a reference in the last sentence of the Introduction to a “glossary of terms used in this document” in Appendix C (Draft Glossary).<sup>19</sup> The Guidelines includes the same terms,

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<sup>12</sup> Consultation Policy at 7: “In cases of conflict between a First Nation’s consultation protocol and this *Policy* or the *Corporate Guidelines*, the *Policy* and *Corporate Guidelines* will prevail.”

<sup>13</sup> Maintaining goodwill, reputation etc. It should be noted that these considerations may apply only to repeat developers and for other organizations on an attenuated “social licence” basis.

<sup>14</sup> Consultation Policy at 2. Consultation Process Agreements must be consistent with the Consultation Policy and presumably the Guidelines as well. The process framework agreement leading to a Consultation Process Agreements has yet be negotiated.

<sup>15</sup> For an example of First Nation Consultation Protocol see: Swan River First Nation Consultation Policy, online: <[http://swanriverfirstnation.org/files/2213/3901/3931/UPDATED\\_CONSULTATION\\_PACKAGE\\_FOR\\_COMPANIES.pdf](http://swanriverfirstnation.org/files/2213/3901/3931/UPDATED_CONSULTATION_PACKAGE_FOR_COMPANIES.pdf)>.

<sup>16</sup> Elmer A Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67.

<sup>17</sup> The Handbook, Section 3.2, justified the use of legal methodologies on the basis that consultation policies could govern legal outcomes and the Guidelines should be analyzed in the same way.

<sup>18</sup> We had noted some sloppy drafting in the Handbook at footnotes 94 and 124 in the Handbook.

<sup>19</sup> Draft Guidelines at 1.

with some changed language, in the glossary in Appendix D (Glossary), however there is no comparable general reference in the Guidelines as to the Glossary being terms used in the Guidelines. That sentence was replaced in the Guidelines with “[f]or the purposes of these Guidelines, the term ‘Crown’ is used interchangeably with ‘GoA’ and ‘Alberta.’”<sup>20</sup> This may just be sloppiness in drafting as presumptively, the Glossary definitions would influence the interpretation of the Guidelines – otherwise why include a Glossary?

The Glossary definitions are below, with the differences between the Draft Glossary and the final Glossary underlined and our commentary:

- *Approvals* are defined in the Glossary as “Includes authorizations or dispositions or licences or registrations or permits as defined under the appropriate statutes or regulations.”

*Approvals* were defined in the Draft Glossary as “Any authorizations or dispositions as defined under the appropriate statutes or regulations.” *Approvals*, as defined in the Draft Glossary may have been interpreted as an implied exclusion (*expressio unius est exclusio alterius*) limited to “licenses, or registrations or permits.” The change to “Includes” as well as the mention of “licences, or registration or permits” makes it clear that *Approvals* have a broader definition with the categories being examples.<sup>21</sup>

- *Crown* is defined in the Glossary to say “In Canada, the Crown may refer to the federal government and each of the provincial governments. Within this document, the Crown refers to the Government of Alberta (GoA or Alberta).”<sup>22</sup>

*Crown* was defined in the Draft Glossary as “In Canada, the Crown refers to any of the federal government and each of the provincial governments. Within this document, the Crown refers to the Government of Alberta (GoA).”

The written Treaties covering Alberta’s territory, Treaty No. 6 (1876), Treaty No. 7 (1877), Treaty 8 (1899),<sup>23</sup> were “negotiated” by the Federal Treaty Commissioners

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<sup>20</sup> Guidelines at 1.

<sup>21</sup> This also accords with the Uniform Law Conference of Canada’s Drafting Conventions at s 21(4), online: <<http://www.ulcc.ca/en/uniform-acts-new-order/drafting-conventions/546-josetta-1-en-gb/uniform-actsa/drafting-conventions/66-uniform-drafting-convention>>.

<sup>22</sup> *Interpretation Act*, RSA 2000, c I-8, is one source of definition in the government context and s 14 of that Act provides that the Crown is not bound unless expressly stated – which the Consultation Policy does provide for in its recognition of legal obligations to consult at 1. The only definition in the *Interpretation Act* that overlaps the Consultation Policy is that of the “Crown” in s 28(1)(w) defining the Crown as the Queen which the Glossary redefines as the Government of Alberta. Nothing appears to turn on this.

<sup>23</sup> Treaty 4 covers a small area in southeast Alberta and Treaty 10 covers to a small portion of Alberta in the east; however, there are no recognized First Nations or Reserves in Alberta under those Treaties. A collection of treaty maps are online at the federal Department of Aboriginal Affairs and Northern Development (DIAND) website. See online: <<https://www.aadnc-aandc.gc.ca/eng/1100100032297/1100100032309>>.

in identical legal language as to surrender terms (with variations as to the territory surrendered), permitted activities For First Nations in the surrendered land and purposes for “taking up” and benefits to the First Nation. For example Treaty 7 included the term:

Her Majesty the Queen hereby agrees with her said Indians, that they shall have right to pursue their *vocations of hunting*<sup>24</sup> throughout the Tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government 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, trading or other purposes<sup>25</sup> by Her Government of Canada; or by any of Her Majesty’s subjects duly authorized therefor by the said Government.

The double underlined sections in the quote above has been interpreted by the Courts to authorize the federal government *and* the Alberta’s provincial government to exercise the “taking up” language within their respective Crown lands, most recently in *Grassy Narrows First Nation v Ontario (Natural Resources)* (2014).<sup>26</sup>

- *Decision* is defined in the Glossary to “Includes any administrative, legislative, statutory, regulatory, policy, and operational decision of the GoA.”

*Decision* was defined in the Draft Glossary as “Any administrative, legislative, statutory, regulatory, policy, and operational judgment, ruling, order, finding, or determination of the GoA.” As noted above, the change from “Any” to “Includes” broadens the definition of decision. Further, while self-referential, the repeated use of the “decision” instead of “judgment, ruling, order, finding, or determination” would, on the plain reading, accommodate a wider definition.

- *Land and natural resource management* are defined in the Glossary and Draft Glossary as “Activities (on or off Crown land) potentially affecting the use of provincial Crown land where such activities arise from decisions involving land, water, air, forestry, or fish and wildlife.” The Consultation Policy makes reference to decisions “that directly involve” the same subject matters.<sup>27</sup>
- *Proponent* is defined in the Glossary as “An entity or person who is either seeking a Crown decision related to land and natural resource management or seeking an approval from the AER under the specified enactments.”

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<sup>24</sup> Treaty 6 said “avocations of hunting and fishing”; Treaty 8, Treaty 10 and Treaty 4 said “vocations of hunting, trapping and fishing.” See online: <<http://www.aadnc-aandc.gc.ca/eng/1370373165583/1370373202340>>.

<sup>25</sup> Treaty 4 said “settlement, mining or other purposes”; Treaty 6 said “settlement, mining, lumbering or other purposes” and Treaty 10 and Treaty 8 said “settlement, mining, lumbering, trading or other purposes.”

<sup>26</sup> *Supra* note 41 at para 4. See also *Dominion of Canada v Province of Ontario*, [1910] AC 637 (PC) at 645, and *Smith v The Queen*, [1983] 1 SCR 554 at 562-65.

<sup>27</sup> The Consultation Policy at 3 does reference the potential application to Federal Lands.

*Proponent* was defined in the Draft Glossary as “An entity or person who is either seeking a Crown decision related to land and natural resource management or seeking an approval from the AER.”

The change *limits the definition* of a proponent seeking approval from the AER to approvals only under the “specified enactments”. Section 1(1)(s) of REDA defines the “specified enactments” as: “(i) the *Environmental Protection and Enhancement Act*, (ii) the *Public Lands Act*, (iii) the *Water Act*, (iv) Part 8 of the *Mines and Minerals Act*, (v) a regulation under an enactment referred to in subclauses (i) to (iv), or (vi) any enactment prescribed by the regulations.”<sup>28</sup> The defunct *Levy Act* had the same definition of “specified enactments” in subsection 1(1)(j) but included the *Forests Act*<sup>29</sup> and the *Historical Resources Act* (HRA).<sup>30</sup> REDA does provide for extension of the definition by regulation but current regulations do not include any extension. The ERCB Information Letter IL 82-11,<sup>31</sup> dated 5 March 1982 appears to be the only current reference to the HRA by the AER and that only applies to “making application for permits, licences, or approvals for major projects.”<sup>32</sup>

- *Surface disturbance* is defined in the Glossary and Draft Glossary as “Any disruption of an area that disturbs the Earth’s surface or waters during activity or after an activity has ceased.” This is a new concept in the Guidelines.
- *Treaty rights* are defined in the Glossary as “Rights held by a First Nation in accordance with the terms of a Treaty agreement with the Crown. Treaties may also identify obligations to be met by a First Nation and the Crown. As they exist today, the Treaty rights to hunt, fish and trap for food may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.

*Treaty rights* were defined in the Draft Glossary as “Rights held by a First Nation in accordance with the terms of a historic or modern treaty agreement with the Crown. Treaties may also identify obligations held by a First Nation and the Crown. These rights may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.”

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<sup>28</sup> The “specified enactments” are: *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA]; *Public Lands Act*, RSA 2000, c P-40; *Water Act*, RSA 2000, c W-3; and *Mines and Minerals Act*, RSA 2000, c M-17. The “energy resource enactments” are listed in s 1(1)(j) of REDA as follows: (i) *Coal Conservation Act*, RSA 2000, c C-17; (ii) *Gas Resources Preservation Act*, RSA 2000, c G-4; (iii) *Oil and Gas Conservation Act*, RSA 2000, c O-6; (iv) *Oil Sands Conservation Act*, RSA 2000, c O-7; (v) *Pipeline Act*, RSA 2000, c P-15; (vi) *Turner Valley Unit Operations Act*, RSA 2000, c T-9; (vii) a regulation or rule under [them]; and (viii) any enactment by regulation.

<sup>29</sup> RSA 2000, c F-22.

<sup>30</sup> RSA 2000, c H-9 [HRA].

<sup>31</sup> ERCB Information Letter IL 82-11, 5 March 1982 [AER Historical Resources Letter], online: <<http://www.aer.ca/documents/ils/pdf/il82-11.pdf>>.

<sup>32</sup> AER Historical Resources Letter at 1.



The deletion of the “historic or modern” phrase appears to be justified as, treaty rights include existing and modern land claim agreements in section 35(3) of the *Constitution Act, 1982*. The change from “held” to “to be met” can be seen as an unwelcome softening of the language from a conclusion to an aspiration. The qualification of Treaty rights as being limited to the rights “to hunt, fish and trap for food” continues Alberta’s misconception of the underlying treaties which we criticized in the Handbook.<sup>33</sup> The phrase “As they exist today” is puzzling, if it is read as merely anticipating a future change by Courts that is perhaps acceptable but if it is a qualification on the boundaries limiting treaty rights to areas that are currently exercised we would argue that this is a misreading of the treaties.<sup>34</sup> It is notable that Alberta does not refer to the *Natural Resource Transfer Agreement (Alberta)* section 12<sup>35</sup> as an additional source for treaty rights which Courts have held to extend subsistence harvesting rights for First Nations province wide.<sup>36</sup>

- *Strategic initiatives* is defined in the Glossary and Draft Glossary as “An embracing or overarching policy addressing an objective of the GoA that may set a context in which project-specific consultation can occur.” This definition, in conjunction with the expanded definition of a “decision,” is a clarification of the Consultation Policy which we called for in the Handbook.<sup>37</sup>
- *Traditional uses* is defined in the Glossary and Draft Glossary as “Customs or practices that First Nations may engage in on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations. These may include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land.” This formulation, identical to the Consultation Policy, was subject to criticism in the Handbook<sup>38</sup> as the definition of traditional uses is the definition of aboriginal rights under the *Van der Peet/Sappier; Gray* test.<sup>39</sup>

Consistent with legal methodology for statutory and contractual interpretation we will consider the Glossary definitions to be *defined terms* in the Guidelines. The extension of those defined terms to interpreting the Consultation Policy may be more problematic as the Consultation Policy expressly subordinates the Guidelines saying “[i]n the event of a discrepancy between the Policy and the existing guidelines, the Policy will prevail.”

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<sup>33</sup> Handbook at 23-27.

<sup>34</sup> See Handbook, Section 3.2.1.

<sup>35</sup> *Natural Resources Transfer Agreement (Constitution Act, 1930, Schedule 2)* is discussed in the Handbook, Section 3.2.1 at 27.

<sup>36</sup> *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324 at paras 2 & 7 [*Badger*].

<sup>37</sup> See Handbook, Section 3.2.2 at 27-29.

<sup>38</sup> See Handbook, Section 3.2.1.

<sup>39</sup> Named for the decision in *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*] that defined the test for aboriginal rights in section 35 of the *Constitution Act, 1982* which was clarified in the *R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686 [*Sappier; Gray*].

## ***First Nation***

The phrase “First Nation” is not defined in the Consultation Policy or Guidelines.

The Consultation Policy, in discussing the obligations of First Nations, requires, among other things, a single representative and says that “[a] First Nation’s Chief and Council, ordinarily recognized by Canada, may serve as this representative.”<sup>40</sup> The Guidelines say that the ACO will give guidance on what First Nation(s) will be contacted,<sup>41</sup> and Alberta lists 48 First Nations on its website<sup>42</sup> and Canada lists 45 “Indian Bands” under the *Indian Act*<sup>43</sup> in Alberta.<sup>44</sup>

First Nations were defined in section 1(1)(d) of the *Levy Act* to be “a band, as defined in the *Indian Act* (Canada), with reserve land in Alberta.” Section 2 of that Act allowed the Minister to make a declaration as to what group of indigenous people qualified as a First Nation. The justification in the legislature was this would allow recognized Indian Bands to be declared as First Nations even as their reserves were being surveyed.<sup>45</sup>

In Alberta it appears that “First Nations” will equate to federally recognized “Indian Bands” with reserve or potential reserve land in Alberta including the three Stoney Nakoda First Nations and the Onion Lake Cree First Nation.

### **A. Purpose of the Guidelines**

The Consultation Policy describes consultation as “... a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on First Nations’ Treaty rights, with a view to substantially address them.”<sup>46</sup> The Guidelines amplify this description,

The Guidelines are intended to clarify the expectations of all parties engaged in the consultation process. They provide an overview of the procedures to follow in the consultation process and demonstrate how the GoA is seeking to fulfil its duty to consult. Because consultation is fact-specific, these Guidelines encourage a process that remains flexible enough to allow the GoA to assess consultation requirements on a case-by-case basis. Therefore, these Guidelines only represent a starting point. Each step within the Guidelines must be undertaken in good faith towards: 1)

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<sup>40</sup> Consultation Policy at 8.

<sup>41</sup> Guidelines at 8.

<sup>42</sup> Online: <<http://indigenous.alberta.ca/576.cfm>>.

<sup>43</sup> *Supra* note 45. This may result in federally unrecognized First Nations not being consulted such as the Lubicon Lake Nation.

<sup>44</sup> Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100020670/1100100020675>>. This difference is attributable to Alberta listing the three Stoney Nakoda Nations separately (they are one Federal Indian Band) and the Onion Lake Cree Nation is headquartered in Saskatchewan.

<sup>45</sup> Handbook at 49. First Nations in other provinces or territories affected by Alberta’s decisions will not be consulted, although the Consultation Policy promises to at 8 “develop coordination processes with other provincial and territorial governments, Canada, or agencies of government, with a view to increasing information- sharing and cross-jurisdictional collaboration.”

<sup>46</sup> Consultation Policy at 1.

gaining a better understanding of First Nations concerns regarding potential adverse impacts of a project on the exercise of Treaty rights and traditional uses, 2) substantially addressing the concerns through a meaningful process, and 3) developing positive working relationships.

The Guidelines apply to all strategic and project-specific decisions that have the potential to adversely impact the continued exercise of Treaty rights and traditional uses as defined in the 2013 Policy.<sup>47</sup>

The recognition in the Guidelines that the Consultation Policy represents a starting point is noteworthy, as is the description that each step “must be undertaken in good faith”. The standards of dealing in *good faith*, that govern *all* parties including any delegated proponents,<sup>48</sup> carry with them legal connotations that are consistent with the jurisprudence in this area. However, the Guidelines fail to mention the contemplative aspects wherein adequate time for consideration is required and the iterative aspects wherein a dialogue is contemplated as contained in other Canadian policies.<sup>49</sup>

### ***Transparency***

The Corporate Guidelines said in its Introduction that “[t]ransparency, adequacy, and accountability of these [consultation] activities” were key outcomes and it devoted an entire section to the *Transparency of Process*.<sup>50</sup> That section essentially threatened First Nations who did not “negotiate” a separate Consultation Process Agreement with Alberta by saying the government would instead rely on the compulsory disclosure of agreements with First Nations “relating to consultation capacity and *other benefits*” under section 8 of the now defunct *Levy Act*.

The Guidelines do not include any mention of transparency<sup>51</sup> or the *Levy Act*. The Consultation Policy still equates transparency with the “... *integrity* of the consultation process [that] depends on all parties knowing clearly at each step of a consultation what the costs of that consultation will be.” The “levy and its resulting funding contribute to this transparency by increasing consultation capacity of First Nation. ... On this basis the levy and its resulting funding contribute to this transparency by increasing consultation capacity of First Nation ... Measures to maintain integrity of the consultation process will be contained in guidelines developed to support this *Policy*.”<sup>52</sup> This has not happened and the Guidelines have arguably increased the uncertainty as to costs. As a Policy goal it appears that consideration of transparency has been lessened.

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<sup>47</sup> Guidelines at 1.

<sup>48</sup> Guidelines at 2.

<sup>49</sup> Handbook at 33-35. This is particularly the case given the tight timelines for consideration, response and discussion in the Guidelines.

<sup>50</sup> Corporate Guidelines at 4-5. See critique in Handbook, Section 3.4.3.

<sup>51</sup> Aside from one mention in Appendix A which described the Sector Specific Matrices as “a planning tool for proponents and in order to support *transparency* with First Nations.”

<sup>52</sup> Consultation Policy at 9.

## Decisions for Consultation

The Consultation Policy said:

### *Matters Subject to this Policy*

Crown decisions that Alberta will assess for potential consultation will include:

- Provincial regulations, policies, and plans that may adversely impact First Nations Treaty rights and traditional uses; and
- Decisions on projects relating to oil and gas, forestry, and other forms of natural resource development that may adversely impact First Nations Treaty rights and traditional uses.

### *Matters Not Subject to this Policy*

Crown decisions that Alberta will not assess for potential consultation will include those relating to:

- Leasing and licensing of rights to Crown minerals;
- Accessing private lands to which First Nations do not have a right of access for exercising their Treaty rights and traditional uses;
- Crown decisions on policy matters that are unrelated to land and natural resource management; and
- Emergency situations that may impact public safety and security.<sup>53</sup>

The Consultation Policy's application is limited to Treaty rights and traditional uses on provincial crown land, however an allowance is made for decisions that may impact treaty rights and traditional uses on Federal lands such as Reserves and National Parks.<sup>54</sup>

The Consultation Policy said that the duty to consult and accommodate arises when 1) Alberta has actual or constructive knowledge of a right; 2) Alberta's decision relating to land and natural resource management is contemplated meaning decisions that directly involve the management of land, water, air, forestry, or fish and wildlife; and 3) Alberta's decision has the potential to adversely impact the continued exercise of a Treaty right or traditional uses.<sup>55</sup>

The Guidelines define, *Land and natural resource management* as "Activities (on or off Crown land) potentially affecting the use of provincial Crown land where such activities arise from decisions involving land, water, air, forestry, or fish and wildlife." It defines *decisions* to include "any administrative, legislative, statutory, regulatory, policy, and operational decision of the GoA." These classifications would include the "taking up" of lands for "other purposes" under the governing Treaties.

This means Alberta will *only* consult on:

- Provincial regulations, policies, and plans when those plans involve decisions related to land, water, air, forestry or fish that may adversely impact the area in which First Nations Treaty rights and traditional uses are currently exercised on Crown lands (provincial or federal); and

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<sup>53</sup> *Consultation Policy* at 3.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Consultation Policy* at 1-2.

- Project decisions relating to oil and gas, forestry, and other forms of natural resource development limited to considering matters related to land, water, air, forestry or fish that may adversely impact First Nations Treaty rights and traditional uses that impact area in which First Nations Treaty rights and traditional uses are currently exercised on Crown lands (provincial or federal).

This is a narrow view of consultation driven by Alberta's narrow interpretation of the Treaties.

### **Application of Policy to Strategic Decisions**

The Consultation Policy and Guidelines apply to all *strategic and project-specific decisions* that have the potential to adversely impact the continued exercise of Treaty rights and traditional uses.

What is meant by “strategic decisions”? *Strategic initiatives* are defined in the Guidelines Glossary as an embracing or overarching policy addressing an objective of the Alberta that may set a context in which project-specific consultation can occur. Further, other sections of Guidelines such as the Guideline's section 3(A) Consultation Triggers give a non-exhaustive list of matters which *may* raise consultation, as including:

- Regulation, policy, and strategic initiatives or changes to public access;
- Fish and wildlife management – A decision that may limit or alter the quality and quantity of fish and wildlife;
- Natural resource development – A decision about surface land activity related to petroleum, forestry, mines and minerals, and other forms of natural resource development; and
- Land use planning that provides a long-term framework for Crown decisions.<sup>56</sup>

The Guidelines define *decisions* to include: “any administrative, *legislative, statutory, regulatory, policy, and operational decision of the GoA*” [emphasis added]. This definition and the Trigger List appears to overrule the much criticized decision in *R v Lefthand*<sup>57</sup> that provided there was no duty to consult with aboriginal peoples about legislation. As we noted in the Handbook, Alberta can exceed the consultation requirements directed by the Courts and under this interpretation Alberta appears to have done so at least in the Guidelines.<sup>58</sup>

Presumptively, *strategic decisions* would include decisions on *strategic initiatives*<sup>59</sup> and they would include, at a minimum, the decisions listed on the Trigger List.

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<sup>56</sup> Guidelines at 8 [Trigger List].

<sup>57</sup> *R v Lefthand*, 2007 ABCA 206, leave denied [2007] SCCA No 468 [*Lefthand*]. See: *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 at 44 “We leave for another day the question of whether government conduct includes legislative action: [citing *Lefthand*]” [*Rio Tinto*].

<sup>58</sup> Handbook, Section 3.2.2 at 33.

<sup>59</sup> See: Handbook, Section 3.2.2 at 29.

This strategic consultations would be conducted directly by the Alberta government through the ACO with the support of the initiating ministry.<sup>60</sup> However, there are no processes in the Guidelines to guide First Nation consultation on strategic decisions.<sup>61</sup>

### ***The “continued exercise of a treaty right”***

The Consultation Policy and Guidelines restrict the duty to consult to those decisions that may adversely impact “the continued exercise of a treaty right or traditional uses.” This restricted view of the scope of Treaty rights is also evident in the Consultation Policy’s statement that the depth of consultation will be influenced by “the degree to which First Nations have used the affected lands and resources for the exercise of Treaty rights and traditional uses *and continue to do so today.*”<sup>62</sup> These statements limit Treaty rights to those that are currently exercised and presumably to specific locations, without taking into account the continued erosion of these rights over time or the traditional practice of nomadic harvesting wherein certain areas are used serially – leaving unused areas to regenerate.

The Treaties protect the opportunity to exercise the rights guaranteed by Treaty in perpetuity. If development occurs on lands which were extensively used for the practice of Treaty rights, and are no longer available, First Nations may need to shift their land-use patterns in response to current development. We argue that the government needs to consult First Nations on the use of lands which are not being used currently, or indeed have been used in the past but presently being unused *and* future plans for development. This is consistent with the Supreme Court of Canada’s decision in *Mikisew* requiring that the Alberta’s process of “taking up” lands allowed under the Numbered Treaties can only take place honourably through consultation and accommodation with First Nations.<sup>63</sup>

## **B. Crown’s Duty to Consult and Accommodate**

In the Consultation Policy and Guidelines, Alberta recognizes that the duty to consult and accommodate First Nations exists when:

1. Alberta has real or constructive knowledge of a right;
2. Alberta’s decision relating to land and natural resource management is contemplated; and

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<sup>60</sup> Consultation Policy at 5-6.

<sup>61</sup> Consultation Policy at 2, “Strategic consultation will be defined in the operational guidelines.”

<sup>62</sup> Consultation Policy at 5 [emphasis added]. This is *not* the case in the Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (2011) [Federal Policy] at 48 where past uses are considered. A link is in Appendix 4A of the Handbook.

<sup>63</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at paras 30-31, 2005 SCC 69 [*Mikisew*].

3. Alberta's decision has the potential to adversely impact the continued exercise of a Treaty right or traditional uses.<sup>64</sup>

The Guidelines state that:

Various decisions made by the Supreme Court of Canada and the Court of Appeal of Alberta have confirmed that a duty to consult may be triggered when the Crown contemplates conduct that could have an adverse impact on the exercise of Treaty rights. The Guidelines are intended to be consistent with case law and demonstrate a practical approach to meeting the requirements established by the courts.<sup>65</sup>

Alberta's interpretation of the governing treaties expressed in the Consultation Policy and Guidelines is problematic.

### ***Alberta's Interpretation of the Governing Treaties***

The Alberta government's understanding of Treaty rights is impoverished. Treaty rights are defined in the Guidelines Glossary as:

Rights held by a First Nation in accordance with the terms of a Treaty agreement with the Crown. Treaties may also identify obligations to be met by a First Nation and the Crown. As they exist today, the *Treaty rights to hunt, fish and trap for food* may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.<sup>66</sup>

The notion that Treaty rights to hunt, fish and trap are restricted to food is erroneous. Alberta's interpretation appears to flow from the minority opinion in *R v Badger* (1996)<sup>67</sup> that Treaty 8 had merged with the *Natural Resources Transfer Agreement, 1930 (NRTA)*.<sup>68</sup> The majority opinion *expressly rejected* the "merger and replacement" interpretation and said that Treaty rights, as the solemn promises of the Crown to First Nations, took precedence:

Treaty No. 8 right to hunt has only been altered or modified by the NRTA to the extent that the NRTA evinces a clear intention to effect such a modification. ... Unless there is a direct conflict

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<sup>64</sup> This rights based approach is then confused when the Guidelines in the last sentence of this section explicitly extend the application of consultation to potential adverse impacts on "traditional uses". This related to Alberta's singular distinction between Treaty rights and traditional uses.

<sup>65</sup> Guidelines at 1.

<sup>66</sup> This is an amplification of the Consultation Policy definition.

<sup>67</sup> *Badger*, *supra* note 85 at paras 2 and 7.

<sup>68</sup> *Constitution Act, 1930*, RSC 1985, App II, No 25, Schedule 2. Paragraph 12 provided: "12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence. Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." This had been interpreted as negating commercial hunting in return for an expanded territory outside of the surrendered lands for livelihood harvesting, in *Frank v The Queen*, [1978] 1 SCR 95, 75 DLR (3d) 481 and *R v Horseman*, [1990] 1 SCR 901.

between the NRTA and a treaty, the NRTA will not have modified the treaty rights. Therefore, the NRTA language which outlines the right to hunt for food must be read in light of the fact that this aspect of the treaty right continues in force and effect.<sup>69</sup>

In *Mikisew*, the court noted that “the clause governing hunting, fishing and trapping cannot be isolated from the Treaty as a whole, but must be read in the context of its underlying purpose, as intended by both the Crown and the First Nations peoples.”<sup>70</sup> That purpose was to ensure that “the same means of earning a livelihood would continue after the treaty as existed before it.”<sup>71</sup> Further, discussing *Badger* it said, “*Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of continuity in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation.”<sup>72</sup>

This is the proper interpretation of Alberta’s numbered Treaties – the exercise of the rights to hunt, fish and trap was “a means of earning a livelihood”,<sup>73</sup> and that livelihood was and remains interwoven in the distinctive cultures of Alberta First Nations. Those means of earning a livelihood include, among others, harvesting and gathering rights for food, medicinal plants, and food such as berries, roots; the aboriginal rights to governance, ceremonial, spiritual, education practices; and the right to transmission of their language and culture to succeeding generations.

Second, the Consultation Policy and Guidelines maintain an artificial distinction between Treaty rights and traditional uses. What Alberta calls “traditional uses” are defined as “customs and practices on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations”, including the use of lands for burial grounds, gathering sites and historical or ceremonial locations.<sup>74</sup> Firstly, “traditional uses” is the very definition of a constitutional aboriginal right: an activity that is an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group, being practised in a current form that relates to the original practice prior to European contact.<sup>75</sup> The suggestion that traditional uses are not protected by section 35 is legally questionable. The Courts have held in *R v Adams* that aboriginal rights do not depend upon aboriginal title but may be exercised on Crown land.<sup>76</sup> Historical treaties such as Treaty 8 are not a complete catalogue of aboriginal rights and aboriginal rights may co-exist with treaty rights.<sup>77</sup> Thus to claim traditional uses are not aboriginal rights is questionable.

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<sup>69</sup> *Supra* note 85 at para 47 [emphasis added].

<sup>70</sup> *Mikisew*, *supra* note 112 at 29.

<sup>71</sup> *Ibid* at para 30.

<sup>72</sup> *Ibid* at para 47.

<sup>73</sup> *Ibid* at paras 47-48. Treaty 6 see: *R v Sundown*, [1999] 1 SCR 393, 1999 CanLII 673 at paras 4-6.

<sup>74</sup> Consultation Policy at 1 and Guidelines Glossary definition.

<sup>75</sup> *Van der Peet*, *supra* note 88; *Sappier; Gray*, *supra* note 88.

<sup>76</sup> [1996] 3 SCR 101, 138 DLR. (4th) 657 [*Adams*]. Aboriginal rights were subject to the applicable Treaty and the lands in *Adams* were surrendered under an 1888 Cession Agreement that was silent as to fishing rights, the Alberta land surrender Treaties were interpreted in *Mikisew* to permit harvesting rights on surrendered lands, subject to the provincial exercise of the taking up clause in the treaty.

<sup>77</sup> *R v Côté*, [1996] 3 SCR 139 at 2, 5 and 9; *R v Marshall (Marshall No 1)*, [1999] 3 SCR 456 at 40-42; and *Van der Peet*, *supra* note 88 at 120.



The traditional uses are actually part and parcel of Treaty rights to a culture and to a way of life if the Treaties are properly interpreted and in any event they could constitute *aboriginal rights*. This is an artificial, made-in Alberta distinction which has negative ramifications. This is particularly the case when regulators make decisions about impacts of proposed projects on *traditional uses* rather than Treaty rights as impact on rights ought to engender a higher level of scrutiny than impacts on mere “*traditional uses*”.<sup>78</sup>

This speaks to Alberta’s misunderstanding of the treaty as a mere commercial transaction – by taking up land when that land is seen as merely a food source. The Courts have said land is source of a livelihood and taking up land is a deprivation of that livelihood, this is a more impactful description of the consequences of taking up.<sup>79</sup>

The Courts in Alberta have partially addressed this issue, in *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*.<sup>80</sup> This is the one of the few decisions in Alberta where the courts scrutinized the government’s fulfillment of the duty to consult, the Court of Appeal said,

[17] There are two types of rights asserted. The First Nations have a treaty right to hunt, fish and trap for food. They also assert rights that are described as “other traditional uses.”<sup>81</sup>

The government argued, based on an interpretation Court of Appeal’s reasoning in *Tsuu T’ina Nation v Alberta (Minister of Environment)*<sup>82</sup> that “as there has been no adjudication on these traditional rights, the court should assess these as weak, and therefore, as favouring a duty to consult at the lower end of the spectrum.”<sup>83</sup> The Court rejected this saying,

[20] Although there has been no adjudication on these rights, it is our view that they should be treated as strongly asserted, given both the honour of the Crown and the promise given by Alberta to the First Nations in July 2005 when the land was transferred to Parks from Sustainable Resource Development. At that time Alberta promised to protect the activities of gathering medicines, berry picking, sweat lodges and fishing within the Recreational Area for the First Nations.<sup>84</sup>

## ***Undisturbed Land***

The implicit or sometimes explicit requirement in the Guidelines<sup>85</sup> that Treaty rights and

<sup>78</sup> The AER in *Dover/Brion* decision, *supra* note 20 considered the impacts on “traditional land uses” and found them to be minimal at paras 214-216.

<sup>79</sup> Even the livelihood description is inadequate, the value of land is best known by those who live on it. To my understanding the connection to land is more profound for indigenous peoples that live in the land – are in a relation with the land – are the land. The deprivation of the “them/land” in taking up for what they can see as lesser purpose must be excruciating.

<sup>80</sup> 2013 ABCA 443; leave refused 2014 CanLII 24499 (SCC) [*Cold Lake*].

<sup>81</sup> *Ibid* at 17 [emphasis added].

<sup>82</sup> 2010 ABCA 137 [*Tsuu T’ina*].

<sup>83</sup> *Cold Lake supra* note 129 at 17 [emphasis added].

<sup>84</sup> *Ibid* at 20 [emphasis added]. Ultimately the Court of Appeal found the process and result “reasonable.”

<sup>85</sup> For example Appendix B Sector-Specific Activities That May Not Require Consultation General Provisions says “Consultation on reclamation plans may not be required if the site was previously disturbed

traditional uses *require undisturbed land* has troubling implications. Firstly, there are differences between disturbances for example clearings in a forest whether natural e.g. fire or manmade i.e. brush clearing for seismic lines or other purposes can assist in exercising treaty rights, even when the edge effects impinge those rights. This is not to say that disturbances can somehow “benefit” treaty rights in increased game availability as that measure does not take into account other environmental impacts such as increased access by non-indigenous hunters and environmental distortions of natural predation cycles. The point is that treaty rights and traditional uses can be exercised on disturbed land, albeit at some lower level and that exercise requires consultation.

Secondly, if land is subject to a temporary surface disturbance such as time limited access licence – does the expiry of that temporary licence result in the lands reverting to a category where First Nations may exercise their Treaty rights? If so, would the First Nation be consulted? Or does the pre-existing surface disturbance absolutely bar either result as suggested by the Guidelines.

Thirdly, given the increasing disturbed area from industrial development, particularly in the Treaty 8 area, does this restrict the areas that First Nations can exercise Treaty rights and traditional uses? Does this effectively result in a situation suggested by Justice Binnie in *Mikisew* of “no meaningful right to hunt”? This is troubling given the estimated 78% of edge effect that may qualify as “disturbed lands” in Northern Alberta.<sup>86</sup>

No other jurisdiction in Canada adopts Alberta’s narrow definition of Treaty rights and no other jurisdiction defines “traditional uses” as non-Treaty rights.<sup>87</sup> Alberta’s singular interpretation pervades its views on the duty to consult in the Consultation Policy and Guidelines.

## **2. Consultation Process – Roles**

The Guidelines state that the Government of Alberta, “Alberta Energy Regulator (AER), project proponents, and First Nations all have roles and responsibilities within the [Alberta’s] consultation process.”<sup>88</sup>

### ***Changed Role of the ACO***

The Guidelines change the consultation model. Previously, the ACO, under the

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or previous consultation occurred within the footprint” and Appendix C Non Sector-Specific Activities That Do Not Require Consultation includes “The activity consists of ...” Short-term testing or temporary modifications to machinery, equipment, or processes that *do not result in a new surface disturbance* beyond the normal course of operations.” Thanks is given to Karen Buss who pointed out this distinction.

<sup>86</sup> PE Komers & Z Stanojevic, “Rates of Disturbance vary by data resolution: implications for conservation schedules using the Alberta Boreal Forest as a case study” (2013) 19 *Global Change Biology* 2916.

<sup>87</sup> Handbook at 38-39.

<sup>88</sup> Guidelines at 2.

Consultation Policy would “manage all aspects of consultation.”<sup>89</sup> The centralization of aboriginal consultation into the ACO which we called conceptually good in the Handbook<sup>90</sup> has been partially undone. The consultation model in Alberta has, for the present, reverted to the Distributed Model in the original 2005 Consultation Policy with the attendant concerns by all parties over the consistency and adequacy of First Nation consultation.

Why the change? We had expressed concerns over the ACO’s capacity<sup>91</sup> and one can assume this was born out by experience given the backlog of approvals, resignations and new hires in the ACO.<sup>92</sup> There is reference to “cross-ministry agreements” as to the role of the ACO. To date, there is no public information about such cross-ministry agreements.<sup>93</sup> To the extent future agreements will concentrate consultation in the ACO it could be a positive development.

What has not changed in the Guidelines is: “activities requiring AER approval” as the ACO will manage Crown consultation and provide a decision on the adequacy of consultation to the AER. Presumably this is limited to activities requiring approvals under the specified enactments.<sup>94</sup>

#### **A. Government of Alberta**

The Guidelines state that the provincial Crown alone, in areas of its jurisdiction, must fulfill the duty to consult and accommodate First Nations. Alberta says that duty involves:

- determining if the duty to consult is triggered;
- assessing which First Nations to consult and at what depth;
- ensuring that First Nations are provided with sufficient information to describe the proposed decision or activity;
- considering information on First Nation concerns specific to the project or initiative;
- assessing what, if any, accommodation is required;
- depending on the potential adverse impact on the exercise of Treaty rights and traditional uses, the scope of the First Nations concerns raised, and the specifics of the proposed project or initiative, consultation timelines may vary; and
- assessment of adequacy will generally occur prior to or within statutory and regulatory timelines.<sup>95</sup>

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<sup>89</sup> Consultation Policy at 5.

<sup>90</sup> Handbook, Section 3.3.1 at 37-38.

<sup>91</sup> Handbook, Section 3.3.3.

<sup>92</sup> See online: <<http://esrd.alberta.ca/lands-forests/first-nations-consultation/first-nations-consultation-updates.aspx>> (Retrieved September 8, 2014). For example the ACO has recently made 70 new hires with the attendant diffusion of institutional memory (private communications with the author).

<sup>93</sup> Guidelines at 3, 8.

<sup>94</sup> Guidelines at 4.

<sup>95</sup> Guidelines at 2. Notably, denying the project or initiative is not mentioned as accommodation.

This formulation, which mirrors the Consultation Policy, was criticized in the Handbook on a number of grounds, and some of those concerns include:

- on surrendered Crown lands *any* development decisions warrant notification to affected First Nations, unless the First Nation directs otherwise;<sup>96</sup>
- arguably the first step in consultation is to consult on the design of the consultation process with the affected First Nation;<sup>97</sup> and
- the Courts have consistently stated that consultation on the anticipated action, including strategic matters, *must* take place prior to the decision to take action.<sup>98</sup>

The Guidelines notes that: “Crown-led consultation *may* be carried out by the GoA on decisions regarding land and natural resource management that have the potential for adverse impacts on the exercise of Treaty rights and traditional uses that could include, but are not limited to, the following:

- Regulatory change;
- Infrastructure and facility development;
- Policy development; and
- Planning initiatives.”<sup>99</sup>

The Guidelines direct the Ministries with responsibilities related to Crown land and natural resources, [Responsible Ministries] as responsible for ensuring that First Nations are consulted if there is potential for adverse impact on the exercise of Treaty rights and traditional uses. Further “[d]epending on the case, any or all of the following may apply: [Responsible Ministries] may work with the Aboriginal Consultation Office to ensure that consultation obligations are met; they may carry out the procedural aspects of consultation activity; they may act as a project proponent; or they may delegate the procedural aspects of consultation.”<sup>100</sup> This list of procedures may qualified by the description as to the role of the ACO in the Guidelines to supervise consultations,<sup>101</sup> but the Guidelines at page 8 state that “[t]he ACO or applicable GoA ministry must directly carry out substantive aspects of consultation.” This contradiction is troubling and raises the potential for the unofficial deployment of the Old Guidelines (2007) by the Responsible Ministries given that the Old Guidelines were customized for each of the Responsible Ministries. Clarity as to the role of the ACO is required.

The Guidelines list the Responsible Ministries that may encounter obligations to consultation but notably, the Ministry of Energy is *not* included.

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<sup>96</sup> Handbook, Section 3.3.5.

<sup>97</sup> Handbook, Sections 1.1.7 and 3.3.5.

<sup>98</sup> *Haida*, *supra* note 53 at 75-76.

<sup>99</sup> Guidelines at 2-3.

<sup>100</sup> Guidelines at 3.

<sup>101</sup> Guidelines at 3: “The ACO will direct, monitor, and support the consultation activities of GoA departments as well as proponents and First Nations, as required.”

**i. Alberta Aboriginal Relations, Aboriginal Consultation Office (ACO)**

The Guidelines changed the role of the ACO; it is now charged with providing *consultation management services* to meet the needs of Alberta, First Nations, the AER, and project proponents.

The objectives of the ACO are spelled out in the Guidelines with some curious phrasing:

- Uphold the honour of the Crown with respect to First Nations consultation for land and natural resource management matters *in alignment with GoA priorities*; – What does this qualifier add to or modify in the meaning of honour of the Crown?
- Clearly discharge the legal duty of the Crown and ensure that the GoA works towards reconciling First Nations Treaty rights and traditional uses *and the interests of all Albertans*; – Are not First Nation members also Albertans?<sup>102</sup>
- Ensure consistency, certainty, and predictability with clear roles and *a standardized process* that First Nations, proponents, and the Crown can follow; and – *Standardized process* timelines outlined in the Sector Specific Matrices are too short and the basis for making exceptions is not clear. While numerically, the majority of consultations *may* fit a standardized process – what about the exceptions and on what basis is that assessed?<sup>103</sup>
- Enhance relationships with the federal and provincial governments, leading to a coordinated approach to First Nations consultation. – What about enhancing relations with First Nations called for in the Consultation Policy?

To accomplish those objectives the ACO will “direct, monitor, and support the consultation activities of GoA departments as well as proponents and First Nations, as required” and provide services as follows:

- *Providing pre-consultation assessment* advice or direction;
- Providing advice or direction during the consultation process;
- Providing advice or direction to First Nations and proponents if disputes arise during the consultation process;
- Providing staff to participate in consultation meetings with proponents and First Nations, as required;
- *Evaluating consultation records*; and
- *Providing an assessment of consultation adequacy*.<sup>104</sup>

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<sup>102</sup> See Handbook at 7-8 and 36. It should be noted that throughout the Consultation Policy and Guidelines, there is, in language chosen, a sense of “us” (Albertans) and “them” (First Nations) which is antithetical to the goal of reconciliation.

<sup>103</sup> The Guidelines do allow some flexibility, in the Reserve Power of the ACO, *infra* note 205 to require additional consultation steps although the grounds upon which that can be exercised are in the discretion of the ACO. See: Handbook, Sections 3.3.6 to 3.3.9.

<sup>104</sup> Guidelines at 3.

In contrast, the Corporate Guidelines contemplated only the *italicized processes* focussing on project proponents. This is a significant conceptual improvement, although it is noteworthy that the support for First Nations is qualified by being “as required” and limited to:

- “advice or direction if disputes arise during the consultation process”, and
- “providing staff to participate in consultation meetings with proponents and First Nations, as required.”<sup>105</sup>

The Guidelines state “[f]or activities requiring AER approval” the ACO will manage Crown consultation and provide a decision on the adequacy of consultation to the AER. It is noteworthy that Alberta’s Aboriginal Consultation Office Update website currently says that “[t]he ACO is aligned with other regulatory bodies to ensure Aboriginal and Treaty rights, as well as traditional uses, are respected in all matters regarding land and natural resource management in Alberta.”<sup>106</sup>

## ii. Alberta Environment and Sustainable Resource Development

The Alberta Environment and Sustainable Resource Development Ministry (ESRD), now Alberta Environment and Parks (AEP)<sup>107</sup> is described in the Guidelines as “stewards of air, land, water, and biodiversity” using “a cumulative effects management approach that establishes outcomes for an area by balancing environmental, economic, and social considerations.” The Policy describe the “ESRD Stewardship Branch” as “a shared service function that provides Aboriginal policy advice, strategic and operational Aboriginal engagement, and consultation support to the ministries of Alberta Energy and ESRD.”

There does not appear to be any office to that effect in the current Organizational Charts of ESRD/AEP or the Energy Ministry, although the ACO Update Website does mention that “[a]s of November 1, 2013, the ACO merged some services provided by the Stewardship Branch of Environment and Sustainable Resource Development (ESRD)”<sup>108</sup> in setting up the ACO. Whether that service will continue within the ACO or be re-established in the AEP is unknown.

The Guidelines state that the ESRD Stewardship Branch will lead Crown consultation on “initiatives” such as:

- ESRD provincial/regional policy development and implementation;
- ESRD management frameworks, sub-regional plans, and other planning initiatives (e.g. caribou range planning and similar species-at-risk plans); and

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<sup>105</sup> *Ibid.*

<sup>106</sup> For changes to the webpage over time see online: <<https://web.archive.org/web/20130201133058/http://www.aboriginal.alberta.ca/1.cfm>>.

<sup>107</sup> *Government Organization Act*, RSA 2000, c G-10 and the *Designation and Transfer of Responsibility Regulation*, Alta Reg 80/2012 (DR Reg), s 6(1).

<sup>108</sup> Online: <<http://www.aboriginal.alberta.ca/1.cfm>>.

- Implementation of regional plans.<sup>109</sup>

The implementation of regional plans is authorized under the *Alberta Land Stewardship Act* (ALSA).<sup>110</sup> The first Regional Plan under ALSA, the Lower Athabasca Regional Plan, 2012 (LARP), has come under criticism from First Nations. The Review requested by some First Nations under ALSA has borne fruit with the leak of the Review Panel Report, June 2015 (Review of LARP, 2015) that criticized the handling of First Nation consultation in the development of LARP and recommended the implementation of a Traditional Land Use Management Framework.<sup>111</sup> The Review of LARP, 2015 is not binding as it only makes recommendations to the Stewardship Minister for presentation to the Alberta Cabinet. Further clarity as to including the development of regional plans under ALSA would be appropriate.

The Guidelines describe government decisions *potentially* involving proponent-led consultation as including those under the:

- *Environmental Protection and Enhancement Act*, RSA 2000, c E-12;
- *Forests Act*, RSA 2000, c F-22;
- *Public Lands Act*, RSA 2000, c P-40; and
- *Water Act*, RSA 2000, c W-3.

AEP's jurisdiction does not include environment approvals for energy related activities which is the mandate of the AER.

### iii. Alberta Culture, Historic Resource Management Branch

The Alberta Culture Ministry, Historic Resource Management Branch *may* be engaged in First Nation consultation under the *Historical Resources Act* (HRA) which applies to all provincial lands whether privately owned or not. The Guidelines state that First Nation “[t]raditional use sites that are considered historic resources include, but are not limited

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<sup>109</sup> Guidelines at 4.

<sup>110</sup> SA 2009, c A-26.8 [ALSA].

<sup>111</sup> Handbook at 28. The Review Panel Report was not disclosed publicly for 6 months. The Review Panel Report is available online: <[http://aptn.ca/news/wp-content/uploads/sites/4/2016/02/LARP-Review-Panel-Recommendations\\_final\\_2015-06-22.pdf](http://aptn.ca/news/wp-content/uploads/sites/4/2016/02/LARP-Review-Panel-Recommendations_final_2015-06-22.pdf)>. See: Brandi Morin, “Alberta violates Aboriginal and Treaty rights in tar sands region: report”, *APTN* (17 February 2016), online: <<http://aptn.ca/news/2016/02/17/alberta-violates-aboriginal-and-treaty-rights-in-tar-sands-region-report/>> and earlier, Bob Weber, “Alberta failing aboriginal people in the oilsands area: report”, *CBC News* (2 February 2016), online: <<http://www.cbc.ca/news/canada/edmonton/alberta-failing-aboriginal-people-in-the-oilsands-area-report-1.3430762>>.

to, burial grounds, ceremonial sites, gathering sites, and historic sites or ceremonial locations.”

The Guidelines state that in the HRA regulatory process, when a known traditional use site, listed on the Listing of Historic Resources (Listing)<sup>112</sup> maintained by the Alberta Culture Ministry, that qualifies as an historic resource that has the potential to be adversely affected by a development project, either consultation with the respective First Nations or avoidance of the site *may* be required. Further, section 31 of the HRA states that a person who discovers an historic resource in the course of an excavation, aside from a permitted historic resource excavation, shall notify the ministry of the discovery. Presumably the First Nations would be advised of the discovery by the ministry.

#### **iv. Alberta Tourism, Parks and Recreation**

The Guidelines state that the Alberta Tourism, Parks and Recreation Ministry (TPR), Parks Division, now AEP, is responsible for regulatory and land management activities in Alberta’s Parks system.<sup>113</sup> Consultation *may* be required when AEP, Parks Division, is making a decision that has the potential to adversely impact the exercise of Treaty rights and traditional uses.

In *specific circumstances*, the following statutory and regulatory decisions made by AEP under Parks-related legislation *may* require consultation:

- Regulatory and policy changes related to resource protection, resource management, land use, or activities in the Alberta Parks system;
- Establishment of new parks or expansion of existing areas;
- Development of new facilities within parks;
- Re-designation of a park to a different classification;
- Development or revision of park management plans;
- Issuance of dispositions within the Alberta Parks system; and
- Issuance of research or collection permits within the Alberta Parks system.<sup>114</sup>

The *specific circumstances* presumably would include where First Nation treaty rights and traditional uses have the potential to be affected.

#### **v. Alberta Municipal Affairs**

The Guidelines note that Alberta Municipal Affairs Ministry is directly responsible for:

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<sup>112</sup> The Guidelines at 4 to 5 describe this Listing as “as a generalized legal land description. The Listing informs developers of potential impacts their proposed project may have on a traditional use site of an historic resource nature, without revealing the specific location and information of the traditional use site.”

<sup>113</sup> Including “Wilderness Areas, Ecological Reserves, Natural Areas, Heritage Rangelands, Wildland Provincial Parks, Provincial Parks, and Provincial Recreation Areas and Willmore Wilderness Park”, Guidelines at 5.

<sup>114</sup> Guidelines at 5.



- Special Areas Board under the *Special Areas Act*, RSA 2000, c S-16, in administering approximately 2.6 million acres of public land within southeast Alberta; and
- Part 15 of the *Municipal Government Act*, RSA 2000, c M-26 (MGA) for all functions of local government in improvement districts (IDs).

Consultation *may* be required when Municipal Affairs makes decisions associated with these lands that have the potential to adversely impact the exercise of Treaty rights and traditional uses. It also notes that, municipalities under the MGA could be delegated procedural aspects of First Nation consultation as a project proponent when applying to Alberta for a regulatory decision.<sup>115</sup>

#### **vi. Alberta Transportation**

The Guidelines note that the Alberta Transportation Ministry is responsible for road authorizations, planning, and other aspects of highway and bridge design and consultation *may* be required in some cases, and Alberta Transportation may be a proponent for such projects.

#### **vii. Alberta Infrastructure**

The Guidelines note that the Alberta Infrastructure Ministry is responsible for infrastructure planning and for building and managing government-owned infrastructure. Consultation *may* be required in some cases, and Alberta Infrastructure may be a proponent for such projects.<sup>116</sup>

#### ***Other Ministries***

It should be noted that the other Ministries might have some responsibility for aboriginal consultation outside of land and natural resources decisions, for example, the Alberta Ministry of Health in relation to Treaty 6's "medicine box" in urban areas and the Ministry of Education for education promised in all of the Alberta Treaties given the recent removal of interjurisdictional immunity in *Tsilhqot'in Nation v British Columbia*.<sup>117</sup> These other decisions are expressly excluded in the Consultation Policy – but those consultations may be guided by the consultation process in the Consultation Policy and Guidelines.

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<sup>115</sup> Guidelines at 5-6. For example Calgary's potential consultation with the Tsuu Tina First Nation on changes to Glenmore dam.

<sup>116</sup> This presumably was a reference to transportation corridors in the, *Land Assembly Project Area Act*, SA 2009, c L-2.5 that was never proclaimed in force and was repealed in *Respecting Property Rights Act*, SA 2014, c 15 section 1. Alberta does own other infrastructure.

<sup>117</sup> *Tsilhqot'in Nation*, *supra* note 40.

## B. Proponents

The Guidelines provides that when considering *proposals* regarding land and natural resource management, Alberta *may* delegate procedural aspects of consultation to another party, such as the project proponent. Those project proponents may include industry, municipal governments, or any other organization or individual requiring a provincial approval.<sup>118</sup> These procedural aspects would include notifying and engaging with First Nations to discuss project-specific issues and possible mitigation to be carried out in accordance with the Consultation Policy and Guidelines. However, when applying to the AER the Glossary definition limits proponents to those making an application under the specified enactments.

*Proposals* are not defined in the Glossary but there appears to be a hierarchy implicit in this language which can be broken into: (1) provincial *initiatives* or *strategic decisions* regarding general changes to land and natural resource management; (2) *proposals* regarding changes to land and natural resource management whether by the federal government or a third party; and (3) *project proposals* on a specific project.

The Guidelines urge proponents to notify and consult with First Nations as early as possible in the pre-application stage but does not require that they do so.<sup>119</sup> The Guidelines note that “[p]roponents must document their consultation activities, share their consultation record with First Nations and provincial staff, and *advise ACO of any issues* that arise.” While the formal process of consultation contemplates the submission of consultation records to the ACO at the end of consultation – the invitation to intervene in the consultation process by the ACO should extend to this pre-application stage, particularly with significant projects.<sup>120</sup>

The Consultation Policy’s intent was to fix deadlines in the process of consultation; this has potentially changed as the Guidelines states “[d]epending on the responses received from First Nations and the specific activities involved, a proponent may be required to repeat certain steps under these Guidelines or to take additional steps to ensure *meaningful consultation* has taken place.” This is one way in which the Guidelines introduce a potential flexibility with the attendant loss of “transparency” as to the certainty of costs.

## C. First Nations

The Consultation Policy and Guidelines state that First Nations have a reciprocal obligation to be timely in responding to the Crown’s efforts to consult and in providing Alberta or proponents with specific information on how the project or initiative may adversely impact the exercise of their Treaty rights and traditional uses. The obligation also requires First Nations to report consultation concerns to Alberta as soon as possible. The Policy requires

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<sup>118</sup> This definition is consistent with the Consultation Policy and the Guidelines Glossary.

<sup>119</sup> This addresses somewhat the complaint in the Handbook at 42.

<sup>120</sup> See description of ACO Services connected with *supra* note 153.

First Nations to identify a single point of contact to serve as the First Nation's authorized consultation representative that Alberta or the proponent should contact. During the consultation process, First Nations are expected to work with the Alberta and project proponents on avoiding, minimizing, or mitigating impacts.

### ***Requirements on First Nations***

This is both unrealistic and unfair. It is unrealistic given that First Nations administer a wide variety of programs including matters within provincial jurisdiction on reserves, communication infrastructure may be limited and decision-makers may be unreachable for days. In short, First Nations are not large urban centres where business is accustomed to rapid decision-making. It is unfair in that the proponent, or the ACO, would have worked on a project or initiative for a considerable period of time before approaching a First Nation while First Nations are required to review highly complex material within Guideline deadlines, usually from a standing start. While pre-application consultation with industry proponents is common, the Policy merely urges it. A First Nation's non-response or failure to respond in time may result in drastic consequences.

Secondly, the requirement to work throughout the process on avoiding, minimizing, or mitigating impacts is particularly unfair when the proponent or the ACO is unable or incapable of providing complete information on the proposal. The process of consultation involves an exchange of information – sometimes it is only when the complete information is available that appropriate measures can be considered.

Thirdly, there is a current deficit of First Nation consultation capacity to assess proposals, to respond within the timelines and properly consider them. This is amplified by the overwhelming consultation requests of many First Nations. The *Levy Act* was intended to address this, but that is now defunct with no public mention of a viable replacement.

In the consultation process, First Nations are compelled to negotiate their losses with limited information, time and resources.

#### **D. Alberta Energy Regulator (AER)**

The Guidelines note that the AER is the single upstream energy regulator. Section 21 of REDA denies the AER any jurisdiction to consider the fulfillment of the Crown's duty to consult and accommodate. That is the role of ACO and,

- ACO works closely with the AER to ensure that consultation required for applications made to the AER *under the specified enactments* occurs prior to the AER's regulatory decision;
- ACO, when appropriate, will provide the AER with *advice relating to the mitigation* of potential impacts to Treaty rights and traditional uses;
- Statements of Concern received by the AER from First Nations or other Aboriginal groups or individuals will be provided to the ACO; and

- Direction on ACO and AER interaction is described in the Second Consultation Direction and JOP#2.

### ***Channelling First Nation Consultation?***

The Consultation Policy said “[t]he assessment of consultation adequacy will generally occur within applicable statutory and regulatory timelines and in accordance with the [Guidelines].”<sup>121</sup> The Draft Guidelines said the consultation process was “intended to be used in addition to statutory and regulatory requirements.”<sup>122</sup> The fact that the Guidelines omit this is troubling.

Firstly, as noted above the Courts have said that consultation must occur prior to making decisions. Secondly, the Courts have said that Crown consultation is an overarching and ongoing obligation – that may be met in stages including regulatory approvals.<sup>123</sup> The Crown’s duty to consult and accommodate is an overarching obligation whereas Alberta legislation limit public input to those “directly affected.”<sup>124</sup> This would require a detailed consideration as to whether the decision in question “directly affects” Treaty rights and traditional uses. There may be indirect impacts, for example on harvesting rights that may be affected by water withdrawals that lower river flows to impact laden canoes that are used to reach and carry products of hunt for First Nations. Further, the regulatory process focussed on the current approval and does not make any allowance for cumulative effects of prior decisions. To channel the duty to consult into regulatory processes that restrict input as they do, risks confining consultation with First Nations to those limits and would be a breach of the duty. The Draft Guideline’s use of the consultation process in addition to the regulatory process could have avoided this.

### ***ACO Control of AER***

The AER is ostensibly independent from government. How then does one enforce the ACO’s decision on the adequacy of consultation and accommodation?

REDA has section 67 which says:

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<sup>121</sup> Consultation Policy at 8.

<sup>122</sup> Draft Guidelines at 3.

<sup>123</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*] at 45-46. In *Alberta in the Tsuu T’ina*, *supra* note 131 at 85.

<sup>124</sup> For example EPEA, s 44(6) “Any person who is directly affected by a proposed activity... [may] submit a written statement of concern to the Director”, s 73(1) “... any person who is directly affected by the application or the proposed amendment, addition, deletion or change ... may submit to the Director a written statement of concern”; *Water Act*, s 109(1)(a) “If notice is provided ... any person who is directly affected by the application or proposed amendment ... may submit to the Director a written statement of concern” and with respect to energy resource activities s 32 of REDA says “A person who believes that the person may be directly *and adversely* affected by an application may file a statement of concern with the Regulator in accordance with the rules.”

**Direction to Regulator**

- 67(1) When the Minister considers it to be appropriate to do so, the Minister may by order give directions to the Regulator for the purposes of
- (a) providing priorities and guidelines for the Regulator to follow in the carrying out of its powers, duties and functions, and
  - (b) ensuring the work of the Regulator is consistent with the programs, policies and work of the Government in respect of energy resource development, public land management, environmental management and water management.
- (2) The Regulator shall, within the time period set out in the order, comply with directions given under this section.

The First Consultation Direction,<sup>125</sup> provided that the AER would provide the ACO with any application that consultation was required; the ACO would provide advice to AER; and AER would provide draft decisions to the ACO but it only applied to approvals under the specified enactments. One difficulty is the legal characterization of this “direction”, either it was an *administrative direction* addressed to the AER in carrying out the AER’s work or it was a *legislative direction* with that category giving rise to potential enforcement by way of judicial review by a third party such as a First Nation.<sup>126</sup> This may directly engage the *Lefthand* decision, which remains the governing case in Alberta that says there is no requirement for First Nation consultation in passing legislation or regulations. It should be noted that the Federal Court declared in *Courtoreille v Canada (Aboriginal Affairs and Northern Development)* that Canada had a duty to consult with the Mikisew Cree First Nation when it introduced legislation that had the potential to adversely impact Mikisew’s Treaty rights.<sup>127</sup>

Consistent with the First Consultation Direction and the Consultation Policy, the AER ruled in *Prosper Petroleum Ltd Regulatory Appeal of 24 Well Licences and a Letter of Authority Undefined Field* (2014 ABAER 013, November 5, 2014)<sup>128</sup> that well licence extensions were governed by the *Oil and Gas Conservation Act*, an energy resource enactment.<sup>129</sup> Under the First Consultation Order this did not prompt any consultation obligation. Notably in paragraph 24 as to the necessary extension of *Public Land* authorizations the AER said,

[24] The panel recognizes that the AER must consider Fort McKay’s interests and rights and how the application could affect them, and it must ensure that Fort McKay is treated fairly in the AER’s process. Ultimately, the AER must weigh the factors relevant to each application and make decisions in the best interests of the people of Alberta as a whole. *In doing that, the AER does not prioritize the rights of any Albertans ahead of others* (emphasis added).

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<sup>125</sup> First Consultation Direction, *supra* note 23.

<sup>126</sup> Giorilyn Bruno & Nigel Bankes, “The First Ministerial Direction to the Alberta Energy Regulator: The Aboriginal Consultation Direction”, *ABlawg.ca* (24 April 2014).

<sup>127</sup> 2014 FC 1244 at 99 [*Courtoreille*]. *Lefthand* was addressed at 44 but Justice Hughes, noted *Rio Tinto* and held that while the development of legislation did not engage consultation – upon the initial presentation of legislation with the potential to affect Treaty rights in the legislature, consultation duties were engaged.

<sup>128</sup> *Prosper Petroleum Ltd Regulatory Appeal of 24 Well Licences and a Letter of Authority Undefined Field*, 2014 ABAER 013 [*Prosper*], online: <<http://www.aer.ca/documents/decisions/2014/2014-ABAER-013.pdf>>.

<sup>129</sup> *Supra* note 77.

In this regard, the AER may be wrong, *Sparrow* said in circumstances of conservation e.g. too little available public lands in an area, the First Nation's constitutional status *would* give them a preference.<sup>130</sup>

The current Second Consultation Direction included the same language contained in First Consultation Direction but carved out another exception in section 6 saying if an “energy application is in respect of an activity or application that is listed in the Consultation Guidelines as not requiring consultation, or is accompanied by a pre-consultation assessment by the ACO indicating that no First Nations consultation is required” the requirements in the Second Consultation Direction do not apply.<sup>131</sup> The Second Consultation Direction did not answer whether it was an administrative direction or a legislative direction,<sup>132</sup> and directed the AER to comply with the “operating procedures” to be developed under section 2 of the Second Consultation Direction.

On February 4, 2015, the AER and ACO issued a *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* (2014)<sup>133</sup> to become effective on March 2, 2015. The implementation was delayed on February 26, 2015 and a revised *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* (2015) (JOP#2)<sup>134</sup> was released on June 10, 2015 to come into effect on July 1, 2015. JOP#2 repeated the Second Consultation Order,<sup>135</sup> set coordinated timelines<sup>136</sup> and referred to a First Nations Impacts and Mitigation Table described as “specifically intended to document any potential adverse impacts of the proposed energy resource activity on existing rights of aboriginal peoples as recognized and affirmed under Part II of the Constitution Act, 1982, and on traditional uses as defined in the Consultation Policy.”<sup>137</sup> The AER has consistently ruled that First Nation consultation is limited to those under the “specified enactments” and not “energy resource enactments”.<sup>138</sup>

There is *no enforcement mechanism* in the Policy requiring the AER to implement the

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<sup>130</sup> *Sparrow*, *supra* note 42 at 64 [*Sparrow* cited to SCR].

<sup>131</sup> Giorilyn Bruno & Nigel Bankes, “A Revised Aboriginal Consultation Direction issued to the Alberta Energy Regulator”, ABlawg.ca (8 December 2014) [Bruno & Bankes, “Revised Aboriginal Consultation”].

<sup>132</sup> See *supra* note 175.

<sup>133</sup> JOP#1, *supra* note 25. This does not appear to be available on the Internet but a copy is on file with the author.

<sup>134</sup> JOP#2 *supra* note 26.

<sup>135</sup> *Ibid*, Section 2.1 at 2, “An activity or application does not require consultation if (1) the activity or application is listed in appendix C of the Consultation Guidelines or (2) the ACO determines during a pre-consultation assessment that consultation is not required.”

<sup>136</sup> *Ibid*, Section 3 at 4, “ACO-AER processes (table 3.1) are triggered by the type of consultation required by the ACO (i.e. no consultation, streamlined, standard, or extensive) and the type of AER application submitted (i.e. Enhanced Approval Process [EAP] and non-EAP applications). The AER does not categorize its applications based on the level of consultation or the associated ACO-AER process.”

<sup>137</sup> *Ibid*. Section 2.3 at 2, Consultation Policy.

<sup>138</sup> See for example AER, *Applications No 1835955 and 1835959 from Penn West Petroleum Ltd* (dealing with the Second Ministerial Order), AER Decision, Statement of Concern No 29935 (6 October 2015), online: <<https://www.aer.ca/applications-and-notice/decision-reports/participatory-procedural-decisions>>.

ACO's advice contained in the First Nation Impact and Mitigation Table in the JOP#2, the Second Consultation Direction or the Consultation Policy.

### 3. Consultation Process

This part of the Guidelines outlines the process of consultation that applies to project proponents (which may include firms, municipalities and in some circumstances the Responsible Ministries), Responsible Ministries and Alberta generally.<sup>139</sup> The ACO may manage consultation on behalf of the Government of Alberta or Responsible Ministries as an agent, or designate a Responsible Ministry as a proponent or otherwise under a cross-ministry agreement. The ACO has a supervisory role in any consultation.

#### *Substantive Aspects of Consultation*

A distinction is made as to *procedural aspects of consultation* which may be delegated to a proponent,<sup>140</sup> and the *substantive aspects of consultation* which the ACO or Responsible Ministry *must* directly carry out. The Guidelines describe these substantive aspects of consultation as including:

- Assessing if the duty to consult is triggered;
- Assessing which First Nations should be consulted;
- Assessing the level and scope of consultation;
- Providing proponents with advice and appropriate information regarding potential adverse impacts to the exercise of Treaty rights and traditional uses;
- Advising First Nations and proponents of consultation requirements;
- Reviewing and approving consultation plans as appropriate;
- Directing proponents to provide First Nations with early and adequate notification;
- Monitoring proponent activities;
- Evaluating consultation records;
- Providing adequacy decisions for AER approvals and providing adequacy assessments with recommendations for all others; and
- Notifying First Nations and proponents about ACO adequacy decisions for AER approvals.<sup>141</sup>

#### *Inadequate Description*

These substantive duties are incomplete. The “duty to accommodate” part of the Crown’s duty to consult and accommodate First Nation concerns is relegated by the Guidelines to the *procedural* aspects of consultation when the proponent will: “[m]odifying project

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<sup>139</sup> There is a possibility that the category of Responsible Ministries listed in Part 2 is considered closed but it is noteworthy that the section 3 A Trigger List in the Guidelines includes reference to the GoA generally.

<sup>140</sup> Guidelines at 8.

<sup>141</sup> Guidelines at 8.

design; Modifying project location or footprint; Modifying project timing; Seeking opportunities to mitigate impacts to traditional uses; and Exploring options to address concerns regarding access.”<sup>142</sup>

This was the issue we had criticized in Section 3.2.4 of the Handbook. In the Handbook, we noted that there were some substantive accommodation measures that *only* the Crown can provide such as replacement reserves, replacement habitat, protection of harvesting areas or cumulative effects management. The confinement of accommodation measures to “modifying project plans” distorts the accommodation part of the duty as project proponents generally lack authority from the Crown to satisfy the substantive concerns of First Nations that only the Crown can provide. Instead industry proponents have entered into a variety of agreements with First Nations intended to address the impact of the development on First Nation communities by the provision of benefits such as direct monetary grants, community investment, job commitments or occasionally limited revenue sharing collectively described as Impact Benefit Agreements (IBA). These IBA are conditional on First Nation objections to the project being set aside and the benefits that industry provides under these IBA’s to address the First Nation substantive concerns will be higher than if the Crown was involved in providing accommodation measures.

If the government or a Responsible Ministry with the necessary authority is the proponent then this may engage Crown only accommodation measures and be adequate. However, the Consultation Policy and Guidelines are silent as to additional Crown accommodation measures that may be deployed.

It is open for the ACO in supervising consultations to direct additional accommodation measures outside of “modifying project plans” but that is not discussed in the Guidelines. The Guidelines do mention that “[t]he ACO may also review the project-specific concerns raised by First Nations and if further clarification is required, through discussion with First Nations and project proponents, seek to identify what mitigation measures may be appropriate.”<sup>143</sup> This is limited to project-specific concerns and will not encompass the cumulative effects of other projects. AER’s position is that cumulative effects management are encompassed in the relevant Regional Plans under ALSA.<sup>144</sup>

## A. Consultation Triggers

In this section, the Guidelines describes a non-exhaustive list of government decisions that may trigger consultation:

- Regulation, policy, and strategic initiatives or changes to public access;
- Fish and wildlife management – A decision that may limit or alter the quality and quantity of fish and wildlife;
- Natural resource development – A decision about *surface land activity* related to

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<sup>142</sup> Guidelines at 16.

<sup>143</sup> Guidelines at 16.

<sup>144</sup> *Dover/Brion, supra* note 20 at paras 43-46.



petroleum, forestry, mines and minerals, and other forms of natural resource development; and

- Land use planning that provides a long-term framework for Crown decisions.<sup>145</sup>

There is no provision for First Nations to initiate consultation, or to compel Alberta to respond or make determinations.

### ***Surface Land Activity***

It is noteworthy that Alberta appears to conceive that First Nation treaty rights (and traditional uses) are only affected by *surface land activity* in natural resource development. Treaty rights require an environment that supports those rights. That environment, particularly in the oil sands area, is under threat from the consequences of both surface and *sub-surface* activities, including for example:

- sub-surface water appropriations to resource companies under the *Water Act*, that result in lower flow levels in rivers;
- de-watering of wetlands affecting harvesting;
- pollution from installations emission, odours and sounds and vibrations that affect wildlife and human health;
- contamination of the environment from sub-surface injections that will reach the surface; and
- environmental contamination from hydrocarbon seepage from wells, pipelines and undetermined subsurface fractures.

These impacts are all related to “energy resource enactments” but the AER is limited to approvals under the specified enactments – based on the ACO’s advice.

### **B. Stages of the Consultation Process**

The Guidelines describe the stages of the Consultation Process as follows:

#### **Stage 1: Pre-Consultation Assessment – ACO**

##### **Pre-Consultation Assessment Deadlines**

The Guidelines sets deadlines for the *Pre-consultation assessment* of consultation to be undertaken by the ACO from the receipt of the complete assessment request documentation:

- Level 1 – 4 days for streamlined consultation;
- Level 2 – 4 days for standard consultation; and
- Level 3 – 10 days for extensive consultation.

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<sup>145</sup> Guidelines at 8. This may be a reference to developing Regional Plans under ALSA.

Timelines start the working day following receipt of a request in complete form and can be “revised for appropriate reasons in certain cases. The Policy lists examples:

- Timelines may be increased or decreased if information from First Nations, the Crown, or proponents demonstrates that potential adverse impacts require either more or less discussion;
- Timelines may be increased if the proponent amends the project and additional consultation is required; and
- Timelines may be increased if the proponent provided incomplete project information or consultation records to the ACO.”<sup>146</sup>

### ***Pre-Consultation Assessment Deadline Critique***

Within these 4 to 10 working days, the following substantive aspects, must be decided:

- Assess whether or not consultation is required;
- If consultation is required, identify which First Nations are to be consulted;
- Assess the potential adverse impacts of a proposed decision or activity;
- Assess the scope of the duty to consult based on available information about the potential adverse impacts to Treaty rights and traditional uses; and
- Assign a level of consultation in order to provide direction on the depth of the consultation.<sup>147</sup>

It should be noted that the ACO controls extensions of time, as the clause “appropriate reasons in certain cases” is undefined. For example a First Nation faced with an amended project description does not have the *right* to an extension to consider the amended project. This potentially encourages industry to do the minimal amount to secure a hearing before the regulator and spring more complete materials at the hearing, as was the case at the Grand Rapids Pipeline Hearing.<sup>148</sup>

This is an extensive list and it is difficult to see how decisions can be individualized to the particular circumstances of proposal within these timeframes. Given the limited timing and basis for assessments, it is difficult to imagine circumstances where anything other than the consent of the affected First Nation can justify a shortened assessment period. These assessment timelines were criticized in Sections 3.3.5 and 3.3.10 of the Handbook and the Guideline’s revision “for appropriate reasons in certain cases” provides scant comfort or guidance for First Nations given their past experience.

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<sup>146</sup> Guidelines at 11.

<sup>147</sup> From the Guidelines, Part 3 at 8.

<sup>148</sup> Lauren Krugel, “First Nation pulls out of hearings into Grand Rapids oil sands pipeline”, *Globe and Mail* (16 July 2014), online: <<http://www.theglobeandmail.com/report-on-business/first-nation-pulls-out-of-hearings-into-grand-rapids-oil-sands-pipeline/article19642165/>>. The AER approved the Grand Rapids Pipeline on 9 October 2014; see AER, *Grand Rapids Pipeline GP Ltd, Applications for the Grand Rapids Pipeline Project*, AER Decision 2014 ABAER 012, 9 October 2014. AFCN withdrawal at para 18, online: <<http://www.aer.ca/documents/decisions/2014/2014-ABAER-012.pdf>>.

## **ACO Process – Information Consolidated**

Once a proponent or a Responsible Ministry requests a pre-consultation assessment, the ACO will consider: the proposed project or initiative; the necessary decision to approve relevant activities; available information on the exercise of Treaty rights and traditional uses including potential heritage designations, government consultation maps and consultation agreements with First Nation (there are none). ACO may use information from past consultation and other information about First Nations to assess the depth of consultation required.

## ***ACO Discretion***

The ACO has significant discretion throughout the process, for example the Guidelines asks: “[w]hether the proposed activity can be regarded as having, been adequately covered by a previous consultation and has had either minor or no subsequent changes and therefore is not subject to further consultation on potential adverse impacts on Treaty rights and traditional uses.”

The underlined portion is open to the ACO’s interpretation either: (1) it is the same activity that has been consulted on before with minor changes not involving adverse impacts or (2) it is in a *similar class* of activities, presumptively in the same area, that has been consulted on before. In either case the First Nation will not receive any formal consultation notice. The second interpretation is the more concerning and the more likely given the grammatical structure.

## **ACO Process – Scope of Consultation**

The Guidelines describe the scope of consultation as related to (1) the nature of the project and (2) its potential impacts on Treaty rights and traditional uses at that location. The pre-consultation assessment is intended to identify three potential levels of consultation, which correspond with the scope of the potential impacts, and those levels identify how deep the consultation should be and the timing required.

They are:

- Level 1: Streamlined – Notification with opportunity for First Nation to respond
- Level 2: Standard – Notification with opportunity for First Nation to respond and required follow-up by proponent
- Level 3: Extensive – Preparation of a consultation plan, notification with opportunity for First Nation to respond, and required follow-up by proponent.

The Basic Matrix in Figure 1 outlines Alberta’s assessment of project impacts: from low, moderate and high impact cross referenced with sensitivity of the area – based on treaty rights and traditional uses with corresponding: low, moderate and high sensitivity.

Figure 1: Framework for assessing scope of impacts and determining depth of consultation

|   |            |                       |                       |                     |
|---|------------|-----------------------|-----------------------|---------------------|
| Sensitivity of the location (based on Treaty rights and traditional uses) | High       | Level 2 – standard    | Level 3 – extensive   | Level 3 – extensive |
|   | Moderate   | Level 2 – standard    | Level 2 – standard    | Level 3 – extensive |
|   | Low        | Level 1 – streamlined | Level 1 – streamlined | Level 2 – standard  |
| Nature of the project   | Low impact | Moderate impact       | High impact           |                     |

### *General Matrix Use Critique*

The factors that tie into the sensitivity of a location “include *history of use and level of contemporary use*, the presence of ceremonial sites, or other values to indicate the importance of the site for Treaty rights and traditional uses.” This is a partial corrective to the issues we identified in the Handbook<sup>149</sup> and discussed above in the *Decisions for Consultation* section. However it references historical use but that it is qualified by requiring some level of contemporary use.<sup>150</sup> Further it limits changes in land use, compelled by development, to those that have a *historical component*. This is different than the formal process we called for in this Update and the Handbook for adjusting land use patterns to accommodate treaty rights and traditional uses for future developments.

### **ACO Process – Sector Specific Matrices Considered**

The ACO’s next step would be to consult the Appendices in the Guidelines; there are three sector-specific consultation matrices:

Appendix A – Required Consultation

Appendix B – Sector-Specific Activities That May Not Require Consultation

Appendix C – Non Sector-Specific Activities That Do Not Require Consultation

Appendix A is limited to public lands administered by AEP *and* AER decisions relating to those lands, and presumably Appendices B and C are similarly limited. This could exclude other public lands under other Ministries, such as the Special Areas administered by the Alberta Municipal Affairs – which is a Responsible Ministry but the Appendices would not apply.

These Appendices are not comprehensive, for example transportation activities are

<sup>149</sup> Handbook at 38.

<sup>150</sup> The Consultation Policy at 8 did say “First Nations are invited to work with Alberta to identify the geographic areas on which they have *historically* exercised their Treaty rights and traditional uses and continue to do so.”

not covered, hydro-electric dams are not covered, changes in provincial regulations regarding wildlife, fisheries, access to name a few. While the non-applicable activities on the land would presumably be governed by analogies to Appendix A and the Basic Matrix it is uncertain as to what level of consultation that provincial strategic decisions will require. The First Nation consultation on LARP for example made no difference other than inviting them to participate in developing First Nations – Richardson Backcountry Stewardship Initiative (or Richardson Initiative).<sup>151</sup> Given the First Nations’ long experience in consulting with the province, as most recently demonstrated in the LARP that consultation is unlikely to be deep or sustained.

The Guidelines describe the purpose of including sector-specific consultation matrices in Appendix A as assisting proponents “in understanding the potential adverse impacts of activities and how they influence consultation requirements.”<sup>152</sup> Sector-specific matrices describe typical project activities and “provide an initial assessment of the impacts of the activity on Treaty rights and traditional uses based on the nature of the project and identify the depth of consultation required.”<sup>153</sup> Appendix B and C are not mentioned in the Guidelines but the use of “matrices” in the Guidelines suggest that these are equally applicable. The general language in the Appendix A, presumably applies to Appendices B and C, and it discusses how the:

Matrices provide an initial assessment based upon knowledge of the physical impacts of an activity but they are not a definitive categorization of the potential adverse impact on Treaty rights or traditional uses. The Matrices identify the nature of the activity and the potential biophysical impact, and propose the depth of consultation that may be required in the absence of *other factors*.

The Crown usually assesses consultation on a case-by-case basis in order to determine if there is a duty to consult and, if so, at what level. The level of consultation identified at the pre-consultation stage may change as consultation progresses and new information is provided. Potential adverse impacts to traditional use sites may also alter the consideration and rationale for consultation requirements.<sup>154</sup>

The Guidelines note that ACO may use information from past consultation and other information about First Nations to assess the depth of consultation required. It appears that, absent other information, the initial level of consultation will only be elevated if there are “potential impacts to traditional uses sites” and these are identified as:

Aboriginal traditional use sites, such as burial sites, ceremonial sites, historic structures, etc., may be considered historic resources under the Historical Resources Act (HRA). Alberta Culture identifies Aboriginal traditional use sites as an HRV 4c in the Listing of Historic Resources (the Listing). The Listing is a primary tool for regulating land-based development and is used exclusively to direct a proponent to apply to Alberta Culture for approval of a development under

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<sup>151</sup> LARP at 34. See also text associated with *supra* note 160.

<sup>152</sup> Guidelines at 10.

<sup>153</sup> Guidelines at 14.

<sup>154</sup> Guidelines at A-1 (emphasis added).

these circumstances. First Nation consultation may be required by Alberta Culture for HRV 4c sites that may be impacted by a proposed development. The presence of HRV 4c lands within a proposed project footprint may change the level of consultation required.<sup>155</sup>

First Nations, generally speaking, are reluctant to identify traditional uses sites for a number of reasons including concerns about vandalism. Many sites are family specific and may require a Traditional Land Use Study (TLU). This reluctance and lack of funding will lead to not registering traditional uses sites on the Listing.

All three matrices carry a *caveat* as to the application of the matrix in the same language on the top of each page of the Appendices:

In all cases the Alberta retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.<sup>156</sup> [Reserve Power]

This Reserve Power would presumably be invoked to elevate the level of consultation *as consultation progresses and new information is provided* by any party. This interpretation of the Reserve Power, if applicable and exercised, would address the significant concern in the Handbook that First Nations did not have any mechanism to elevate the level of consultation.<sup>157</sup>

The ACO would look at the project description and then categorize the project activities into Appendix A, B or C. It is not clear whether, the presence of an identified HRV 4c site would elevate the activities in Appendix C to require consultation or the activities in Appendix B where consultation is optional into a circumstance where consultation is required and if so at what level. The ACO may decide that no First Nation consultation is required and will advise the proponent of the same.

Appendix A<sup>158</sup> deals with required First Nation Consultation and categorizes project impacts into three categories:

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<sup>155</sup> Guidelines at 14.

<sup>156</sup> Appendix A at A2, Appendix B at B1 and Appendix C at C1.

<sup>157</sup> Handbook, Sections 3.3.5 and 3.3.7.

<sup>158</sup> Appendices B and C are discussed in detail below under “C. AER First Nation Consultation Not Required”.

|  |  |
|--|--|
| Low Impact: These activities are typically short duration (less than 2 years), small in size (less than 5 ha), and have low or limited environmental impacts.  | Level 1 – Streamlined Consultation   |
| Moderate Impact: These activities are typically moderate in duration (more than 2 years), moderate in size (greater than 5 ha), and have moderate environmental impacts.   | Level 2 – Standard Consultation  |
| High Impact These activities are typically long in duration (more than 10 years), large in size and scale or complexity, have extensive environmental impacts, and include approvals from multiple regulatory authorities. | Level 3 – Extensive Consultation<br>- and -<br>Level 3 – Extensive Consultation with EIA |

The descriptions of sector specific project activities are at a broad level with little detail.

It is not clear where the transition points are as the description is for a *typical project*: for example does an otherwise low impact project with a longer duration >2 years require a Level 2 – Standard Consultation? Or is it the area affected? Or an environmental impact? Or is it any one of them? Similar questions would arise in Appendix B and Appendix C activities. Given the time constraints of 4 to 10 days for a pre-consultation assessment – it would be difficult to customize the consultation level.

More significantly, the distinction between Level 1 – Streamlined Consultation and Level 2 – Standard Consultation is *at most* 5 working days of consultation. That is not enough time to address for example “low or limited environmental impacts” versus the Level 2 – Standard Consultation of “moderate environmental impacts.” In effect, low and moderate impact consultations are merged into one category of 15-20 day consultation period. This difference should be expanded.

### ***Matrices as Design of Consultation***

The use of a consultation matrix in these Appendices to direct levels of consultation and where consultation will not be required embodies the *design of consultation*. The use of a matrix criticized in the Handbook on several grounds, firstly the lack of First Nation input into the design of consultations, i.e. matrices, secondly the possibility of there being no consultation and thirdly, the short deadlines within the consultation procedure.<sup>159</sup> These problems continue with the Guidelines.

The use of matrices, represent what Alberta sees as affecting the Treaty rights to food, not First Nations. Matrices are generalized – that apply in all areas at all times and will be inadequate in different circumstances. The Matrices can be determinative as to the need for consultation, e.g. Appendix C. The Courts have ruled that meaningful consultation requires flexibility. Alberta’s use of matrices with their rigid categories, resulting in tight

<sup>159</sup> Handbook, Sections 3.3.5 to 3.3.9 at 40-44.

and inflexible timelines in the levels of consultation, limits proper consideration of the impacts of proposals and mitigation options and does not exhibit that flexibility. We repeat the argument that on surrendered Crown lands *any* development decisions warrant notification to affected First Nations, unless the First Nation directs otherwise.<sup>160</sup>

### **ACO Process – First Nation Information Package**

Once the ACO determines the appropriate Level of Consultation and affected First Nations, the proponent will be directed to provide a comprehensive information package to the identified First Nations as soon as possible. While it is not clear in the Guidelines, I would argue that different First Nations in an area should have the same consultation level for the sake of administrative efficiency. The Guidelines state that the information packages must contain:

- Notice that the proponent has been advised to consult with the First Nation and share information about the proposed activity;
- The level of consultation;
- A description of the consultation process, where applicable;
- An ACO-First Nations consultation number, if applicable;
- A plain language information package describing the proposed activity, location, and potential impacts;
- Any information provided by the ACO about potential First Nations concerns in the area;
- A description of the [Government of Alberta] or regulatory authorization being sought; and
- A request that the First Nation send feedback to the proponent within the prescribed time period about how the project may impact their First Nations Treaty rights and traditional uses.

The timelines for a response from the First Nation are discussed below.

### **Stage 2: Consultation Process Timelines**

The Guidelines says the *procedural* aspects of First Nation consultation for proponents and First Nations will be governed by the following timelines:

#### *Level 1: Streamlined consultation* (Notification Only)

- Notified First Nations have up to 15 working days to respond to the project notification.
- If a First Nations responds to the notification, consultation should be complete within the next 15 working days following that response.
- If the 15 working day notification period has expired without a response, the proponent, after providing First Nations with 5 working days to review the

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<sup>160</sup> Handbook, Section 3.3.5.



proponent's consultation record, may submit that consultation record to the ACO to determine the adequacy of consultation.

*Level 2: Standard consultation*

- Notified First Nations have up to 15 working days to respond to project notification.
  - If no response is received within approximately 5 working days of the initial notification, the proponent will follow up with the First Nation.
  - If no response is received within approximately 10 working days of the initial notification, the proponent will follow up a second time with the First Nation.
- If a First Nations respond to notification, consultation should be completed within the next 20 working days following that response.
- If the 15 working day notification period has expired without a response, the proponent, after providing First Nations with 5 working days to review the proponent's consultation record, may submit that consultation record to the ACO to determine the adequacy of consultation.

*Level 3: Extensive consultation*

- Once the *proponent's* consultation plan is approved by the ACO in the pre-consultation assessment, the proponent will send a notice to the affected First Nations and the notified First Nations have up to 20 working days to respond to project notification.
  - If no response is received after approximately 10 working days, the proponent will follow up with the First Nation; and
  - If no response is received after approximately 15 working days of the initial notification, the proponent will follow up a second time with the First Nation.
- If First Nations respond to notification, consultation should be substantially underway or completed within 60 working days of the response to notification.
- If the 20-day notification period has expired and there is no response to the second follow-up letter, the proponent, after giving the First Nations 10 days to review the consultation record, may ask the ACO to review the consultation record.

*Level 3: Extensive consultation for projects with EIAs (Environmental Impact Assessments)*

- Once the *proponent's* consultation plan is approved by the ACO in the pre-consultation assessment, the proponent will send a notice to the affected First Nations and notified First Nations have up to 20 working days to respond to project notification.
  - If no response is received within approximately 10 working days, the proponent will follow up with the First Nation.
  - If no response is received within approximately 15 working days, the proponent will follow up a second time with the First Nation.
- Where First Nations respond to the notification, consultation is expected to be completed within the applicable *regulatory timelines*.
- If the 20-day notification period has expired and there is no response to the second follow-up letter, the proponent, after giving First Nations 10 days to review the consultation record, may ask the ACO to review the consultation record.

In the Response to Notification, the Guidelines states that First Nations should “[d]escribe specific Treaty rights and traditional uses that may be impacted by the project at that location, and Identify if and why the impacts described may require a deeper level of consultation.”<sup>161</sup>

### ***Consultation Process Timeline Critique***

Arguably these timelines are unrealistic, unfair and dishonourable. Firstly, it is unrealistic given that First Nations administer a wide variety of programs, communication infrastructure may be limited and decision-makers may be unreachable for days. In short, First Nations are not large urban centres where business is accustomed to rapid decision-making. Secondly, it is unrealistic to expect First Nations to be able to identify what Treaty rights and traditional uses are currently being exercised in that area without enquiries. Like any community, First Nation community leaderships lack the current knowledge as to what the community members are doing. This is the usual purview of Traditional Land Use Studies (TLU) that require time and resources to organize and conduct. The 15 to 20 working days involved in formulating a response is an inadequate time period to conduct a TLU. It is unfair in that the proponent, or the ACO, would have worked on a project or initiative for a considerable period of time before approaching a First Nation while First Nations are required to review highly complex material within these deadlines, usually from a standing start. While pre-application consultation with industry proponents is common, the Policy merely urges it.

It is dishonourable in that timelines are imposed on First Nations that are not adequate to allow full consideration, especially in light of the limited consultation capacity. This will result in an automatic rejection of even the most innocuous proposal (to be on the safe side) with the attendant confusion, delay and uncertainty. A slower timeline will allow for faster approvals on average, all other factors being equal. Further timelines are not negotiated as First Nations have requested, or even allowed as timelines are not flexible.

The Guidelines note that “specific timelines *may* need to be revised in certain circumstances, depending, for example, on the complexity of the project. Other relevant factors may include circumstances that make a timely response difficult for a First Nation community, such as an emergency situation in the community.”<sup>162</sup> This extension of time is entirely within the control of the ACO. Further it only partially addresses our criticism in the Handbook as to the timing of First Nation’s Response and still represents an *unreasonable “goal timeline”* given the manifold responsibilities of First Nation governance and limited resources.

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<sup>161</sup> The Guideline requirement that the First Nation Response should include a written submission to the proponent together “with a copy to the ACO staff member identified on the file” was removed on the basis that the Consultation Records will include this. This amendment was made under a “Consultation Guidelines Correction” (28 July 2015), online: <[http://www.aboriginal.alberta.ca/documents/Guidelines\\_Correction.pdf?0.7474295638967305](http://www.aboriginal.alberta.ca/documents/Guidelines_Correction.pdf?0.7474295638967305)>.

<sup>162</sup> Guidelines at 12.

A First Nation's non-response or failure to respond in time may result in drastic consequences, as the proponent will provide their consultation record for First Nation review and within 5 to 10 days submit that record to the ACO for assessment of adequacy. If confirmed, First Nation consultation will be considered to be complete and the ACO will so advise the AER or Relevant Government Ministries. The drastic consequences have been somewhat ameliorated by the requirements that project proponents provide their consultation record for review by First Nations for 5 days in Level 1 – Streamlined Consultation and 10 days in the Standard and Extensive Consultations that provide an additional mechanism giving notice to the First Nation.

### **Stage 3: Consultations Conducted**

The ACO will monitor activity on all consultation files, and the designated staff will be available to assist with any issues that arise during the consultation process whether from First Nations or proponents. The level of the consultation required and the associated timelines may be revised during the consultation process if information from First Nations, proponents, or the Crown demonstrate that potential adverse impacts require either more or less discussion. At any time during the consultation process the ACO may redirect proponents to repeat steps that have not been completed adequately. In Level 3 Consultations the ACO could provide staff to attend consultation meetings on request or when the delegation of procedural aspects is inappropriate, i.e. direct the ACO to First Nation consultation. This may address the private proponent's inability to provide Crown only accommodation measures but this is far from clear.

While good faith efforts are required from all parties – there may be no agreement reached as to impacts, mitigation or accommodation measures. After the consultation period expires it becomes open for a project proponent to submit its consultation record to the First Nation for review and thereafter the ACO for a determination of consultation adequacy.

### ***Conduct of Consultation Critique***

During the 15 day (Level 1 – Streamlined); 20 day (Level 2 – Standard) or 60 day (Level 3 Extensive no EIA) consultation period, the parties and potentially the ACO are required to engage in a dialogue with the First Nation; meet to explain the project; answer any questions about the project; conduct a site visit if necessary, determine the details of the potential impacts; assess whether or not the impacts can be mitigated; change plans if required, get approval from decision makers as necessary; and once the proponent understands the nature of the First Nation's concerns, both parties are expected to work together to discuss potential strategies to avoid or minimize the impacts; negotiate with regard to mitigation measures in good faith all the while document the negotiations for the consultation record. These requirements would engage a proponent's project team full time – on one consultation. Translate this into several consultations with different firms at the same time for one First Nation the difficulty is obvious. It is not unknown for one First Nation – outside of the oil sands area to have 1,000 consultation negotiations a year.

It is noteworthy that *Level 3 Consultations* and *Level 3 Consultations with an EIA*, only require the generation of *proponent's plan* for consultation subject to the ACO's supervision. There is no mention of First Nation's input into the consultation plan let alone the terms of an environmental review panel in *Level 3 Consultations with an EIA*, something we had argued in the Handbook was a legal requirement.<sup>163</sup> The Guidelines note that *Level 3 Consultations with an EIA* consultation is "expected to be completed within the applicable *regulatory timelines*." The Draft Guidelines had provided that the consultation process was "intended to be used *in addition* to statutory and regulatory requirements" but the Guidelines have removed this. In any case the Policy does not require the consultation process to be complete prior to making the Crown decision as called for by the Courts, although the JOP#2 attempts to coordinate the regulatory approval with First Nation consultation.

In the Federal Consultation Policy<sup>164</sup> an EIA process was promoted as the "the best process" for aboriginal consultation, based on "consultation with aboriginal leaders." This would appear to be the locus of consultation in *Level 3 Consultations with an EIA* in Alberta's Policy. Aside from the well documented concerns about the effectiveness of EIA processes,<sup>165</sup> the focus on effects to the environment is *at best a proxy* for effects on aboriginal rights. Alberta First Nations have expressed these concerns about the Alberta EIA process in their Position Paper.<sup>166</sup> I would argue that an EIA process alone is ill-suited to assess the effect on First Nation's constitutional rights let alone satisfy the duty of consultation and accommodation by the Crown.

It is noteworthy that the Level 2 – Standard Consultation dealing with the majority of consultation situations in the Basic Matrix above, has consultation period of *at best 5 working days longer* than Level 1 Streamlined Consultation and elevation of the consultation level from Level 1 to Level 2 would provide little benefit. In contrast, elevating Level 2 to Level 3 Extensive Consultation added 40 working days for consultation. The consultation periods should be changed. The ACO's requirement to repeat consultation steps would be useful *except* there is no express mention of extending the consultation period to account for the repeated steps.

All of these time lines are structured to favour the proponent.

#### **Stage 4: Consultation Record Review**

All consultation activities must be documented by the proponents and should be

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<sup>163</sup> Handbook, Section 1.1.7.

<sup>164</sup> Now located online: <[https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui\\_1100100014665\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf)> at 25.

<sup>165</sup> See: Jenny Pope et al, "Advancing the theory and practice of impact assessment: Setting the research agenda" (2013) Environmental Impact Assessment Review 41 at 1. For a review of the literature, see also Douglas C Baker & James N McLelland, "Evaluating the effectiveness of British Columbia's environmental assessment process for first nations' participation in mining development" (2003) Environmental Impact Assessment Review 23 at 581 for an early example.

<sup>166</sup> These difficulties are referenced in the Handbook's Appendix 3 at 94.

documented by the First Nation. If there is no First Nation Response within the timelines or at the end of the consultation period, *regardless of the results of the consultation* the proponent may send a copy of their consultation record to the appropriate First Nations for review. The time for First Nations review of the consultation record depends on the level of consultation:

- Level 1 – First Nations will have 5 working days;
- Level 2 – First Nations will have 5 working days; and
- Level 3 – First Nations will have 10 working days.

This time period is intended for review as to accuracy only and not an extension of consultation.

After review the First Nation may comment back to the proponent, the ACO, or both. If the proponent's consultation record appears inaccurate to the First Nation or the ACO, the ACO will work with the proponent and provide direction to address the gaps. If components of consultation remain outstanding, the ACO will consider whether it is appropriate to continue to involve the proponent or whether the ACO will complete the outstanding components.

### ***Consultation Record Review Critique***

The consultation record may be voluminous and this review could put a strain on First Nation consultation capacity. Further, by delaying this exchange to the end of the consultation process misunderstandings may accrue. A better practice would be to encourage regular exchanges of recent consultation records (or amended records if called for) to ensure parties are on the same page.

### **Stage 5: ACO Assessment of Consultation Adequacy**

The Guidelines state that the “ACO is responsible for deciding the adequacy of consultation for activities requiring AER approvals [and] In other cases, the ACO shall provide a recommendation to a Crown decision-maker as to whether consultation is adequate.” This is misleading. Within the government the ACO's recommendation to a Responsible Ministry, i.e. Crown decision maker, will be an expression of government policy. The AER is not within the government and the ACO's advice is confined to providing summary impact and mitigation measure tables – there is no enforcement mechanism to assure the AER complies with the ACO determinations.

The government imposes deadlines on the ACO to conduct this assessment of adequacy as follows:

*Adequacy Assessment:* from the expiry of the First Nation Response Period regarding the consultation record:

- Level 1 – up to 10 days for adequacy assessment for streamlined consultation;
- Level 2 – up to 10 days for adequacy assessment for standard consultation; and
- Level 3 – up to 20 days are required for adequacy assessment for extensive consultation.

Within these 10-20 working days, based on written records alone, the following substantial aspects of consultation must be addressed:

- Evaluating consultation records;
- Providing adequacy decisions for AER approvals and providing adequacy assessments with recommendations for all others; and
- Notifying First Nations and proponents about ACO adequacy decisions for AER approvals.

In assessing adequacy, the ACO will review information gathered during the pre-consultation assessment information review, the proponent's consultation record and any information provided by the First Nation. The ACO will consider, at a minimum, if the following factors have been addressed:

- Were all identified First Nations provided project information and given an opportunity to participate in the consultation process?
- Did the proponent provide project-specific information within a reasonable time before approvals were required or before the project was scheduled to start?
- If the First Nation provided site-specific concerns about how the proposed project may adversely impact their Treaty rights and traditional uses, did the proponent make reasonable attempts to avoid and/or mitigate those potential impacts?
- Did the proponent indicate how they intend to mitigate any potential adverse impacts to the exercise of Treaty rights and traditional uses?

The ACO will provide advice to Responsible Ministries and to the AER as to what mitigation was identified in the consultation process.

The ACO will strive to advise the appropriate ministry if concerns that are not project- and location- specific are presented in the consultation record. That ministry may follow up with First Nations as appropriate to clarify what process may be followed to discuss those concerns.

### ***Assessment Critique***

Working from written records, it is difficult to see how a proper detailed analysis can be undertaken within the timelines – particularly with the additional communication

requirements. There is no mention of Crown mitigation measures such as extended wildlife habitat, additional protections or reserves.

The ACO is in blatant conflict given the *ACO's conduct* of Level 3 (or Level 1 or 2 consultations that are taken over by the ACO) with the *ACO's role in assessing the adequacy* of the fulfilment of the Alberta's duty to consult and accommodate First Nations. We noted this problem in the Handbook and the Guidelines have not addressed this conflict.<sup>167</sup>

There are no mechanisms to contest, review or enforce the ACO's determination as to the adequacy of consultation, which are merely advisory to the AER. The only remedy is to bring bringing expensive, time consuming, resource consuming lawsuits for judicial review within tight timelines. The results of any such judicial review will normally be a Court direction for additional consultation.

#### **4. AER First Nation Consultation Not Required**

One of the principle concerns in the Handbook and within this Update is the possibility that Alberta's duty to consult and accommodate would not be fulfilled when First Nation consultation and accommodation is not required for activities that would warrant it.<sup>168</sup>

A major concern for First Nations is the growth of energy development projects, particularly in the oil sands area with the attendant environmental damage and the cumulative effects of such development. There is always the risk that the ACO may mischaracterize an activity as not requiring First Nation consultation and so advise the Alberta energy regulator, but there is an additional risk posed by the interface between the ACO and AER.

The AER established by REDA has jurisdiction over approvals for energy resource activities under the energy resource enactments and is mandated to regulate the management of public lands; protect the environment and manage water in accordance with the specified enactments.<sup>169</sup> There is an incentive for proponents to make different applications for the same project, each tailored to avoid First Nation Consultation. The AER, under the Second Consultation Direction and JOP#2 will not require First Nation consultation for:

- a) applications in respect of an energy resource activity that is governed by an energy enactment alone with or without a related *Public Land* application, as in the *Prosper* decision;
- b) applications that are listed in the Consultation Guidelines Appendix "C"; or
- c) applications accompanied by a pre-consultation assessment by the ACO indicating that no First Nations consultation is required.

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<sup>167</sup> Handbook at 45.

<sup>168</sup> Handbook at 41.

<sup>169</sup> REDA, ss 1(1)(i), 2.

## Activity Governed by Energy Resource Enactment

As discussed above, in *Prosper* the AER ruled that activities governed by “energy resource enactments” do not engage the Second Consultation Direction. That may be the wrong interpretation, in Bruno and Bankes commentary, *Revised Aboriginal Consultation*, an argument is advanced that:

The statement of scope refers to REDA for the meaning of the terms “application”, “energy resource activity” and “approval”. These terms are each defined under s. 1(1)(a), s. 1(1)(i) and s. 1(1)(b) REDA as follows:

... The above definition of “application” refers to the issuance of an approval, and the definition of “approval” refers to permits and licences issued under both energy resource enactments and specified enactments. The definition of “energy resource activity” refers to an activity that requires an approval issued under an energy resource enactment (or which is listed by regulation as linked or incidental to an activity that requires an approval under an energy resource enactment). This definition does not refer to “specified enactments” – thus, it is hard to see how one can even have an approval of an energy resource activity that is issued under a specified enactment. Given this tangle, it is far from clear that the Direction only applies to applications under specified enactments. Rather, it may be argued that the Direction applies to applications under both energy resource enactments and specified enactments. See e.g. Kirk N. Lambrecht, “Constitutional Law and the Alberta Energy Regulator” at 42-43, here).<sup>170</sup>

As noted above, there are other issues in *Prosper* and it may be that another hearing commission may overrule *Prosper* interpretations,<sup>171</sup> but it remains the law today.

### Activities in Sector Specific – Appendix “C”

Appendix C in the Guidelines lists activities that do not require First Nation consultation for any Responsible Ministry’s decision maker and applications to the AER including:

1. An activity that is regulated by a Code of Practice

The activity is regulated by a “code of practice”<sup>172</sup> under the *Water Act*, **and** *Environmental Protection and Enhancement Act* (EPEA).

This exemption is problematic. The *Water Act* in section 3(2) vests the property and right to diversion in all surface and groundwater in the provincial Crown and it is argued that aboriginal rights to water in Alberta have never been extinguished and still exist notwithstanding the *Water Act*.<sup>173</sup> Secondly, what is the proper interpretation of the bolded word “**and**” of this exemption? Is it conjunctive, that is the exemption only applies

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<sup>170</sup> Bruno & Bankes, “Revised Aboriginal Consultation”, *supra* note 180 at 3-4; For Lambrecht see Kirk N Lambrecht, “Constitutional Law and the Alberta Energy Regulator” (2014) 23 Const F 33.

<sup>171</sup> REDA, *supra* note 11, ss 11-13. Separate Commissions are appointed for each hearing from a roster.

<sup>172</sup> Alberta Queen’s Printer, online: <<http://www.qp.alberta.ca/508.cfm>>.

<sup>173</sup> Monique M Passelac-Ross & Christina M Smith, *Defining Aboriginal Rights to Water in Alberta: Do They Still “Exist”? How Extensive are They?*, Occasional Paper #29 (Calgary: CIRL, 2010).



to activities that are subject to *both* Acts<sup>174</sup> or disjunctive the exemption is for activities regulated by the *Water Act* or the EPEA?

The EPEA has 21 *Codes of Practice* under it, some notable ones include:<sup>175</sup>

- Code of Practice for Compressor And Pumping Stations And Sweet Gas Processing Plants – design and operating requirements for compressor and pumping stations and sweet gas processing plants must meet to ensure environmental protection;
- Code of Practice for Exploration Operations –seismic and oil sands exploration wells;
- Code of Practice for Land Treatment of Soil Containing Hydrocarbons –oil spills;
- Code of Practice for Landfills – operations receiving <10,000 tonnes of waste per year – need not register under EPEA but governed by this code;
- Code of Practice for Pesticides – pesticide *and* herbicide application;
- Code of Practice for Pits – operation of gravel and sand pits; and
- Code of Practice for the Release of Hydrostatic Test Water from Hydrostatic Testing of Petroleum Liquid and Gas Pipelines – wastewater >1000 m<sup>3</sup> from pipeline pressure treatment disposed on land or into water.

The *Water Act* has 4 Codes of Practice, the notable ones include:<sup>176</sup>

- Code of Practice for Pipelines and Telecommunications Lines Crossing a Water Body;
- Code of Practice for the Temporary Diversion of Water for Hydrostatic Testing of Pipelines;
- Code of Practice for Watercourse Crossings.

There is no language in these technical codes to require consultation with First Nations to satisfy the duty to consult and accommodate.

These are significant activities that may impact treaty rights and traditional uses, but it appears that Alberta considers these technical “codes of practice”, which apply under all conditions,<sup>177</sup> adequate consideration of treaty rights and traditional uses.

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<sup>174</sup> The *Water Act* in s 5(1) provides that the Water Director may, if he is of the opinion that the activity requires an approval under the EPEA must refer the application to the Director of the EPEA.

<sup>175</sup> The other 14 are: Code of Practice for a Waterworks System Consisting Solely of a Water Distribution System; Code of Practice for Asphalt Paving Plants; Code of Practice for Compost Facilities; Code of Practice for Concrete Producing Plants; Code of Practice for Energy Recovery; Code of Practice for Forage Drying Facilities; Code of Practice for Foundries; Code of Practice for Hydrologic Tracing Analysis Studies; Code of Practice for Sawmill Plants; Code of Practice for Small Incinerators; Code of Practice for Tanker Truck Washing Facilities; Code of Practice for Wastewater Systems Consisting Solely of a Wastewater Collection System; Code of Practice for Wastewater Systems Using a Wastewater Lagoon; and Code of Practice for Waterworks Systems Using High Quality Groundwater.

<sup>176</sup> The other one is: Code of Practice for Outfall Structures on Water Bodies.

<sup>177</sup> The application of Codes of Practice is modified by 17 associated Maps delineating Management Areas.

2. An activity that requires a short-term diversion of water

The activity requires a short-term diversion of water and use of water authorized by a temporary diversion licence under the *Water Act*. This is a one year unqualified diversion on public lands that may impact Treaty rights including long term effects from the water diversion, for example in draining wetlands or changing migration patterns of waterfowl or other environmental effects.

3. An activity that requires temporary, short-term access to public land

The activity requires temporary, short-term access to public land and were identified as “not requiring consultation” in the *Temporary Field Authorization Guidelines* (see Tables C and D). On January 30, 2014, the *Temporary Field Authorization Guidelines* with Tables C and D were merged into the: *PLAR Approvals and Authorizations Administrative Procedures* (2014) (*PLAR*)<sup>178</sup> that list among others, activities, *Public Land Act* dispositions and Disposition Operating Approval (DOA) that authorize the activities on the particular Disposition as well as Temporary Field Authorizations (TFA) that do not (with one exception) require any First Nation consultation.

The *list of activities that do not require First Nation consultation is extensive in PLAR* – indeed it becomes a serious question as to what activities do require First Nation consultation. There is a bias as to *existing dispositions*, thus new uses for existing dispositions do not require consultation – even if that new use would interfere with Treaty rights and traditional uses, for example First Nation consultation is not required for:

- Temporary Access Roads: if the use will be less than 1 year on existing access roads with no additional surface disturbance – except mulching existing vegetation;<sup>179</sup>
- Flood Recovery (Temp & Disposition Required) & Bank Stabilization – potential permanent structure installed in Flood Recovery Disposition Required;<sup>180</sup>
- Berms (Access Limitation, Onsite & Offsite Containment);<sup>181</sup>
- Drilling waste disposal: all methods including- Spray & pump off to forested lands, land spraying/spreading, and land farming (if <0.25 hectare & <1 year);<sup>182</sup>
- Erosion Protection: <2 years construction activity;<sup>183</sup>
- Additional Area non-linear: <0.5 hectare;

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<sup>178</sup> *PLAR Approvals and Authorizations Administrative Procedures* (2014), online: <<http://aep.alberta.ca/forms-maps-services/forms/lands-forms/aep-forms/documents/ApprovalsAuthorizationsProcedures-Jan2014.pdf>>.

<sup>179</sup> *PLAR* at 46

<sup>180</sup> *Ibid* at 50.

<sup>181</sup> *Ibid* at 51.

<sup>182</sup> *Ibid* at 54.

<sup>183</sup> *Ibid* at 55, also Fireguard if <0.5 hectare

- Flare Stacks, Log Decks, Multi-pipe (existing ROW), sewage disposal <25 m<sup>3</sup>/day;<sup>184</sup>
- Surface water pump off, Road pull-outs for passing/meeting;<sup>185</sup>
- Oil sands exploration (seismic and wells);<sup>186</sup>
- Despite the Consultation Policy trigger promises – there are a number of Plans that do not require consultation, for example: Annual Disturbance/Reclamation Plan; Annual Operating Plan-Surface Materials (oil sands mine); Development and Reclamation Plan and Conservation and Reclamation Business Plan;<sup>187</sup>
- Storage: <3 years and <0.5 hectare;<sup>188</sup> and
- Waiver: Activity Timing Conditions; Alternate Construction Technique; Alternate Uses of Disposition (<2 years & waiver must not materially impact the intention and purpose of the Disposition); and Waiver of Other Condition.<sup>189</sup>

In Table D: Geophysical and Metallic Minerals TFAs, the only activities that First Nation consultation *is required* include:

- New Seismic or Extension of Existing Cutlines: >0.5 hectare with 10 km in Green Area;
- New Metallic and Industrial Mineral: >0.5 hectares & for temporary workspace;
- Staging areas: >0.5 hectares;

Everything else in *PLAR* does not require First Nation consultation, including: Existing Seismic Lines and/or Extension <30 km in Green Area; Shifting Seismic Lines within the same row of quarter-sections; Temporary Creek Crossings; Road Pullouts for passing/meeting; Explosive Magazine Storage in existing clearings; existing Temporary Access only; and Stub-lines in authorized areas.<sup>190</sup>

Depending on the location, especially seismic operations and oil sands exploration activities, all of the *PLAR* authorized activities will have an impact on Treaty rights and traditional uses and should involve First Nation consultation, but the Guidelines expressly excludes this.

4. The activity consists of:

- Adjustments, repairs, replacements, or maintenance made in the normal course of operations.

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<sup>184</sup> *Ibid* at 59.

<sup>185</sup> *Ibid* at 60.

<sup>186</sup> *Ibid* at 63.

<sup>187</sup> *Ibid* at 64-65.

<sup>188</sup> *Ibid* at 71.

<sup>189</sup> *Ibid* at 72-73.

<sup>190</sup> *Ibid*, Table D is at 76-78.

- Short-term testing or temporary modifications to machinery, equipment, or processes that do not result in a *new surface disturbance* beyond the normal course of operations.

These do not appear to be problematic, although as noted above this reflects Alberta's view of Treaty rights and traditional uses requiring undisturbed land.

5. The application is for renewals and amendments to existing authorizations:

- Correcting clerical errors;
- Effecting a change in ownership;
- Addressing matters related to temporary discontinuance of an activity;
- Filing as-built (final survey submissions) if the lands applied for have not changed from the original application; and
- Amendment for the purpose of deleting lands from an application (deletion of lands)

On the surface these do not appear to be problematic, but the following changes could raise issues of First Nation Consultation:

- Amalgamate authorizations – what happens if an authorization not requiring First Nation Consultation is amalgamated with one that does?
- Changing monitoring, reporting, or inspection requirements – what if these are mitigation requirements or conditions of approval?
- Amend a term of condition if there is no new surface disturbance beyond the normal course of operations – what if these are mitigation requirements?

Almost all of Appendix “C” activities have the potential to affect Treaty rights and traditional uses.

Appendix “C” has the Reserve Power in the ACO to elevate consultation. However if the proponent relies on Appendix “C” alone in an application to the AER, which the Second Consultation Direction's JOP#2 allows – the ACO may be unaware of the specifics in the application and be unable to exercise the Reserve Power and result in the First Nation not being consulted appropriately.<sup>191</sup>

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<sup>191</sup> The Second Consultation Direction Section 4 says “The AER shall direct proponents to contact the ACO for any proposed or planned energy resource activity prior to submitting an energy application to the AER.” Section 5 a) allows for a copy of the application or ACO access. The JOP#2 at 4-5 in Section 3.1 describes the ACO-AER Process 1 (No Consultation Required) and relies on the proponent to “... *proponent checks appendix C of the Consultation Guidelines* to determine if consultation is not required ... [and] If the activity or application is listed, *the proponent may proceed to apply to the AER.*” The Government of Alberta's Proponent Guide to First Nations Consultation Procedures for Land Dispositions, February 2015 is also silent in this regard. Online: <<http://indigenous.alberta.ca/documents/ProponentGuide-FirstNationsConsultation-ProceduresLandDispositions.pdf>>.

## Pre-Consultation Assessment by ACO

The third way in which an applicant need not conduct First Nation consultation is to have the ACO do a Pre-consultation Assessment, this would normally take 4 business days. As described above, the ACO will consider: the proposed project, relevant decisions and activities; available information on the exercise of Treaty rights and traditional uses such as heritage designations, government consultation maps and current consultation agreements (there are none). More significantly “[w]hether the proposed activity can be regarded as having, been adequately covered by a previous consultation and has had either minor or no subsequent changes and therefore is not subject to further consultation on potential adverse impacts on Treaty rights and traditional uses.” This is open to interpretation either: (1) it is the same activity that has been consulted on before with minor changes not involving adverse impacts or (2) it is in a *similar class* of activities that has been consulted on before, but in either case the First Nation will not receive any consultation notice.

Any application to the ACO for activities in Appendix C may engage the Reserve Power to elevate or require First Nation Consultation and may encourage separate applications. Assuming the activities are not covered by Appendix A discussed above pages 42 to 45, the activities which may or may not require consultation are listed in the Appendix B.

In Appendix B, the Reserve Power can be used and there are three General circumstances when consultation may not be required.

- If consultation was deemed adequate within the past two years and there have been no adjustments to the scope or footprint of the project, consultation may not be required. *This may be problematic, depending on how the ACO interprets “scope or footprint of project”.*
- Consultation on reclamation plans may not be required if the site was previously disturbed or previous consultation occurred within the footprint. *–This presumes that reclamation plans and reclamation activities are benign and also how ACO interprets “footprint.”*
- Approval amendments and renewals: As long as the amendments/renewals are within the scope of the original approval and no new impacts are contemplated (new lands or novel impacts to existing lands), consultation may not be required. *– Dependent on ACO interpretation of “scope original approval” and concerns about “renewals” some temporary effects on Treaty rights, assuming those effects had been consulted on, may be accepted but lengthening them may be problematic.*

There are seven categories of activities in Appendix B, including

- (1) Forestry and Fire Management – the activities that do not require consultation depending upon the initial depth of consultation i.e. Herbicide plan with previous consultation at the General Development Plan stage – *if differing herbicides use is consulted on then a change may be acceptable but if not then need consultation –*

proscribed burns – “little to no risk” *Notice consultation should be required.*

- (2) Transmission Lines and Utility Corridors – Power lines and vegetative control easements that overlap existing surface dispositions, within <5 m of new cut. – *existing surface dispositions may be for an entirely different purpose, no length limit, 5 m new cut is as wide as legacy seismic lines – that do not regrow – consultation should be required.*
- (3) Geophysical surveys – defined as low impact seismic<sup>192</sup> with narrow meandering lines or utilizing existing lines – *any new lines should require consultation – drill holes are plugged/reclaimed within one season – should be within one month, anything longer migratory patterns may be disrupted.*
- (4) Coal, Minerals, and Quarries – same description below.
- (5) Petroleum, Natural Gas, and Oil Sands – a Program on existing linear disturbance, (e.g. roads, power lines) or disturbed areas or previously approved programs/dispositions. – *existing linear disturbance should at a minimum be a dedicated road otherwise consultation is required; if previously approved programs/dispositions involved the same use otherwise consultation – this is the most dependent on ACO interpretation.*
- (6) Pipelines – Pipeline installation or replacement on lease (PIL); and located on existing dispositions. – *existing dispositions must be consulted on PIL – Bored pipelines – consultation should be necessary.*
- (7) Sand and Gravel – Activities that are temporary, usually under 90 days, with land use ≤640 acres – *This is 1 section or 259 hectares – there is no volume limits attached – this can be a significant impact and should engage consultation requirements.*

The Pre-consultation assessment by the ACO will, under the deadlines for an ACO decision, be necessarily rushed and superficial and can involve significant potential impacts from activities listed in Appendix B on Treaty rights and traditional uses.

### ***Consequences of No Consultation***

Finally, I note the consequences of a decision that no First Nation consultation is required and therefore:

- the affected First Nation will never receive formal notice;
- litigation may result – delaying the activity if possible;
- damage will be done by the activity – poisoning the First Nation towards the proponent and Alberta, ACO, AER and anyone else associated with the approval; and

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<sup>192</sup> Described as “Non-intensive 3D and 2D (>300 m source line spacing) Activity is of a very low intensity (e.g. narrow meandering lines or utilizing existing lines); little or no disturbance to the ground-level vegetation or soils; no mechanical ground access; short duration (usually a few weeks); drill holes are plugged/reclaimed within one season; negative impacts to land are mitigated through approval conditions and exploration directives and directions within the Policy and Procedures for Submitting the Geophysical Field Report.”

- future proposals involving the proponent and First Nation consultation will be less likely to succeed or involve inordinate compensation.

Litigation may not be confined to contesting the lack of notice or the inadequacy of Alberta's Consultation Policy but include any resulting harms or infringements.

## **5. Industry Concerns – New Consultation Policy**

In general, oil, gas and oilsands developers are looking for certainty and stability in the regulation of their industry. They are not indifferent to costs but given the traditional business environment of significant revenues, the cost of compliance is a limiting factor in advancing any project. A more significant consideration is the length of time to obtain regulatory approvals in each jurisdiction with the consequent loss of revenue.

Receiving regulatory approval for contentious oil and gas projects used to require an approval from the ERCB with limited appeals to the Alberta Court of Appeal and even fewer to the Supreme Court. Industry could prevail on First Nations to forgo public hearings, that would delay the project, by way of industry driven compensation through a variety of Impact Benefit Agreements.

With Alberta's release of the Consultation Policy in August of 2013 and the passage of REDA in June of the same year, Alberta has interjected itself into the First Nation consultation process.

Now, before even reaching the regulatory process, the Consultation Policy and Guidelines require industry to request a First Nation consultation assessment from the ACO. If the ACO says consultation is required – consultations will have to be conducted, the ACO will supervise consultation, the ACO will review consultation records with the potential to require additional consultation and make a decision as to adequacy with a recommendation to the AER. The adequacy decision of the ACO may be subject to judicial review by the Court of Queen's Bench, an appeal to the Court of Appeal and a more likely appeal to the Supreme Court. This adds a layer to the regulatory approval process.

This delay and uncertainty have led international firms to reconsider projects in Alberta – even before the recent downturn in oil and gas prices. This remains a concern for industry.

## **Conclusions**

The original First Nation Consultation Policy in 2005 was unsatisfactory to Alberta First Nations who rejected it and actively engaged Alberta with their concerns to little avail.<sup>193</sup> The traditional reluctance of the Energy Resources Conservation Board (ERCB) to consider the adequacy of Crown consultation and First Nation constitutional questions,

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<sup>193</sup> Handbook Section 2.1 and 2.2.

despite the jurisdiction to do so,<sup>194</sup> left the First Nations with only the threat of extensive public hearings. The delay in extensive public hearings for industry was enough to compel a variety of confidential Impact Benefit Agreement (IBA) between industry and First Nations to forego regulatory objections. As discussed in Neil Reddekopp's paper, the "Theory and Practice in the Government of Alberta's Consultation Policy" (2013)<sup>195</sup> this compelled rapprochement between industry and First Nations because Alberta's indifference was "neither permanent nor particularly stable."<sup>196</sup> That rapprochement, however unsatisfactory to First Nations was generally viewed to be satisfactory to industry – as evidenced by the lack of litigation by First Nations in the preceding decade.<sup>197</sup> However, as Mr. Reddekopp notes this apparent lack of litigation was motivated by a number of factors not the least of which was First Nation poverty.<sup>198</sup>

All of this appeared to change in 2013 when Alberta interjected itself into the consultation process with Alberta's revised approach to First Nations consultations embodied in:

1. The creation of the AER in REDA and the removal of AER jurisdiction in regard to the adequacy of Crown consultation in section 21;
2. The passage of the *Levy Act* to provide funding for First Nations consultation capacity;
3. The centralization of First Nation consultation and accommodation within the office of the ACO in Alberta's Indigenous Relations Ministry;
4. The release of the Consultation Policy and Guidelines.

Alberta's interjection into First Nation consultation has had mixed results.

### AER Jurisdiction

The AER, established under REDA, is structured as an independent industry funded regulator governing all upstream coal, oil, gas and oil sand activities with environmental authority over public lands used for energy related activities under the specified enactments. The AER's jurisdiction has been narrowed to allow consideration of persons who were "directly and adversely affected" and removed any possibility for the AER to consider the adequacy of Crown consultation. Instead the AER would receive adequacy advice from the ACO pursuant to Ministerial Directions under section 67 of REDA.

However, the AER as a regulatory body has the duty to act constitutionally including respecting aboriginal rights under section 35 of the *Constitution Act, 1982*. This was the argument in the very first decision of the AER in the approval of the Devon/Brion Project where leave was granted by the Alberta Court of Appeal but a confidential

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<sup>194</sup> Handbook Section 3.5.2. The AER has continued this practice, Handbook Section 3.5.3.

<sup>195</sup> Neil Reddekopp, "Theory and Practice in the Government of Alberta's Consultation Policy" (2013) 22 Const Forum Const 48 at 55-58.

<sup>196</sup> *Ibid* at 58.

<sup>197</sup> *Ibid* at 55-56.

<sup>198</sup> *Ibid*.



agreement was reached between the project proponent and First Nations before the hearing of the appeal. This issue will continue to arise.

With respect to the delay occasioned by public hearings before the AER particularly with major projects in the oilsands area First Nations would qualify as being affected and public hearings would be necessary. While the AER is directed to accept the ACO's advice - First Nations can still raise issues of consultation and accommodation that are unresolved to their satisfaction in the public hearings unless an IBA is entered into with them.

Some of the AER's decisions remain problematical, for example:

- the decision in *Prosper* categorizing all land public land uses to be equal may violate the *Sparrow* doctrine as to the priority of aboriginal harvesting;
- the reliance on LARP to deny buffer zones next to First Nation Reserves in *Brion/Devon* and *Prosper* may be questionable in light of the Review of LARP, 2015; and
- the narrow interpretation of standing being limited to those persons directly and adversely affected within a small geographical area.

#### Levy Act

The *Levy Act* was intended to provide a fund for First Nation consultation capacity to be shared by industry by levying a fee on certain industry applications. However, section 8 of the *Levy Act* compelled disclosure of industry funding to First Nations for “consultation related activities” to the province justified by the goal of transparency.

In most IBA arrangements funding for First Nation consultation activities, such as Traditional Land Use Studies are a small component. The bulk of the privately negotiated confidential IBA is directed towards the compensation for impacts on the First Nation communities through moneys, investments, job opportunities or other benefits. Indeed some First Nations have Consultation Protocols that charge fees to project proponents to fund their consultation activities. Motivated in part by the regulatory tribunal requirement to “level the playing field” and business interests in advancing the timing of approval, providing reasonable funding to First Nations to participate in the regulatory process has long been an accepted practice in Canada. As a practical matter industry was already paying for consultation capacity for affected First Nations

The *Levy Act* was stalled and later cancelled due to industry and First Nation concerns over disclosure of confidential agreements, effect on Federal funding for First Nations and other legal issues. With the demise of the *Levy Act* – the *status quo ante* prevails with industry still funding First Nation consultation capacity as a standard practice.

## ACO

In the Handbook, we had lauded the concentration of First Nation Consultation and Accommodation capacity within one office of the government given the unique understanding and intercultural sensitivity required for effective and meaningful First Nation consultation and accommodation. This was qualified by the concern over the inherent conflict between the dual roles wherein the ACO's conducts consultation and the ACO's determination as to the adequacy of its own conduct.

The Guidelines have undone any centralization benefits by moving to the decentralized model of the old 2005 Consultation Policy by requiring, the ACO *or* the Responsible Ministries to conduct substantive aspects of consultation. The inherent conflict in the ACO's dual roles remains and has been expanded to conflicts within the Responsible Ministries.

## Consultation Policy and Guidelines

With the removal of jurisdiction from the AER to consider the adequacy of Crown consultation, Alberta lost the metaphorical fig leaf of the unexercised jurisdiction of the ERCB over the adequacy of Crown consultation and assumed responsibility for Crown consultation directly.

The implementation of Alberta's Consultation Policy was structured for quick, limited consultation, shared expense in the *Levy Act*, and the segregation of the single energy regulator from considering the adequacy of government consultation. It has failed.

Alberta's interpretation of the governing treaties as protecting the rights to hunt and fish for food is mistaken. Traditional uses as not treaty rights is mistaken. The requirement as recognizing only the continued use of treaty rights and traditional uses further restricts the application and will, with further development, continue to restrict the recognition of treaty rights. This unique narrow interpretation drives the recognition of treaty rights in Alberta as being confined to surface activities without regard to the environment to support those treaty rights. It also drives the incorrect implication that these treaty rights may only be exercised on undisturbed land. This unique interpretation is in contrast to what the Supreme Court of Canada indicated with respect to the interpretation of Treaty No. 8 in *Mikisew*: the treaty right was the right to livelihood from the surrendered lands held by the Crown and is contrary to what the Court of Appeal said in *Cold Lake* which involved long disturbed public lands where treaty rights applied.

This narrow interpretation drives the application of the Consultation Policy to decisions related to surface activities and in particular the distinction between environmentally related "specified enactments" where consultation might be required and "energy resource enactment" approvals where consultation is not required. This denies the connectivity between land and sub-surface activities that affect the environment necessary to support Treaty harvesting rights.

Other notable failures of Alberta's Consultation Policy include:

- limited application to the areas of continued current exercise of treaty rights;
- the lack of a process for First Nations to compel government consultation in any fashion especially with respect to changing land uses for present and future development;
- minimal time of 4 to 10 days for the ACO to conduct Pre-consultation Assessments that will drive the levels of consultation:
  - Level 0 – No Consultation and no notification – and this result is possible without going through the ACO;
  - Level 1 – Streamlined Consultation with 15 days to conduct consultation;
  - Level 2 – Standard Consultation with 20 days to conduct consultation;
  - Level 3 – Extensive Consultation with 60+ days to conduct consultation.
- minimal time of 10-20 days for the ACO to assess the adequacy of fulfillment of the Crown's duty to consult and accommodate from written records while in a blatant conflict of interest by assessing its own conduct;
- inadequate time to properly assess project proposals, potential mitigation measures and options particularly with inadequate consultation capacity;
- inadequate provision of mitigation options confined to the proponent's plan modification without authority from the Crown to address substantial aboriginal concerns – further distorting the process; and
- fixed timelines and fixed matrices based on flawed considerations.

The Guidelines have tinkered with the Consultation Policy at the margins but have not recast the Consultation Policy into an effective meaningful consultation process that First Nations have called for and are entitled to. Some beneficial aspects of the Guidelines include:

- direction that each step be undertaken in good faith by all parties;
- the ACO's power to require repeated steps in the consultation process;
- the ACO's expanded list of consultation services and First Nation access to them, albeit limited to those that "may be required";
- the ACO's ability to intervene in the process, although whether that will allow for mitigation measures that only the Crown can provide is uncertain; and
- the ACO's Reserve Power to elevate the level of consultation, although that may not be available with the proponents proceeding with activities listed in Schedule "C" directly to the AER.

Some negative aspects include:

- distributing the substantive aspects of consultation to the Responsible Ministries;
- incorporating the concept of surface disturbance areas where treaty rights cannot be exercised and do not require consultation;
- grandfathering prior consultations to determine the need for new consultation;
- the change from the consultation process being in addition to the regulatory process to being in alignment with the regulatory process; and

- the difference between the time for Streamlined Consultation and Standard consultation remains minimal.

The failure of the Guidelines to significantly modify the failures of the Consultation Policy is understandable but regrettable. It does underscore that further changes in the Guidelines, promised annually, will not address the deficiencies in the Consultation Policy or process.

In short, Alberta's Consultation Policy and its implementation as reflected in the new Guidelines fails to consult and accommodate honourably. It continues to frustrate industry stakeholders and First Nation rights holders.

### New Promises

Previous Alberta Governments have continually promised to revisit Alberta's constitutionally mandated process for indigenous consultation and accommodation, the last government promised to do so in October of 2014. The current government made an election promise, to negotiate with First Nations on a new consultation policy and promised to implement the *United Nations Declaration on the Rights of Indigenous Peoples, 2007*. We await concrete action on this promise.

I note the urgency of improvement in the Alberta consultation process. The development of the oil sands has been at the centre of provincial aspirations for a growing economy, even before the recent concerns about climate change, Alberta's treatment of the First Nations in the oil sands area has brought domestic and international condemnation. The First Nations in Alberta are not anti-development but they have legitimate concerns over the manner and pace of development that result in changes to the health and wellbeing of their communities. Economic reasons aside, reconciliation with indigenous peoples is not only a Canadian constitutional requirement but an aspirational value in a just and democratic society. The development of a meaningful consultation process requires government engagement with the First Nations, industry and the public. This engagement will take considerable time and a prolonged effort on the part of all Albertans. We await further developments in this dynamic area of Alberta law.

## Appendix A

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

### Introduction

The Government of Alberta ("Alberta") is committed to strengthening relationships with First Nations through the continued recognition of the Treaty relationship between First Nations and the Crown. Alberta's legal duty to consult and accommodate is grounded in the honour of the Crown. Under this Policy, Alberta will seek to reconcile First Nations' constitutionally protected rights with other societal interests with a view to substantially address adverse impacts on Treaty rights and traditional uses through a meaningful consultation process.

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. In this document, "decisions relating to land and natural resource management" refers to provincial Crown decisions that directly involve the management of land, water, air, forestry, or fish and wildlife.

### *Treaty Rights Context*

Alberta respects that First Nations' Treaty rights are protected by section 35 of the *Constitution Act, 1982*, and understands the important role these rights have in maintaining First Nations' cultures and traditions. Alberta recognizes that impacting Treaty rights to hunt, fish, and trap for food may trigger a duty to consult. These rights may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.

### *Traditional Uses*

Alberta recognizes that First Nations may engage in customs or practices on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations ("traditional uses"). Traditional uses of land include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land. First Nations' traditional use information can help greater inform Crown consultation and serve to avoid or mitigate adverse impacts. Alberta will consult with First Nations when traditional uses have the potential to be adversely impacted by land and natural resource management decisions.

### *Duty to Consult*

Consultation is a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on First Nations' Treaty rights, with a view to substantially address them. Alberta recognizes that a duty to consult exists when the following three factors are all present:

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1. Alberta has real or constructive knowledge of a right;
2. Alberta's decision relating to land and natural resource management is contemplated; and
3. Alberta's decision has the potential to adversely impact the continued exercise of a Treaty right.

### *Accommodation*

Consultation may reveal a Crown duty to accommodate First Nations. The primary goal of accommodation will be to avoid, minimize, or mitigate adverse impacts of a Crown decision on Treaty rights or traditional uses.

Accommodation, where appropriate, will be reflected in the Crown's decision.

### **Policy Response**

Through *The Government of Alberta's First Nations Consultation Policy on Land and Natural Resource Management, 2013* ("Policy"), Alberta will seek to reconcile First Nations' Treaty rights and First Nations' traditional uses with Alberta's mandate to manage provincial Crown lands and resources.

Alberta will consult with First Nations when Crown land and natural resource management decisions may adversely impact Treaty rights protected under the *Constitution Act, 1982*, as well as traditional uses.

In conjunction with the changes to the regulatory regime represented by the Integrated Resource Management System and Regulatory Enhancement Project, Alberta intends to increase its emphasis on strategic consultation. Strategic consultation will be defined in the operational guidelines.

### **Policy Application**

#### ***Provincial Crown Lands***

This *Policy* applies to strategic and project-specific Crown decisions that may adversely impact the continued exercise of Treaty rights and traditional uses. Specifically, the *Policy* applies to Crown decisions in relation to land and natural resource management with the potential to adversely impact

- Treaty rights on provincial Crown lands, as described above; or
- Traditional uses on provincial Crown lands, as described above.

Alberta may enter into specific consultation process agreements with individual First Nations to further clarify the consultation process. A formal process to outline the creation of consultation process agreements will be developed after the implementation of this *Policy*. Consultation process agreements will be consistent with this *Policy*.

### ***Matters Subject to this Policy***

Crown decisions that Alberta will assess for potential consultation will include:

- Provincial regulations, policies, and plans that may adversely impact First Nations Treaty rights and traditional uses; and
- Decisions on projects relating to oil and gas, forestry, and other forms of natural resource development that may adversely impact First Nations Treaty rights and traditional uses.

### ***Matters Not Subject to this Policy***

Crown decisions that Alberta will *not* assess for potential consultation will include those relating to:

- Leasing and licensing of rights to Crown minerals;
- Accessing private lands to which First Nations do not have a right of access for exercising their Treaty rights and traditional uses;
- Crown decisions on policy matters that are unrelated to land and natural resource management; and
- Emergency situations that may impact public safety and security.

The *Policy* does not preclude other Crown processes that may engage First Nations and lead to government-to-government agreements or resolutions. That engagement may occur between First Nations and Crown officials and elected leadership.

### ***Federal Crown Lands***

In some cases, the *Policy* may also apply to provincial Crown decisions relating to or impacting lands other than provincial Crown lands. Alberta recognizes that First Nations members may also be exercising Treaty rights and traditional uses on federal Crown lands (including Indian reserves). Therefore, consultation with First Nations may be required for provincial Crown decisions with the potential to adversely impact the exercise of Treaty rights and traditional uses on federal Crown lands.

### ***Guiding Principles***

In November 2005, the Supreme Court of Canada released its decision in *Mikisew Cree First Nation v. Canada*, addressing the Crown's duty to consult First Nations in Treaty areas. From this decision and others, a number of principles have been derived to help guide consultations in a respectful and meaningful manner. Alberta believes that the following principles will result in meaningful consultation.

- Alberta will consult with honour, respect, and good faith, with a view to reconciling First Nations' Treaty rights and traditional uses within its mandate to manage provincial Crown lands and resources for the benefit of all Albertans.
- Consultation requires all parties to demonstrate good faith, reasonableness, openness, and responsiveness.

- Consultation should be carried out before Crown decisions on land and natural resource management are made. Where appropriate, consultation will be done in stages.
- Alberta and project proponents will disclose clear and relevant information regarding the proposed development, decision, or project to First Nations and allow reasonable time for review.
- The level of consultation depends on the nature, scope, magnitude, and duration of the potential adverse impacts on the Treaty rights and traditional uses of the affected First Nation.
- Alberta will inform First Nations and project proponents of known potential adverse impacts and the degree of consultation to be undertaken.
- Alberta will solicit, listen carefully to, and seriously consider First Nations' concerns with a view to substantially address potential adverse impacts on Treaty rights and traditional uses.
- Proponents must act within applicable statutory and regulatory timelines and in accordance with *The Government of Alberta's Corporate Guidelines for First Nations Consultation Activities*.
- First Nations have a reciprocal onus to respond with any concerns specific to the anticipated Crown decision in a timely and reasonable manner and to work with Alberta and project proponents on resolving issues as they arise during consultation.
- The Crown's duty to consult does not give First Nations or project proponents a veto over Crown decisions, nor is the consent of First Nations or project proponents required as part of Alberta's consultation process.
- Accommodation will be assessed on a case-by-case basis and applied when appropriate. The Crown is ultimately responsible for accommodation, but project proponents may have a role in accommodating First Nations.

## **Elements of Consultation**

### ***Content of the Duty***

The content of the duty to consult and the appropriate level of consultation to be conducted are based on specific factors. Because the degree of consultation required varies with specific circumstances, Alberta's approach to meeting the duty to consult requires flexibility and responsiveness.

Alberta has developed draft *Government of Alberta's Corporate Guidelines for First Nations Consultation Activities* ("*Corporate Guidelines*"), which include a draft consultation matrix that classifies activities according to their relative potential impact on Treaty rights and traditional uses. Operational matrices will be created to identify when (i.e. in what cases) and how much (i.e. the degree of) consultation is required. The matrices will also identify timelines within the consultation process.



### ***Scope of Consultation***

The scope of consultation will be defined by the project or initiative being proposed and its potential adverse impacts on the continued exercise of Treaty rights and traditional uses. For projects or initiatives to which the operational matrices would apply, Alberta will use the operational matrices to make its initial determination of the scope of consultation.

### ***Depth of Consultation***

Alberta recognizes that more consultation may be required where the potential adverse impact on Treaty rights and traditional uses is greater. Factors that could influence the depth of consultation include:

- The geographic extent of the anticipated Crown decision's impact on the land or resources; and
- The degree to which First Nations have used the affected lands and resources for the exercise of Treaty rights and traditional uses and continue to do so today.

### ***Consultation Office***

Alberta will also establish a consultation office that reports to the Minister of Aboriginal Relations. In satisfying Alberta's duty to consult, this office will manage all aspects of consultation, including:

- Policy development and implementation;
- Pre-consultation assessment;
- Management and execution of the consultation process;
- Assessment of consultation adequacy;
- Consultation capacity-building initiatives with First Nations; and
- Measures to protect the transparency and integrity of the consultation process.

The consultation office will carry out these activities in a manner described in this *Policy* and the draft *Corporate Guidelines*.

### ***Direct Consultation by the Crown***

Alberta will consult directly in the following situations:

- When Alberta undertakes strategic initiatives with the potential to adversely impact Treaty rights and traditional uses;
- When Alberta acts as a project proponent; and
- When a project requires Level 3 consultation as set out in the draft *Corporate Guidelines*.

Direct Crown consultation will ordinarily be carried out by the consultation office with support from appropriate provincial departments. Consultation for certain strategic initiatives may be led by provincial departments with support from the consultation office. For Level 3 consultation, proponents may be required to participate in and lead various aspects of direct consultation.

## Delegation

Within this *Policy*, a proponent is defined as “an entity or person who is either applying for or seeking a Crown decision related to land and natural resource management.” Alberta recognizes that the legal duty to consult rests with the Crown. However, when consultation relates to specific projects, the law allows the Crown to delegate procedural aspects of consultation to project proponents.

Generally, the consultation office will delegate procedural aspects of consultation for projects where the preliminary assessment indicates that the scope of consultation is limited (refer to the operational matrices within the draft *Corporate Guidelines*). When delegating aspects of consultation, the consultation office will assess consultation adequacy. The level of consultation that the consultation office requires of proponents depends on the extent of the potential adverse impacts on the Treaty rights and traditional uses and the scope and depth of the proponents’ anticipated activities.

When it delegates procedural aspects of consultation, the consultation office will remain engaged in the consultation process. In general, procedures that may be delegated to project proponents include:

- Providing First Nations with plain language information on project scope and location;
- Identifying potential short- and long-term adverse project impacts;
- Meeting with First Nations to discuss their concerns;
- Developing potential mitigation strategies to minimize or avoid adverse impacts;
- Implementing mitigation measures, as directed; and
- Summarizing, for both Alberta and First Nations, consultation efforts including an explanation, when required, of how specific First Nations’ concerns regarding adverse impacts have been addressed.

Despite the above, the consultation office will direct and manage all aspects of consultation for those projects requiring Level 3 consultation with First Nations as set out in the draft *Corporate Guidelines*. In cases involving proponents, the consultation office will guide the proponents in how to support the consultation.

Proponents will summarize, for both Alberta and the appropriate First Nations, their consultation efforts in a way that clearly demonstrates how mitigation strategies will address impacts to the Treaty rights and traditional uses. Using this information, the consultation office will assess the adequacy of consultation and provide direction to proponents regarding mitigation.

Alberta acknowledges that some First Nations have developed their own consultation protocols. Alberta encourages proponents to be aware of these protocols, but does not require proponents to comply with them while consulting with First Nations. In cases of conflict between a First Nation’s consultation protocol and this *Policy* or the *Corporate Guidelines*, the *Policy* and *Corporate Guidelines* will prevail.

As stated above, the consultation office will manage delegated aspects of consultation. Forthcoming operational guidelines will set out minimum standards for delegated consultation activities, specific timelines, and a range of Crown-management activities. This clarification of the Crown's role will help ensure delegated consultation activities are meaningful and consistent with the *Policy*.

## **Roles and Responsibilities in Delegated Consultation**

### ***Government of Alberta***

#### **Conducting a Pre-Consultation Assessment**

Pre-consultation assessments will guide the consultation office in determining if consultation is needed in the circumstances and, if so, the scope and extent of the consultation required. The consultation office will complete this initial assessment as early as possible in the planning phase of an anticipated Crown decision.

#### **Determining Notification Requirements**

The consultation office is responsible for determining which projects require consultation and which First Nations need to be notified and for directing proponents to provide reasonable time for First Nations to respond with their specific concerns about the potential adverse impacts.

#### **Considering the Response and Determining Adequacy**

The consultation office will determine whether delegated activities were performed adequately by considering what efforts were made to mitigate or substantially address potential adverse impacts on Treaty rights and traditional uses. This assessment of adequacy will be made after consultation is completed and before the Crown decision is made. If the consultation office finds performance to be inadequate, the consultation office may direct the proponent to take further steps to achieve adequacy.

#### **Accommodating First Nations**

While accommodation is the responsibility of the Crown, proponents will have a role in identifying and implementing potential mitigation measures, where appropriate.

#### **Reporting the Decision and Following Up**

In a manner consistent with the draft *Corporate Guidelines*, Alberta may report its decision in writing to the affected First Nations. When procedural aspects of consultation are delegated, it is expected that proponents will identify adverse impacts on Treaty rights and traditional uses to Alberta, and how they plan to mitigate those impacts.

## **First Nations**

### **Timely Information Sharing and Communication**

First Nations have a reciprocal obligation to be timely in responding to the Crown's efforts to consult and in providing Alberta or proponents with specific information on how the project or initiative may adversely impact the exercise of their Treaty rights and traditional uses. The obligation also requires First Nations to report consultation concerns to Alberta as soon as possible. First Nations are invited to work with Alberta to identify the geographic areas on which they have historically exercised their Treaty rights and traditional uses and continue to do so.

### **Providing a Single Point of Contact**

Consultation will occur on a government-to-government basis. Alberta recognizes that consultation will require the participation of different levels of officials, employees, or agents of Alberta and First Nations, depending on the nature of the anticipated Crown decision and the organizational structure of the particular government. For clarity and efficiency, Alberta requires First Nations to identify a single point of contact to serve as the First Nation's authorized consultation representative that Alberta or the proponent should contact. A First Nation's Chief and Council, ordinarily recognized by Canada, may serve as this representative.

## **Project Proponents**

### **Carrying Out Delegated Activities**

Project proponents that have procedural aspects delegated to them by Alberta's consultation office may include industry, municipal governments, or any other organization requiring Crown approval of a project. The consultation office will assess the adequacy of the consultation. As directed by Alberta, proponents will notify potentially affected First Nations early in project planning to allow reasonable time for First Nations' concerns to be considered. Proponents will discuss project-specific issues that arise with First Nations as well as strategies to address those concerns.

## **Consultation Timelines**

The assessment of consultation adequacy will generally occur within applicable statutory and regulatory timelines and in accordance with the *Corporate Guidelines*.

## **Coordinating Consultation**

Consultation may involve coordination across jurisdictions, departments, agencies, and processes. Alberta will continue to work on enhancing cross-government working relationships, in order to strengthen this coordination. Alberta will also develop coordination processes with other provincial and territorial governments, Canada, or agencies of government, with a view to increasing information-sharing and cross-jurisdictional collaboration.

## ***Alberta Energy Regulator***

Alberta has established the Alberta Energy Regulator (“the Regulator”). This Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation-associated First Nations’ Treaty rights as recognized and affirmed under Part II of the *Constitution Act, 1982*. The consultation office will work closely with the Regulator to ensure that any needed consultation occurs for decisions on energy project applications within the Regulator’s mandate.

## **Consultation Capacity**

Alberta will develop a program to increase capacity funding to First Nations and to fund that program through a levy on industry. The consultation office will be responsible for managing and distributing this funding to First Nations. Alberta will solely fund government-led consultation for Crown projects.

## **Transparency of Process**

The integrity of the consultation process depends on all parties knowing clearly at each step of a consultation what the costs of that consultation will be.

The levy and its resulting funding contribute to this transparency by increasing consultation capacity of First Nations. Alberta supports general community economic development initiatives which proceed outside this *Policy*, including current discussions with First Nations on an Economic Opportunities Initiative. The option of entering into agreements about project impact benefit agreements is open for exploration between First Nations and proponents.

Measures to maintain integrity of the consultation process will be contained in guidelines developed to support this *Policy*.

## **Corporate and Operational Guidelines**

To provide all parties to the consultation process with increased clarity and direction, and to ensure that consultation is meaningful, Alberta will adopt *Corporate Guidelines* and operational guidelines that will:

- Develop a range of Crown-monitoring activities for delegated consultation;
- Clarify specific information required from First Nations on projects and initiatives;
- Coordinate consultation by working with Canada and provincial governments;
- Reflect the needs of proponents and First Nations as well as specific ministry mandates and regulatory processes; and
- Guide the development of consultation matrices to identify triggers, project scope, and depth of consultation, and address the range of projects and initiatives and their potential to impact Treaty rights and traditional uses.

## Review

It is important for all parties to continue to identify, discuss, and resolve issues related to First Nations consultation. Alberta will review this *Policy*, and all associated documentation, in separate engagement forums with First Nations, industry, and other stakeholders annually as mutually decided upon by the affected parties. The purpose of these forums will be to assess the performance, standards, and best practices of the consultation process. This will ensure that the *Policy* reflects developments in First Nations consultations and responds to the future needs of First Nations, industry and other stakeholders. Alberta reserves the right to amend this *Policy* as appropriate.

## Conclusion

This *Policy* replaces *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (adopted May 16, 2005) and comes into force upon a date to be specified.

Alberta's previous *First Nations Consultation Guidelines on Land Management and Resource Development* (updated November 14, 2007) outlined procedures to help the Crown implement its duty to consult. The *Policy* and *Corporate Guidelines* support these existing guidelines, which will remain in effect, with necessary changes, until forthcoming operational guidelines under the *Policy* come into effect. Many of the matters outlined in the *Policy*, including the consultation office, operational matrices, the consultation levy and consultation process agreements, will require further engagement and discussion with First Nations, industry, and other stakeholders.

In the event of a discrepancy between the *Policy* and the existing guidelines, the *Policy* will prevail. Where consultation on a project or initiative has commenced prior to this *Policy* coming into effect, consultation will be completed under the previous policy and guidelines.

## **Appendix B**

# The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management

July 28, 2014

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# 1. Introduction

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*The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013 (2013 Policy)* was released on August 16, 2013. The *2013 Policy* and this document, *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (Guidelines)*, replace the 2005 policy and the guidelines established in 2007. To fully implement the *2013 Policy*, the Government of Alberta (GoA) committed to developing these *Guidelines* along with sector-specific consultation matrices (Appendix A). The *Guidelines* are intended to be responsive to operational needs and informed by best practices. For this reason, the GoA will review the *Guidelines* annually and will engage with First Nations, industry, and government ministries when doing so. For the purposes of these *Guidelines*, the term "Crown" is used interchangeably with "GoA" and "Alberta".

These *Guidelines* will come into effect on the date of their official release. Any consultation process initiated prior to the official release of the *Guidelines* will be concluded under the direction of the guidelines established in 2007.

## A. Purpose of the Guidelines

The *Guidelines* are intended to clarify the expectations of all parties engaged in the consultation process. They provide an overview of the procedures to follow in the consultation process and demonstrate how the GoA is seeking to fulfil its duty to consult. Because consultation is fact-specific, these *Guidelines* encourage a process that remains flexible enough to allow the GoA to assess consultation requirements on a case-by-case basis. Therefore, these *Guidelines* only represent a starting point. Each step within the *Guidelines* must be undertaken in good faith towards: 1) gaining a better understanding of First Nations concerns regarding potential adverse impacts of a project on the exercise of Treaty rights and traditional uses, 2) substantially addressing the concerns through a meaningful process, and 3) developing positive working relationships.

The *Guidelines* apply to all strategic and project-specific decisions that have the potential to adversely impact the continued exercise of Treaty rights and traditional uses as defined in the *2013 Policy*.

## B. Crown's Duty to Consult and Accommodate

Various decisions made by the Supreme Court of Canada and the Court of Appeal of Alberta have confirmed that a duty to consult may be triggered when the Crown contemplates conduct that could have an adverse impact on the exercise of Treaty rights. The *Guidelines* are intended to be consistent with case law and demonstrate a practical approach to meeting the requirements established by the courts.

The Crown's duty to consult is rooted in the honour of the Crown and the protection afforded to Aboriginal and Treaty rights under section 35 of the *Constitution Act, 1982*. Consultation is a process intended to help parties understand and consider the potential adverse impacts of anticipated Crown

decisions on the exercise of Treaty rights and traditional uses. Through consultation, the GoA seeks to reconcile First Nations Treaty rights with the interests of all Albertans. Consultation may reveal a Crown duty to accommodate First Nations.

As stated in the *2013 Policy*, Alberta recognizes that a duty to consult exists when the following three factors are all present:

1. Alberta has real or constructive knowledge of a right;
2. Alberta's decision relating to land and natural resource management is contemplated; and
3. Alberta's decision has the potential to adversely impact the continued exercise of a Treaty right.

Furthermore, the *2013 Policy* states that the GoA will consult with First Nations when traditional uses have the potential to be adversely impacted by land and natural resource management decisions.

## 2. Roles and Responsibilities in the Consultation Process

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The GoA, Alberta Energy Regulator (AER), project proponents, and First Nations all have roles and responsibilities within the GoA's consultation process. These roles and responsibilities are outlined in this section.

Whether GoA consults directly or delegates procedural aspects to proponents, the expectation is that all parties will participate in the process in good faith.

### A. The GoA

The duty to consult rests with the GoA. The GoA is responsible for overseeing and managing all substantive aspects of consultation, including determining if the duty to consult is triggered; assessing which First Nations to consult and at what depth; ensuring that First Nations are provided with sufficient information to describe the proposed decision or activity; considering information on First Nation concerns specific to the project or initiative; and assessing what, if any, accommodation is required. Although the GoA may delegate some procedural aspects of consultation to proponents, the Crown retains the sole responsibility for overseeing the overall consultation process and ensuring that the proponent's consultation activities comply with the *2013 Policy* and *Guidelines*. The process for managing delegated procedural aspects of consultation is described in section 3.

GoA assessment of consultation adequacy will generally occur prior to or within statutory and regulatory timelines. Depending on the potential adverse impact on the exercise of Treaty rights and traditional uses, the scope of the First Nations concerns raised, and the specifics of the proposed project or initiative, consultation timelines may vary.

Crown-led consultation may be carried out by the GoA on decisions regarding land and natural resource management that have the potential for adverse impacts on the exercise of Treaty rights and traditional uses that could include, but are not limited to, the following:

- Regulatory change;
- Infrastructure and facility development;
- Policy development; and
- Planning initiatives.

Ministries with statutory and regulatory responsibilities related to Crown land and natural resource management in Alberta are responsible for ensuring that First Nations are consulted if there is potential for adverse impact on the exercise of Treaty rights and traditional uses. Depending on the case, any or all of the following may apply: ministries may work with the Aboriginal Consultation Office to ensure that consultation obligations are met; they may carry out the procedural aspects of consultation activity; they may act as a project proponent; or they may delegate the procedural aspects of consultation.

## **i. Alberta Aboriginal Relations, Aboriginal Consultation Office**

To strengthen the GoA's role in the First Nations consultation process, the GoA created the Aboriginal Consultation Office (ACO). The ACO, administered by the Ministry of Aboriginal Relations, was established to provide consultation management services to meet the needs of GoA ministries, First Nations, the AER, and project proponents in a way that is efficient, coordinated, and consistent. The ACO has the following objectives:

- Uphold the honour of the Crown with respect to First Nations consultation for land and natural resource management matters in alignment with GoA priorities;
- Clearly discharge the legal duty of the Crown and ensure that the GoA works towards reconciling First Nations Treaty rights and traditional uses and the interests of all Albertans;
- Ensure consistency, certainty, and predictability with clear roles and a standardized process that
- First Nations, proponents, and the Crown can follow; and
- Enhance relationships with the federal and provincial governments, leading to a coordinated approach to First Nations consultation.

The ACO will direct, monitor, and support the consultation activities of GoA departments as well as proponents and First Nations, as required. In addition, the ACO will support consistent application of policy, process, and best practices. ACO support includes the following:

- Providing pre-consultation assessment advice or direction;
- Providing advice or direction during the consultation process;
- Providing advice or direction to First Nations and proponents if disputes arise during the consultation process;
- Providing staff to participate in consultation meetings with proponents and First Nations, as required;
- Evaluating consultation records; and
- Providing an assessment of consultation adequacy.

For activities requiring GoA decisions, the ACO will manage the consultation for the Crown and provide support as described above, which may be outlined under the terms of a cross-ministry agreement.

For activities requiring AER approval, the ACO will manage the consultation process for the Crown and provide support as described above. The ACO will decide whether or not consultation was adequate and provide that decision to the AER.

## ii. Alberta Environment and Sustainable Resource Development

Alberta Environment and Sustainable Resource Development (ESRD), as stewards of air, land, water, and biodiversity, will lead the achievement of desired environmental outcomes and sustainable development of natural resources for Albertans. ESRD takes a cumulative effects management approach that establishes outcomes for an area by balancing environmental, economic, and social considerations and implementing appropriate plans and tools to ensure those outcomes are met.

ESRD's Stewardship Branch is a shared service function that provides Aboriginal policy advice, strategic and operational Aboriginal engagement, and consultation support to the ministries of Alberta Energy and ESRD.

Examples of initiatives potentially requiring Crown-led consultation led by the Stewardship Branch include:

- ESRD provincial/regional policy development and implementation;
- ESRD management frameworks, sub-regional plans, and other planning initiatives (e.g., caribou range planning and similar species-at-risk plans); and
- Implementation of regional plans.

Examples of decisions potentially requiring proponent-led consultation pursuant to the *2013 Policy* include those under the following legislation:

- *Environmental Protection and Enhancement Act*;
- *Forests Act*;
- *Public Lands Act*; and
- *Water Act*.

## iii. Alberta Culture, Historic Resource Management Branch

Alberta Culture's Historic Resources Management Branch (HRMB) is mandated to protect and preserve Alberta's historic resources under the legislative authority of the *Historical Resources Act (HRA)*, which applies to all lands within provincial jurisdiction, both publicly and privately owned. The *HRA* protects historic resources such as designated historic places, archaeological and paleontological sites, and historic buildings, while regulating development to preserve these significant historical resources. Traditional use sites that are considered historic resources include, but are not limited to, burial grounds, ceremonial sites, gathering sites, and historic sites or ceremonial locations.

As part of the *HRA* regulatory process, when a known traditional use site of an historic resources nature has the potential to be adversely affected by a development project, either consultation with the respective First Nations or avoidance of the site may be required. First Nation traditional use sites of an historic resource nature that are known to Alberta Culture appear on the *Listing of Historic Resources (Listing)* as a generalized legal land description. The *Listing* informs developers of potential impacts their

proposed project may have on a traditional use site of an historic resource nature, without revealing the specific location and information of the traditional use site.

Additionally, section 31 of the *HRA* states that a person who discovers an historic resource in the course of making an excavation for a purpose other than for seeking historic resources shall notify the minister of the discovery. This section applies to newly discovered traditional use sites of an historic resource nature that are encountered during the development activities. If such historic resources are encountered and may be impacted by the proposed development, the proponent is required to notify Alberta Culture immediately.

#### **iv. Alberta Tourism, Parks and Recreation**

Alberta Tourism, Parks and Recreation (TPR), Parks Division, is responsible for regulatory and land management activities of Alberta's Parks system, including Wilderness Areas, Ecological Reserves, Natural Areas, Heritage Rangelands, Wildland Provincial Parks, Provincial Parks, and Provincial Recreation Areas and Willmore Wilderness Park.

Consultation may be required when TPR, Parks Division, is considering a decision that has the potential to adversely impact the exercise of Treaty rights and traditional uses. In specific circumstances, the following statutory and regulatory decisions made by TPR under Parks-related legislation may require consultation:

- Regulatory and policy changes related to resource protection, resource management, land use, or activities in the Alberta Parks system;
- Establishment of new parks or expansion of existing areas;
- Development of new facilities within parks;
- Re-designation of a park to a different classification;
- Development or revision of park management plans;
- Issuance of dispositions within the Alberta Parks system; and
- Issuance of research or collection permits within the Alberta Parks system.

#### **v. Alberta Municipal Affairs**

Alberta Municipal Affairs is responsible under the *Special Areas Act* for administering approximately 2.6 million acres of public land within southeast Alberta, which is administered by the Special Areas Board. The Special Areas Board is directly responsible to the Minister of Municipal Affairs.

Municipal Affairs is also responsible, through part 15 of the *Municipal Government Act*, for all functions of local government in improvement districts (IDs).

Consultation may be required when Municipal Affairs makes decisions associated with lands in the "Special Areas" or IDs that have the potential to adversely impact the exercise of Treaty rights and traditional uses.

Municipal Affairs, under the purview of the *Municipal Government Act*, also provides support and advice to assist municipalities in providing Albertans with strong and effective local government. While First Nations consultation is the responsibility of the GoA, municipalities could be delegated some procedural

aspects of First Nations consultation as a project proponent when applying to the GoA for regulatory decisions.

## vi. Alberta Transportation

Alberta Transportation is responsible for road authorizations, planning, and other aspects of highway and bridge design. Consultation may be required in some cases, and Alberta Transportation may be a proponent for such projects.

## vii. Alberta Infrastructure

Alberta Infrastructure is responsible for infrastructure planning and for building and managing government-owned infrastructure. Consultation may be required in some cases, and Alberta Infrastructure may be a proponent for such projects.

## B. Proponents

When considering proposals regarding land and natural resource management, Alberta may delegate procedural aspects of consultation to another party, such as the project proponent. Proponents may include industry, municipal governments, or any other organization or individual requiring a provincial approval. Procedural aspects of consultation to be delegated may include notifying and engaging with First Nations to discuss project-specific issues and possible mitigation. Fulfillment of these delegated procedural aspects should comply with the *2013 Policy* and be carried out as directed within the *Guidelines*.

Section 3 of these *Guidelines* provides more specific information regarding procedural aspects of consultation. Appendix A provides sector-specific consultation matrices to assist proponents in understanding the potential adverse impacts of activities and how they influence consultation requirements.

Proponents are encouraged to notify and consult with First Nations as early as possible in the pre-application stage. Proponents must document their consultation activities, share their consultation record with First Nations and provincial staff, and advise the GoA of any issues that arise. Depending on the responses received from First Nations and the specific activities involved, a proponent may be required to repeat certain steps under these *Guidelines* or to take additional steps to ensure meaningful consultation has taken place. A proponent's guide to consultation (to be released subsequent to the *Guidelines*) will provide additional details on the administrative steps, submission standards, and requirements for the consultation process.

The GoA recognizes that many First Nations and proponents have long-standing and established relationships. The GoA encourages strong relationships and clear communication between proponents and First Nations.

## C. First Nations

Where a proponent or the Crown is required to provide written notification to First Nations of a proposed land and resource management decision or activity, First Nations will have the opportunity to state whether their exercise of Treaty rights or traditional uses may be adversely impacted.

When responding to written notification, the First Nation should respond in writing, name the specific project and any applicable GoA First Nations consultation number, identify the location of the potential adverse impacts, and clearly identify the potential adverse impacts on the exercise of their Treaty rights and traditional uses that require further consultation.

During the consultation process, First Nations are expected to work with the GoA and project proponents on avoiding, minimizing, or mitigating impacts. First Nations should engage in consultation as outlined in section 3 of the *Guidelines* or in accordance with any applicable consultation process agreements with the GoA.

## D. Alberta Energy Regulator

Pursuant to the *Responsible Energy Development Act (REDA)*, the AER has jurisdiction for upstream oil, gas, oil sands, and coal activities. The AER has regulatory responsibility for the entire life cycle of upstream energy resource development in the province. To accomplish this, the AER delivers and is accountable for regulatory functions previously provided by the AER's predecessor, the Energy Resources Conservation Board, and by ESRD under the "specified enactments" (*Public lands Act, Mines and Minerals (Part 8) Act, Water Act*, and the *Environmental Protection and Enhancement Act*) in respect of energy resource development.

Under section 21 of *REDA*, the AER has no jurisdiction to assess the adequacy of Crown consultation associated with the rights of Aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*. The ACO works closely with the AER to ensure that consultation required for applications made to the AER under the specified enactments occurs prior to the AER's regulatory decision. The ACO, when appropriate, will provide the AER with advice relating to the mitigation of potential impacts to Treaty rights and traditional uses. Statements of concern received by the AER from First Nations or other Aboriginal groups or individuals will be provided to the ACO.

Direction on ACO and AER interaction is described in *Ministerial Order 141/2013, the Aboriginal Consultation Direction* put in place by Alberta Energy on November 26, 2013, and may be amended or replaced from time to time. In addition, the ACO and AER are cooperatively developing joint operating procedures for administration and coordination of ACO and AER operations. Once released, these procedures will be updated and amended as required.

## 3. Process for Consultation

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The ACO may manage consultation on behalf of applicable GoA ministries under the terms of a cross-ministry agreement.

The ACO or the applicable GoA ministry may delegate procedural aspects of consultation, including:

- Contacting First Nations by mail, telephone, or other means;
- Presenting and describing project plans and descriptions; and
- Modifying project plans in response to concerns raised during consultation.

The ACO or applicable GoA ministry must directly carry out substantive aspects of consultation, including:

- Assessing if the duty to consult is triggered;
- Assessing which First Nations should be consulted;
- Assessing the level and scope of consultation;
- Providing proponents with advice and appropriate information regarding potential adverse impacts to the exercise of Treaty rights and traditional uses;
- Advising First Nations and proponents of consultation requirements;
- Reviewing and approving consultation plans as appropriate;
- Directing proponents to provide First Nations with early and adequate notification;
- Monitoring proponent activities;
- Evaluating consultation records;
- Providing adequacy decisions for AER approvals and providing adequacy assessments with recommendations for all others; and
- Notifying First Nations and proponents about ACO adequacy decisions for AER approvals.

### A. Consultation Triggers

Consultation with First Nations is triggered when the GoA is contemplating a decision and has knowledge of the potential for that decision to have an adverse impact on the exercise of Treaty rights or traditional uses. While this list is not exhaustive, the following types of decisions may produce such triggers:

- Regulation, policy, and strategic initiatives or changes to public access;
- Fish and wildlife management – A decision that may limit or alter the quality and quantity of fish and wildlife;
- Natural resource development – A decision about surface land activity related to petroleum, forestry, mines and minerals, and other forms of natural resource development; and
- Land use planning that provides a long-term framework for Crown decisions.



## **B. Stages of the Consultation Process**

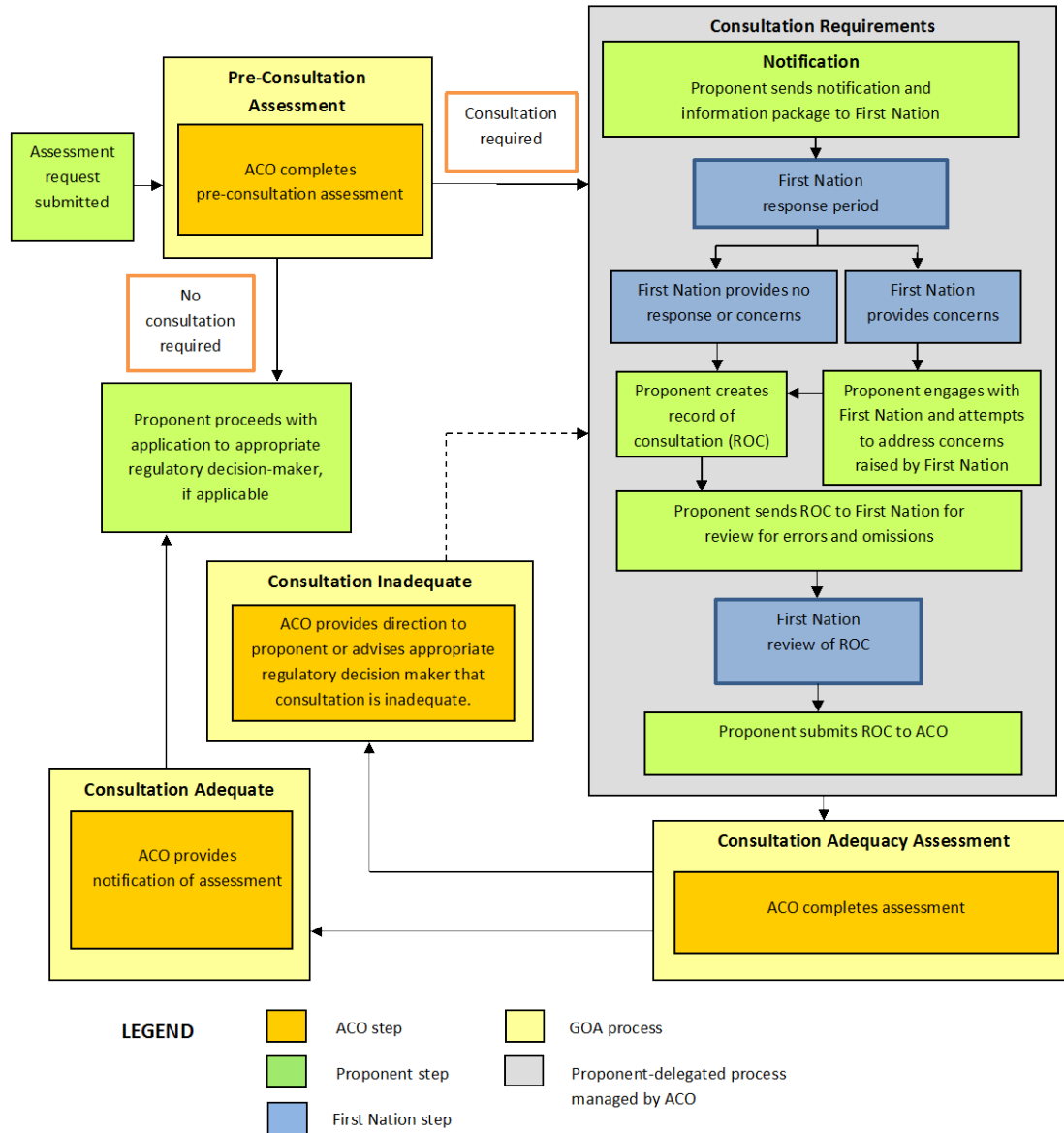
The following outlines the stages of the consultation process. Each step is described in more detail in subsequent sections.

1. Pre-consultation assessment;
2. Information sharing;
3. Determining the level of consultation;
4. Exploring concerns;
5. Verifying the record of consultation; and
6. Determining consultation adequacy.

## **C. Consultation Process Flowchart**

The following flowchart provides a general overview of the consultation process.

**Consultation Process Flowchart**



## D. Processing Timelines

The ACO strives to process all assessments quickly and thoroughly. Within those general limits, and recognizing that timelines may change depending on how consultations proceed, the ACO will be expected to act within the timelines below. Timelines start the GoA working day following receipt of an assessment request.

To the extent applicable, the timelines should provide guidance to other GoA ministries for their consultation; however, in consultation with the ACO, these timelines may be altered, as required, for example, when the other GoA ministry, as the proponent, carries out procedural aspects of consultation or makes the assessment.

- Pre-consultation assessment:
  - Level 1 – If assessment request documentation is complete, the ACO will complete pre-consultation assessments within 4 GoA working days for streamlined consultation.
  - Level 2 – If assessment request documentation is complete, the ACO will complete pre-consultation assessments within 4 GoA working days for standard consultation.
  - Level 3 – If assessment request documentation is complete, the ACO will complete pre-consultation assessments within 10 GoA working days for extensive consultation.

When a traditional use site of an historic resource nature with an HRV 4c designation on the *Listing of Historic Resources* may be impacted by the proposed development, the ACO will provide Alberta Culture with a copy of the ACO pre-consultation assessment notice that is sent to the proponent.

- Adequacy assessment will proceed after First Nations have had the opportunity to review the record of consultation (also known as "consultation record"):
  - Level 1 – If the consultation summary documentation is complete, up to 10 GoA working days are required for adequacy assessment for streamlined consultation.
  - Level 2 – If the consultation summary documentation is complete, up to 10 GoA working days are required for adequacy assessment for standard consultation.
  - Level 3 – If the consultation summary documentation is complete, up to 20 GoA working days are required for adequacy assessment for extensive consultation.

These timelines may be revised for appropriate reasons in certain cases. For example:

- Timelines may be increased or decreased if information from First Nations, the Crown, or proponents demonstrates that potential adverse impacts require either more or less discussion;
- Timelines may be increased if the proponent amends the project and additional consultation is required; and
- Time lines may be increased if the proponent provided incomplete project information or consultation records to the ACO.

## E. Consultation Process Timelines

The following timelines apply to the consultation process. All timelines noted in these Guidelines start the GoA working day following the date of verified document delivery to the destination. The ACO recognizes that specific timelines may need to be revised in certain circumstances, depending, for example, on the complexity of the project. Other relevant factors may include circumstances that make a timely response difficult for a First Nation community, such as an emergency situation in the community.

The ACO expects that proponents will devote adequate time to address First Nations issues and concerns that arise during consultation.

- Level 1: Streamlined consultation
    - Notified First Nations have up to 15 GoA working days to respond to project notification.
    - Where First Nations respond to notification, consultation should be complete within 15 GoA working days of response to notification.
    - If the 15-day notification period has expired and the First Nation has not responded to the project notification within that time, the proponent, after providing First Nations with 5 GoA working days to review the consultation record, may ask the ACO to review the consultation record.
  
  - Level 2: Standard consultation
    - Notified First Nations have up to 15 GoA working days to respond to project notification. If no response is received within approximately 5 GoA working days, the proponent will follow up with the First Nation.
    - If no response is received within approximately 10 GoA working days of the initial notification, the proponent will follow up a second time with the First Nation.
    - Where First Nations respond to notification, consultation should be completed within 20 GoA working days of response to notification.
    - If the 15-day notification period has expired and the First Nation has not responded, the proponent, after giving First Nations 5 GoA working days to review the consultation record, may ask the ACO to review the consultation record.
  
  - Level 3: Extensive consultation
    - Once the proponent's consultation plan is approved by the ACO following the pre-consultation assessment:
      - Notified First Nations have up to 20 GoA working days to respond to project notification.
      - If no response is received after approximately 10 GoA working days, the proponent will follow up with the First Nation.
      - If no response is received after approximately 15 GoA working days of the initial notification, the proponent will follow up a second time with the First Nation.
-

- Where First Nations respond to notification, consultation should be substantially underway or completed within 60 GoA working days of response to notification.
  - If the 20-day notification period has expired and there is no response to the second follow-up letter, the proponent, after giving the First Nations 10 days to review the consultation record, may ask the ACO to review the consultation record.
- Level 3: Extensive consultation for projects with EIAs
  - Once the proponent's consultation plan is approved by the ACO following the pre-consultation assessment:
    - Notified First Nations have up to 20 GoA working days to respond to project notification.
    - If no response is received within approximately 10 GoA working days, the proponent will follow up with the First Nation.
    - If no response is received within approximately 15 GoA working days, the proponent will follow up a second time with the First Nation.
    - Where First Nations respond to the notification, consultation is expected to be completed within the applicable regulatory timelines.
    - If the 20-day notification period has expired and there is no response to the second follow-up letter, the proponent, after giving First Nations 10 days to review the consultation record, may ask the ACO to review the consultation record.

## F. Stages of Consultation

### i. Pre-consultation Assessment

The pre-consultation assessment is intended to assess whether consultation is required. The ACO will:

- Assess whether or not consultation is required;
- If consultation is required, identify which First Nations are to be consulted;
- Assess the potential adverse impacts of a proposed decision or activity;
- Assess the scope of the duty to consult based on available information about the potential adverse impacts to Treaty rights and traditional uses; and
- Assign a level of consultation in order to provide direction on the depth of the consultation.

The scope of consultation is related to 1) the nature of the project and 2) its potential impacts on Treaty rights and traditional uses at that location. The pre-consultation assessment identifies three potential levels of consultation, which correspond with the scope of the potential impacts. The level of consultation identifies how deep the consultation should be and what process steps are required.

- Level 1: Streamlined – Notification with opportunity for First Nation to respond

- Level 2: Standard – Notification with opportunity for First Nation to respond and required follow-up by proponent
- Level 3: Extensive – Preparation of a consultation plan, notification with opportunity for First Nation to respond, and required follow-up by proponent.

Figure 1 below illustrates a framework for determining the level of consultation.

This framework will be enhanced overtime with geographically referenced information that captures areas of known use and areas of significance identified by First Nations.

Factors that may determine the sensitivity of a location include history of use and level of contemporary use, the presence of ceremonial sites, or other values to indicate the importance of the site for Treaty rights and traditional uses.

**Figure 1: Framework for assessing scope of impacts and determining depth of consultation**

|   |          |                       |                       |                     |
|---|----------|-----------------------|-----------------------|---------------------|
| Sensitivity of the location (based on Treaty rights and traditional uses) | High     | Level 2 – standard    | Level 3 – extensive   | Level 3 – extensive |
|   | Moderate | Level 2 – standard    | Level 2 – standard    | Level 3 – extensive |
|   | Low      | Level 1 – streamlined | Level 1 – streamlined | Level 2 – standard  |
| Nature of the project   |          | Low impact            | Moderate impact       | High impact         |

Sector-specific matrices describing typical project activities are located in Appendix A. The matrices provide an initial assessment of the impacts of the activity on Treaty rights and traditional uses based on the nature of the project and identify the depth of consultation required.

## ii. Information Sharing

### a. Information review

After receiving a request for a pre-consultation assessment from a proponent, or for consultation advice from another ministry, the ACO will consider:

- Information about the proposed project and the relevant decisions and activities;
- Available information regarding the exercise of Treaty rights and traditional uses, including:
  - Information from Alberta Culture and
  - Existing agreements or protocols between First Nations and the GoA;
- Whether the proposed activity can be regarded as having, been adequately covered by a previous consultation and has had either minor or no subsequent changes and therefore is not subject to further consultation on potential adverse impacts on Treaty rights and traditional uses; and
- Maps depicting the geographic areas where the GoA consults a First Nation.

In the pre-consultation assessment notice the ACO will strive to advise proponents of Alberta Culture requirements if applicable, and will copy Alberta Culture on the same. Consultation overseen by the ACO and consultation overseen by Alberta Culture will proceed concurrently.

#### **b. Determining the level of consultation**

The ACO will provide proponents with direction on which First Nations must be consulted and on the level of consultation required. The ACO may use Information from past consultation and other information about First Nations to assess the depth of consultation required.

The level of the consultation required and associated timelines may be revised during the consultation process if information from First Nations, proponents, or the Crown demonstrate that potential adverse impacts require either more or less discussion.

#### **c. Information package to First Nations**

The proponent will provide a comprehensive information package to the identified First Nations as early as possible, including:

- Notice that the proponent has been advised to consult with the First Nation and share information about the proposed activity;
- The level of consultation;
- A description of the consultation process, where applicable;
- A GoA First Nations consultation number, if applicable;
- A plain language information package describing the proposed activity, location, and potential impacts;
- Any information provided by the GoA about potential First Nations concerns in the area;
- A description of the GoA or regulatory authorization being sought; and
- A request that the First Nation send feedback to the proponent within the prescribed time period about how the project may impact their First Nations Treaty rights and traditional uses.

#### **d. Follow-up with First Nation**

A First Nation response to a notification package should include a written submission to the proponent with a copy to the ACO staff member identified on the file, quoting a First Nation consultation number, if applicable. The submission from First Nations should:

- Describe specific Treaty rights and traditional uses that may be impacted by the project at that location, and
- Identify if and why the impacts described may require a deeper level of consultation.

In response to any feedback received, the ACO will expect the proponent to follow up with the First Nation. For level 2 or level 3 consultations, if a response has not been received from the First Nation, the proponent must follow up and again request feedback about how the project may impact their Treaty rights and traditional uses.

### **e. Consultation monitoring**

The ACO may make staff available to participate in consultation meetings with proponents and First Nations upon request for any level 3 consultation, or in situations where delegating procedural aspects of consultation is not appropriate.

The ACO will monitor activity on all consultation files. The responsible ACO staff will also be available to assist with any issues that arise during the consultation process. Requests for assistance will be accepted from First Nations or from proponents and the objective of the ACO's participation is to assist all parties in effectively proceeding with the consultation process with the intention of addressing concerns regarding Treaty rights and traditional uses.

At any time during the consultation process the ACO may redirect proponents to repeat steps that have not been completed adequately.

### **iii. Exploring Concerns**

Proponents are encouraged to consider options to avoid, minimize, or mitigate impacts respecting Treaty rights and traditional uses brought forward during consultation with the First Nation. Exploration of these concerns should be documented thoroughly in the consultation record. The adequacy assessment process will take into account the efforts of proponents to address First Nation concerns.

Efforts to accommodate concerns may include:

- Modifying project design;
- Modifying project location or footprint;
- Modifying project timing;
- Seeking opportunities to mitigate impacts to traditional uses; and
- Exploring options to address concerns regarding access.

The ACO may also review the project-specific concerns raised by First Nations and if further clarification is required, through discussion with First Nations and project proponents, seek to identify what mitigation measures may be appropriate.

### **iv. Verifying the Consultation Record**

The proponent must send a copy of the consultation record to the appropriate First Nation for their review. The First Nation has the opportunity to review the consultation record for accuracy and comment back to the proponent, the ACO, or both. If the proponent's consultation record appears inaccurate to the First Nation or the ACO, the ACO will work with the proponent and provide direction to address gaps. If components of consultation remain outstanding, the ACO will consider whether it is appropriate to continue to involve the proponent or whether the GoA will complete the outstanding components.

- First Nations review of the consultation record:
  - Level 1 –First Nations will have 5 GoA working days to review the consultation record for streamlined consultation.



- Level 2 – First Nations will have 5 GoA working days to review the consultation record for standard consultation.
- Level 3 – First Nations will have 10 GoA working days to review the consultation record for extensive consultation.

The time period provided for the verification of the consultation record is for review and assessment of accuracy, it is not intended to be an extension to the consultation timelines.

## v. Determining Consultation Adequacy

The ACO is responsible for deciding the adequacy of consultation for activities requiring AER approvals. In other cases, ACO shall provide a recommendation to a Crown decision-maker as to whether consultation is adequate. Although the optimal outcome of consultation is that all consulting parties reconcile interests, agreement of all parties is not required for consultation to be adequate.

In assessing adequacy, the ACO will review information gathered during the pre-consultation assessment information review, the proponent's consultation record and any information provided by the First Nation. The ACO will consider, at a minimum, if the following factors have been addressed:

- Were all identified First Nations provided project information and given an opportunity to participate in the consultation process?
- Did the proponent provide project-specific information within a reasonable time before approvals were required or before the project was scheduled to start?
- If the First Nation provided site-specific concerns about how the proposed project may adversely impact their Treaty rights and traditional uses, did the proponent make reasonable attempts to avoid and/or mitigate those potential impacts?
- Did the proponent indicate how they intend to mitigate any potential adverse impacts to the exercise of Treaty rights and traditional uses?

The ACO will provide advice to GoA ministries and to the AER as to what mitigation was identified in the consultation process.

The ACO will strive to advise the appropriate ministry if concerns that are not project- and location specific are presented in the consultation record. That ministry may follow up with First Nations as appropriate to clarify what process may be followed to discuss those concerns.

## G. Review

As per the commitment made by the GoA to review the *2013 Policy* annually, these *Guidelines* may also be updated annually. Feedback and comments from other ministries, First Nations, and proponents will be considered and incorporated as appropriate.

## H. Contact Information

For an up-to-date list of consultation contacts at the ACO, please refer to our website at

<http://www.aboriginal.alberta.ca/575.cfm>.

## Appendix A: Sector-Specific Consultation Matrices

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The *Sector-Specific Consultation Matrices (Matrices)* are presented as a planning tool for proponents and in order to support transparency with First Nations. The *Matrices* provide an initial assessment based upon knowledge of the physical impacts of an activity but they are not a definitive categorization of the potential adverse impact on Treaty rights or traditional uses. The *Matrices* identify the nature of the activity and the potential biophysical impact, and propose the depth of consultation that may be required in the absence of other factors.

The Crown usually assesses consultation on a case-by-case basis in order to determine if there is a duty to consult and, if so, at what level. The level of consultation identified at the pre-consultation stage may change as consultation progresses and new information is provided. Potential adverse impacts to traditional use sites may also alter the consideration and rationale for consultation requirements.

Aboriginal traditional use sites, such as burial sites, ceremonial sites, historic structures, etc., may be considered historic resources under the *Historical Resources Act (HRA)*. Alberta Culture identifies Aboriginal traditional use sites as an HRV 4c in the *Listing of Historic Resources (the Listing)*. The *Listing* is a primary tool for regulating land-based development and is used exclusively to direct a proponent to apply to Alberta Culture for approval of a development under these circumstances. First Nation consultation may be required by Alberta Culture for HRV 4c sites that may be impacted by a proposed development. The presence of HRV 4c lands within a proposed project footprint may change the level of consultation required. It is important to note that the *Listing* is only one tool that Alberta Culture uses to determine if an application for *HRA* approval is required for all other types of historic resources (i.e., archaeological, paleontological, and historic).

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

### Sector-Specific Consultation Matrices

| Sector <sup>3</sup>                           | Low Impact<br>STREAMLINED CONSULTATION<br><i>These activities are typically short duration (less than 2 years), small in size (less than 5 ha), and have low or limited environmental impacts.</i>   | Moderate Impact<br>STANDARD CONSULTATION<br><i>These activities are typically moderate in duration (more than 2 years), moderate in size (greater than 5 ha), and have moderate environmental impacts.</i>   | High Impact<br>EXTENSIVE CONSULTATION<br><i>These activities are typically long in duration (more than 10 years), large in size and scale or complexity, have extensive environmental impacts, and include approvals from multiple regulatory authorities.</i> |
|---|--|--|--|
| <b>Forestry and fire management</b>           | FireSmart plans (vegetation management component only)<br>Herbicide plans where there was no previous consultation)<br>Temporary roads that are new routes with no previous consultation   | Forest management agreement (FMA) renewal<br>New FMA<br>Forest management plan (FMP) amendment (e.g., mountain pine beetle amendment)<br>General development plan (GDP), Community Timber Permit Program (CTPP), FMA, and quota-holders<br>Prescribed burn <sup>2</sup> (Types 1 and 2)<br>All weather roads | Forest management plans  |
| <b>Transmission line and utility corridor</b> | Power lines easements, rural electrification association easements (EZE, REAs) and vegetative control easements (VCEs) that overlap existing surface dispositions, with > 5 m of new cut<br>Power line EZE, REA, and VCE easements that do not overlap existing surface dispositions and are < 1 km long | Power line EZE, REA, and VCE easements that do not overlap existing surface dispositions and are > 1 km long   | Large-scale regional transmission line projects  |
| <b>Geophysical</b>                            | Intermediate intensive 3D seismic (> 130 m ≤300 m source line spacing)   | Intense 3D seismic (≤130 m source line spacing);<br>4D seismic<br>Access roads   | n/a  |

<sup>1</sup> These matrices are intended to apply to 1) land administered by ESRD under the *Public Lands Act* and 2) all AER decisions under the specified enactments relevant to such activities. They are not intended to apply to land administered by other ministries where there is no AER decision.

<sup>2</sup> For the purposes of these matrices the following definitions apply: Type 1 prescribed burn is the most complex and has the greatest potential for impact. It involves standing timber, and it requires a detailed plan and proposal. Type 2 prescribed burn is complex and has some potential for impact. It generally involves standing timber, and it requires a detailed plan and proposal.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

| Sector <sup>3</sup>                   | Low Impact<br>STREAMLINED CONSULTATION<br><i>These activities are typically short duration (less than 2 years), small in size (less than 5 ha), and have low or limited environmental impacts.</i>  | Moderate Impact<br>STANDARD CONSULTATION<br><i>These activities are typically moderate in duration (more than 2 years), moderate in size (greater than 5 ha), and have moderate environmental impacts.</i>   | High Impact<br>EXTENSIVE CONSULTATION<br><i>These activities are typically long in duration (more than 10 years), large in size and scale or complexity, have extensive environmental impacts, and include approvals from multiple regulatory authorities.</i> |
|---------------------------------------|---|--|--|
| Coal, minerals, and quarries          | Coal exploration programs (CEPs)<br>Other mines and minerals exploration (MME)  | All weather roads and railways, (haul roads, access roads) and other associated dispositions<br>New underground mining activity on existing sites  | New mine approvals<br>Mine extensions  |
| Pipelines                             | Small power lines and pipelines (< 1 km long) or pipelines bundled with single well site with associated facilities, access, pipelines (< 5 ha total size)  | Gathering pipelines (> 1 km long) or pipelines bundled with larger sites or projects (e.g., multiple well sites) with associated facilities, access, etc. (> 5 ha total size)  | Large-scale pipeline projects  |
| Sand and gravel                       | Sand and gravel sites and/or projects with associated infrastructure <sup>4</sup> (< 5 ha total size) subject to the requirements for temporary field authorizations (TFAs), dispositional operational approvals (DOA) and surface material licences (SMCs) and require a Water Act authorization | Sand and gravel sites and/or projects with associated infrastructure (> 5 ha total size) subject to the requirements for surface materials leases (SMLs) and are subject to an <i>Environmental Protection and Enhancement Act (EPEA)</i> and a <i>Water Act</i> authorization for reclamation | Large-scale exploration programs   |
| Petroleum, natural gas, and oil sands | Single well site <sup>4</sup> with associated facilities, access, pipelines (≤ 5 ha total size)   | Medium-sized sites or projects (e.g., multiple well sites <sup>4</sup> ) with associated facilities and access (> 5 ha total size)<br>Oil sands exploration (OSE) programs<br>All weather roads – licences of occupation (LOCs)  | Large multiple well site <sup>4</sup><br>In-situ projects with associated facilities and access (e.g., steam-assisted gravity drainage (SAGD))<br>Seasonal drilling programs – large-scale or complex<br>Oil sands mines – pit development                     |

<sup>3</sup> For the purposes of these matrices, "infrastructure" is defined as any works, buildings, structures, facilities, equipment, apparatus, mechanism, instrument, or machinery belonging to or used in connection with a pit, and includes any storage site or facility, disposal site, or facility.

<sup>4</sup> A single well site can include more than one bore hole. Multiple well sites refer to multiple well pads and can include multiple bores drilled on a single pad.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

## Appendix B: Sector-Specific Activities That May Not Require Consultation

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### General

- If consultation was deemed adequate within the past two years and there have been no adjustments to the scope or footprint of the project, consultation may not be required.
- Consultation on reclamation plans may not be required if the site was previously disturbed or previous consultation occurred within the footprint.
- Approval amendments and renewals: As long as the amendments/renewals are within the scope of the original approval and no new impacts are contemplated (new lands or novel impacts to existing lands), consultation may not be required.

### Forestry and Fire Management

#### Activities that may not require consultation

Type 3 prescribed burns: Least complex with little or no chance of impact. Generally consists of annual hazard reduction involving burning off grass meadows, lesser vegetation, etc. There is no detailed planning and approval process.

Annual operating plans and operational plan amendments: Where changes to block location, harvest scheduling, and road design are consistent with the overall strategies of the FMP or the GDP; do not conflict with mitigation strategies to address concerns raised by a First Nation in previous consultation; or where there was previous consultation.

Temporary roads: Where there was previous consultation at the GDP level.

Herbicide plans: Where there was previous consultation at the GDP level.

Compartment assessment: When previously identified and consulted on in the GDP process.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

## Transmission Lines and Utility Corridors

### Activities that may not require consultation

Power lines and vegetative control easements that overlap existing surface dispositions, with < 5 m of new cut.

## Geophysical

### Activities that may not require consultation

Non-intensive 3D and 2D (>300 m source line spacing) Activity is of a very low intensity (e.g., narrow meandering lines or utilizing existing lines); little or no disturbance to the ground-level vegetation or soils; no mechanical ground access; short duration (usually a few weeks); drill holes are plugged/reclaimed within one season; negative impacts to land are mitigated through approval conditions and exploration directives and directions within the *Policy and Procedures for Submitting the Geophysical Field Report*.

## Coal, Minerals, and Quarries

### Activities that may not require consultation

Program on existing linear disturbance, (e.g. roads, power lines) or disturbed areas or previously approved programs/dispositions.

## Pipelines

### Activities that may not require consultation

Pipeline installation or replacement on lease (PIL); and located on existing dispositions.

Bored pipelines

## Petroleum, Natural Gas, and Oil Sands

### Activities that may not require consultation

Program on existing linear disturbance, (e.g. roads, power lines) or disturbed areas or previously approved programs/dispositions.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

## Sand and Gravel

### Activities that may not require consultation

Activities that are temporary, usually under 90 days, with land use  $\leq$  640 acres with a requirement for a temporary field authorization (TFA) or disposition operating approval (DOA) such as:

1. Surface materials<sup>1</sup> exploration activities subject to a surface material exploration approval (SME); or
2. Pits<sup>2</sup> that are subject to requirements under the *Code of Practice for Pits* and/or the *Environmental Protection and Enhancement Act* and/or the *Conservation and Reclamation Regulation*, and/or require a *Water Act* authorization.

### Acronyms

AER – Alberta Energy Regulator

CEP – Coal exploration programs

CTPP – Community timber permit

DOA – Disposition operational approval

EIA – Environmental impact assessment

EPEA – *Environmental Protection and Enhancement Act*

ESRD – Environment and Sustainable Resource Development

EZE – Easement

FMA – Forest management agreement

FMP – Forest management plan

GDP – General development plan

LOC – Licence of occupation

MME – Mines and minerals exploration

OSE – Oilsands exploration programs

PIL – Pipeline installation on lease

REA – Rural electrification association

SAGD – Steam-assisted gravity drainage

SME – Surface materials exploration

SMC – Surface material licence

SML – Surface material lease

TEP – Transportation exploration program

TFA – Temporary field authorization

VCE – Vegetative control easement

<sup>1</sup> For the purpose of these matrices, surface materials include: marl, clay, silt, sand, gravel, having a depositional history that is not associated with the bedrock formation.

<sup>2</sup> For the purpose of these matrices, pits are defined as openings or excavations in or working off the surface or subsurface for the purpose of removing any sand, gravel, clay, or marl, of any size, but does not include:

(i) A borrow excavation,

(ii) A pit on public land, meaning land administered under the *Public Lands Act*,

(iii) A pit, or a portion of a pit, where the surface or subsurface of the land has not been disturbed by pit operations since August 15, 1978, or

(iv) A pit, or a portion of a pit, on which a waste management facility is operating or operated pursuant to a valid approval or registration under the *Environmental Protection and Enhancement Act*.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

## Appendix C: Non Sector-Specific Activities That Do Not Require Consultation

| Activity or Application   |
|---|
| The activity is regulated by a code of practice under the <i>Water Act</i> and <i>Environmental Protection and Enhancement Act</i> .  |
| The activity requires a short-term diversion and use of water authorized by a temporary diversion licence under the <i>Water Act</i> .  |
| The activity requires temporary, short-term access to public land and is identified as “not requiring consultation” in the <a href="#">Temporary Field Authorization Guidelines</a> (see tables C and D).   |
| The activity consists of: <ul style="list-style-type: none"> <li>• Adjustments, repairs, replacements, or maintenance made in the normal course of operations.</li> <li>• Short-term testing or temporary modifications to machinery, equipment, or processes that do not result in a new surface disturbance beyond the normal course of operations.</li> </ul>  |
| The application is for renewals and amendments to existing authorizations, including: <ul style="list-style-type: none"> <li>• Correcting clerical errors;</li> <li>• Changing monitoring, reporting, or inspection requirements;</li> <li>• Effecting a change in ownership;</li> <li>• Addressing matters related to temporary discontinuance of an activity;</li> <li>• A single short-term extension (up to 1 year) of the expiry date for an authorization or a term or condition of the authorization;</li> <li>• Amend a term of condition if there is no new surface disturbance beyond the normal course of operations;</li> <li>• Amalgamate authorizations;</li> <li>• Filing as-built (final survey submissions) if the lands applied for have not changed from the original application; and</li> <li>• Amendment for the purpose of deleting lands from an application (deletion of lands)</li> </ul> |



## Appendix D: Glossary

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### **Approval**

Includes authorizations or dispositions or licences or registrations or permits as defined under the appropriate statutes or regulations.

### **Crown**

In Canada, the Crown may refer to the federal government and each of the provincial governments. Within this document, the Crown refers to the Government of Alberta (GoA or Alberta).

### **Decision**

Includes any administrative, legislative, statutory, regulatory, policy, and operational decision of the GoA.

### **Land and natural resource management**

Activities (on or off Crown land) potentially affecting the use of provincial Crown land where such activities arise from decisions involving land, water, air, forestry, or fish and wildlife.

### **Proponent**

An entity or person who is either seeking a Crown decision related to land and natural resource management or seeking an approval from the AER under the specified enactments.

### **Surface disturbance**

Any disruption of an area that disturbs the Earth's surface or waters during activity or after an activity has ceased.

### **Treaty rights**

Rights held by a First Nation in accordance with the terms of a Treaty agreement with the Crown. Treaties may also identify obligations to be met by a First Nation and the Crown. As they exist today, the Treaty rights to hunt, fish and trap for food may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.

### **Strategic initiatives**

An embracing or overarching policy addressing an objective of the GoA that may set a context in which project-specific consultation can occur.

### **Traditional uses**

Customs or practices that First Nations may engage in on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations. These may include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land.

## Appendix C

| Energy   |   |  |
|--|---|--|
| Environment and Sustainable Resource Development                                 |   |  |
| Office of the Minister of Energy   | 408 Legislature Building<br>Edmonton, Alberta<br>Canada T5K 2B6 | Telephone 780-427-3740<br>Fax 780-422-0195 |
| Office of the Minister of<br>Environment and Sustainable<br>Resource Development | 420 Legislature Building<br>Edmonton, Alberta<br>Canada T5K 2B6 | Telephone 780-427-2391<br>Fax 780-422-6259 |

### DEPARTMENT OF ENERGY

### DEPARTMENT OF ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT

#### *RESPONSIBLE ENERGY DEVELOPMENT ACT* SA 2012, c. R-17.3

Energy Ministerial Order 105/2014  
Environment and Sustainable Resource Development Ministerial  
Order 53/2014

We, Frank Oberle, Minister of Energy, and Kyle Fawcett, Minister of Environment and Sustainable Resource Development, pursuant to section 67 of the *Responsible Energy Development Act*, make the Aboriginal Consultation Direction, in the attached Appendix.

Energy Ministerial Order 141/2013 is repealed.

DATED at the City of Edmonton, in the Province of Alberta, this 31<sup>st</sup> day of October, 2014.

Original signed by Minister Frank Oberle

\_\_\_\_\_  
Frank Oberle  
Minister

Original signed by Minister Kyle Fawcett

\_\_\_\_\_  
Kyle Fawcett  
Minister

## APPENDIX

### ABORIGINAL CONSULTATION DIRECTION

#### PURPOSE

The Ministers of Energy and Environment and Sustainable Resource Development are authorized by section 67 of the Responsible Energy Development Act (REDA) to give directions to the Alberta Energy Regulator (the "AER") for the purpose of

- (a) providing priorities and guidelines for the AER to follow in the carrying out of its powers, duties and functions, and
- (b) ensuring the work of the AER is consistent with the programs, policies and work of the Government of Alberta in respect of energy resource development, public land management, environmental management and water management.

This Direction applies to "applications" to the AER for "energy resource activity" "approvals" under "specified enactments", all as defined in REDA ("energy applications").

The purpose of this Direction is to ensure that the AER considers and makes decisions in respect of energy applications in a manner that is consistent with the work of the Government of Alberta ("Alberta")

- (a) in meeting its consultation obligations associated with the existing rights of aboriginal peoples as recognized and affirmed under Part II of the Constitution Act, 1982; and
- (b) in undertaking its consultation obligations pursuant to The Government of Alberta's Policy on Consultation with First Nations on Land Management and Resource Development, 2013 as amended and replaced from time to time ("Consultation Policy") and associated Consultation Guidelines ("Guidelines").

This Direction

- (a) recognizes that
  - i. the AER has a responsibility to consider potential adverse impacts of energy applications on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* within its statutory authority under REDA,
  - ii. AER processes will constitute part of Alberta's overall consultation process as appropriate,
  - iii. Alberta retains the responsibility to assess the adequacy of Crown consultation in respect of energy applications,
- (b) facilitates timely, efficient and effective information exchange between the AER and Alberta with respect to energy applications that require aboriginal consultation; and

- (c) requires the AER to act consistently with decisions made by Alberta under the Consultation Policy and Guidelines in respect of energy applications to
  - i. support informed consideration of applications by the AER,
  - ii. ensure that the AER's approval of energy applications is consistent with Alberta's consultation and engagement in respect of the energy resource activity to which it relates.

Any opinion, consideration or decision of the AER in respect of energy applications' potential adverse impacts on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* shall not be construed as the opinion, consideration or decision of Alberta.

### **DIRECTIONS TO THE AER**

#### **Coordination**

- 1) The AER shall create and maintain a consultation unit that will work with Alberta's Aboriginal Consultation Office (ACO) to ensure Alberta will be able to meet consultation obligations associated with
  - a) the existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*, and
  - b) the Consultation Policy and Guidelines.
- 2) The AER shall assist the ACO to establish and maintain operating procedures that set out how the AER and the ACO will cooperate to administer and coordinate their work for the purposes of this Ministerial Order.
- 3) The AER shall follow the operating procedures established under section 2 of this Ministerial Order.

#### **Applications**

- 4) The AER shall direct proponents to contact the ACO for any proposed or planned energy resource activity prior to submitting an energy application to the AER.
- 5) When a proponent files an energy application with the AER, the AER shall, provide the ACO with
  - a) a copy of or access to the application,
  - b) a copy of any statement of concern filed by a First Nation or other aboriginal group in respect of the application,
  - c) a copy of any submission filed by a First Nation or other aboriginal group in respect of the application under the Alberta Energy Regulator Rules of Practice, and
  - d) copies of any evidence and information submitted by or with respect to First Nations and other aboriginal groups.

- 6) Unless an energy application is in respect of an activity or application that is listed in the Consultation Guidelines as not requiring consultation, or is accompanied by a pre-consultation assessment by the ACO indicating that no First Nations consultation is required, the AER shall
  - a) require the proponent of the energy application to include information about the potential adverse impacts, if any, of the proposed energy resource activity on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* and on traditional uses as defined in the Consultation Policy,
  - b) advise the ACO of any changes the proponent proposes to the energy application,
  - c) advise ACO if alternate dispute resolution (ADR) involving First Nations or other aboriginal groups will be used with respect to an application, and
  - d) advise ACO if a hearing will be held on the application and the AER's decisions with respect to including First Nations or other aboriginal groups in the hearing process.

#### **Decisions**

- 7) Prior to making a decision in respect of an energy application for which First Nations consultation is required by the Consultation Guidelines or by the ACO, the AER shall request advice from the ACO
  - a) respecting whether Alberta has found consultation to have been adequate, adequate pending the outcome of the AER's process, or not required, and
  - b) on whether actions may be required to address potential adverse impacts on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* or traditional uses as defined in the Consultation Policy.
- 8) When the AER makes a decision in respect of an energy application for which First Nations consultation is required by the Consultation Guidelines or by the ACO, the AER must immediately provide the ACO with a copy of its decision, and any related reasons, in respect of the decision, at the same time it provides notice of the same to the proponent.

#### **Appeal and Reconsideration**

- 9) The AER must immediately provide the ACO with a copy of any application for regulatory appeal, reconsideration or leave to appeal application to the Court of Appeal filed by a First Nation or any other aboriginal group.

## Appendix D



### Joint Operating Procedures for First Nations Consultation on Energy Resource Activities

June 10, 2015

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Alberta Energy Regulator & Aboriginal Consultation Office

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ii Joint Operating Procedures for First Nations Consultation

## Agreement

Under the *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (Procedures)*, the Aboriginal Consultation Office (ACO) and the Alberta Energy Regulator (AER) agree to the following:

- 1) The ministerial order issued on October 31, 2014 (*Energy 105/2014 and Environment and Sustainable Resource Development 53/2014*) and the *Procedures* apply only to applications made to the AER under the specified enactments, as defined by the *Responsible Energy Development Act* (i.e., *Public Lands Act, Mines and Minerals Act (Part 8), Water Act, and the Environmental Protection and Enhancement Act*), in respect of energy resource activities.
- 2) The *Procedures* sets out the procedures to administer and coordinate the operations of the ACO and the AER on matters relating to First Nations consultation in accordance with the directions provided to the AER in the ministerial order.
- 3) In addition to following the defined procedures, ACO and AER staff are encouraged to informally engage one another, as needed, to coordinate the processing of individual files or applications.
- 4) The *Procedures* operates as a standing request from the AER to the ACO for advice on mitigating potential impacts on Treaty rights and traditional uses, under section 7 of the ministerial order, for all decisions made by the AER under the specified enactments.
- 5) The *Procedures* will be revised or updated as needed with the involvement of both the ACO and the AER.

<original signed by>

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Stan Rutwind  
Assistant Deputy Minister  
Department of Aboriginal Relations  
Government of Alberta

<original signed by>

---

Jennifer Steber  
Executive Vice President  
Government and Stakeholder Relations  
Alberta Energy Regulator

<Original signed December 10, 2014>

Date



Alberta Energy Regulator & Aboriginal Consultation Office

## Revision History

| Version date      | Description   |
|-------------------|---|
| December 10, 2014 | Release of the <i>Procedures</i> .  |
| June 10, 2015     | Section 2.3 and 4 amended to reflect updated AER application requirement. |

## Definitions of Key Terms

The following terms are defined for the purposes of the *Procedures*.

| Term                   | Definition  |
|------------------------|---|
| ACO report             | A written report from the ACO to the proponent, First Nations, and the AER that contains the ACO's finding on consultation adequacy and that may also contain advice to the AER on any impacts on Treaty rights and traditional uses identified during consultation.  |
| ACO hearing report     | A written report from the ACO that may contain advice to the AER on any impacts on Treaty rights and traditional uses that were raised during an AER hearing and that had not been previously addressed by the consultation process. The ACO hearing report may be submitted during an AER hearing and is permitted by section 49(2) of the <i>Responsible Energy Development Act</i> . |
| Consultation           | As defined in <i>The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013</i> , a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on First Nations' Treaty rights, with a view to substantially address them.   |
| Delegated consultation | Those procedural aspects of consultation (as defined above) that the Crown delegates to and are carried out by the proponent.   |
| First Nation           | First Nation "bands" as defined by the <i>Indian Act (Canada)</i> .   |

## 1 Background

The Government of Alberta (Alberta), under *The Government of Alberta's Policy on Consultation with First Nations on Land and Resource Management, 2013*, created the Aboriginal Consultation Office (ACO), which reports to the minister of Aboriginal Relations. The ACO was established to manage all aspects of aboriginal consultation, including working with the Alberta Energy Regulator (AER) to ensure that any needed consultation occurs for decisions on energy applications within the AER's mandate.

The AER has jurisdiction under the *Responsible Energy Development Act (REDA)* for the entire life cycle of upstream energy resource development in the province, including upstream oil, natural gas, oil sands, and coal activities. The AER combines the regulatory functions provided by its predecessor, the Energy Resources Conservation Board, with those regulatory functions previously provided by Alberta Environment and Sustainable Resource Development (ESRD) under the specified enactments (*Public Lands Act, Mines and Minerals Act (Part 8), Water Act, and the Environmental Protection and Enhancement Act [EPEA]*) in respect of energy resource activities. *REDA* excludes the AER from determining the adequacy of consultation.

*The Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (Procedures)* sets out the procedures to administer and coordinate the operations of the ACO and AER on matters relating to First Nations consultation in accordance with the ministerial order issued on October 31, 2014 (*Energy 105/2014 and ESRD 53/2014*). The *Procedures* supports the ACO's ability to rely on the AER's regulatory process to form part of Alberta's consultation process, when necessary.

The *Procedures* works in conjunction with

- the ministerial order on aboriginal consultation direction (*Ministerial Order 105/2014 and 53/2014* issued on October 31, 2014, and any amendments),
- *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013 (Consultation Policy)*,
- *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (Consultation Guidelines)*, and
- any other relevant Alberta aboriginal consultation policy, guideline, or procedure.

## 2 Approach

### 2.1 Activities Not Requiring Consultation

An activity or application does not require consultation if (1) the activity or application is listed in appendix C of the *Consultation Guidelines* or (2) the ACO determines during a pre-consultation assessment that consultation is not required. The AER will accept applications for activities listed in appendix C of the *Consultation Guidelines* or will require the pre-consultation assessment from the ACO as part of the AER application to confirm consultation was not required by the ACO.

### 2.2 Statements of Concern

The AER will provide any statement of concern received from a First Nation or other aboriginal group and proponent responses directly to the ACO. The AER will also forward statements of concern received from individuals who may be representing a First Nation or other aboriginal group. The ACO will review these statements of concern for information about potential adverse impacts on Treaty rights and traditional uses.

### 2.3 First Nations Impacts and Mitigation Table

Unless an application is for an activity listed in appendix C of the *Consultation Guidelines*, the proponent must submit an application supplement on First Nations consultation. If consultation on the application was required, the proponent will have to do one of the following: (1) fill in the First Nations impacts and mitigation table in the supplement, (2) provide the information requested in the table in a separate document attached to the supplement, or (3) attach the ACO report to the supplement. Information in the table is drawn from the records already required and verified by the ACO (i.e., consultation log) or from the ACO report.

The First Nations impacts and mitigation table is specifically intended to document any potential adverse impacts of the proposed energy resource activity on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*, and on traditional uses as defined in the *Consultation Policy*.

### 2.4 Statement-of-Concern Period and Closing Consultation

In cases where consultation has been occurring for an extended period prior to the submission of an AER application (e.g., large, complex projects), there is a need to “reconnect” the consultation and regulatory processes in advance of making a regulatory decision. The goal is for the delegated consultation and the AER’s statement-of-concern period to end at the same time, so that all input can be assessed and considered in the regulatory decision.

Coordination between the ACO and AER will begin during a proponent's consultation planning, with the ACO providing information about consultation requirements and the AER providing information about its statement-of-concern period. Throughout the consultation period, the ACO will monitor the consultation reports regularly provided by the proponent and will advise the proponent if the consultation is likely to be considered adequate. This information will allow the proponent to determine if they can apply to the AER and be able to close the delegated portion of consultation within the time allotted for submitting a statement of concern.

#### **2.5 ACO Adequacy Assessment and ACO Report**

The ACO will provide to the proponent, First Nations, and the AER an ACO report that contains its finding on consultation adequacy and any advice to the AER on mitigating impacts on Treaty rights and traditional uses. The AER will not make a decision on an application until after receiving the ACO report.

#### **2.6 AER Hearings**

If the AER calls a hearing on an application, the ACO may observe the hearing and may provide an ACO hearing report containing advice on any impacts on Treaty rights and traditional uses that were raised during the hearing and not previously addressed by the consultation process.

#### **2.7 Regulatory Appeals, Reconsiderations, and Appeals to the Court of Appeal**

The AER will notify the ACO if a First Nation or other aboriginal group is requesting a regulatory appeal or leave to appeal to the Court of Appeal, and if the AER is reconsidering a decision. The ACO will not participate in any regulatory appeal proceedings by the AER, but may rely on the regulatory proceedings to help mitigate any project impacts on Treaty rights and traditional uses.

#### **2.8 Alternative Dispute Resolution**

The AER will notify the ACO if a First Nation or other aboriginal group is to participate in alternative dispute resolution (ADR). The ACO will not participate in an ADR process.

### 3 Joint Operating Procedures

ACO-AER processes (table 3.1) are triggered by the type of consultation required by the ACO (i.e., no consultation, streamlined, standard, or extensive) and the type of AER application submitted (i.e., Enhanced Approval Process [EAP] and non-EAP applications). The AER does not categorize its applications based on the level of consultation or the associated ACO-AER process.

Table 3.1 AER application type and ACO consultation requirements for each ACO-AER process

| ACO-AER process   | AER application type                                  | ACO consultation requirements          |
|-------------------|---|--|
| ACO-AER process 1 | Applications requiring no consultation                | None                                   |
| ACO-AER process 2 | EAP applications                                      | Streamlined or standard (level 1 or 2) |
| ACO-AER process 3 | Non-EAP applications                                  | Streamlined or standard (level 1 or 2) |
| ACO-AER process 4 | Non-EAP applications requiring extensive consultation | Extensive (level 3)                    |

#### 3.1 ACO-AER Process 1 (No Consultation Required)

ACO-AER process 1 applies to applications for activities where consultation is not required by Alberta (figure 3.1, table 3.2). For these applications, the AER will confirm either that the application submitted is for an activity listed in appendix C of the *Consultation Guidelines* or that the application is accompanied by the ACO’s pre-consultation assessment indicating that no consultation is required.

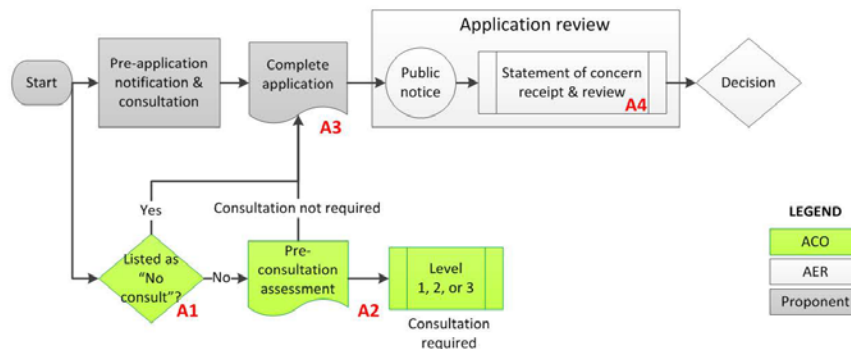


Figure 3.1 Illustration of ACO-AER process 1

Table 3.2 Process steps and description for ACO-AER process 1

| Step      | Description   |
|-----------|---|
| <b>A1</b> | <p><b>No consultation required</b></p> <ul style="list-style-type: none"> <li>• The proponent checks appendix C of the <i>Consultation Guidelines</i> to determine if consultation is not required by Alberta (i.e., the activity is listed in the appendix). <ul style="list-style-type: none"> <li>- If the activity or application is listed, the proponent may proceed to apply to the AER.</li> <li>- If the activity or application is not listed, the proponent proceeds to step A2.</li> </ul> </li> </ul>  |
| <b>A2</b> | <p><b>Pre-consultation assessment (if required)</b></p> <ul style="list-style-type: none"> <li>• The proponent requests a pre-consultation assessment from the ACO.</li> <li>• The ACO conducts the assessment to determine if aboriginal consultation is required.</li> <li>• If the assessment indicates that no consultation is required, the proponent may apply to the AER, attaching the pre-consultation assessment to the AER application.</li> <li>• If the assessment indicates level 1, 2, or 3 consultation is required, the proponent proceeds with the required consultation, and the applicable ACO-AER process will be used.</li> </ul>             |
| <b>A3</b> | <p><b>Complete application</b></p> <ul style="list-style-type: none"> <li>• The AER confirms that the application is for an activity or application listed in appendix C of the <i>Consultation Guidelines</i> or that the application is accompanied by an ACO pre-consultation assessment indicating that no consultation is required. <ul style="list-style-type: none"> <li>- The AER will not accept applications that do not meet either of these requirements and will direct the proponent to the ACO.</li> </ul> </li> <li>• Once the AER has confirmed that no consultation is required, the application proceeds to the decision-making step.</li> </ul> |
| <b>A4</b> | <p><b>Statement of concern<sup>1</sup></b></p> <ul style="list-style-type: none"> <li>• The AER addresses through its established processes any statements of concern that it receives. <ul style="list-style-type: none"> <li>- Applications made to the AER under the <i>Mines and Minerals Act</i> (Part 8) follows the process outlined in that enactment.</li> </ul> </li> <li>• The AER provides any statements of concern received from First Nations or other aboriginal groups and proponent responses to the ACO.</li> </ul>  |

<sup>1</sup> Under the AER's regulatory process, "a person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules." (*REDA*, section 32).

### 3.2 ACO-AER Process 2 (Enhanced Approval Process Applications)

Certain land-use applications for energy resource activities made under the specified enactments are handled through the AER's EAP. For EAP applications, the ACO may require streamlined (level 1) or standard (level 2) consultation, which must be completed before the proponent applies to the AER (figure 3.2, table 3.3). Once the consultation has been completed, the ACO may provide advice to the AER on mitigating impacts on Treaty rights and traditional uses and will inform the AER of whether the ACO has found the consultation to be adequate or adequate pending the outcome of the AER's process.

Once the ACO indicates that the consultation is complete, the proponent is able to submit its application electronically to the AER through the EAP. Submissions to the EAP require a valid First Nations consultation (FNC) number, issued through the Electronic Disposition System (EDS). As part of the AER application, proponents will be required to submit the First Nations impacts and mitigation table, based on their record of consultation.

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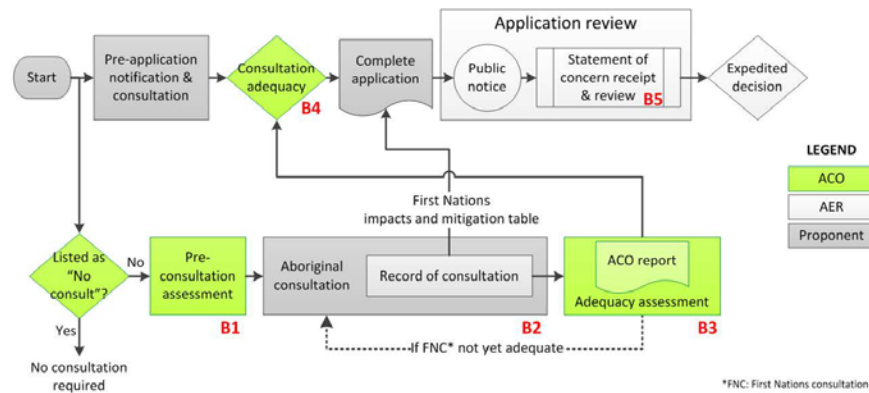


Figure 3.2 Illustration of ACO-AER process 2 for EAP applications

Table 3.3 Process steps and description for ACO-AER process 2 for EAP applications

| Step      | Description  |
|-----------|--|
| <b>B1</b> | <p><b>Pre-consultation assessment</b></p> <ul style="list-style-type: none"> <li>The proponent applies to the ACO requesting a pre-consultation assessment to determine the level of First Nations consultation required.</li> <li>The proponent proceeds to step B2 if the assessment indicates that streamlined consultation (level 1) or standard consultation (level 2) is required. If extensive consultation (level 3) is required, refer to ACO-AER process 4.</li> </ul>   |
| <b>B2</b> | <p><b>Consultation with First Nations</b></p> <ul style="list-style-type: none"> <li>The proponent provides project information to First Nations and consults on project-specific impacts on Treaty rights and traditional uses, in accordance with the <i>Consultation Guidelines</i>.</li> <li>As part of the AER application, proponents will be required to submit the First Nations impacts and mitigation table.</li> </ul>  |
| <b>B3</b> | <p><b>ACO report</b></p> <ul style="list-style-type: none"> <li>The ACO assesses adequacy in accordance with the <i>Consultation Policy</i> and <i>Consultation Guidelines</i>.                             <ul style="list-style-type: none"> <li>In cases where proponent consultation is not adequate, the ACO may require further consultation.</li> </ul> </li> <li>The ACO completes the adequacy assessment and generates the ACO report within the time specified in the <i>Consultation Guidelines</i>.</li> <li>The ACO report to the First Nations and the AER contains the ACO's finding on consultation adequacy and may also contain advice on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses identified during First Nations consultation.</li> </ul> |
| <b>B4</b> | <p><b>Consultation adequacy</b></p> <ul style="list-style-type: none"> <li>Once the ACO has determined consultation adequacy and has generated an ACO report, the proponent may submit its application to the AER.</li> <li>The AER proceeds with its review of the application so that it may issue a regulatory decision.</li> </ul>   |

(continued)



| Step | Description  |
|------|--|
| B5   | <p><b>Statement of concern<sup>1</sup></b></p> <ul style="list-style-type: none"> <li>The AER addresses through its established processes any statements of concern that it receives.                             <ul style="list-style-type: none"> <li>Applications made to the AER under the <i>Mines and Minerals Act</i> (Part 8) follows the process outlined in that enactment.</li> </ul> </li> <li>The AER provides any statements of concern received from First Nations or other aboriginal groups and proponent responses to the ACO.</li> </ul> |

<sup>1</sup> Under the AER's regulatory process, "a person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules." (REDA, section 32).

### 3.3 ACO-AER Process 3 (Non-Enhanced Approval Process Applications)

Non-EAP land-use applications, including applications made under the *Public Lands Act*, *Mines and Minerals Act* (Part 8), *Water Act*, and *EPEA*, follow a modified ACO-AER process 2 (figure 3.3, table 3.4). The AER will accept applications and begin a technical review while consultation is ongoing (i.e., consultation and the technical review run concurrently). Statements of concern received by the AER from a First Nation or other aboriginal group and proponent responses are provided to the ACO and may inform consultation.

Once the consultation has been completed, the proponent will be required to submit the First Nations impacts and mitigation table to the AER. The ACO will assess consultation adequacy and will generate an ACO report to inform First Nations and the AER of whether the ACO has found the consultation to be adequate or adequate pending the outcome of the AER's process. The ACO report may also contain advice to the AER on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses. The AER will not proceed with a decision on the application until the ACO has provided its finding on consultation adequacy.

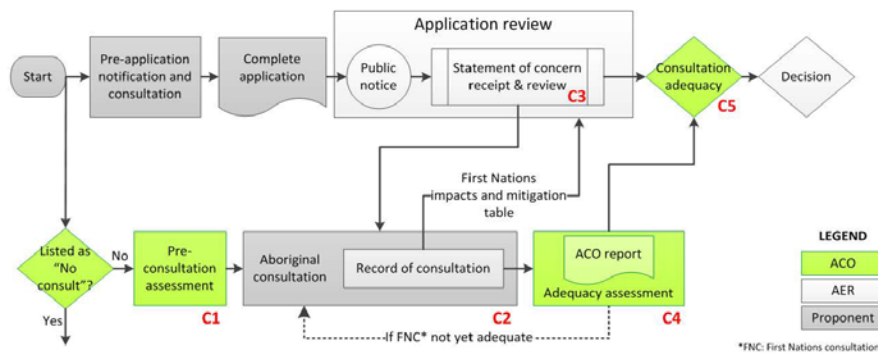


Figure 3.3 Illustration of ACO-AER process 3 for non-EAP applications

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**Table 3.4 Process steps and descriptions for ACO-AER process 3 for non-EAP applications**

| Step | Description  |
|------|--|
| C1   | <p><b>Pre-consultation assessment</b></p> <ul style="list-style-type: none"> <li>The proponent applies to the ACO requesting a pre-consultation assessment to determine the level of First Nations consultation required.</li> <li>The proponent proceeds to step C2 if the assessment indicates that streamlined consultation (level 1) or standard consultation (level 2) is required. If extensive consultation (level 3) is required, refer to ACO-AER process 4.</li> </ul>   |
| C2   | <p><b>Consultation with First Nations</b></p> <ul style="list-style-type: none"> <li>The proponent provides project information to First Nations and consults on project-specific impacts on Treaty rights and traditional uses, in accordance with the <i>Consultation Guidelines</i>.</li> <li>As part of the AER application, proponents will be required to submit the First Nations impacts and mitigation table.</li> <li>Proponents may file their application with the AER so that the application review process can begin.</li> </ul>  |
| C3   | <p><b>Statement of concern<sup>1</sup></b></p> <ul style="list-style-type: none"> <li>The AER addresses through its established processes any statements of concern that it receives. <ul style="list-style-type: none"> <li>Applications made to the AER under the <i>Mines and Minerals Act</i> (Part 8) follows the process outlined in that enactment.</li> </ul> </li> <li>The AER provides any statements of concern received from First Nations or other aboriginal groups and proponent responses to the ACO.</li> <li>The ACO may direct the proponent to address potential impacts on Treaty rights and traditional uses identified in the statements of concern as part of the ongoing consultation with First Nations.</li> </ul>  |
| C4   | <p><b>ACO report</b></p> <ul style="list-style-type: none"> <li>The ACO assesses adequacy in accordance with the <i>Consultation Policy</i> and <i>Consultation Guidelines</i>. <ul style="list-style-type: none"> <li>In cases where proponent consultation is not adequate, the ACO may require further consultation.</li> </ul> </li> <li>The ACO completes the adequacy assessment and generates the ACO report within the time specified in the <i>Consultation Guidelines</i>.</li> <li>The ACO report to the First Nations and AER contains the ACO's finding on consultation adequacy and may also contain advice on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses identified during First Nations consultation.</li> </ul> |
| C5   | <p><b>Consultation adequacy</b></p> <ul style="list-style-type: none"> <li>Once the ACO has determined consultation adequacy and has submitted an ACO report, the AER may complete its application review and issue a regulatory decision.</li> </ul>  |

<sup>1</sup> Under the AER's regulatory process, "a person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules." (*REDA*, section 32).

### 3.4 ACO-AER Process 4 (Extensive Consultation)

ACO-AER process 4 (figure 3.4, table 3.5) applies to energy resource activities for which the ACO requires extensive consultation (level 3). The coordination of the consultation and regulatory processes between the ACO and AER will begin during the development of a consultation plan by the proponent, which is required by the ACO on projects requiring extensive consultation.

The consultation process and regulatory process reconnect as the regulatory process draws close to a decision point. This reconnection occurs with the period for delegated consultation ending at the same time as the period for submitting a statement of concern.

If a hearing is called by the AER on an application, the ACO may observe and may provide advice on any potential impacts on Treaty rights and traditional uses that are raised that had not been previously addressed by the consultation process.

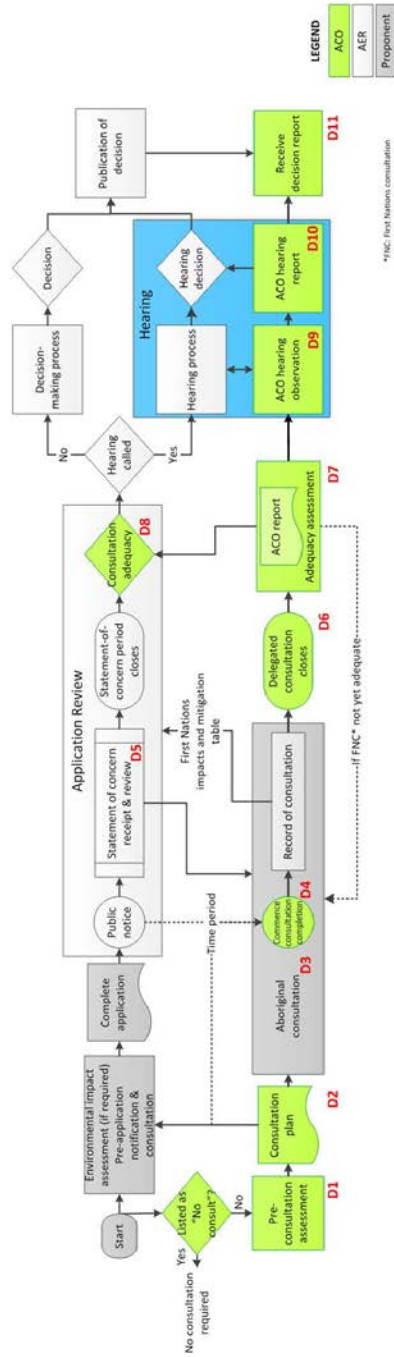


Figure 3.4 Illustration of ACO-AER process 4

Table 3.5 Process steps and description for ACO-AER process 4

| Step | Description  |
|------|--|
| D1   | <p><b>Pre-consultation assessment</b></p> <ul style="list-style-type: none"> <li>The proponent applies to the ACO requesting a pre-consultation assessment to determine the level of First Nations consultation required.</li> <li>The proponent proceeds to step D2 if the assessment indicates that extensive consultation (level 3) is required.</li> </ul>   |
| D2   | <p><b>Consultation plan</b></p> <ul style="list-style-type: none"> <li>The proponent prepares and submits a consultation plan to the ACO outlining its approach to consultation.</li> <li>The ACO will provide the proponent information about consultation requirements and the AER will provide the proponent information about the AER's statement-of-concern period.</li> </ul>  |
| D3   | <p><b>Consultation with First Nations</b></p> <ul style="list-style-type: none"> <li>The proponent provides project information to First Nations and consults on project-specific impacts on Treaty rights and traditional uses, in accordance with the <i>Consultation Guidelines</i>.</li> <li>As part of the AER application, proponents will be required to submit the First Nations impacts and mitigation table.</li> <li>Proponents may file their application with the AER so that the application review process can begin.</li> </ul>  |
| D4   | <p><b>Consultation completion notice</b></p> <ul style="list-style-type: none"> <li>The ACO prepares a consultation completion notice that indicates to the proponent and First Nations that the period for delegated consultation is soon coming to an end.</li> <li>The period remaining for delegated consultation specified in the consultation completion notice is the same as the period stated in the AER's public notice of application for receiving statements of concern.</li> <li>Delegated consultation may continue to occur during the period in which the AER will accept statements of concern, but will end at the same time as the deadline for submitting statements of concern.</li> </ul>   |
| D5   | <p><b>Statement of concern<sup>1</sup></b></p> <ul style="list-style-type: none"> <li>The AER addresses through its established processes any statements of concern that it receives. <ul style="list-style-type: none"> <li>Applications made to the AER under the <i>Mines and Minerals Act</i> (Part 8) follows the process outlined in that enactment.</li> </ul> </li> <li>The AER provides any statements of concern received from First Nations or other aboriginal groups and proponent responses to the ACO for its information.</li> <li>The ACO may direct the proponent to address potential impacts on Treaty rights and traditional uses identified in the statements of concern as part of the ongoing consultation with First Nations.</li> </ul>                                |
| D6   | <p><b>Delegated consultation closes</b></p> <ul style="list-style-type: none"> <li>The portion of the delegated consultation comes to an end at the same time as the deadline for submitting a statement of concern to the AER.</li> </ul>   |
| D7   | <p><b>ACO report</b></p> <ul style="list-style-type: none"> <li>The ACO assesses adequacy in accordance with the <i>Consultation Policy</i> and <i>Consultation Guidelines</i>. <ul style="list-style-type: none"> <li>In cases where proponent consultation is not adequate, the ACO may require further consultation.</li> </ul> </li> <li>The ACO completes the adequacy assessment and generates the ACO report within the time specified in the <i>Consultation Guidelines</i>.</li> <li>The ACO report to First Nations and the AER contains the ACO's finding on consultation adequacy and may also contain advice on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses identified during First Nations consultation.</li> </ul> |
| D8   | <p><b>Consultation adequacy</b></p> <ul style="list-style-type: none"> <li>Once the ACO has determined consultation adequacy and has submitted an ACO report, the AER may complete its review of the application and issue a regulatory decision or call a hearing.</li> </ul>   |

(continued)

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| Step | Description  |
|------|--|
| D9   | <p><b>ACO hearing observation</b></p> <ul style="list-style-type: none"> <li>• If it appears to the AER at the time that a hearing is called that First Nations will be participating, the AER will notify the ACO of the hearing. The ACO may elect to observe or monitor the hearing.</li> <li>• The ACO has discretion to participate beyond observing or monitoring the hearing.</li> <li>• If information is revealed during the hearing about impacts on Treaty rights and traditional uses, the ACO may provide a hearing report.<sup>2</sup></li> </ul>  |
| D10  | <p><b>ACO hearing report</b></p> <ul style="list-style-type: none"> <li>• The ACO considers all relevant evidence submitted during the hearing before preparing a hearing report.</li> <li>• The ACO provides the hearing panel and the parties with the ACO hearing report (under REDA, section 49(3)) prior to or at the close of the evidentiary portion of the hearing and before the final submissions of the parties.                             <ul style="list-style-type: none"> <li>- The ACO hearing report addresses the adequacy of consultation and may contain advice on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses raised during the hearing.</li> <li>- The ACO hearing report deals only with matters raised during the hearing and is not subject to cross-examination.</li> </ul> </li> </ul> |
| D11  | <p><b>Decision report</b></p> <ul style="list-style-type: none"> <li>• The AER publishes the decision report, making it available to the ACO and First Nations.</li> <li>• Hearing participants, if a hearing occurs, receive a copy of the decision report from the AER.</li> </ul>   |

<sup>1</sup> Under the AER's regulatory process, "a person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules." (REDA, section 32).

<sup>2</sup> The ACO hearing report is a written statement from the Crown permitted by section 49(2) of REDA.

#### **4 AER Application Requirement**

For activities listed in appendix C of the *Consultation Guidelines*, there are no additional AER application requirements.

For all applications under the specified enactments submitted to the AER, except those applications for activities listed in appendix C of the *Consultation Guidelines*, an application supplement on First Nations consultation is required effective July 1, 2015.

The supplement is provided on the AER's website.

## **Appendix 1:**

### **Draft Glossary**

#### **Approval**

Any authorizations or dispositions as defined under the appropriate statutes or regulations.

#### **Crown**

In Canada, the Crown refers to any of the federal government and each of the provincial governments. Within this document, the Crown refers to the Government of Alberta (GoA).

#### **Decision**

Any administrative, legislative, statutory, regulatory, policy, and operational judgment, ruling, order, finding, or determination of the GoA.

#### **Land and natural resource management**

Activities (on or off Crown land) potentially affecting the use of provincial Crown land where such activities arise from decisions involving land, water, air, forestry, or fish and wildlife.

#### **Proponent**

An entity or person who is either seeking a Crown decision related to land and natural resource management or seeking an approval from the AER.

#### **Surface Disturbance**

Any disruption of an area that disturbs the Earth's surface or waters during activity or after an activity has ceased.

#### **Treaty rights**

Rights held by a First Nation in accordance with the terms of a historic or modern treaty agreement with the Crown. Treaties may also identify obligations held by a First Nation and the Crown. These rights may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.

#### **Strategic initiatives**

Ari embracing or overarching policy addressing an objective of the GoA that may set a context in which project-specific consultation can occur.

#### **Traditional uses**

Customs or practices that First Nations may engage in on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations. These may include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land.



## Publications



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