

AESO Comments on Duty to Consult

The AESO's proposal to allocate "Land Acquisition Costs/Aboriginal Peoples" and "Land Acquisition Timing/Aboriginal Peoples" risks to the proponent is consistent with the case law on aboriginal consultation and with Alberta's First Nations Consultation Guidelines on Land Management and Resource Development (Updated November 14, 2007). As Brookfield has indicated, in *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 at paragraph 53 ("Haida"), the Supreme Court of Canada stated: "The Crown may delegate procedural aspects of consultation to industry proponents..." The court in *Haida* also noted that the Crown cannot delegate the honour of the Crown.

In November 2007, the Government of Alberta issued Alberta's First Nations Consultation Guidelines on Land Management and Resource Development (the "Consultation Guidelines"). The Consultation Guidelines can be found at <http://www.aboriginal.alberta.ca/1.cfm> The Consultation Guidelines are consistent with *Haida* and other case law regarding aboriginal consultation.

The role of the Government of Alberta is described in the Consultation Guidelines. The Consultation Guidelines clearly state: "[t]he duty to consult rests with the Crown (Alberta),"¹ and state further that "[a]s manager of the consultation process, Alberta will delegate some project-specific activities to Proponents."² Under the Consultation Guidelines, Alberta states it "remains fully engaged in the substantive aspects of consultation, even when some aspects are delegated."³ Under the Consultation Guidelines, the Government of Alberta will determine which projects may adversely impact First Nations Rights and Traditional Uses and therefore require consultation, and will inform proponents of this. The Alberta government will also inform proponents as to which First Nations they should consult. The Alberta government will also review consultation performed by proponents and determine whether it is "adequate." Among other things, Alberta states that it will review and approve consultation plans, oversee the consultation process by evaluating reports submitted by proponents and "make final decisions about project approvals once Alberta determines that consultation has been adequate."⁴

The role of proponents is also outlined in the Consultation Guidelines. The Consultation Guidelines provide detailed guidance to industry on the consultation activities they are expected to perform.

The AESO's proposal to allocate "Land Acquisition Costs/Aboriginal Peoples" and "Land Acquisition Timing/Aboriginal Peoples" risks to the proponent does not change the existing allocation of risk in the province of Alberta regarding consultation, accommodation and negotiation of access to lands with aboriginal peoples.

¹ Consultation Guidelines, page 2.

² Consultation Guidelines, page 3.

³ Consultation Guidelines, page 3.

⁴ Consultation Guidelines, page 3.

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Brookfield mentions “accommodation costs”. The Consultation Guidelines note that “accommodation can mean efforts to reconcile, adjust, or adapt.”⁵ Efforts made by proponents to avoid and mitigate First Nations concerns will be assessed by the Alberta government as part of its assessment of the adequacy of proponent-led consultation.

Again, the AESO’s proposal with respect to aboriginal consultation reflects the status quo in the province of Alberta.

⁵ Consultation Guidelines, page 2.