QUÉBEC

AMERINDIANS AND INUIT OF QUÉBEC

INTERIM GUIDE FOR CONSULTING THE ABORIGINAL COMMUNITIES

SHINE AMONG THE BEST

Québec

Interministerial working group on the consultation of the Aboriginal people

Ministère du Développement durable, de l'Environnement et des Parcs

Ministère de la Justice du Québec

Ministère des Ressources naturelles et de la Faune

Ministère des Transports du Québec

Secrétariat aux affaires autochtones

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INTRODUCTION

In recent months, various Aboriginal communities have shown a growing interest in taking part, in numerous ways, in economic development projects.

Reckoning that they should be consulted and accommodated for all projects that affect their interests and their rights on the territories to which they have laid claim, the Aboriginal communities have alternately requested changes, financial compensation, jobs or the outright cancellation of projects or activities deemed detrimental to the preservation of the rights which they have asserted.

These requests are based on the recent evolution of jurisprudence in the field of Aboriginal law. Mention may be made of the rulings in the Haida Nation v. British Columbia (Minister of Forests)[1] and Taku River Tlignit First Nation v. British Columbia (Project Assessment Director) cases[2], handed down by the Supreme Court of Canada on November 18, 2004 and which concern the Crown's duty to consult and accommodate the Aboriginal people, as well as the decision in the Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) case[3], rendered on November 24, 2005. As we will see, these decisions set new requirements in the field of Aboriginal law.

Over the years, several government departments, agencies and corporations have developed consultation practices that satisfy the parameters established by the Supreme Court of Canada. However, in other cases, certain departments wonder whether their consultation practices comply with those parameters.

The purpose of this guide is to define more clearly the main aspects of the Crown's duty to consult and, where necessary, accommodate the Aboriginal communities. This guide was developed by an interministerial working group set up in the summer of 2005 at the request of the Cabinet.

1. [2004] 3 S.C.R. 511, hereinafter referred to as the "Haida ruling".
2. [2004] 3 S.C.R. 550, hereinafter referred to as the "Taku River ruling".
3. 2005 SCC 69.

1 OBJECTIVES

In the matter of consultation of the Aboriginal communities, the guide proposes guideposts intended for the various government departments, agencies and corporations, whose activities could infringe certain Aboriginal rights claimed by the Aboriginal communities, without these rights having necessarily been defined or proven.

More concretely, the document provides guidelines, the purpose of which is to make more operational the constitutional duty incumbent upon the Government of Québec to consult the Aboriginal communities. It also specifies the notion of accommodation which arises, in some cases, from the duty to consult.

2 SCOPE

The Interim Guide for Consulting the Aboriginal Communities applies to every government department, agency and corporation[4] when an action being envisaged can infringe the rights claimed by one or more Aboriginal communities. In general, the actions that should be considered do not concern private lands.

The guide applies to activities related to the planning and drafting of statutes and regulations, as well as to the activities ensuing therefrom, such as the development of the territory and natural resources. It also applies to government policies that may affect the rights claimed by Aboriginal communities.

It is, however, important to point out that the guide does not seek to settle the question of the recognition of Aboriginal rights or treaty rights for each of the Aboriginal communities or to address more comprehensive elements being discussed with certain communities. These matters will have to be dealt with by resorting to the processes agreed upon, among others, within the context of the comprehensive territorial negotiations, in which the federal government is a participant. The objective here is to make sure that the rights and interests of the Aboriginal communities are given fair consideration within the current context of government activities.

Given the fact that some of the procedures related to consultation and participation in management have been defined on the territory subject to the James Bay and Northern Québec Agreement as well as to the Northeastern Québec Agreement, the degree of consultation ensuing from the Haida and Taku River rulings may be fairly limited, even non-existent. Moreover, the guide does not apply when specific consultation measures have already been agreed upon with the Aboriginal communities, notably within the context of sectoral agreements.

4. To make the text easier to read, the word "department" also refers to agencies and corporations of the Government of Québec.

3 DUTY TO CONSULT

To better grasp the legal grounds underpinning the Crown's duty to consult the Aboriginal communities, a presentation will be made of the main milestones in the evolution of Aboriginal law in recent decades and more specifically, of the importance of the Haida and Taku River rulings.

Evolution of Aboriginal law

Aboriginal law has developed considerably over the last fifteen years. However, the start of the revolution in this field dates back to the early 1970s when the Supreme Court of Canada ruled, in the Calder case, that the existence of the Aboriginal rights of the Aboriginal people did not necessarily depend on the recognition of such rights by the Crown, but rather on the fact that the Aboriginal people were organized in societies occupying the land as their forefathers had done for centuries.

Aboriginal rights span a wide spectrum and are divided into four categories. Generally, an Aboriginal right is an activity that consists of an element of a custom, a practice or a tradition that was an integral part of the distinctive culture of an Aboriginal community prior to the arrival of the Europeans and that has endured. Aboriginal rights are thus associated with activities related to the way of life of the Aboriginal people.

As for the various categories of Aboriginal rights, at one end of the spectrum there are those rights that are not attached to a territory (language, for example). Next come Aboriginal rights exercised by means of activities that are not specific to a territory, followed by Aboriginal rights that are practiced by way of activities that are closely related to a parcel of territory. Hunting, fishing and trapping activities fall under these latter two categories. Finally, at the other end of the spectrum lies Aboriginal title which is the right to the territory itself and which is similar to title of ownership. Aboriginal title includes the right to occupy lands and to use natural resources on an exclusive basis.

The existing rights of the Aboriginal people, whether Aboriginal or treaty rights, are recognized under section 35 of the Constitution Act, 1982. Hence, they benefit from constitutional protection. However, these rights, including Aboriginal title, are not absolute. The Courts have recognized that the Crown can infringe these rights insofar as it can justify its action. Basically, such a justification is made when the Crown succeeds in showing that it acted in such a way as to truly take into account the existence of Aboriginal rights. Consultation may therefore serve as proof of justification.

Evolution of the duty to consult

Prior to the Haida and Taku River rulings, the concept of the consultation of the First Nations was contained within the analysis framework of section 35 of the Constitution Act, 1982. The four components of the analysis framework of section 35 recognized by the Supreme Court of Canada are listed below:

1) Has the applicant demonstrated that he was acting pursuant to an Aboriginal right?

2) Was this right extinguished prior to the enactment of section 35?

3) Has this right been infringed?

4) Is the infringement justified?

Aboriginal law prior to the Haida and Taku River rulings seemed to require that the Aboriginal people have proven their rights, before the Crown had to justify the infringement of these rights. Indeed, it was only at the fourth stage of the aforementioned analysis framework that the Crown could give evidence of a consultation to justify its infringement of an Aboriginal right or a treaty right.

At that time, consultation was certainly an important means, but it was only one means among others allowing the Crown to justify the infringement of an Aboriginal right. More specifically, within the analysis framework of section 35 of the Constitution Act, 1982, the justification of the infringement of Aboriginal rights leads to the application of a two-part test. The Crown must first show that it was acting pursuant to a valid legislative objective, such as by reason of public safety, by reason of conservation or for any other compelling and valid reason. Insofar as the conclusion is drawn that a valid legislative objective exists, it is then necessary to examine the second part of the test: the Crown's fiduciary duty towards the Aboriginal people. It is within this framework that the Court will examine if, when endeavouring to obtain the desired result, the Crown limited as much as possible the infringement of Aboriginal rights, if financial compensation was paid, and if the Aboriginal people were consulted.

In the Haida and Taku River rulings handed down on November 18, 2004, the Supreme Court of Canada made, whether explicitly or implicitly, the following findings: 1) the classic recourses of the Aboriginal people before the Courts to obtain recognition of their rights are long and costly; 2) the injunction route is virtually impossible for the Aboriginal people due to the balance of convenience which generally tips in favour of the Crown; 3) comprehensive territorial negotiations are, by definition, a long process; and 4) the agreements on temporary measures are insufficient or unfeasible, such that the territory continues to be developed despite the existence of legal recourses or negotiations pertaining to the claims of the Aboriginal people.

That is why the highest court in the land ruled, in the Haida and Taku River cases, that the Crown henceforth had the duty to consult the Aboriginal communities and to address their concerns even before the Aboriginal communities had established the existence of their title on lands as well as their Aboriginal rights.

This duty to consult the Aboriginal communities ensues from the principle of the honour of the Crown. This principle arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it. The measures that are likely to adversely affect the rights claimed by the Aboriginal communities concern both development projects requiring State intervention and planning activities involving public lands.

The content of the duty to consult and accommodate the Aboriginal communities will vary according to the circumstances. The Supreme Court of Canada stipulates that the precise nature of the obligations that arise in various situations will be defined as the courts are called upon to rule on this question. Moreover, the Supreme Court points out that the strength of the case supporting the right and the seriousness of the potentially adverse effects on this right will have consequences on the scope of the Crown's duty.

The Court summarizes the various principles applicable to consultation, including the following:

- Both parties must demonstrate good faith.

- The Crown must have the intention of substantially addressing the concerns of the Aboriginal communities as they are expressed; that is what is expected of honourable conduct.

- True consultations must be held without there being an obligation to reach agreement.

- The Aboriginal communities must not frustrate the efforts made in good faith by the Crown. Nor should they defend unreasonable positions to prevent the Crown from acting in those cases where, despite a true consultation, the parties are unsuccessful in reaching agreement.

The right to be consulted under certain circumstances does not give the Aboriginal communities a veto right over the Crown's decisions.

The Court goes on to explain that the requirements concerning the consultation extend over a spectrum. Where the claim to title is weak, Aboriginal right is limited or the potential for infringement is minor, the only duty of the Crown is to give notice to the interested Aboriginal community, disclosing information and discussing any issues raised by the project. If, on the other hand, a strong *prima facie* case for the claim is established, the right and the potential infringement is of high significance to the Aboriginal communities, and the risk of non-compensable damage is high, a deep consultation, aimed at finding a satisfactory interim solution, may be required.

If, following consultation, it appears that the Crown must modify its project, the Supreme Court of Canada considers that an obligation to accommodate may arise. The Supreme Court points out that the Aboriginal communities do not have a veto right, but the interests of both parties must be balanced, and there must be give and take. In the accommodation process there is no duty to agree, but each party must make good faith efforts to understand the other party's concerns and move to address them.

Another important clarification made by the Supreme Court of Canada is that the Crown alone remains legally responsible for the consequences of interactions with third parties, which affect the interests of Aboriginal communities. While the Crown may delegate certain procedural aspects of consultation to third parties, the latter cannot be held responsible for failures related to the duty to consult.

Importance of the Haida and Taku River rulings

The Haida and Taku River rulings mark a certain break from the existing principles associated with consultations in that the governments henceforth have the duty to consult the Aboriginal communities even before they have proven the existence of their title on lands as well as their Aboriginal rights.

4 THE CONSULTATION THAT THE CROWN MUST HOLD

Since the honour of the Crown requires that the rights and interests of Aboriginal communities be addressed, departments must consult and, in certain cases, accommodate these communities.

When the question of the consultation of the Aboriginal communities arises, the departments will be able to refer to their Aboriginal Affairs Coordinator. In addition, given the legal consequences of the process described below, departments must seek the advice of their legal division, in collaboration with the Direction du droit autochtone et constitutionnel (Aboriginal and constitutional law directorate) of the Ministère de la Justice. An interministerial support group, coordinated by the Secrétariat aux affaires autochtones, will also be at the disposal of departments. This group's operation will be elaborated upon when the work to implement the guide begins.

Preliminary analysis

When determining on a preliminary basis whether or not the envisaged action risks infringing a right claimed by an Aboriginal community, the following questions may be useful: Are Aboriginal people present on the territory in question? Is this territory currently the subject of negotiations with the governments? Are there known or recognized hunting, fishing and trapping rights? What use do the Aboriginal people make of this territory? Will the envisaged action have an impact on the territory, the resources and the activities in progress?

In several cases, it is possible that an envisaged action does not affect an Aboriginal community. In such instances, the consultation is not necessary. In cases where an action is of public interest, while not having major impacts on an Aboriginal community, the consultation may be limited to conveying information by letter.

In all cases where the preliminary analysis points to an infringement of the rights and interests of Aboriginal communities, we propose parameters that make it possible to hold an adequate consultation. As part of this consultation, the communities will be able to specify the nature of the rights that they are claiming along with their interests and they will have the opportunity to explain the potential infringement that may result from the carrying out of a project to develop or enhance the territory or its resources. Each department must evaluate the envisaged actions on a case-by-case basis.

Parameters of an adequate consultation

The following sections specify the basic framework for consulting the Aboriginal communities. As has already been mentioned, it is quite possible that the current consultation practices of several departments already comply with the orientations proposed in this guide. The departments must make sure of this and, as the case may be, harmonize their practices with the content of this guide in such a way that the departments orient their future consultations of the Aboriginal communities by taking into account their own ministerial reality.

Objectives of an adequate consultation:

- Allow the Crown to provide relevant information concerning the envisaged action (for example, when possible, the scope of the action, the technical parameters, the cost, etc.) and to specify its interests as well as those of the populations affected, both Aboriginal and non-Aboriginal.

- Allow the Aboriginal communities to explain in a clear and precise manner the nature of their rights and interests in relation to the planned action.

- Allow the Aboriginal communities to explain in a clear and precise manner how the envisaged action will impact their rights and interests.

- Establish means making it possible to reconcile the rights and interests of the Aboriginal communities with the planned government action and present the possibilities of accommodation, as the case may be.

Principles that should guide the consultation process:

- The parties must demonstrate good faith and openness.

- The Crown must address the rights and interests of the Aboriginal communities.

- The Aboriginal communities have the duty to participate in the process and to make known their rights and interests in a precise and clear manner, in relation to the envisaged action.

- The parties have the duty to seek accommodation solutions, as the case may be.

- The parties must agree to the time constraints necessary to carry out the planned action.

Who should be consulted?

The band councils of Aboriginal communities affected by the envisaged activity must be consulted.

Participation of third parties in certain stages of the process:

The duty to consult and accommodate Aboriginal communities lies with the Crown. Procedural aspects may be delegated to third parties, for example to project proponents. The latter may also take part in certain stages of the process, in those instances where their presence may be considered indispensable, among other things, to explain certain technical aspects of a project. Third parties may also be questioned when deciding on accommodation measures and their implementation.

Interministerial consultation:

As some actions planned by a proponent or a department may concern other departments, these departments should hold discussions to ensure the harmonization and a greater coherency of the steps taken to consult the Aboriginal communities.

In addition, efforts should be made to ensure the convergence of the consultation activities, when possible. It will be in the interest of the departments to hold discussions with one another to avoid multiplying initiatives with the band councils of Aboriginal communities.

Funding:

In order to facilitate the participation of Aboriginal communities in the consultation processes initiated by the Government of Québec, a financial support program will be prepared by the Secrétariat aux affaires autochtones, in collaboration with the Conseil du trésor.

The details of this program will be made public shortly.

Consultation stages

The following stages must allow an adequate consultation that gives tangible expression to the government's desire to truly address the rights and interests of the Aboriginal communities.

First stage: create an adapted consultation process

- Identify the Aboriginal community or communities affected by the project or by the decision, as well as the band council or councils that represent them legally. Certain cases may appear complex, for example, when the boundaries of the claimed territories have yet to be determined. The department will then specify the Aboriginal community most likely to be affected and the latter will be able to inform the department if other band councils of other Aboriginal communities should also be consulted.

- Agree, when necessary, on precise objectives related to the consultation approach that is beginning and, preferably, with the representatives designated by the band council of the Aboriginal communities concerned.

- Apply an approach that is easy to understand for the band councils and that may have been decided upon with them.

- Consult the band councils separately from the consultation normally applied to all citizens, taking into account the circumstances.

- Clearly explain to the band councils what their role will be, as well as the decision-making process and the timetable.

- To ensure a valid consultation, provide for an adequate time period, based on several criteria, such as the complexity of the subject matter and the requirements related to the implementation of the project.

- Plan everything according to a timetable allowing for a certain amount of flexibility.

- Secure the participation of band councils upstream of the consultation processes in such a way that it is possible to modify the initial position (the project as it was defined at the outset).

- Envisage the use of techniques adapted to band councils, for example by having the documentation translated in the appropriate language.

- Provide in a quick and objective manner the necessary information in a language that is clear and understandable (specification of the envisaged action, of the territory concerned, as the case may be, and of the completion timetable), and provide expert reports that are available and relevant.

- Adapt the consultation methods according to the importance of the action being envisaged: exchanges of letters, conference calls, technical meetings, publications, visits to the communities, visits to the place where the project is planned, etc.

- Indicate that there will be a feedback process by specifying that there will be a report on the efforts made to address the rights and interests voiced by the band council(s) concerned.

- Collect and keep each of the steps taken by the department, irrespective of their success.

Second stage: implement the consultation

- Implement the consultation according to what was decided upon during the design phase: timetable, exchanging of information, respecting the objectives, etc.

- If necessary, validate the content of the information collected from the band councils concerned, when elements appear to be ambiguous, in order to avoid any misunderstandings.

Third stage: analyze the consultation

Two principles must guide the departments' action at the end of the consultation:

- Endeavour to understand the concerns formulated by the band councils of the Aboriginal communities and try to address these concerns by looking for means to limit, wherever possible, the impact of the envisaged action.

- Deploy all possible efforts in the search for accommodation measures even if, ultimately, there is no obligation to reach agreement with the Aboriginal communities, as these communities have no veto right.

To evaluate if accommodation measures must be sought and, if so, at what level, a department must first analyze the results of the consultation that it held with the Aboriginal communities by way of their respective band council(s). This stage will help determine the envisaged action's degree of infringement of the rights and interests of the Aboriginal communities.

When making this analysis, the following questions may be useful:

- What is the extent of the territory affected by the envisaged action?

- What activities are carried on by the Aboriginal communities?

- To what extent will the activities carried on by the Aboriginal communities be affected? Will this be permanent?

- Will the envisaged action adversely impact access to and utilization of the resources? If so, to what extent and over how much of the territory?

- Will the envisaged action change or damage the nature of the territory or the availability of resources? If so, to what extent and for how long?

- Does the envisaged action threaten the integrity of heritage sites, for example burial grounds or meeting places?

- Is the envisaged action planned on a territory located near the reserve?

- Does the envisaged action involve the sale of lands to third parties?

- Does the envisaged action involve the issue of long-term leases to third parties? If so, do these leases infringe the rights and interests of Aboriginal communities?

- Are these leases renewable and do they involve other changes to the territory, as well as other extractions of resources?

Depending on the results of the analysis, the department will have to determine if it is necessary and possible to apply accommodation measures in order to mitigate the prejudicial effects of the envisaged action.

5 ADJUSTMENT OF THE ACCOMMODATION

If the analysis of the information gathered during the consultation shows that the Aboriginal communities will not be affected by the envisaged action, accommodation measures will not be necessary. In this case, the department can proceed to stage 7.

If the analysis shows that the envisaged action risks having an impact on the rights and interests of one or more Aboriginal communities, accommodation measures can be negotiated to mitigate, as much as possible and taking into account the circumstances, the disturbance of the rights and interests of the Aboriginal communities caused by the envisaged action, by considering:

- The permanent nature of the effect that the envisaged action may have.

- The extent of the territory affected.

- The level of occupation of the territory by the Aboriginal community.

- The nature of the envisaged intervention.

It is up to the department to apply the accommodation measures adapted to its reality and to evaluate their importance. These measures can take various forms, for example, the modification of a project, the creation of a technical committee or the participation of the Aboriginal people in the environmental monitoring. What is important is that the accommodation measures mitigate, as much as possible and taking into account the circumstances, the disturbance of the rights and interests of the Aboriginal communities caused by the envisaged action.

In this respect, the payment of financial compensation should not be an automatic reflex or even a means that is favoured to the detriment or exclusion of other accommodation measures. It should only be envisaged when the infringement of the rights and interests of the Aboriginal communities ensuing from a planned government action entails a high degree of seriousness and other measures cannot adequately accommodate the Aboriginal communities concerned.

6 EMERGENCY SITUATIONS

For certain specific government activities, it is possible that all the stages of the consultation as well as the timetable cannot be followed owing to emergency situations, for example public safety requirements. In such cases, which must be the exception rather than the rule, reasonable efforts must nevertheless be made to address the rights and interests of the Aboriginal communities and, as the case may be, to accommodate them. Under such circumstances, the justification will have to be explained in stage 7.

7 DECISION

As mentioned previously, the consultation practices of departments will have to include an assessment that will record the steps taken for the consultation (letters, meetings, etc.), the description of the concerns expressed by the band council(s) of the Aboriginal communities, the explanation of the decision made by the government or by the empowered minister(s) with respect to these concerns and, as the case may be, the accommodation measures adopted.

Where applicable, this assessment will have to be appended to the briefs submitted to the Cabinet. In all cases, this assessment or a motivated letter, signed by a minister or a public servant and explaining the government's decision, will have to be conveyed to the Aboriginal communities in question.

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