

Developing a Federal Approach to Consultation and Accommodation



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Indian and Northern
Affairs Canada

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Canada 

Crown's Legal Duty

- ❖ *Haida, Taku River* and *Mikisew Cree* Supreme Court decisions ruled that the federal and provincial Crown have a legal duty to consult, and possibly accommodate, when their conduct may impact established or potential Aboriginal/Treaty rights.
- ❖ Duty may be triggered by any federal or provincial approval, license, permit or by any large or small size project or activity that could affect established or potential Aboriginal/Treaty rights, such as the management or disposal of Crown property.
- ❖ In the context of unprecedented growth in the resource sector, a failure to consult Aboriginal groups adequately can prove costly for all Canadians, with approval processes halted, work stoppages, delays and missed economic opportunities.
- ❖ Failing to adequately consult increases the risk of court intervention and judicial imposition and ongoing supervision of consultation processes.

Intergovernmental Collaboration

- ❖ Sharing of best practices and information on our respective approaches to consultation, and ongoing collaboration between governments would:
 - assist in managing expectations of First Nation, Métis and Inuit groups with regard to consultation and accommodation.
 - facilitate the identification of who has the mandate/authority to be consulted.
- ❖ On projects where both governments have roles to play (authorizations, funding, etc.), improved intergovernmental coordination will ensure efficiency and timeliness of decision-making.
- ❖ Tripartite agreements on consultation processes between Canada, Provinces/Territories and First Nations, Métis and Inuit groups may facilitate the dialogue between parties and result in improved buy-in in the consultation/accommodation results.
- ❖ Lack of Aboriginal community capacity to adequately participate in consultations is a concern for federal, provincial/territorial governments. Options for addressing this issue need to be developed by governments when their respective activities may trigger a legal duty to consult.

Developing a Federal Approach: Work to Date

- ❖ Since late 2004, federal officials from approximately 14 departments and agencies have worked on a federal initiative on consultation and accommodation to assess policy and operational changes needed. DOJ has worked to ensure consistent legal advice.
- ❖ In 2005-2006, federal officials held preparatory discussions with First Nations, Métis and Inuit groups across the country, representatives of provinces/territories and federal officials to inform them about a federal initiative and discuss how they wanted to work with Canada to develop a federal approach.
- ❖ On November 1st, 2007 the Government of Canada launched an action plan to address the legal duty of federal departments/agencies to properly consult with First Nation, Métis and Inuit groups when Crown conduct may adversely impact established or potential Aboriginal and Treaty rights.

Developing a Federal Approach: Action Plan

The Government of Canada's action plan will ensure that:

- ❖ Federal officials receive interim consultation guidelines and related training;
- ❖ Federal officials begin monitoring and improving the coordination of consultation and accommodation practices across departments;
- ❖ A repository of information is created to track the location and nature of Canada's established and potential Aboriginal and Treaty rights; and
- ❖ First Nations, Métis and Inuit groups, as well as provinces, territories and industry groups are engaged in the development of a policy on consultation and accommodation beginning in winter 2008.

Developing a Federal Approach: Expected Results

- ❖ Assist in reducing inconsistencies and adverse precedent-setting across government;
- ❖ Ensure that First Nation, Métis and Inuit groups are engaged in a results-oriented and time-specific dialogue aimed at developing Canada's policy on consultation/accommodation issues;
- ❖ Improved coordination with other federal activities/processes (such as environmental assessments and regulatory processes) and provincial and territorial activities.
- ❖ Federal positions that fill legal and policy gaps with a view to reducing future litigation, strengthening decision-making and promoting reconciliation of Aboriginal and Treaty rights with other societal interests.
- ❖ Get ahead of the courts by developing sustainable approaches and partnerships that provide more predictability, certainty and transparency on when and how to consult and possibly accommodate Aboriginal groups.

Moving Forward

- ❖ Further discussions with Provinces and Territories during the development of a federal policy on consultation and accommodation, notably to improve coordination of consultation when both governments are involved in projects. This is likely to take place in late Winter and Spring 2008.
- ❖ In the meantime it is important for governments to ensure better coordination on a case-by-case basis.
- ❖ Federal, provincial and territorial governments may also wish to discuss means of sharing information on potential and established Aboriginal and Treaty rights.