

SUBJECT: Duty to Consult

SUBMITTED BY: Investment and Growth Committee

BACKGROUND

As the voice of Saskatchewan business, the Saskatchewan Chamber of Commerce seeks to encourage environmentally and socially responsible and sustainable investment and development in the province. In recent years, Saskatchewan has experienced significant economic growth due in large part to investment in, and development of, the province's natural resources. The Chamber's members however, have increasingly expressed concern regarding how Aboriginal peoples are involved in the development of the province's natural resources.

The *Government of Saskatchewan First Nation and Métis Consultation Policy Framework* ("Consultation Policy Framework") provides Saskatchewan's policy on consultation with First Nations and Métis communities for use by government ministries, agencies, Crown corporations, First Nations, Métis and proponents. That policy took effect in June 2010, replacing the *Government of Saskatchewan Interim Guide for Consultation with First Nations and Métis People*. On December 16, 2013 Government Relations released the *Proponent Handbook*, which provides guidance to project proponents with respect to the voluntary engagement process

The duty to consult may be triggered by government decisions and actions that have the potential to adversely impact the exercise of Treaty and Aboriginal rights and pursuit of traditional uses of both land and resources. The decisions and actions that will be assessed by government for potential consultation obligations include, but are not limited to, the following:

1. *Legislation, Regulation, Policy and Strategic Plans*: Creating a new or amended piece of legislation, regulation, policy or strategic plan that may have the effect of limiting or altering the use of Crown lands and renewable resources.
2. *Fish and Wildlife Management*: A decision that may limit or alter the quality and quantity of fish and wildlife or the right of access to these resources.
3. *Resource Extraction*: A decision related to the harvesting and processing of timber or the permitting and licensing of Crown surface lands for extraction and production of minerals.
4. *Land Reservations*: Any action that has the effect of restricting the use of unoccupied Crown lands and other lands to which there is a right of access.
5. *Land Use Planning*: Land use planning activities that provide a long-term framework for government decisions.
6. *Lease, Grant or Sale of Unoccupied Crown Land*: Decisions related to the long-term lease, granting or sale of unoccupied Crown land.

7. *Changes to Public Access:* A decision that will have the effect of changing public access to Crown lands and renewable resources.
8. *Environmental Approvals:* A decision where an activity has the potential to negatively impact the environment.

The Chamber acknowledges that Aboriginal and Treaty rights are constitutionally recognized and protected. The Chamber also acknowledges that the Crown has a legal duty to consult and, if appropriate, accommodate Aboriginal peoples when government decisions or activities have the potential to impact Aboriginal or Treaty rights. Although the Chamber believes that the recognition and accommodation of Aboriginal and Treaty rights is important to all Canadians, the Chamber is concerned that the developing legal landscape regarding the “duty to consult” Aboriginal peoples may halt or reverse the province’s current positive economic trajectory.

ISSUE

Chamber members have expressed the following concerns regarding how the duty to consult is managed in Saskatchewan with respect to natural resource development:

- i. There is a lack of coordination and agreement among Aboriginal peoples, industry and the Crown as to who must be consulted, and who is going to conduct the consultation.
- ii. Timelines for acquiring some permits have more than tripled in recent years, resulting in substantial delay and uncertainty with respect to the provincial regulatory process.
- iii. The provincial First Nations and Métis Consultation Participation Fund does not provide sufficient funding, and Aboriginal groups are requesting funding from industry in addition to what they can receive from the fund.
- iv. Aboriginal peoples’ displeasure with the Consultation Policy Framework has created additional regulatory uncertainty in the province.

As a result of these developments, the Chamber is concerned that industry may be hesitant to make new resource investments in the province. The Chamber is also concerned that such developments could have a polarizing effect on parties, thus discouraging Aboriginal peoples, industry and the Crown from partnering to take advantage of the opportunities presented by the province’s natural resources.

According to the Consultation Policy Framework, proponents are expected to collaborate with government in the provision of project information to potentially impacted First Nations and Métis communities. Proponents may also be expected to participate in government meetings with potentially impacted First Nations and Métis communities to discuss potential impacts of the proposed activity. Where an adverse impact on Treaty or Aboriginal rights and/or traditional uses is identified, proponents will be expected to work with government and the parties being consulted to develop and implement measures to address these impacts. It is also understood that project

proponents may conduct voluntary engagement with potentially impacted communities and that this information can be used to inform the provincial “Duty to Consult” decision.

Under the Framework, proponents are responsible for the costs associated with their engagement in consultation processes and procedural aspects that may be assigned to them by government. Proponents are responsible for the costs of any necessary adjustments or actions to project activities deemed required to avoid, minimize or mitigate adverse impacts on Treaty and Aboriginal rights and traditional uses.

The Consultation Matrix set out in the Framework to guide government assessment on the level of consultation and time frames provides no certainty with respect to response times. The “Anticipated Timeline for Government Decision from Day of Notification” for large projects is stated only as “Decision anticipated to exceed 90 days.”

In order to address the above concerns, the Chamber believes the following is necessary to ensure that appropriate parties have a meaningful opportunity to participate in Saskatchewan’s regulatory application and approval process regarding natural resource development:

- a. Clearer timing requirements for consultation activities including deadlines.
- b. Clearer expectations regarding who should be consulted with and to what extent, depending on the type of natural resource project.
- c. Adequate funding to facilitate participation of the appropriate parties in the regulatory application and approval process.
- d. Clearer expectations for who will be consulted, who will conduct the consultation, and how information arising from consultation will be integrated into decision making.

The Chamber believes that with such improvements, prosperity in the province can be sustained and built upon into the future, while at the same time striking the proper balance between responsible natural resource development opportunities and Aboriginal and Treaty rights.

RECOMMENDED

- 1) That the Government of Saskatchewan further refine the *Government of Saskatchewan First Nation and Métis Consultation Policy Framework* to provide greater detail on the parties to be involved and the extent of consultation (including the establishment of clear timelines/deadlines) by project type and location.
- 2) That the Government of Saskatchewan revise the *Government of Saskatchewan First Nation and Métis Consultation Policy Framework* to provide specific, practical deadlines for decision making by project type.