
LMTAC Discussion Paper (Updated – October 2009)

Local Government Consultation with First Nations Issues & Concerns

Legal Context

Case law has placed the fiduciary “duty to consult” with the Federal and Provincial Crown; however, some First Nations want to extend the “duty to consult” to local government. Local governments are neither agents nor representatives of the Crown; therefore, local government decision-making powers are not subject to consultation obligations except as required by Provincial statute. Both the Federal and Provincial Governments need to provide clarity regarding the circumstances that require local government to consult with First Nations. For example, local government rights of way (ROW) located on Crown lands.

Consultation Scope

Federal and Provincial Governments need to ensure that the “duty to consult” does not create yet another approval and permitting process for development, over and above existing Federal, Provincial and local government approval and permitting processes. Such a circumstance would imply an ability of First Nations to “veto” development which is not the intent of consultations respecting potential infringements on aboriginal rights and title. Such implied “approval authority” runs contrary to case law which has found that the Crown may reasonably expect First Nations to “not frustrate reasonable good faith attempts to consult by the Crown or take unreasonable positions that thwart government from making decisions.”¹

Consultation Delegation

Both the Federal and Provincial governments have implemented processes that delegate procedural aspects of consultation to local governments in circumstances such as land use planning involving Provincial Crown Lands and projects requiring Federal permitting procedures. This recently created a circumstance where a First Nation refused to consult with a local government on the basis that the duty to consult rests with the Federal Crown; however, the responsible Federal agency delegated procedural aspects of consultation to the local government (acting as a project proponent) and, therefore, would not intervene. For all intents, such an approach by the Federal government provides First Nations with *de facto*

¹ Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult (February 2008) pg 17.

“approval authority” or “veto power” which is not the intent of First Nation consultation. Both the Federal and Provincial governments need to ensure that delegated First Nation consultation procedures maintain equitability and consistency in consultation expectations across Federal and Provincial ministries and agencies. Opportunities for Federal and Provincial governments to coordinate efforts should be encouraged to the greatest extent possible.

Process Clarity

Federal and Provincial Governments need to provide clear process guidance regarding the manner in which local governments must consult with First Nations. This is particularly important in circumstances where the Federal or Provincial governments have delegated procedural aspects of consultation to local governments.

Process Delays

The courts have indicated that during consultation processes, it is incumbent upon First Nations to:

- Clearly outline in a timely manner the nature and scope of the aboriginal or treaty rights they claim and the potential adverse impacts that the Crown activity, or that of a third party, will have on such rights;
- Make the concerns of the affected aboriginal groups known to the Crown;
- Not frustrate reasonable good faith attempts to consult by the Crown or take unreasonable positions that thwart government from making decisions; and
- Attempt to reach a mutually satisfactory resolution to a particular situation².

The experience of local governments has been one of frustration due to excessive delays when engaging in most First Nation consultation processes. Project uncertainty can be exacerbated in the event a First Nation delays or refuses to engage in the consultation process. Both the Federal and Provincial governments need to establish principles that include clear and reasonable timelines regarding consultation with First Nations. In addition, there needs to be a means to engage in First Nation consultation via a “single point of access” to improve efficiency and to ensure a fair and timely consultation process. Similar to process requirements for local governments that engage in public consultation processes, Federal and Provincial governments should require transparent and open deliberations by First Nations engaged in their consultation processes.

Consultation Fees

As a matter of principle, governments of all orders do not charge each other for participation and engagement in consultation processes, regardless of size or capacity. The issue of “consultation fees” runs contrary to this basic principle, and any requirement for payment of fees to engage in consultation with First Nations would further strain the limited fiscal and human resources of local and regional governments. It is incumbent upon the Federal and Provincial governments to address the question of funding for First Nations’ participation in consultation processes.

² Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult (February 2008) pg 17.

Protection-of-Privacy

Provincial and federal protection-of-privacy legislation does not apply to non-treaty First Nations, whereas it does apply to local governments in British Columbia. To ensure consistent protection of personal information, protection-of-privacy legislation should apply whenever Provincial and Federal governments send a consultation referral to First Nations. Including personal information facilitates the potential risk of inappropriate use of the information by First Nations that are not bound by protection-of-privacy legislation. Accordingly, the applicant's name and address should not be included as part of the federal or provincial consultation referral since the potential existence of aboriginal rights and title relates only to the location of the property and not the applicant. Only the legal description or GPS coordinates (latitude and longitude) of the subject property need be communicated by the Crown.

Freedom-of-Information

It is also important to recognize that provincial and federal freedom-of-information legislation does not apply to non-treaty First Nations, whereas it does apply to local governments in British Columbia. As a consequence, when local governments are required to consult with First Nations as part of a federal or provincial permitting process, there is not the same transparency and accountability that provincial freedom-of-information legislation would otherwise mandate. This disparity needs to be addressed to make transparency and accountability a part of all consultation processes with First Nations in British Columbia.

Shared Territories

The issue of First Nations' shared territories, or territorial overlaps, poses significant challenges for local government to achieve effective consultation. The concept of "Consultation Areas" introduced by the Province under its *New Relationship* policy with First Nations in BC, makes it unclear as to the geographic extent within which any given First Nation must be consulted, as the scope may be greater than a First Nation's self-defined traditional territory. This has raised the expectation of some First Nations as to their "area of involvement". There is also the question of "conflicting opinion" that may arise between multiple First Nations within a given shared territory, and how local governments are expected to manage such conflicting perspectives during consultation processes. In the absence of a single "voice" for all First Nations having interests within a given regional district, the Provincial Archaeology Branch's *Local Government Initiative* provides the only practical means for local governments to pursue consultation regarding aboriginal archaeological interests as applied to local government permitting processes. Similarly, for issues other than archaeological interests, there needs to be a means to engage First Nations in consultations via a "single point of access", particularly in highly urbanized areas such as *Metro Vancouver*.

APPENDIX A

Outstanding Questions Regarding Provincial and Federal Government Approaches to Consultation with First Nations:

- Do treaty First Nations share a reciprocal obligation to consult with adjoining Local Governments on major projects that may impact Local Government roads, environment, ROW's, and other habitable concerns?
- Are consultation processes a means to seek First Nation input or support? If seeking First Nation support, does this imply a veto?
- What factors determine 'reasonable' accommodation? Does the responsibility to accommodate rest with the entity that holds the duty to consult (i.e. the Crown)?
- Statements of Intent (SOI), filed under the *BC Treaty Process*, provide publicly accessible maps that assist project proponents in identifying First Nations with whom a duty to consult may exist. Provincial 'Consultative Area' (CA) maps are not publicly available, but the name suggests they would be better suited to assist in determining affected First Nations. Can the province clarify the difference between a SOI and a CA map?
- Does consultation need to conclude prior to the issuance of permits and start of development, or can the stages overlap? Are there sunset clauses for consultation processes?
- How can the differing expectations and capacity of First Nations be managed during consultations, particularly when consulting with multiple First Nations?
- Will the Federal or Provincial government provide information to project proponents that payment of 'consultation fees' to a First Nation is a voluntary decision? Are resources being made available by the Federal or Provincial government to assist with First Nation capacity challenges?
- Is there any information that can be shared on cases currently before the Courts across the country re: duty to consult, including the ongoing *Little Salmon/Carmacks* appeal?
- Has consideration been given to implementing a cross ministry/agency consultation framework, or placing responsibility with a single organization?
- What is the Federal approach to consultation with respect to fisheries?