THE SCHOOL OF PUBLIC POLICY

MASTER OF PUBLIC POLICY
CAPSTONE PROJECT

Lost in Translation: Examining Alberta's Duty to Consult Policy and the Challenge Government Faces when Policies are Imposed on them by the Judicial System.

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Capstone Executive Summary

The province of Alberta created their duty to consult policy following the *Mikisew Cree First Nation v. Heritage Canada* case.[1] This case extended continuing rights for future and current claims and acknowledged the duty of the Crown to consult when these rights were to be potentially impeded. The Government of Alberta took this as a cue to develop their own duty to consult policy, so to ensure they would never be in violation of this ruling. This is notable in Alberta due to a large provincial focus on resource development. Being required to consult with Aboriginal communities before moving forward with resource development projects is a potential barrier to quick economic expansion.

The Alberta duty to consult policy created in 2007 received widespread criticism from both companies and Aboriginal communities and was amended in 2013. Unfortunately, the 2013 regulations were met with the similar disdain from stakeholders as the previous version.

The recently elected New Democratic Party of Alberta stated in 2015 its intent to re-evaluate and amend the duty to consult policy in Alberta to better serve its intended purpose.[2] This purpose being according to the Government of Alberta's website: "…to reconcile First

[1] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2001 FCT 1426 (CanLII).
[2] Southwick, Reid "What NDP's Victory Means for Alberta's Relations with Aboriginals" *Calgary Herald*, May 09, 2015.

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."[3]

This capstone analyzes the Alberta duty to consult policy and the legal precedents than led to its creation. The results of this capstone demonstrates how complicated policy creation can be when it is born not out of political initiative, but rather imposed by the judicial system.

[3] "The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013" Government of Alberta: Indigenous Relations, June 3, 2013.

Introduction

Consultation, in general, is the act of including impacted stakeholders and gathering feedback prior to making any final decisions and using the opinions and feedback to guide those decisions to an extent. In theory, consultation seems like a simple process, but in practice it is a whole different story: How much to consult? Who to consult? Why consult? How much influence should consultation have? All of these questions hold a great deal of weight and are much more complex to answer than they appear. The concept of consultation is fairly nuanced, and it is continuously being developed, deepened and expanded by the judicial system.

The judicial system in Canada was the first to recognize that the Crown has a duty to consult and accommodate Aboriginal communities when there is knowledge of treaty or traditional rights being potentially impacted by development projects. The duty to consult was born out of case law and precedents, and then imposed onto the Crown. What was lacking (and perhaps intentionally) in the judicial rulings was any clear definitions of what consultation should look like and how much consultation is required to be considered adequate. The Government of Alberta created its duty to consult policy in an effort to streamline and clarify consultation procedures for itself, industry proponents and Aboriginal communities.

The Alberta duty to consult policy is an example of the Crown's inability to establish an effective consultation process that works for all stakeholders. Governments are struggling to balance the real and continuing rights of Aboriginal peoples to be consulted when treaty and traditional rights are impacted and their other duties to their constituents and local industries to provide economic development. The current Alberta government led by the New Democratic

Party (NDP) made one of their election promises to revamp the current policy in a manner that will improve the process for all sides. Unfortunately for the Alberta government, there is no clearly defined strategy of how to improve the consultation policy and how to perfectly balance the often-contrasting needs of Aboriginal peoples and industry.

Literature Review

This paper, using a meta-analysis literature review, identifies and outlines the main concepts that arise within consultation and the legal precedents that led to the creation of the Alberta duty to consult policy. The literature review found that at the heart of consultation there must exist procedural fairness, honour of the Crown and reconciliation efforts in order for it to be meaningful in the eyes of the law. These concepts were formally presented throughout various court cases, most notable of which are *Haida Nation v. British Columbia; Taku River Tlingit First Nation v. British Columbia;* and *Mikisew Cree First Nation v. Canada*. And in recent years this has been especially emphasized by the 2016 decision of the Federal Court of Appeal to overturn the Crown's approval of Enbridge's Alberta to British Columbia pipeline due to a lack of adequate consultation efforts.

Procedural Fairness: Consultation, according to Isaac and Knox (2003),[4] is founded on the legal notion of procedural fairness. Procedural fairness is the obligation of government to inform individuals whose interests may be negatively impacted by a decision and allow them

[4] Isaac, Thomas, and Anthony Knox, "The Crowns Duty to Consult Aboriginal People," *Alberta Law Review* 41, no. 1 (2003): 49-73.

the opportunity to give feedback to decision makers so that they may arrive at more inclusive conclusions. This concept does not mean that all views and feedback need to be accepted by the decision maker, nor does it imply that there is inherent veto power. Rather it underscores that governments must take the opinions and needs of adversely impacted populations into account. This sentiment was made clear in the *Haida Nation v. British Columbia* ruling:

> The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly.[5]

What is considered fair consultation and inclusion in one case is not necessarily transferrable to another. Stakeholders can have varying degrees of legitimate claims or rights, and these circumstances will influence the degree to which consultation may occur.

While this flexibility can be advantageous to keep the consultation process open to specific situations, it also can be debilitating for economic projects. The concept of procedural fairness is a product of case law and, like consultation, is a constantly moving target as judges are the arbitrators of what is fair. Governments can make what they deem to be fair efforts in the consultation process, but may still fail to have economic projects approved if a judge retroactively finds their consultation to be inadequate.

The Honour of the Crown: When studying the Crown's duty to consult it is important to become familiar with the notion of "the honour of the Crown." This is a term that has been created and spread through the various legal proceedings in which the courts have said time

[5] Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, pg, 514.

and again that the Crown has the duty to act honourably with Aboriginal peoples. This means that the Crown is obligated to meaningfully consult Aboriginal communities when there is real knowledge that a proposed project could adversely impact their rights.[6] *Haida Nation v. British Columbia* summarizes this feeling in the following two statements:

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown.[7]

And

> Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights.[8]

Essentially the honour of the Crown is a term that has been created by the courts and the provincial and federal government must act in accordance to this statement. What makes it so complicated is the question of "how" is determined retroactively by the judicial system. There is no clearly defined path of how to fairly consult and uphold the honour of the Crown. The concept of fair consultation is one that changes over time and is determined by a judge, provinces and the federal government who are then in constant threat of being accused of acting against the honour of the Crown and there is very little they can do besides attempting to create clarifying policies and guidelines.

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[6] Peach, Ian, "Who Speaks for Whom? Implementing the Crown's Duty to Consult in the Case of Divided Aboriginal Political Structures," *Canadian Public Administration* 59, no. 1, March 2016.
[7] Haida Nation v. British Columbia (Minister of Forests), [2004] SCC 73, pg, 520.
[8] Ibid, pg, 526.

Consultation and Reconciliation: The underlying purpose of consultation is to inspire reconciliation efforts between the Crown and Aboriginal peoples. The act of meaningfully involving Aboriginal people in the decision making process is a positive affirmation by government that Aboriginal rights are legitimate and important. Justice Binnie emphasizes this thought in the *Mikisew Cree First Nation v. Heritage Canada* case in his opening statements:

> The fundamental objective of the modem law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal peoples concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.[9]

It was also emphasized in the *Haida Nation v. British Columbia* case judgment:

> The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.[10]

[9] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, pg. 1.

[10] Haida Nation v. British Columbia (Minister of Forests), [2004] SCC 73, pg. 514.

Taking this deeper, Kaitlin Ritchie in the *UBC Law Review*[11] discusses this concept of consultation with the underlying attempt at reconciliation and identifies three areas of threats to consultation and reconciliation: (1) Delegation: the government is placing more and more of the responsibilities of consultation on to industry and this has potential to reduce the relationship between the Crown and Aboriginal peoples. (2) Resourcing: while it has been established that the government will aid the Aboriginal people in financing and supporting the consultation process, they are not obligated. This presents a problem as often Aboriginal communities do not have the capacity or the resources to navigate the consultation process on their own and that has the potential to leave these communities vulnerable to unfair negotiation. (3) The consultation processes and the cumulative effects of consultation: Ritchie raises concerns that the collective impacts of consultations will reduce the treaty rights of Aboriginal people over time.

Meaningful Consultation: In order for the Crown's duty to consult to be meaningful it must consist of varying degrees of procedural (consultation) and substantive (accommodation) aspects. The concepts of fair consultation and accommodation or mitigation of impacts are founded in various legislative documents and legal case rulings. In particular, Section 35(1) of the Canadian Constitution plays a key role in the decisions the courts and the Crown have made in regards to consultation. Section 35(1) recognizes the treaty and traditional rights of Aboriginal people and was the foundation upon which the duty to consult was born within case law.

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[11] Ritchie, Kaitlin, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation," *UBC Law Review* 46, no. 2 (2013); 397-438.

R v. Sparrow in 1990[12] was the first case where the concept of the Crown's duty to consult was raised and it allowed for future cases to expand on this premise. Following this, *Delgamuukw v. Canada* (1997)[13] made some clarifications between Aboriginal title and Aboriginal rights which opened up future consultation rulings to not only include basic rights attached to land titles, but also inherent rights around cultural practices such has hunting, fishing, ceremonies and other site-specific activities. [14]

Legal Precedents: While there have been many cases that have dealt with the notion and legalities of consultation, there are three major cases that significantly solidified the Crown's duty to consult and drove provinces, like Alberta, to create its own policies. This trilogy of notable cases consists of *Haida Nation v. British Columbia, Taku River Tlingit First Nation v. British Columbia* and *Mikisew Cree First Nation v. Canada*.

Haida Nation v. British Columbia: This case was brought to the Supreme Court of Canada upon appeal of the Haida First Nation against the Government of British Columbia.[15] In this case a forestry project that impacted the Haida people's traditional rights and land claims was approved without consulting the Aboriginal community. This major case was the first real acknowledgement of the Crown's duty to consult with, and potentially accommodate, the treaty and traditional rights of Aboriginal communities.

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[12] R. v. Sparrow, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC).
[13] Delgamuukw v. British Columbia, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC).
[14] Flanagan, Tom, "Clarity and Confusion? The New Jurisprudence of Aboriginal Title," *Fraser Institute Centre for Aboriginal Studies*, April 2015.
[15] Haida Nation v. British Columbia (Minister of Forests), [2004] 3 SCR 511, 2004 SCC 73 (CanLII).

The Chief Justice presiding over the Haida case made it clear that if the Crown has knowledge of a proven claim or an unproven but credible claim, then the duty to consult and accommodate is triggered. How that consultation and accommodation occurs will vary based on the circumstances.[16] Determining the level of consultation and accommodation is the Crown's responsibility.[17] The Haida Nation case was also noteworthy as it recognized that the private company, Weyerhaeuser, did not share in the Crown's legal duty to consult and therefore only the procedural aspects of consultation could be delegated to industry. [18]

Taku River Tlingit First Nation v. British Columbia, 2014: The significance of this case is that it addressed the idea of meaningful consultation and accommodation, and aided in clarifying just how far the Crown was required to consult with Aboriginal communities. Taku River Tlingit First Nation claimed that their concerns had not been adequately considered in the Crown's decision to allow an old mine to be reopened. The court sided with the Taku River Tlingit First Nation and acknowledged that the Crown had failed to consult or even inform the community of their decision and if they had they would not have made the same decision.[19]

The courts stated that the Crown must determine how to integrate the consultation process and involvement of impacted Aboriginal communities into the decision-making process. How far that consultation must be integrated is based on each case and how impacted the

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[16] Peach, Ian, "Who Speaks for Whom? Implementing the Crown's Duty to Consult in the Case of Divided Aboriginal Political Structures," *Canadian Public Administration* 59, no. 1, March 2016.
[17] Olynyk, John M, "The Haida Nation and Taku River Tlingit Decisions: Clarifying Roles and Responsibilities for Aboriginal Consultation and Accommodation," *Lawson Lundell*, February 2005.
[18] Ibid.
[19] Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74.

community will be. This is important because it affirms the government's duty to consult but allows for governments to implement the consultation process in a way that works best for the government and for the situation.[20]

Mikisew Cree First Nation v. Heritage Canada: The Mikisew Cree First Nation, who alleged that the Government of Canada had failed to consult and accommodate on a road development project through Wood Buffalo National Park, brought this case to the Supreme Court of Canada.[21] The court sided with the Mikisew Cree First Nation and stated that the government had failed to consider the treaty rights (hunting, fishing and trapping) of the Mikisew First Nation community. Had they done so, the court felt that the development of this road and the decisions behind the project would have been significantly different.[22]

This case was particularly relevant to Alberta as it recognized that even in the presence of a treaty, the duty to consult remained a legal obligation of the Crown. It also identified that the affected Aboriginal community had the responsibility to provide feedback and make their concerns known to the decision-makers.[23] The final piece of this decision means that Aboriginal communities must reciprocate the consultation efforts put forth by the Crown and its proponents by actively involving themselves and being open to being consulted.

Enbridge Pipeline Appeal, 2016:

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[20] Olynyk, John M, "The Haida Nation and Taku River Tlingit Decisions: Clarifying Roles and Responsibilities for Aboriginal Consultation and Accommodation," *Lawson Lundell*, February 2005.
[21] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 SCR 388, 2005 SCC 69 (CanLII).
[22] Joseph, Bob, "Mikisew Case," Indigenous Corporate Training, October 16, 2014.
[23] Ibid.

A more recent ruling that impacts economic development and emphasizes the significance of Aboriginal consultation is the Federal Court of Appeal's decision to overturn the Enbridge pipeline approval from the National Energy Board and the Federal Cabinet.[24] The proposed Enbridge pipeline project, titled "The Northern Gateway Project," consists of two proposed 1,178 kilometer pipelines that are intended to send Alberta bitumen to the BC coast to be transported to new markets oversees and also to receive natural gas condensate to distribute in Alberta markets.[25] This pipeline project, despite its promise of being economically positive, has faced numerous roadblocks. One roadblock in particular is several of the First Nations communities that will be directly impacted by the pipeline development. In 2014, after significant controversy, consultation and a report by the National Energy Board of Canada, Enbridge received approval (subject to 209 conditions) for the pipeline from the federal government.[26]

This decision was very controversial and received a lot of criticism particularly from Aboriginal people and environmentalists, and in response, a group of Aboriginal communities appealed the decision to the Federal Court of Appeal. The court sided with the Aboriginal communities and overturned the previously awarded government approval on the grounds that there had not been adequate consultation by the Crown with the impacted Aboriginal communities. The court was also clear, to state that the government's decision on this project should be a balance of all considerations: economic, cultural and environmental. This statement is an assertion of the right of government to approve projects despite dissenting opinion, as

[24] Gitxaala Nation v. Canada, 2016 FCA 187 (CanLII).
[25] Morgan, Geoffrey, "Court Quashes Northern Gateway Approvals, Leaving Pipeline's Fate in Hands of Liberal Government," *Financial Post*, June 30, 2016.
[26] Proctor, Jason, "Northern Gateway Pipeline Approval Overturned," CBC News, June 30, 2016.

long as they can prove sufficient consultation and accommodations efforts were made. As a result of the ruling, the federal government must either redo their consultation efforts, or review all publically made consultation documents from their previous consultation submissions, before they can make any further decisions about the pipeline project.[27]

The court decision is so notable because of the implications it could has on other similar development projects. As legal rulings grow broader and broader on the subject of consultation it becomes increasingly difficult for governments and proponents to prove that adequate consultation occurred. Adequate consultation does not have a formal definition, and that means proving adequacy is at the mercy of the judicial system that judges retroactively. Industry and the government must be explicit in and mindful of their every move during the consultation process. All decisions must be justified and all feedback must be taken into account. Failing to do so is a costly error that has the potential to postpone a project to the point of ruin.

Types of Consultation

Three types of consultations emerged through the above-mentioned cases along with other legal rulings such as *Delgamuukw v. British Columbia*, 1997 which emphasized the obligation of the Crown to consult Aboriginal peoples including involving them in decisions, actions and legislations that may impact Aboriginal title. The first category is the basic act of consultation with the objective of addressing all potential concerns. Second, is deeper than basic consultation, Aboriginal peoples are included in the decision-making process. Third, and

[27] Morgan, Geoffrey, "Court Quashes Northern Gateway Approvals, Leaving Pipeline's Fate in Hands of Liberal Government," *Financial Post*, June 30, 2016.

potentially most controversial is that Aboriginal peoples must consent before any decisions can be made.[28] This third level of consultation has not been accounted for in any policy to date but has received a lot of discussion. The *Haida Nation v. British Columbia* case was the first major ruling to explicitly state that consultation did not amount to a veto, and that the purpose of consultation was not to result in approval from the Aboriginal community but rather to make honourable efforts to mitigate the negative impacts and take their feedback into account.

Findings

The Alberta Duty to Consult Policy

In 2007, following the rulings from the *Mikisew Cree First Nation v. Heritage Canada* case, the Government of Alberta created its consultation policy. As previously noted, the Mikisew Cree case extended continuing rights for future and current claims and acknowledged that it was the duty of government to consult when these rights were to be potentially impeded. The Alberta duty to consult policy was an effort by the Government of Alberta to create clear process and ensure compliance with legal precedents.

The duty to consult applies to all government bodies at all levels across Canada but what makes this policy so notable in Alberta is the province's large resource industry. Being required to consult with First Nation communities before moving forward with resource development is a potential barrier for quick economic expansion in the resource sector.

[28] Reddekopp, Neil, "Theory and Practice in the Government of Alberta's Consultation Policy," *Constitutional Forum* 22, no. 1, 2013.

The Alberta government in 2013 updated the policy and its attached guidelines were updated from their original version in 2014. Below is a brief summary of the policy and its attached guidelines in both the original (2005/2007 respectively) and current (2013/2014 respectively) versions.

Policy

The original policy document was released in 2005 and the attached guidelines were finalized by 2007; both received severe backlash from many Aboriginal communities who claimed they were not properly consulted in the creation of the policy and therefore refused to recognize it as legitimate.[29] In response, the policy was amended to its current version in 2013. The updated policy still receives criticisms from both the companies and the Aboriginal communities and the current NDP government, during the 2015 election, stated their determination to rewrite the policy to benefit both Industry and First Nation communities.[30]

Original Policy Analysis

The original policy and its guidelines presented a vague and complex consultation system. While it recognized the legitimate and continuing right of First Nations people to be consulted when any economic development projects might negatively impact their treaty rights and it stated that all consultation must be done under the honour of the Crown, what the policy failed to do was provide explicit instructions on how to carry out consultation efforts. The duty to

[29] Wohlberg, Meagan, "Treaty 8 Chiefs Reject Alberta's Consultation Policy," *Northern Journal*, September 16, 2013.
[30] Southwick, Reid, "What NDP's Victory Means for Alberta's Relations with Aboriginals" *Calgary Herald*, May 09, 2015.

consult was spread across government departments, but no one held ownership over the policy. This was further complicated by the delegation of much of the consultation duties to proponents.[31]

Both Industry and Aboriginal communities criticized the policy for its lack of organization and clarity. Aboriginal people in particular felt they had not been properly consulted before the policy's creation, and Industry felt that too much of the responsibility was pushed to them with not enough guidance to actually perform adequate consultation.[32] The Government of Alberta then, in 2013, pledged to revamp the duty to consult policy. Based on these critiques they identified five major points of contention that needed to be addressed: First, they noted the need for a centralized government office to deal with consultation activities. Secondly, it was determined that the role of the proponent needed to be made more explicit. This included outlining the notification and inclusion processes of consultation and establishing that proponents need to go beyond notifying First Nations communities of potential impacts. Third, it was acknowledged that in order to better guide the consultation process a consultation matrix should be created. This matrix would act as a guide for all involved stakeholders to follow when planning out consultation activities. Fourth, the issue of the Aboriginal communities' capacity to handle consultations was raised. Both industry and government had been supporting the communities they were consulting with and it was agreed that that support needed to continue but in a more formal manner. A levy on industry was then created

[31] Neufeld, Richard A., Caitlin Graham, and Kathleen Shannon, "Changes to the Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013," *Lexology*, October 1, 2013.
[32] Laidlaw, David, "Alberta First Nations Consultation & Accommodation Handbook – Updated to 2016," *Canadian Institute of Resources Law*, March 2016.

to help provide Aboriginal communities with the capacity to consult; this levy was recently cancelled, as industry found they were paying twice to support Aboriginal communities in consultation[33] - once into the levy and then again directly to the Aboriginal communities when they ran out of the resources supplied to them from the Government of Alberta. Lastly, and perhaps most critically the Government of Alberta, in accordance with legal precedents, realized that the policy needed to be adjusted from merely considering treaty and constitutional rights to include traditional rights as well.

Current Policy

In addition to the changes mentioned above, the current policy (2013) can be broken down into three essential components that facilitate the consultation process in Alberta:

1. *Focus on pre-consultation assessment*

   In keeping with the legal precedents which speaks to the seriousness of consultation and the responsibility of the Crown to properly explain their decisions and genuinely address all legitimate concerns, the Government of Alberta's duty to consult policy places emphasis on due diligence prior to consultation. This piece of the policy speaks to addressing the concept of procedural fairness and ensuring that the Crown and its proponents are fulfilling the consultation process to an adequate and fair degree. As noted in the *Mikisew Cree First Nation* Case, governments must take the time to consult

[33] Neufeld, Richard A., Caitlin Graham, and Kathleen Shannon, "Changes to the Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013," *Lexology*, October 1, 2013.

and accommodate Aboriginal communities; failing to do so can lead to them making decisions that do not reflect the feedback or needs of the Aboriginal community. Pre-consultation can help to ensure that the impact upon treaty or traditional rights is being properly taken into account to guide the level of project consultation to occur.[34]

2. *Delegated consultation*

Particularly in project-specific consultation the Government of Alberta limits its role in the consultation process and instead delegates the procedural aspects of consultation to the proponent. In general the duties that can be delegated to proponents include providing Aboriginal communities with plain language information; identifying potential adverse impacts for Aboriginal communities; meeting with Aboriginal communities to discuss their apprehensions; developing and implementing accommodation or mitigation strategies; and reporting delegated activities to both the Government of Alberta and Aboriginal communities.[35] In essence, the Government of Alberta has created a system where Aboriginal communities and Industries are forced to negotiate with each other to resolve any areas of issue. As Neil Reddekopp (2013) states, this policy is flawed in theory but does work in practice because both sides of the consultation are incentivized to reach a deal before it gets sent to the Energy Regulation Commission Board for review.[36] The Aboriginal community fears a review will lead to a

[34] "The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013" *Ministry of Aboriginal Relations, Government of Alberta,* June 3, 2013, pg. 6.
[35] Ibid, pg. 7.
[36] "Who is the ERCB and what is its role?" *Alberta Energy Regulator.*

project being approved despite their objections and Industry fears massive, costly delays.[37] Unfortunately this success is not a reflection of the policy but rather the involved stakeholders trying to make the most out of an unavoidable situation. This success can more than likely change along with the circumstances of the resource industry and other factors.

Delegated consultation activities, as previously discussed in the Haida Nation case, can be delegated to industry proponents but only the Crown holds the responsibility of consultation. If consultation is not adequately completed the fault falls solely to the Crown not the proponents.

3. *Creation of the Aboriginal Consultation Office*

The Government of Alberta, in response to the lack of centralization in the past policy, created the Aboriginal Consultation Office. The purpose of this office is to "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

[37] Reddekopp, Neil, "Theory and Practice in the Government of Alberta's Consultation Policy" *Constitutional Forum* 22, no. 1, 2013.

- Measures to protect the transparency and integrity of the consultation process."[38]

This aspect of the Alberta policy is a way for the Government of Alberta to maintain the ownership of the duty to consult and ensure that all consultation activities are performed in a way that reflects the honour of the Crown. Having one governing body also helps to keep the policy process clear and reduces confusion that proponents previously faced in the original policy around issues like ownership, reporting and documentation.

Guidelines

Following the creation of the consultation policy, the Government of Alberta created the *Guidelines on Consultation with First Nations on Land and Natural Resource Management* document. This document provides a framework, which all stakeholders can reference, to ensure that they are applying the duty to consult policy into their daily operations.

The guidelines can be summed up under four main points:

1. *Determine which projects require consultation and with whom*

   Prior to consultation the Aboriginal Consultation Office will determine the potential effects of the project on Aboriginal rights and based on this, the scope and level of consultation that should occur.[39] To determine this, the Aboriginal Consultation Office

[38] Ibid, pg. 5.
[39] "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management," *Ministry of Aboriginal Relations, Government of Alberta,* July 28, 2014, pg. 3.

will review all details of a proposed project including project area, proposed activities, details on treaty rights and traditional land use, and all other relevant documents.

2. *Advise industry of consultation procedures that must be followed*

The guidelines, based on the policy, separate consultation into three levels, and an assessment conducted by the Aboriginal Consultation Office determines which level the industry must adhere to.[40]

a) Level 1: The assessed project is determined to have no impact on Aboriginal rights; no consultation is required

b) Level 2: The assessed project is determined to have low impacts on Aboriginal rights; the proponent (industry) will be given the responsibility to carry out the consultation process

c) Level 3: The assessed project is determined to have high and/or permanent adverse impacts on Aboriginal Rights; the Province of Alberta will take the responsibility of carrying out the consultation process[41]

In addition to levels of consultation, the Government of Alberta has also attached notification and consultation timelines to their consultation process. For levels 1 and 2 the proponents are required to notify their identified Aboriginal community, upon which the community has 15 days to respond. For level 3, the Aboriginal community has 20

[40] Ibid, pg. 12.
[41] Millen, Roy, and Katie Slipp, "Bulletin." Alberta: New Aboriginal Consultation Office, November 18, pg. 16.

days to respond. Halfway through the respective notification timelines, if no response has been received, the proponent is required to follow up with the Aboriginal community. If there is still no response from the Aboriginal community despite follow-up notification efforts, the proponents can request that the Aboriginal Consultation Office to review the consultation record.[42]

For a visual outline of the consultation levels and general process, see Appendix A.

3. *Review industry's consultation plans and subsequent activities to determine their adequacy and completeness.*

Upon the completion of the proponent's consultation process, the proponent will submit the details of the consultation to the relevant First Nations for review and the opportunity to comment. This process can either lead to identification of gaps in consultation, in which case the Aboriginal Consultation Office will work with the proponent to address the gaps; or the consultation details along with the approval from the relevant First Nations will be submitted the Aboriginal Consultation Office to review for adequacy.[43] Delegated consultation responsibilities to proponents include: notifying and engagement; identifying potential issues; and providing options to mitigate or eliminate these issues. The Aboriginal Consultation Office determines whether the

[42] "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management," *Ministry of Aboriginal Relations, Government of Alberta,* July 28, 2014, pg. 12.
[43]Carpenter, Sandy, Duff Harper, and Jessica Mercier, "Alberta Finalizes First Nation Consultation Guidelines," *Blakes*, May 08, 2014.

consultation process has been adequate and will report to the Alberta Energy Regulator or provide a recommendation to the Crown decision-maker.[44]

4. *Accommodation will be reflected in the regulatory approval process and are determined based on the adequacy of consultation and industry's effort to change plans and adjust to minimize impact.*[45]

   The Alberta Energy Regulator has jurisdiction for oil, gas and coal activities in the province, but they do not have jurisdiction to assess consultation according to the *Responsible Energy Development Act.*[46] The guidelines, however, specify that the Aboriginal Consultation Office will be expected to work closely with the Alberta Energy Regulator to ensure that consultation occurs prior to any decisions regarding development projects.[47]

Best Practices: Some common and best practices involved in the consultation process include but are not limited to:

- Site visits
- Community meetings
- Cultural awareness training

[44] Ibid.
[45] "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management," *Ministry of Aboriginal Relations, Government of Alberta,* July 28, 2014, pg. 3.
[46] Government of Alberta, Office Consolidation, *Responsible Energy Development Act,* December 17, 2014.
[47] "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management," *Ministry of Aboriginal Relations, Government of Alberta,* July 28, 2014, pg. 7.

- Pre-application consultation
- Business, employment and training
- Long-term relationship building
- Community investment[48]

Criticisms of the Current Policy

Aboriginal Criticisms: From the start, Aboriginal communities have been very critical of Alberta's duty to consult policy, and despite the Government of Alberta's effort to reconcile some of their criticisms from the first policy they are still not satisfied. In particular, the main critiques of the policy include the policy not including all aspects of treaty and traditional right and the now repealed levy.

Members of the Keepers of the Athabasca group, along with other First Nations communities from Treaty 6 and Treaty 8 territory, argue that the new policy does not include all traditional rights. Alberta's policy lists traditional rights as fishing, hunting and trapping activities but fails to note other aspects such as burial and ceremonial grounds and other food harvesting activities.[49] In addition, it has also been noted that on top of missing pieces of traditional rights, the new policy does not require consultation to occur on land or leasing rights for Crown resources. First Nations, with support from legal precedents, maintain that this is an area in which consultation is essential and keeping it out of the policy is an extreme flaw.

[48] Statt, Graham, "Bearpaw Legal Education & Resource Centre," Consultation in Alberta, September 2007.
[49] Land, Lorraine, "Creating the Perfect Storm for Conflicts Over Aboriginal Rights: Critical New Developments in the Law of Aboriginal Consultation," *OKT Law*, January 27, 2014.

Keepers of the Athabasca group members, as well as the Confederacy of Treaty 6 First Nations Chiefs critiqued the policy on the grounds that the new policy takes away from self-governance and reinforces historical paternalistic relationships. This statement is directed in particular to the now scrapped levy on industry in which the government collects money from corporations and distributes the money to Aboriginal communities as needed. The problem with this system is that it leaves the Aboriginal people relying on government too heavily.[50] They saw the former levy as a sovereignty issue, reinforced by the line in the policy that states that all decisions under the levy act are final and not subject to review. The newly elected NDP Government repealed the levy in 2016 as a first step in their effort to reconcile with Aboriginal communities and revamp the duty to consult policy.[51]

Industry Criticisms: Industry has been less forthright with their criticisms of the policy, but several pieces of the policy hinder industry's ability to deliver economic development projects. These pieces include determining adequate consultation, the now repealed levy, and consulting with multiple Aboriginal communities.

In general, industry criticizes and worries about the duty to consult because it is becoming more apparent that consultation now amounts to consent. Under the current duty to consult policy, companies take on the bulk of the consultation activities as proponents. They are responsible for notification, negotiation and reporting and despite the policy's attempt to clarify their actions, there is no guarantee that their projects will pass. There is a very real risk

[50] Wohlberg, Meagan, "Alberta's New Aboriginal Consultation Policy Criticized," *Northern Journal*, August 26, 2016.
[51] Land, Lorraine, "Creating the Perfect Storm for Conflicts Over Aboriginal Rights: Critical New Developments in the Law of Aboriginal Consultation," *OKT Law*, January 27, 2014.

that Aboriginal communities will oppose their efforts and that opposition will lead to the project's demise. Despite case law making it clear that consultation does not amount to veto, consultation does have the potential to delay projects to the point of ruin. Industry is constantly worried that despite receiving government approval, their projects still won't occur unless the Aboriginal communities they are consulting with fully consent. This was recently seen in the Enbridge Pipeline appeal case, 2016.

Before the levy was repealed it also received a great deal of criticism from industry proponents; they felt they were paying twice to support Aboriginal communities in the consultation process. Often the support provided to Aboriginal communities from the levy was not sufficient to sustain the communities throughout the entire process, industry then had to provide funding outside of the levy.[52]

The final challenge for industry is not only a problem with the Alberta policy but one that spans all jurisdictions; it is the difficulty they face when they have to consult with multiple Aboriginal communities. Industry often finds that Aboriginal communities hold off coming to agreements because they are waiting to see what other communities are able to negotiate. This challenge arises most often with pipeline projects as they often span long distances and many jurisdictions with their own set of consultation policies.[53] It can extend their project timelines and prove very costly.

Conclusions

[52] Ibid.
[53] Flanagan, Tom, "Considering the Duty to Consult," Alberta Oil Magazine, March 24, 2014.

The Alberta government is struggling to comply with ever-changing legal expectations; that struggle shines through in their inability to create a policy that receives praise from all stakeholders. As consultation with First Nations communities becomes more and more demanding, economic development projects will continue to be stalled to the point of ruin.

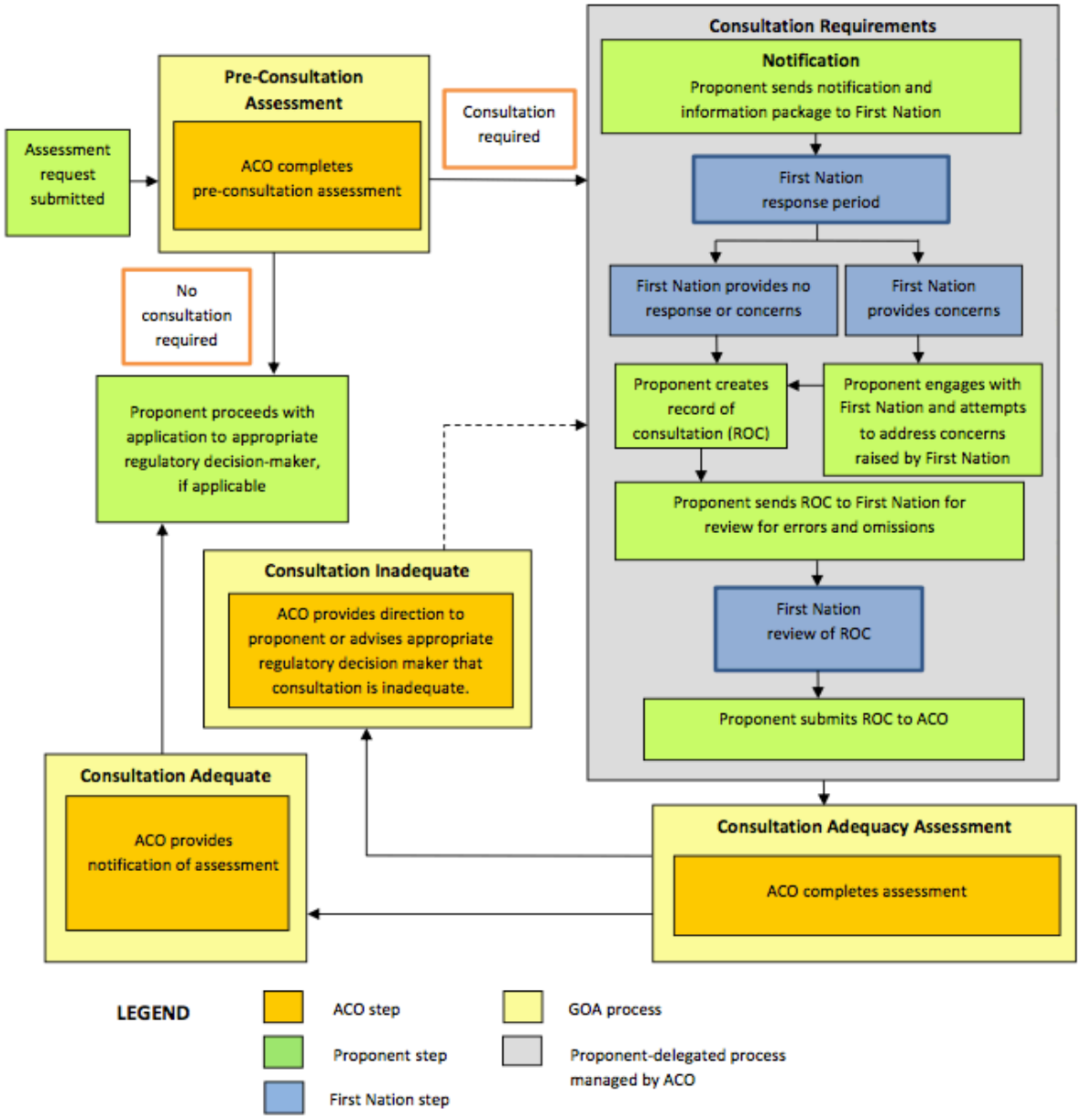
In the upcoming months and years the current Alberta government led by the New Democratic Party will have their work cut out for them trying to revamp the current policy in a way that works for both Aboriginal communities and Industry. They will have to be very careful to encompass all of the case law that has been passed while also addressing the challenges faced by industry in the consultation process. Unfortunately for the Alberta NDP government there appears to be no clear answer as to how to balance the needs of the two stakeholders.

Case law has made it very clear that consultation with Aboriginal communities is imperative to development projects in Canada. Consultations must be done with the honour of the Crown and therefore should not be done superficially but rather they must be extensive and complete as the adverse impacts on Aboriginal community command.

Alberta's duty to consult policy is an example of how complex policy development can become when a policy is born not out of political initiative, but rather imposed by the judicial system. The judicial branch of Canada is the holder of the principles of duty to consult, they have time and again shown their desire to see consultation occur but they lack the power to implement it so the must delegate it to the provinces. As the courts continue to expand the power of the duty to consult, it limits governments in their ability to honourably consult and accommodate with their commitment to the rest of their voter population to provide

opportunities of economic growth and employment. Governments hold a duty to represent the entire population to which they serve. The duty to consult policy forces them to operate under constraints that make certain aspects of their governing duties difficult to balance.

Appendix A



The Government of Alberta in their duty to consult guidelines provides the above flowchart. It outlines the process that proponents, the Crown and Aboriginal communities must follow during the consultation process. It is included in this document to provide the reader with a visual representation of the previously mentioned duty to consult policy and its accompanying guidelines.

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