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January 7, 2011

**Email**

**Attention: Sheila Kitz**

County of St. Paul  
5015 - 49 Avenue  
St. Paul, AB T0A 3A4

Dear Ms. Kitz:

**Re: Onion Lake Cree Nation**

You have provided to us a copy of the letter dated December 15, 2010 provided to the County by the Onion Lake Cree Nation. The letter was sent to notify the County of the First Nation's view of the duty to consult with the First Nation. You have asked for our comments with regard to the content of this letter.

We understand that the Onion Lake Cree Nation has sent the identical letter to many, many municipalities, the Provincial Government and other entities. The letter is a form letter with the names changed depending upon the intended recipient.

The Onion Lake Cree Nation straddles the boundary between Alberta and Saskatchewan. Based upon our review of maps, the Onion Lake Cree Nation reserve lands are not located within the County of St. Paul nor adjacent to the County of St. Paul.

The Onion Lake Cree Nation is surrounded on three sides by lands which are within the County of Vermilion River. The majority of the lands within the County of Vermilion River which are adjacent to the reserve are freehold or privately owned lands.

We did review the letter from the Onion Lake Cree Nation with a colleague who works with Alberta Justice in the Aboriginal Law Group. She advised that the Province understands that the Onion Lake Cree Nation does exercise harvesting or hunting rights around the Lloydminster area and also an area near Kehiwin Lake. We were also advised that the individual who signed the letter, Candice Maglione, did work with Aboriginal Affairs with the Province of Alberta, previously.

In order to give you some perspective, we will outline the following in this letter.

1. What is the duty to consult with a First Nation?
2. When does such a duty arise?
3. When might a municipality have such a duty?
4. If a municipality has a duty to consult what is required?

We will also offer some comments on specific statements made in the December 15, 2010 letter from the Onion Lake Cree Nation.

### **1. What is the duty to consult with a First Nation?**

The *Constitution Act* recognizes “aboriginal” and “treaty rights” of aboriginal peoples of Canada. The Crown has a duty to consult with First Nations when an activity or decision to be made by the Crown might adversely effect a treaty right or an aboriginal right.

Treaty rights are rights protected under treaties with the Crown, such as Treaty 6. By that treaty, the First Nations surrendered certain lands to the Crown and were given the right to pursue their hunting, trapping and fishing activities on the lands surrendered, except upon such areas as are settled for (taken up) other purposes. Aboriginal rights are practices, customs or traditions integral to the distinctive culture of an aboriginal group, with continuity with the traditions, customs and practices that existed prior to contact with Europeans. While such aboriginal rights have been asserted in Alberta, no Court case has found such rights to be established.

The duty to consult is founded in the honour of the Crown. The Crown has a duty to consult when the Crown has knowledge, real or constructive, of the potential existence of an aboriginal or treaty right and contemplates conduct that might adversely affect that right. The duty also arises when the Crown considers granting interests in the lands surrendered when the treaties were entered. This would include dispositions or approvals for Crown lands.

The Crown can delegate its duty to consult to other entities. The municipality exercises powers delegated by the Province. To the extent that the Crown has delegated to the municipality certain powers, the exercise of which could adversely affect treaty rights or aboriginal rights, the municipality will have a duty to consult with a First Nation when exercising those powers.

The duty to consult includes a requirement to obtain information about the impact the project decision will have on the First Nation’s exercise of treaty hunting, fishing and trapping rights, communicate this to the First Nation, attempt to deal with the First Nation in good faith with the intention of substantially addressing concerns.

### **2. When does the duty to consult arise?**

The duty to consult arises when a decision or a activity might adversely effect a treaty right or an aboriginal right.

### **3. When might a municipality have such a duty?**

In our opinion, the instances where a municipality will have a duty to consult with an aboriginal First Nation are likely fairly limited. The reason we say this is the following. Municipalities do not make decisions with regard to matters on reserve lands. In addition, a first nation which exercises treaty rights to harvest outside the boundaries of a reserve will usually do so on Crown owned or public lands. Members of a First Nation may obtain a right of access to carryout such hunting and fishing on privately owned lands. They also have such rights if the privately owned lands are not put to visible and incompatible use. Visible and incompatible use would be evident by reason of the presence of a fence, an agricultural use or a no trespassing sign.

The instances where a duty to consult for a municipality might be triggered is where a project is proposed by the municipality or the municipality has a decision making function or an approval function related to a project on private or public lands which are close to a reserve, or upon public lands where the municipality has reason to believe the First Nation exercises their harvesting rights. The duty to consult would be triggered if, in considering the type of project proposed or the decision proposed to be made, a conclusion was made that it is possible that the effects of the decision/project could flow onto reserve lands or lands where the municipality knows the First Nation exercises their harvesting rights. For instance, if the municipality was considering a Land Use Bylaw or other planning bylaws, provisions of would allow, by reason of the land use districts assigned to public lands or lands near or adjacent to reserve lands, intensive industrial, residential or recreational uses that could have an adverse effect on the reserve or public lands where it is known that the First Nation exercises their harvest rights, a duty to consult would arise. The same would be true if the municipality was issuing an approval for lands as described above.

In most instances where a municipality does issue an approval for public lands, the project involved deals with natural resources. Many oil and gas projects do not require municipal approval (wells and batteries). If however, the project was a larger petro-chemical installation, or a gravel pit, to be located on public lands and the other criteria referred to above were triggered, it would be necessary to engage the First Nation to satisfy the duty to consult.

The municipality's duty to consult is related only to the municipality's scope of authority and the type of decisions the municipality can make. The December 15 letter from the Onion Lake First Nation makes reference to historical resource information. This reference ignores the fact that municipalities do not regulate historical resources, but rather the Province does so through the *Historical Resources Act*. As well, the "current use" information deals with matters for which the municipality does not gather information, nor does the municipality have jurisdiction (for instance moose calving or mating grounds). In addition, it is unrealistic to think that the municipality can tell the Onion Lake Cree Nation what is important to the First Nation, as seems to be suggested by the content of the letter.

#### **4. What is required of the municipality?**

The extent of the content of the Crown's duty to consult is a matter of degree. The extent depends on the nature of the right and the seriousness of the potential adverse impact. We believe that the municipality will have to develop a risk analysis that will be triggered when the decision being taken by a municipality involves lands which are located in proximity to a First Nation reserve, or which involve public lands or are adjacent or near to public lands known to be used by the First Nation for hunting and trapping. In those instances, the municipality will need to do a risk analysis. The likelihood of the need to consult in those situations will be influenced by the size of the project, and the footprint that will be disturbed by the project. As well, the closer the project is to the boundary of a reserve or lands that are known to be used by the First Nation for harvesting, the greater likelihood of the need to consult. As well, as the value of the project increases, there is a greater likelihood that the First Nation will take the position that there is a duty to consult.

If by doing the risk analysis, the municipality concludes that there is a reasonable risk of adverse impact, the municipality should notify the First Nation of the proposed project or decision being contemplated, in order to attempt to engage the First Nation. In order to meet the duty that is imposed, when there is such a duty to consult, the municipality needs to provide notice to the First Nation with sufficient information about the decision being considered to allow the First Nation to make a decision if they wish to engage in consultation. As an example, if the First Nation was adjacent to land upon which a petro-chemical installation was proposed, the First Nation should be given notice of the proposed project in sufficient detail to allow them to determine whether or not they wish to be involved in providing information to the municipality. While we use this as an example, we also note that for this type of project, the required consultation would likely have occurred before the municipality makes a decision. The reason we say this is that in order for a petro-chemical installation to proceed, Provincial approvals are required and the Provincial approving bodies will have required consultation by the proponent (oil company) of the project.

Similarly, if the municipality is considering an entire new Land Use Bylaw, or an amendment to the Land Use Bylaw for lands near to the reserve boundary, it would be desirable to give a First Nation notice of that process and provide them with an opportunity to provide comments. It is important in carrying out and meeting the required duty to consult, if such a duty exists, to document and record the steps that are taken by the municipality. Once the municipality has taken steps to give notice and an opportunity to provide comment, the onus shifts to the First Nation to demonstrate that they took advantage of that opportunity.

Consultation can include timely notice of potential adverse impact, information about the location and nature of the project that identifies anticipated potential adverse impacts and face to face discussions. The aim of the process is to find out the First Nation views, to take those views into account during the decision making process and to find ways to avoid or mitigate adverse impact on the treaty right.

## **Other Comments**

We also know that Municipal Affairs is trying to wrestle with the issue of the scope and the requirement of the duty to consult that is placed upon a municipalities. They are consulting with AAMD&C and AUMA. The Province has not yet amended its policy with regard to consultation to specifically address the issue of the municipality's duty as a decision maker.

We note that the Onion Lake Creek Nation has provided their consultation protocol. That is their protocol but it is not the protocol that has been adopted by the Province of Alberta. As yet, the Province has not indicated if the Provincial protocol applies to municipalities as decision makers.

We also note that reference is made in the December 15, 2010 letter to projects proposed by CNRL, Husky and Devon. This suggests that the type of projects which the First Nation is concerned about are oil and gas. This is consistent with what we have learned in other instances where the First Nation takes a position where an oil company is proposing a project because they are likely able to obtain some funding or financing compensation from the oil company in exchange for raising the issue of the need to consult.

In terms of a response to the Onion Lake Creek Nation, we suggest that you send a letter to them thanking them for their letter and advising them that the *Municipal Government Act* requires municipalities to engage with members of the public in specific instances and the municipality will comply with those requirements. You could also confirm that to the extent applicable, the Alberta Government guidelines on consultation would apply rather than the First Nation's consultation protocol.

We also suggest that you consider involvement through AAMD&C in the consultation being carried out by Municipal Affairs or at least keep abreast of the developments there. Once that consultation process is completed, between Municipal Affairs and the municipal organizations, it is likely that guidance will be provided by Municipal Affairs regarding development of processes and policies to guide the municipalities in situations and instances where the duty to consult could arise and the steps that should be taken.

We hope these comments are of assistance to you. If you have any questions with respect to the above, please contact the writer.

Yours truly,

**REYNOLDS, MIRTH, RICHARDS & FARMER LLP**

PER:

SHEILA C. MCNAUGHTAN, Q.C.

SCM/mln

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