

# Understanding the Federal Action Plan on Aboriginal Consultation and Accommodation



Presentation To The Canadian Institute's 5<sup>th</sup> Annual Aboriginal Consultation for Industry Conference

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Tuesday, December 4, 2007



# Background: What Did The Supreme Court Of Canada Say?

- The Supreme Court (*Haida and Taku River*, 2004) ruled that the Crown, federal and provincial, has a legal duty to consult and possibly accommodate First Nation, Métis or Inuit communities when the Crown has « real or constructive knowledge » of an established or potential Aboriginal Right and contemplates conduct that might adversely affect it.
- The scope and content of the duty will be proportionate to a preliminary assessment of the strength of the claimed right and the seriousness of the adverse effect on the right. Therefore, the duty will be highest when the claimed Aboriginal right is very compelling and the impacts of the proposed project or activity will be severe and permanent.
- In *Mikisew Cree* (2005), the Court recognized a similar obligation to consult when the Crown proposes to « take up » treaty lands for specific purposes.
- In all cases, the duty is grounded in the « Honour of the Crown »; does not apply to industry and does not confer upon Aboriginal groups a « veto right » as the Crown can make decisions based on societal interests other than Aboriginal interests.



# Background: How Important Are These Decisions?

- They represent a significant « turning point » as Court expanded circumstances where the Crown has a legal obligation to consult and possibly accommodate First Nation, Métis or Inuit communities.
- These Supreme Court of Canada decisions have subsequently been applied by Trial Court judges such as in *Little Salmon* (Yukon), *Chicot* (NWT) and *Dene Tha'* (NWT).
- The duty to consult may be triggered by a federal approval, license, permit or any other federal activity that could affect Aboriginal and Treaty Rights whether it be with regard to large or small scale projects.
- These decisions impose upon officials the onus to legally justify applicable processes and rationale for decisions taken.
- Judges may review and possibly strike down consultation and accommodation practices, which may halt approvals, thus creating uncertainty to many economic development initiatives in Aboriginal communities.



# Conclusion: No Longer « Business As Usual »

- Concerted effort required to bring about effective change because,
  - conflicting interpretations on the scope and meaning of the duty results in considerable uncertainty which:
    - affects government initiatives and decision-making processes
    - creates tension and difficulties with First Nation, Métis and Inuit groups, Provinces and Territories, and Industry;
  - band Councils are experiencing “consultation fatigue” as many are overwhelmed by large number of consultation requests;
  - governments need to bring about increased consistency, efficiency and effectiveness of process and outcomes;
  - the legal duty to consult may be triggered in situations where a parallel consultation process is also required under a statutory regime (e.g. CEAA).





# Canada's Response To The Court Decisions

- Since November 2004, Canada has been implementing a three-pronged strategy:
  1. engage **Aboriginal** representatives in discussions aimed at understanding their position regarding the development of a federal policy on consultation;
  2. inform **federal** employees of these decisions and related implications;
  3. open dialogue with **provincial/territorial** officials to better understand each other's perspectives and to, whenever possible, coordinate our respective consultation and accommodation approaches;
- This strategy has been undertaken by INAC and Justice Canada together with representatives from 14 other federal departments and agencies.



# What We Heard in 2005 and 2006

- Representatives of First Nations, Inuit and Métis groups:
  - stated that Canada must address their lack of capacity to be consulted;
  - seek regional approaches, except for Métis, who seek a national one;
  - want direct involvement in developing a federal policy and want process to be linked to other initiatives (e.g. BC's "New Relationship", bilateral processes);
  - generally expressed a broad interpretation of the Crown duty to consult (e.g. accommodation, scope and veto).
- Federal officials:
  - need a better understanding of what the court decisions mean for them;
  - seek policy/operational guidance on when and how to consult;
  - expressed a preference for regional approaches;
  - require additional resources to undertake consultation;
  - support strengthened communications and information-sharing.



# What We Heard in 2005 and 2006 (Continued)

- Provincial/Territorial officials:
  - encounter similar policy and operational challenges;
  - want to improve coordination and consistency with Canada;
  - many provinces/territories have developed interim policies;
  - have concerns that content of a federal approach may put pressure on P/T approaches.
- Industry representatives:
  - asked that Canada come forward with a clear policy;
  - look to federal government to provide processes that will bring about predictability, certainty and stability.



# Challenges for the Federal Government

- Amongst numerous challenges, the following are particularly important
  - How to ensure that the “strength of a claim and severity of the impacts” analysis is carried out properly over thousands of projects or activities annually?
  - How to ensure consistent consultation practices across departments and agencies?
  - How to ensure that departments and agencies inform each other of their “real or constructive” knowledge of established and potential Aboriginal and Treaty rights?
  - How to ensure that consultation activities are better coordinated when both a federal and provincial duty to consult are triggered?
  - How to ensure that discharging the duty to consult facilitates Crown / Aboriginal reconciliation while not delaying investment in communities in need of employment opportunities?
- The combined effect of these and other challenges require that the Government of Canada develop an approach that is legally satisfactory, applied consistently, efficient in its implementation, and proactive and conducive to improved Crown-Aboriginal relations.





# What does the Action Plan consists of?

- On November 1, 2007 the Government of Canada issued a Communiqué announcing a federal Action Plan on First Nation, Métis and Inuit consultation and accommodation. In particular the Plan consists of the following concrete measures:
  - create a repository for information on location and nature of potential or established Aboriginal and Treaty rights;
  - establish mechanisms to coordinate and monitor government-wide consultation practices and accommodation precedents;
  - develop policy positions to address many legal and policy gaps and engage with Aboriginal groups on elements of such a policy;
  - meet with Provinces, Territories and Industry groups to discuss elements of the policy;
  - release interim guidelines to officials, provide related training;
  - set up a small Interdepartmental Team to implement the Action Plan.



# Elements of the Action Plan

- I. Information Repository on Established and Potential Aboriginal and Treaty Rights
  - a comprehensive repository of information on the location and nature of all established and potential Aboriginal and Treaty rights is required to assess whether a duty to consult exists and the extent of the consultation required;
  - the development of a repository may build upon an existing electronic inventory system, such as a geomatics system or an informational database, to link and/or map information from departmental databases and other sources.



# Elements of the Action Plan

- II. Interdepartmental mechanisms to monitor and improve coordination of consultation practices and accommodation precedents
- monitoring and improving coordination of consultation and accommodation practices across government;
  - collaboration with the Major Projects Management Office and Canadian Environmental Assessment Agency on major resource projects would also be required to ensure that consultation and accommodation processes used for all projects are consistent across government;
  - options would also be developed regarding the creation of a long-term horizontal management framework. The Interdepartmental Team would research, evaluate and consult on different options.



# Elements of the Action Plan

## III. Development of a Federal Policy on Consultation and Accommodation

- a policy on consultation and accommodation will address many outstanding legal and policy questions including, for instance, the scope of the duty, who is the Crown, what is accommodation, capacity of government and Aboriginal groups to engage in consultation, and the evolving legal duty with regulatory and statutory obligations to consult;
- a policy will ensure linkages are made with other related policies, for example, comprehensive claims policy and self-government policy.



# Elements of the Action Plan

## IV. Engagement Strategy on a Federal Policy

- a focussed, results-oriented and time-sensitive engagement process with First Nations, Métis and Inuit groups in the development of a federal policy on consultation and accommodation. Discussions would also be held with provinces/territories and industry representatives;
- this will be a two-phased process. The engagement phase will consist of face-to-face discussions with many First Nations, Métis and Inuit groups across Canada. Draft policy options, based on the results of the engagement phase, would then be shared with participants for review and discussion;
- ministers would eventually be informed of progress made on a federal policy and a decision taken.



# Elements of the Action Plan

## V. Development and Distribution of Interim Consultation Guidelines

- interim consultation guidelines that would provide operational guidance will be distributed to federal officials. Learning needs in relation to these guidelines would be identified and training sessions would be developed. The interim guidelines would be updated as case law evolves and as best practices emerge. Once a federal policy is completed, the guidelines will be revised, as required.

## VI. The Interdepartmental Team

- an Interdepartmental Team, is being created to implement this Action Plan. The Team would consist of dedicated officials from key departments and agencies, including possibly Indian and Northern Affairs Canada, Department of Justice, Office of the Federal Interlocutor, Natural Resources Canada, Environment Canada, Canadian Environmental Assessment Agency, Department of Fisheries and Oceans, Transport Canada, and Treasury Board. Department of Justice would also provide legal analysis, advice and training.





# Developing of the Action Plan: Expected Results

- The Action Plan is expected to:
  - assist in reducing departmental inconsistencies and precedent setting by cutting across all departments and agencies;
  - ensure that First Nation, Métis and Inuit groups are engaged in a dialogue aimed at developing Canada's policy positions on issues of importance to them (e.g. funding their participation at consultation exercises);
  - allow Canada to facilitate coordination with other related federal activities (e.g. Major Projects Management Office, Canadian Environmental Assessment Agency) and provincial and territorial activities;
  - inform all stakeholders, including provinces/territories, Aboriginal groups, industry and the courts that Canada is taking its duty to consult seriously and in working collaboratively towards finding a lasting solution to the consultation and accommodation challenges.

