

We Need Your Input! Discussion Document on First Nations Consultations

The Department of Aboriginal Relations recently sent a discussion document to the AAMDC looking for municipal input in regards to proposed changes to First Nations consultations.

The discussion paper is attached to this bulletin and the AAMDC requests that member municipalities submit comments on the proposed changes to the AAMDC **by November 28, 2012**. AAMDC staff will collect the responses and submit the compiled responses to Alberta Aboriginal Relations.

In summary, the paper introduces four large areas of change:

- **Development of a Consultation Office:** this is an acknowledgement of the need for the province to take an increased role in First Nations consultations. This would act as an oversight body and would supplement existing units by:
 - Setting standards
 - Assure quality of the consultation process;
 - Monitor implementation of the Policy;
 - Determine adequacy of consultation for industry and government led consultation;
 - Support departments on Crown-led consultation; and,
 - Support industry on delegated, industry-led consultation.

In essence, this office would define what is an appropriate level of consultation is for a given project and determine adequacy. It would provide supports and increase assurance from municipalities and industry that sufficient consultation has been undertaken.

- **Consultation Process Matrix:** To ensure consistency between consultation needs on similar types of projects, a matrix will be developed that can be applied to any project. This will clearly define expectations of all parties and identify categories of impact related to certain activities. This matrix would be available to all parties.
- **Capacity Funding** –The province realized that industry and municipalities were being requested to pay First Nations prior to consultation in order to ensure capacity to review an application. In place of this, the province is proposing an increased fund that would be kept by the province, with money supplied from industry contributions. This money will be flow-through dollars to First Nations in order to ensure that they have the capacity to fully engage in the consultation process. The new fund is intended to address any capacity issues, therefore no other funding would be required.

- **Financial Disclosure** – There are instances where industry provides financial or other benefits for First Nations. Currently, these are not kept track of and the province is looking to develop a compulsory public disclosure system for all of these types of agreements.

AAMDC members are invited to review the attached paper, and submit comments to Stephanie Williston at Stephanie@aamdc.com **by November 28, 2012**.

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DISCUSSION PAPER: FIRST NATIONS CONSULTATION

The Supreme Court of Canada has determined that the Crown has a legal duty to consult with First Nations when Crown land decisions may adversely impact First Nations' constitutionally protected treaty rights. On May 16, 2005, the Government of Alberta ("Alberta") released *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* ("2005 Policy"). To support and implement the 2005 Policy, Alberta also developed its *First Nations Consultation Guidelines on Land Management and Resource Development*, which were completed in September 2006 and updated in November 2007.

The 2005 Policy recognizes that the duty to consult is grounded in the honour of the Crown and guided by case law. The 2005 Policy also recognizes the treaties between First Nations and the Crown, as protected under section 35 of the *Constitution Act, 1982*. For its part, Alberta has the constitutional right to manage and develop provincial Crown lands and natural resources in the province and take up lands for such purposes. This right, however, is subject to the Crown's duty to consult First Nations and, where appropriate, accommodate their concerns when Crown decisions may adversely impact their continued exercise of constitutionally protected treaty rights.

The 2005 Policy also contains a commitment to review Alberta's approach to consultation. Alberta is currently reviewing its 2005 Policy and engaging with First Nations, industry, municipal associations and other affected stakeholders to help strengthen the consultation process and ensure consistency with current case law. This review is seeking to find better ways to improve communication, build stronger relationships, and find better ways to resolve consultation-related issues between all affected parties, with a view to reconciling First Nations rights with the societal interests of all Albertans.

As part of Alberta's consultation policy review, a number of changes are being contemplated. The changes are intended to improve Alberta's current consultation process and to address the issues and concerns raised by First Nations, industry, municipal associations and other affected stakeholders during Alberta's 2005 Policy review. These changes signify a policy shift that attempts to manage Alberta's legal obligations, increase certainty for all parties, and provide for consultation resourcing while honouring the Crown's duty to consult.

A Greater Role for Alberta

We have heard from First Nations and stakeholders that Alberta should take on a greater role in the consultation process. Concern has also been expressed about the extent to which Alberta delegates procedural aspects of the consultation process to industry proponents. Furthermore, though some improvements have recently been made in the process, some parties believe that the consultation function in government lacks clarity and consistency among departments.

Therefore, a centralized Consultation Office is proposed for Alberta. It would not replace existing First Nations consultation units in individual departments which will continue to build relationships with First Nations and lead in conducting consultation to meet their business needs. Rather, it would act as an oversight body and would supplement existing units by doing the following:

- Set standards and best practices for the consultation process;
- Assure quality of the consultation process;
- Monitor implementation of the Policy;
- Determine adequacy of consultation for industry and government led consultation;
- Support departments on Crown-led consultation; and,
- Support industry on delegated, industry-led consultation.

Alberta would take on a greater role in consultation. In particular, where the duty to consult is triggered in relation to an industry project, and industrial proponents are tasked with carrying out procedural aspects of consultation as delegated by Alberta, government departments would continue to participate in addressing matters that are properly of Crown concern and will, in some cases, enhance Alberta's role in the consultation process. The Consultation Office would monitor, advise, support and guide consultation activities of government departments and industry as required. It would also determine adequacy of consultation. Where Alberta is the proponent on a project or initiative that triggers its duty to consult, those government departments having approval-granting authority would lead the consultation. The Consultation Office will support the consultation process and will determine adequacy.

Consultation Process Matrix

First Nations and industrial proponents have requested more clarity within Alberta's consultation process, including clear and consistent direction related to Alberta's expectations of all parties. In response, Alberta would develop a Consultation Process Matrix that would identify categories of impact related to specific activities, and other related consultation expectations.

Alberta would make the Consultation Process Matrix publicly available to First Nations, industry, municipal associations, and other stakeholders as a strategic tool for all parties in order to better understand consultation expectations, more effectively manage timelines associated with consultation processes, and ensure transparency in government decisions.

Capacity Funding

Alberta's policy is to provide consultation capacity funding to First Nations and currently does so through the First Nations Consultation Capacity Investment Program. First Nations and industry stakeholders have advised that the amount of funding is inadequate for First Nations to carry out their obligations in the consultation process.

Furthermore, First Nations have been seeking additional funds for capacity from industry and, though under no obligation to do so, industry has agreed to provide additional funding in some circumstances.

Alberta is proposing to develop a program to provide enhanced capacity funding to First Nations and to fund that program through a levy on industry. Alberta will be responsible for the management and distribution of this funding to First Nations. Government-led consultation will be funded solely by Alberta for Crown projects.

Financial Disclosure

Alberta is also aware that, from time to time, industrial proponents have entered into agreements that provide financial or other benefits to First Nations with respect to resource development and consultation. Alberta would seek to develop a compulsory public disclosure system to include all related agreements in order to assure increased transparency and accountability in the consultation process.