

**RECENT LEGAL DEVELOPMENTS ON  
CONSULTATION AND ACCOMMODATION  
RELATING TO ENVIRONMENTAL AND ARCHAEOLOGICAL ISSUES**

By Nancy Kleer  
Olthuis, Kleer, Townshend LLP  
for  
The Canadian institute  
6<sup>th</sup> Annual Forum on Aboriginal Law, consultation and Accommodation  
February 22-23, Toronto, ON

## **A. Case law developments about the duty to consult and accommodate**

1. The duty to consult is “upstream” of the statutory mandate of decision makers:

**The scope of statutory decision makers’ authority goes beyond their statutory mandate when having to comply with the duty to consult and accommodate.**

In May 2011, the decision of the BCCA in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (hereafter *West Moberly*) set out several important findings that in certain circumstances may substantially affect how the duty to consult and accommodate must be met when dealing with projects that will cause natural and social environmental impacts, including aboriginal archaeological effects.

The facts in the *West Moberly* case concerned three decisions within the traditional territory of the First Nations, which they challenged on the basis that they impacted their Treaty No. 8 right to hunt caribou:

- a decision to amend an existing mining permit authorizing the corporation to obtain a 50,000 ton bulk sample of coal;
- a decision to amend an existing permit approving a 173 drill hole, five trenched advanced exploration program; and
- a decision to issue a licence for the corporation to cut and clear up to 41 hectares of land to facilitate advanced exploration.<sup>1</sup>

There was evidence in this case that one herd of caribou, the Burnt Pine herd, had only 11 individuals left in it, and that the First Nations had themselves decided many decades ago that they could not hunt that particular herd at all in the hopes it could recover.

At trial in the *West Moberly* case, the Court found:

[54] ... the Crown has delegated its duty towards First Nations peoples to departmental officials. But in so doing it has not given those officials the authority to consider fully the First Nations concerns, nor the power to accommodate those concerns. The same July 20, 2009, document which states that the Ministry of Energy, Mines and Petroleum Resources recognizes that the cumulative impacts of First Coal’s project upon West Moberly’s traditional territory have been raised by both West Moberly and the Ministry of the Environment, states that it is “beyond the scope of this project to fully assess” those impacts.

[55] The honour of the Crown is not satisfied if the Crown delegates its responsibilities to officials who respond to First Nations’ concerns by saying the necessary assessment of proposed “taking up” of areas subject to treaty rights is beyond the scope of their authority.”

---

<sup>1</sup> *West Moberly* at paras. 2-5.

This aspect of the trial decision was considered by the BCCA, as the governments of British Columbia and Alberta both challenged this part of the decision. Those governments argued that a statutory decision maker could only focus their mitigation efforts within their statutory authority. The Court of Appeal dismissed this ground of appeal, finding that

“statutory decision makers are required to respect legal and constitutional limits. The Crown’s duty to consult lies upstream of the statutory mandate of decision makers: see *Beckman* at para. 48 and *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 (CanLII), 1999 BCCA 470, 64 B.C.L.R. (3d) 206 at para. 177.”

This line of reasoning is an extension of decision in *Haida* in which the Supreme Court found that the Crown could delegate procedural aspects of the duty, but that the ultimate responsibility for ensuring the duty is met rests with the Crown. Clarifying that the consultation obligation lies ‘upstream of the statutory mandate’ also makes it clearer that, while in many ways ‘administrative law’ principles are used when assessing Aboriginal consultation obligations and processes, the administrative law requirement for a statutory decision as a trigger for consultation in the first place, or as a requirement for judicial review, will not be required.<sup>2</sup>

## 2. Cumulative Effects

### **Consideration of cumulative effects may be required in order to fulfill the duty to consult and accommodate.**

The British Columbia Court of Appeal in *West Moberly* did not accept the argument advanced by the appellants that the effect of the Supreme Court’s decision in *Rio Tinto Alcan Inc. v. Carrier Sekani* 2010 SCC 43 was that the Crown could only consider the effects on asserted or proven aboriginal and treaty rights of the immediate Crown action under consideration.

In *Rio Tinto*, the Supreme Court of Canada was considering a decision of the BC Utilities Commission on whether or not to approve an energy purchase agreement. The sale of energy, the Utilities Commission had concluded on the evidence, would not lead to any new physical impacts; there were past impacts, to be sure, but the decision(s) that had caused those past impacts had been made decades before and were not under review. In *Rio Tinto*, the Supreme Court concluded that claimants must show that there is a causal relationship between the Crown’s decision and the potential for adverse impacts on an Aboriginal claims or rights in order for consultation to be required.<sup>3</sup> The degree of the impact must be appreciable, and ‘mere speculative impacts’ will not be sufficient to demonstrate that there are adverse effects.<sup>4</sup> Also, the Court said the adverse effect must go to the future *exercise* of a right, rather than to a

---

<sup>2</sup> Other court decisions have also found that, for the purposes of bringing a judicial review application, there is not necessarily the need for a statutory decision, given the constitutional source of the consultation duty. See *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.* 2005 BCSC 697 at para 94 – 104 and *Wii’litswx v. British Columbia (Minister of Forests)* 2008 BCSC 1139.

<sup>3</sup> *Rio Tinto Alcan v. Carrier Sekani* at paras. 45-47.

<sup>4</sup> *Ibid.* at para. 46.

negotiating position in trying to achieve a settlement about that right, for instance.<sup>5</sup> Finally, the Court stated that the adverse effects need to be new effects stemming from the current contemplated Crown conduct or decision under review. It was not sufficient if the adverse effects stem from the larger adverse impacts of a project, of which the activity or decision is a part.<sup>6</sup>

The Court of Appeal in *West Moberly* concluded that *Rio Tinto* was distinguishable from the facts at issue in *West Moberly* and so went on to investigate whether the consultation had been adequate in that case and concluded it was not. In the majority decision on this point, the Court said:

I do not understand *Rio Tinto* to be authority for saying that when the “current decision under consideration” will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners’ treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners’ treaty right to hunt. (latter emphasis added)

In the same part of the decision, Chief Justice Finch also considered whether the Court below made an error by considering not only the impact of the amended exploration permits (the immediate Crown decision under review), but also the effects that a full mining operation might have on the caribou herd. The Chief Justice found there was no error in considering this evidence. He noted that the First Nation’s objective was to “preserve not only those few animals remaining in the Burnt Pine caribou herd, but to augment and restore the herd to a condition in which it might once again be hunted. If that position were to be given meaningful consideration in the consultation process, I do not see how one could ignore at least the possibility of a full mining operation, if it were shown to be justified by the exploration programs.”

The linkage between cumulative effects and the scope of consultation was appropriate, I would argue. The First Nations had properly linked cumulative effects to their hunting rights, asserting that the meaningful exercise of their treaty hunting rights needed to be measured by looking at the cumulative impacts of prior takings up of the land and how that had led to the present status of their particular hunting right. This reasoning is helpful in situations where First Nations are looking at the scope of consultation required when a decision about one project is just one decision among many that, taken together, will ultimately seriously impact an Aboriginal right (such as harvesting).

### 3. The role of the courts in determining appropriate accommodation

In *West Moberly*, the Court of Appeal considered whether the trial court erred by holding that the method of accommodation that had to be followed was a plan to protect and augment the Burnt Pine caribou herd. On this point, the Court split three ways.

Chief Justice Finch concluded that the judge was correct in holding that the consultation process was not meaningful, but held that the proper remedy was not to determine what the specific accommodation

---

<sup>5</sup> Ibid. at paras. 46, 50.

<sup>6</sup> Ibid. at para. 53.

should be (as the trial judge had done). Rather, he would require further consultation between the parties on accommodation, having regard for what he had stated the scope of the consultation should include. He did, however, allow for the possibility that in other cases, a judge could on judicial review substitute a specific form of accommodation. Justice Finch chose, however, not to make a final conclusion about it, but instead found that to make such an order would not be appropriate, since the order would “impair further consultation” (para. 163).

Justice Hinkson wrote concurring reasons, agreeing with the Chief Justice on some points but differing with the Chief Justice’s disposition about the trial judge’s ruling about accommodation. Justice Hinkson concluded that *Rio Tinto* stood for the proposition that,

“...for the duty to consult to be triggered, the Crown’s current proposed conduct must itself be causally linked to the potential adverse consequence affecting the Aboriginal right. It follows that where this test is met, the duty to accommodate should only be concerned with addressing the potential adverse effects of the current proposed Crown conduct, and not with remedying harm caused by past events. That is not to say, as the Court in *Rio Tinto* noted at para. 49 above, that past harms are without remedy, only that those harms are not properly addressed by way of consultation and accommodation undertaken in connection with current Crown conduct.

... I do not understand that the duty to accommodate, as explained in *Rio Tinto*, obliges the Crown to accommodate the effects of prior impacts upon the treaty rights of the West Moberly.”

Justice Hinkson concluded there was an error made by the chambers judge in requiring that for there to be reasonable accommodation, the Crown had to have a reasonable, active plan for more than the protection of the Burnt Pine caribou herd. He found that that went beyond the scope of the duty of reasonable accommodation, and concluded that protection of what remains of the Burnt Pine caribou herd was appropriate accommodation, but the rehabilitation of the herd was not. Justice Finch, on the other hand, did not find that the chambers judge had erred in making the ruling about what constituted reasonable accommodation in the circumstances, but instead found that the appropriate accommodation should be determined by the parties through consultation.

The dissenting judge, Justice Garson, found that the consultation had been adequate in this case, and so disagreed with the majority on that point. On the matter of accommodation, she decided that the court’s job on a judicial review was not to mandate specific accommodation measures nor specific outcomes to the process (para.287).

Although they differed about the adequacy of the consultation and the scope of what should be considered on accommodation, the court generally agreed that the Court should not itself mandate specific accommodation measures. The court’s ruling about its role in not mandating specific accommodation measures but leaving that to the consultation process has been applied by subsequent courts (e.g. the BCSC in *Halalt FN v. BC (Environment)*, 2011 BCSC 945).

Leave to appeal the *West Moberly* decision to the Supreme Court of Canada has been sought. As of the start of February 2012, no decision has been made on the application for leave. We anticipate that the Supreme Court may be asked to overturn the BCCA on the grounds that it diverged from the SCC's decision in *Carrier Sekani* by requiring, in this particular case, a consultation process that dealt with the effects of more than just the particular decision that was under review.

In this author's view, the BCCA did properly conclude that the consultation had to include consideration of what had led to the state of affairs in relation to the Burnt Pine caribou. The concern over cumulative effects went to the heart of ensuring that the First Nations had, and would continue to have, a meaningful right to hunt (see para. 62). Considering cumulative effects, as an integral part of determining whether a meaningful right to hunt will be affected by a Crown decision, is also consistent with the Supreme Court's earlier decision in *Mikisew Cree*, where the Court explored the notion of the intersection between Aboriginal consultation and 'meaningful' hunting rights.

#### 4. Injunctions and the duty to consult and accommodate

In two recent decisions, First Nations have successfully obtained injunctions against mining companies to prevent on-the-ground activity from proceeding while consultation and accommodation was being pursued. These decisions are summarized below. I highlight these decisions because of what they say about the role of injunctions when there is an assertion (either in a judicial review or in a claim) that the First Nation hasn't been properly consulted and accommodated.

##### *(a) Taseko Mines Limited v. Phillips, 2011 BCSC 1675.*

Taseko Mines had been seeking to develop a mine, the Prosperity Mine, in an area where the Tsilhqot'in Nation has claims to aboriginal title and aboriginal rights that are currently in the courts. British Columbia had decided that, though there were significant adverse effects, they were justifiable, and so had been prepared to let the project proceed after their provincial EA was completed. Canada, however, had decided in Nov. 2010 that the Prosperity Mine project as proposed would cause significant adverse environmental effects that could not be justified in the circumstances, so the project as originally proposed did not proceed. Canada took this position after a federal environmental assessment panel concluded in July 2010 that the Prosperity Mine project would cause significant adverse environmental effects on fish and fish habitat, on navigation, on the current use of lands and resources for traditional purposes by First Nations and on cultural heritage, and on certain potential or established Aboriginal rights or title, and that the Project, in combination with past, present and reasonably foreseeable future projects would result in a significant adverse cumulative effect on grizzly bears in the South Chilcotin region and on fish and fish habitat.

In this case, aboriginal rights to the particular area to be affected by the mine had been established at trial in the BC Supreme Court.

After Canada turned down the earlier design for the mine, the company submitted a newly designed mine for environmental assessment approval. Taseko Mines then obtained from the province several

exploration permits which Taseko said they needed to obtain further geological information regarding the newly designed mine.

The First Nations brought an application for judicial review of these provincial decisions to issue permits. While the judicial review had been started, the Chief of one of the First Nations of the Tsilhqot'in Nation sought an injunction to prevent exploration. The mining company also sought an injunction to prevent obstruction of their access to carry out work authorized by the permits.

The Court found, in weighing the balance of convenience and granting the First Nation a 3-month interim injunction, that it needed to "take into account the fact that if the injunction does not issue, the petitioners will have lost their asserted right to be consulted at a deep level in relation to the exploration program, and their petition will become moot." The Court considered the public interest of the mining company in obtaining information for the environmental assessment process, but found that a short delay that would be occasioned by an injunction meant that there wasn't a significant risk to that interest. On the other hand, the public interest to ensure reconciling the competing interests of the Nation and the mining company through the process of consultation and accommodation weighed heavily in the balance of convenience.

As an aside, and further to the comments above regarding considering cumulative impacts in fulfilling the duty to consult and accommodate, the court also spoke to the issue of cumulative impacts in an area already affected by mineral exploration activity. The court found that the balance of convenience tipped in favour of the First Nation, having considered cumulative impacts: "Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last."<sup>7</sup>

(b) *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al.*, 2011 ONSC 7708

This injunction application decision reiterates principles from earlier decisions dealing with irreparable harm and balance of convenience in injunctions sought by First Nations. It also has arguably placed consultation and accommodation requirements higher up on the agenda where impacts to aboriginal archaeological cultural heritage and burial grounds are possible.

Wahgoshig First Nation had been trying to get a junior exploration company, Solid Gold Resources Corp., to consult with it given the First Nation's strong view that there was a significant likelihood of irreparable harm to cultural heritage, and to sacred and burial sites in the face of proposed exploration activities. The exploration company counter-argued that the First Nation had not actually proved any irreparable harm, and that they hadn't proven they could not be compensated in money for any damages.

The Court decided, following earlier cases, that absolute certainty of irreparable harm wasn't required to be established in order to obtain an injunction, and in fact that if the duty to consult and accommodate hasn't been met, then that could make it impossible to ever show such harm. It

---

<sup>7</sup> *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675 at para. 65.

concluded that, without meaningful consultation and accommodation between the First Nation and the company, facilitated by the Crown, there was a significant possibility of harm to Wahgoshig's treaty and aboriginal rights. The Court also found that damages would not and could not suffice as compensation, given the type of rights – cultural heritage and burial grounds – at issue.

As for the balance of convenience, the Court disagreed with the Crown's position that an injunction (vs. a consultation remedy that Ontario argued would promote reconciliation by balancing the rights to be consulted with the rights to explore) was not an appropriate remedy. The Court, in weighing the balance, took note of the First Nation's position that there was a public interest to ensure its constitutional rights to consultation and accommodation would be respected, which would not be the case without an injunction. Without an injunction in place, it would send a message to exploration companies that their rights to consultation and accommodation could be rendered meaningless by ignoring them. The Court ordered:

- A 4-month injunction against exploration activity;
- That consultation and accommodation involving the First Nation, the company and the Crown take place during that 4-month period; and
- That, if the consultation and accommodation wasn't productive, the First Nation could seek an extension of the injunction.

Leave to appeal the decision granting the injunction has been sought by Solid Gold, and Solid Gold also subsequently brought a damage claim against Ontario.

## **B. Legal Landscape affecting Aboriginal Archaeological Resources**

### 1. Who owns aboriginal archaeological resources in Ontario?

According to the Ontario Ministry of Tourism, Culture and Sports (MTCS),<sup>8</sup> in Ontario, 80 per cent of all archaeological sites are Aboriginal. The Ministry's website lists artifacts like pottery shards, arrow and spear points, and what it calls everyday materials. It notes that "Some artifacts, such as sacred bundles, funerary objects and human remains are sensitive, and one must treat them with utmost respect and dignity."

But who "owns" these every-day and sacred aboriginal archaeological artifacts and aboriginal human remains that have been discovered? The *Ontario Heritage Act* R.S.O. 1990, c. O.18 does not explicitly state that the province owns heritage resources.<sup>9</sup> However, under that Act, consultant archaeologists receive licenses to conduct archaeological assessments which require them to "hold in safekeeping" all

<sup>8</sup> [http://www.mtc.gov.on.ca/en/aboriginal/aboriginal\\_museums\\_arch.shtml](http://www.mtc.gov.on.ca/en/aboriginal/aboriginal_museums_arch.shtml)

<sup>9</sup> Contrast this with, for example, Newfoundland and Labrador where, under its *Historic Resources Act*, it states that "the property in all archaeological objects, whether or not those objects are in the possession of the Crown, is vested in the Crown."



artifacts they find in course of their work, or to transfer them to Ontario or public institutions licensed under s. 66(1) of the Act.

As a consequence of these provisions, archaeologists' homes, offices and barns contain many artifacts, which are not regularly monitored by the Province to determine whether they are safely kept. Aboriginal archaeological resources are not required to be made available to or even reported to the aboriginal people whose history those artifacts reflect. The artifacts are to be held "in trust for the people of Ontario" if transferred to a public institution.

So does the statute mean that Ontario has legislated that the "people of Ontario" beneficially own artifacts found on private property, even aboriginal artifacts? That would be what the statute suggests, but it is not clear.

What is clear, however, is that aboriginal peoples whose cultural patrimony is stored in barns or in county museums are *not* explicitly recognized under Ontario's statutes as having legal rights to those aboriginal heritage resources. That, I suggest, is a problem that could and should be fixed, and which would simplify the development process.

In parts of Canada where modern land claim agreements have been concluded, the problem of who should be recognized as having title to aboriginal heritage resources is addressed in very different ways than in Ontario. Exclusive or joint title to archaeological resources discovered in the lands covered by those treaties has been determined by some of those treaties to be held by aboriginal governments. See for example the Labrador Inuit Land Claims Agreement, s. 15.11.2. It declares title to archaeological material found in the Labrador Inuit Lands (an area of about 15,800 square kilometers) after the treaty comes into effect to be vested in the Nunatsiavut Government. Title to archaeological resources found in federal Crown lands and on all other lands in the large settlement area outside of Labrador Inuit Lands is jointly vested in the Nunatsiavut Government and Canada and the Province respectively. Various British Columbia land claim agreements provide that the ownership of artifacts found in the aboriginal-owned lands will rest with the First Nation unless another person establishes ownership. In the Yukon, the Yukon First Nations own the artifacts on their settlement lands. The Tlicho land claim agreement in the Northwest Territories provides that Tlicho artifacts are the cultural patrimony of the Tlicho First Nation. The Tlicho Government is, by treaty, the custodian of heritage resources on Tlicho lands. The Tlicho Government shall notify government when a heritage resource, other than a Tlicho heritage resource, is found on Tlicho lands (an area of about 39,000 square kilometres).

That kind of clarity of aboriginal ownership or custodianship would be of value in Ontario, but the clarity doesn't exist at this point in time. I would suggest that the issues associated with archaeological discoveries and what that requires in terms of consultation with aboriginal peoples begin with the fact that the legal system in Ontario does not explicitly recognize the aboriginal peoples' rights to their own aboriginal heritage resources.

A related issue to aboriginal peoples ownership over *physical* artifacts is the ownership of the intellectual property rights in the designs, images, or other non-tangible aspects of those resources. A

full discussion of the intellectual property rights to aboriginal cultural material is beyond the scope of this paper, but it is important to note that this issue is a live one.<sup>10</sup>

## 2. Aboriginal rights to archaeological heritage resources?

It is suggested by Ontario's heritage statute that "the people of Ontario" generally speaking have an interest in aboriginal archaeological resources found in Ontario. While I would agree that the people of Ontario should be "interested" in aboriginal archaeological resources as part of an understanding of the history of the province, the nature of their legal entitlement is a different question. Do or should aboriginal peoples instead be recognized as having legal entitlements to such resources at law – the underlying question I leave with you for consideration is whether aboriginal peoples in Ontario should be recognized as "approval authorities" where the cultural patrimony of archaeological resources is theirs.

Some First Nations in Ontario have been or are pursuing some form of recognized legal entitlement to archaeological resources in Ontario. Specifically, some First Nations have or are seeking s. 35 aboriginal rights declarations about protection of cultural sites and burial sites in Ontario. The types of potential cultural rights at issue for Aboriginal groups would include rights such as:

- Rights to protect burial and cultural sites from disturbance
- Easement rights ensuring access to burial or cultural sites, for the purpose of ceremonies and cultural activities
- Property rights in the cultural materials and human remains extracted from archaeological sites
- Rights to have artifacts currently held in the possession of archaeologists or museums repatriated to First Nations Communities

The legal test for proof of aboriginal rights has been enunciated by the Supreme Court of Canada in *R. v. Van der Peet* [1996] 2 SCR 507. The test for an aboriginal right has been clearly articulated: is it a practice, custom or tradition integral to the distinctive culture of the aboriginal people claiming the right?

In *Hiawatha First Nation v. Ontario (Minister of the Environment)*, 2007 CanLII 3485 (ON SCDC), seven First Nations brought a claim in which they alleged, among other things, that they had an aboriginal right to preservation of Anishnaabeg burial sites and they feared that development of the Seaton lands (lands in Pickering) would destroy burial sites which likely are located on the Seaton lands.

The Court did conclude based on the evidence that "There is no dispute that burial sites of their ancestors are sacred to the Anishnaabeg, and of primordial cultural importance." The Court cited the evidence of Dr. Darlene Johnston (then an Assistant Professor at the Faculty of Law, University of Toronto) about the centrality of aboriginal lands and burial sites to aboriginal culture and identity. The Court found that there is general agreement that the Anishnaabeg practice of honouring the burial sites

---

<sup>10</sup> This area of the law is underdeveloped in Canada and protection, such as it is, is dealt with primarily through contract. Other jurisdictions have recognized rights to the IP of cultural resources, e.g. *Milpurrurru v Indofurn Pty Ltd*, 54 FCR 240 (1994) (Aus.),

of their ancestors meets the aboriginal rights test, but it also found that in the particular instance of the First Nations claiming the right in that case, the Williams Treaties had surrendered those rights because of the “basket clause” as interpreted by the Supreme Court of Canada in *R. v. Howard*<sup>11</sup>. In *Howard*, the Supreme Court had concluded on the evidence before it that the signatories in 1923 would have understood the basket clause to be a broad release of *all* their rights, including, so the Court in this case said, their aboriginal rights in relation to burial grounds.

Without getting into the concerns these First Nations have about the decision in *Howard*, it is clear that the ruling in *Hiawatha First Nation v. Ontario (Minister of the Environment)* is confined to consideration of the unique effect of the Williams Treaties and the ‘basket clause’ on aboriginal rights to burial grounds. How *other* Treaties are interpreted would depend on the evidence in relation to those treaties, and on all the treaty interpretation principles that have been enunciated in various Supreme Court rulings in the past decades.<sup>12</sup>

To date, however, aboriginal rights to access and protect ancestral burial grounds and other cultural heritage areas have not yet been recognized by a court as such. In the meantime, First Nations, Crown representatives, and developers are faced with a medley of situations in which aboriginal archaeological resources may be encountered, and a medley of statutory requirements to be met in some, but not other, land development scenarios that may or may not require consultation and some form of accommodation to be reached. This is particularly problematic in view of the provisions in the *Cemeteries Act*, which remain woefully inadequate in protecting Aboriginal burial sites.<sup>13</sup>

On a practical level, most private developers recognize that an Aboriginal interest exists in a situation where there is a clear historical connection between a First Nation and an archaeological site found in its traditional area. As a result, many First Nations have negotiated private agreements which guarantee access and protection.

In light of the uncertainty regarding the exact nature of statutory requirements, and the likelihood that burial and cultural sites (outside of the Williams Treaties’ area) may be determined by a court to be s. 35

---

<sup>11</sup> [1994] 2 SCR 299.

<sup>12</sup> For example, Wahgoshig First Nation recently filed a statement of claim following upon the injunction decision noted above. This claim will require interpretation of another Treaty (Treaty 9) and its potential protections of Aboriginal cultural rights. In its claim, Wahgoshig asserts, among other things, that it has aboriginal rights to practice sacred traditional lifestyle and ceremonial activities, and to use and preserve sacred sites, prayer areas, and burial grounds. Wahgoshig First Nation is a signatory to Treaty 9 which recognizes, expressly in the written terms of the treaty, hunting, trapping and fishing rights as treaty rights. The First Nation asserts that it has an aboriginal right to use and protect its burial grounds and other cultural heritage areas, values and sites, without interference from others, and that the infringement of those rights by the *Mining Act* regime cannot be justified. This claim has not advanced through the courts yet, so where it leads is still to be seen.

<sup>13</sup> For an analysis of the problems with the Ontario *Cemeteries Act*, and its inadequacies and its inappropriate cultural process for protecting Aboriginal burial sites, see the background reports and final report of the *Ipperwash Inquiry*, and specifically, the report: *Respecting and Protecting the Sacred*, commissioned by the Inquiry and written by Darlene Johnston, available at [http://www.archives.gov.on.ca/english/collections/e-records/ipperwash/policy\\_part/research/pdf/Johnston\\_Respecting-and-Protecting-the-Sacred.pdf](http://www.archives.gov.on.ca/english/collections/e-records/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf). See also the section below on the *Cemeteries Act*.

protected rights, proponents and the Crown should look to at least assess these issues as early in the process as possible to avoid unwelcome surprises once a project is significantly underway.

### 3. When is archaeological assessment required?

The current statutory framework governing archaeological investigation and discoveries in Ontario and how the duty to consult and accommodate comes into play before and after archaeological discoveries are made present a complex and vague set of rules and guidelines.

Below I briefly review situations when formal archaeological assessments are or are not required or suggested in Ontario's statutory framework. The general conclusion drawn from a review of these situations is that statutory and regulatory requirements about when to do a formal archaeological assessment before ground disturbance takes place are not clear. The key to when an archaeological assessment is required rests with the statutory "approval authority" for particular types of developments. Once an approval authority determines that an archaeological assessment is required, a consultant archaeologist engaged under a licence issued by MCTS will perform that assessment and be required to follow the 2011 Standards and Guidelines for Consultant Archaeologists.

It is important to note, however, that even if an archaeological assessment has not occurred, if artifacts or human remains are 'discovered', the *Ontario Heritage Act* is triggered, and the archaeological site may only be disturbed if there is an archaeological assessment. Contravention of the Act can trigger substantial fines (up to \$1,000,000).<sup>14</sup>

#### *a. Mineral Exploration*

Archaeological assessment is not currently required under statute or regulation before a company engages in exploration work under the *Mining Act*.

Parts of the 2009 revisions to the *Mining Act*, which are not yet proclaimed in force as the regulations are still being worked on, will provide that under section 35 of that Act, the Minister by order may withdraw from prospecting and staking any land, mining rights or surface rights that are the property of the Crown. In making this decision, the Minister will consider whether the lands meet the prescribed criteria for a "site of Aboriginal cultural significance". Under Section 51, the Minister will be enabled by order to impose restrictions on a mining claim holder's right to the use of portions of the surface rights of a mining claim if they are on lands that meet the prescribed criteria as sites of Aboriginal cultural significance.<sup>15</sup>

Consultation with aboriginal communities in exploration plan development and exploration permits may be a feature of the new *Mining Act* regime, and what role formal archaeological investigation will play in exploration plan and permitting remains to be seen. This paper does not explore the lengthy process

<sup>14</sup> *Ontario Heritage Act*, R.S.O. 1990, ch O.1, s. 48 and 69

<sup>15</sup> For information about the anticipated criteria, see MNDMF's August 2011 presentation, "Modernizing Ontario's Mining Act – Overview" found online at [http://www.mndm.gov.on.ca/mines/documents/mining\\_act/MAM\\_Overview\\_Aug2011final\\_E.pdf](http://www.mndm.gov.on.ca/mines/documents/mining_act/MAM_Overview_Aug2011final_E.pdf).

that has preceded the passage of these revisions or the process of developing the new regulations in another instance (the renewable energy project area) where the Province may be introducing a form of consultation with aboriginal peoples through regulatory requirements. However, the requirements for that consultation may not be linked to there being any particular constitutionally recognized aboriginal or treaty rights of aboriginal peoples, including rights in relation to archaeological resources.

*b. Land developments under the Planning Act*

The *Planning Act* RSO 1990 c. P13 s. 2(d) requires municipal councils in carrying out their responsibilities under the *Planning Act* to have regard to, among other things, “the conservation of features of significant... cultural [or] archaeological... interest.” This requirement is defined in more detail in policy 2.6, Cultural Heritage and Archeology, found in the *Provincial Policy Statement, 2005*, issued by MMAH under s. 3 of the *Planning Act*.

The *Provincial Policy Statement 2005* (2.6.2) provides:

Development and site alteration shall only be permitted on lands containing archaeological resources or areas of archaeological potential if the significant archaeological resources have been conserved by removal and documentation, or by preservation on site.

However, archaeological assessments are not specifically required for all developments referred to under the *Planning Act*. They are specifically required:

- for applications for plans of subdivision (Reg. 544/06); and
- when otherwise directed by the Official Plan (OP)

It is important to note that MTCS is not the “approval authority” for land use and development decisions made under the *Planning Act* after an archaeological assessment is completed. MTCS staff (archaeology review officers) instead have the role of ensuring that licensed archaeologists meet the requirements set out in their licences, including requirements for fieldwork and reporting. Some of those requirements are set out in the *Standards and Guidelines for Consultant Archaeologists* issued for fieldwork and reporting, others of which may be set out in the specific archaeological licences issued under the *Ontario Heritage Act*.

The approval authority for land use and development decisions under the *Planning Act* will often be a municipality or in some cases the Ministry of Municipal Affairs & Housing depending on the specific powers granted to the municipality.<sup>16</sup> This can present an important problem – in order for an archaeological assessment to be done at all, someone in the approval authority has to initially decide there is archaeological potential. So, if a municipal planner is looking at a project, and he or she has no archaeological expertise, he or she is not required to consult with the MTCS (much less local First Nation who may themselves have archaeological expertise as well) to determine if there is archaeological potential in an area slated for development. This means that areas of high aboriginal archaeological potential may be missed in the permitting process for developments in municipalities, and therefore no

---

<sup>16</sup> For information about the approval authorities under different provisions of the *Planning Act*, see <http://www.ontla.on.ca/library/repository/mon/24003/300004.pdf>

engagement or consultation with aboriginal peoples would happen at all. The MTCS has a checklist outlining the provincial criteria for determining areas of archaeological interest, which municipalities are expected to use when they are the approval authorities prior to the approval of development or site alteration.<sup>17</sup> The criteria include factors such as: location of registered archaeological site within 250 metres of the location, presence of a water source within 300 metres (including historical shorelines), etc. If the approval authority is unsure about whether a particular criterion is met, the MTCS directs that a licenced archaeologist should be retained to perform at least a “Stage 1 assessment”.

The 2011 *Standards and Guidelines for Consultant Archaeologists* acknowledge this situation, noting that a non-specialist will often be the one determining “archaeological potential”. If a First Nation is not consulted by a municipality at all for a particular planning decision, and if a proponent does not itself consider that it should engage in such consultation, getting the municipality to require or the proponent to perform an archaeological assessment at all can be a problem if a First Nation or other aboriginal people believe the area to be one of high archaeological potential.

If an approval authority gives an approval without properly assessing (or having a licenced archaeologist assess) the archaeological potential for a development, this may make the project approval vulnerable to challenge.

### *c. Renewable Energy Projects*

The Renewable Energy Approvals (REAs) required under the *Environmental Protection Act* for renewable energy projects require proponents to self-assess about the potential for archaeological resources and archaeological potential. The requirements are laid out in sections 20-23 of O. Reg. 359/09 under the *Environmental Protection Act*. I will not go through all the details but hit some of the highlights instead.

Section 20 requires the proponents of various types of renewable energy approvals (see 20(3) for exceptions) first to “consider” if the project might impact an archaeological or heritage resource at the project location. If the proponent concludes there is no possibility of such an impact, then they have to report on that when they submit their application for the REA. If however, they conclude that the project might have an impact on an archaeological resource, they are to engage a consultant archaeologist (licenced under the *Ontario Heritage Act*) to complete an archaeological assessment. The archaeological assessment report, together with any MTCS comments, will be part of what is submitted to the Ministry of Environment as part of the REA application. If an archaeological assessment is required, then the *Standards and Guidelines for Consultant Archaeologists* will be engaged.

In the spring of 2010, the MTCS issued an Information Bulletin with guidance about the role of archaeological assessment in the REA process. The title of the bulletin is *Information Bulletin for Applicants Addressing the Cultural Heritage Component of Projects Subject to Ontario Regulation 359/09 Renewable Energy Approvals*.

---

<sup>17</sup> See [http://www.mtc.gov.on.ca/en/archaeology/archaeology\\_assessments.shtml#a1](http://www.mtc.gov.on.ca/en/archaeology/archaeology_assessments.shtml#a1)

The *Green Energy Act* and related legislation do not specifically set out requirements to avoid or mitigate impacts on archaeological resources; rather, proponents will need to modify their projects in order to avoid or mitigate these impacts as part of the REA process.

*d. Aggregate Resources Act permits for quarries*

One of the statutory purposes of the *Aggregate Resources Act* (“ARA”) is to minimize adverse impacts on the environment. The Aggregate Resources Policy Manual published by the Ministry of Natural Resources and available online gives guidance on the requirements of the ARA. It refers in one part of the policy (A.R. 4.01.07) to the purpose of and value of a “cultural heritage resource report” which MCTS considers to be the equivalent of an archaeological assessment. According to the policy, the purpose of such a report is “to ensure that archaeological resources are identified, assessed for their significance, and protected (i.e. preserved or collected) in order to better understand and appreciate Ontario’s culturally diverse Aboriginal and non-Aboriginal communities heritage.”

MTCS’s view is that the Policy requires that archaeological assessments are to be completed for the whole property, not just areas of extraction, if a property has archaeological potential. MTCS will have to accept the archaeological assessment report if it is required, before the ARA permit can be issued.

*e. Projects requiring environmental assessment clearance*

Many public sector projects require completion of EA requirements under various Class EA documents. Those EA processes are proponent-driven, and archaeological assessments may or may not be required when a class EA is to be completed. If, however, archaeological resources are identified, there are no specific archaeological protection mechanisms set out under the *Environmental Assessment Act*, but the proponent is to modify the project to avoid those impacts.

Larger private sector developments may also be designated under the provincial *Environmental Assessment Act* as having to go through environmental assessment, or may be required to go through EA under the *Canadian Environmental Assessment Act* where federal triggers (e.g. a *Fisheries Act* authorization) trigger the requirement for an EA. If so, archaeological assessments may also have to be carried out.

*f. Archaeology requirements for forestry operations*

The 2011 *Standards and Guidelines for Consultant Archaeologists* discussed in more detail below deal specifically with archaeological requirements in forest planning, noting that there are specific exceptions to the general rules dealing with, for example, property inspection in Stage 1, where property access would be difficult in remote locations. As well, archaeological assessment in forestry management planning may not always be required even in areas of high archaeological potential, if for example the forestry is to be done in winter over snow. I will not explore here the details about this topic, but would refer interested people both to the Standards and Guidelines as well as to the Forest Management Class EA which is implemented by the Ministry of Natural Resources.

#### 4. Aboriginal Engagement under the 2011 *Standards and Guidelines for Consultant Archaeologists*<sup>18</sup>

If an archaeological assessment is being conducted by a consultant archaeologist under a licence issued under the *Ontario Heritage Act*, the 2011 *Standards and Guidelines for Consultant Archaeologists* (revised from the 1993 Technical Guidelines) set out requirements (i.e. standards) as well as guidelines for aboriginal engagement during the process of doing the archaeological assessment. The guidelines use the term “engagement”, not “consultation”. The aboriginal engagement provisions set out in the 2011 Standards and Guidelines are not triggered by the Crown first having to determine whether there is an aboriginal or treaty right or a claim that requires consultation. Thus, following the guidelines is not a guarantee that consultation and accommodation to fulfill the Crown’s duty will have been met.

The Standards and Guidelines’ requirements for aboriginal engagement when an archaeologist has been hired to complete an archaeological assessment came into effect in January 2011 – there were no such aboriginal engagement requirements on archaeologists before this time. I will briefly review the applicable provisions in the Standards and Guidelines dealing with aboriginal engagement.

*Stage 1 Archaeological Assessment* – This is the stage of background study and (where called for) property inspection. Section 1.1, Guideline 1 provides that the background study may also include research information from Aboriginal communities about traditional use areas and sacred and other sites on or around the property. The Guidelines refer archaeologists to the draft<sup>19</sup> *Technical Bulletin on Engaging Aboriginal Communities in Archaeology* for guidance on how to engage with aboriginal communities.

Also in Stage 1, the Standards and Guidelines refer to aboriginal engagement when recommending that areas should be exempt from test pit surveys under certain conditions when the area meets the criteria for low archaeological potential. In making such recommendations, the Guideline encourages consultants to engage with Aboriginal communities to ensure there are no unaddressed Aboriginal cultural heritage interests (see p. 20).

*Stage 2 Archaeological Assessment* – This is the property assessment stage. The Guidelines suggest (p. 40) that the archaeologist may engage with Aboriginal communities to determine their interest in archaeological resources found during Stage 2, and to ensure there are no unaddressed Aboriginal archaeological interests. The Guidelines also recommend informing interested aboriginal communities at the end of Stage 2 in order to prepare for their engagement in stage 3.

*Stage 3 Archaeological Assessment* – This is the site-specific assessment phase which may or may not be proceeded to, depending on the results of Stage 2. It is a requirement (i.e. a standard) at this stage under Section 3.1, Standard 1 that the research includes information sources which identify the site as sacred to an aboriginal community and requires that the archaeologist seek oral or written information from the relevant aboriginal community.

---

<sup>18</sup> The Standards and Guidelines are available online at [http://www.mtc.gov.on.ca/en/publications/SG\\_2010.pdf](http://www.mtc.gov.on.ca/en/publications/SG_2010.pdf).

<sup>19</sup> It is draft according to MCTS because it is meant to be a living document.



Under Section 3.4, which is the analysis stage to determine whether an archaeological site requires mitigation of impacts, the cultural heritage value or interest of the site is assessed, in order to see if Stage 4 mitigation is required or not, and if so, what strategies should be developed. Stage 4 mitigation will be required if the sites haven't been completely excavated and documented by the end of Stage 3. Sacred and burial sites always require Stage 4 mitigation, so this would include aboriginal burial sites. Woodland period<sup>20</sup> archaeological sites require Stage 4 mitigation as well.

At this stage, aboriginal communities are required to be engaged to assess the cultural heritage value or interest of an aboriginal archaeological site of sacred or spiritual importance, or if it is associated with traditional land uses or geographic features of cultural heritage interest, or is the subject of aboriginal oral histories.

Under Section 3.5, Standard 1 requires that aboriginal communities also have to be engaged in formulating mitigation strategies if Stage 4 work is required, for certain types of aboriginal archaeological sites, including for example sacred sites and sites known to contain human remains, as well as where such sites are going to have their topsoil stripped.

#### *Aboriginal Engagement Technical Bulletin*

The draft Technical Bulletin on Engaging Aboriginal Communities in Archaeology sets out questions to help archaeologists determine who to engage, including for example if the geographic location is close to aboriginal communities or in their traditional territories. In some cases this may require engaging with more than one aboriginal community. Does it fall within a treaty area? What cultural affiliation has been inferred?

The Technical Bulletin also provides advice on how to engage aboriginal communities, including for example by including them in the assessment, using their services, and incorporating their feedback into strategies for investigating the archaeological site.

Though not set out in the bulletin, note that aboriginal communities may in certain situations want to work out further involvement in the archaeological assessment process beyond what is in the Guidelines, as well as working out other accommodations directly with the proponent in relation to the overall project. Some of the additional accommodations may be related to specific measures to protect the archaeological site or to compensate for unavoidable impacts.

### **C. Aboriginal Peoples Burial Grounds**

The *Cemeteries Act* RSO 1990 c. C.4 and its replacement as of July 1, 2012 (the *Funeral, Burial and Cremation Services Act, 2002*, S.O. 2002, C. 33) requires that when burial sites containing human remains are discovered by a person, that person has to cease fieldwork or construction and report the discovery to the police or coroner (s. 95 of FBCSA).

---

<sup>20</sup> Defined by MTCS as the period from 350 to 3,000 years ago.

July 1, 2012 has been named by proclamation as the day on which the provisions dealing with “aboriginal peoples burial grounds” come into force. I will restrict my comments to those new provisions and the regulations under them.

An “aboriginal peoples burial ground” means land set aside with the apparent intention of interring in it, in accordance with cultural affinities, human remains and containing remains identified as those of persons who were one of the aboriginal peoples of Canada. So it must actually “contain” remains in order to be an aboriginal people burial ground, and there has to have been an apparent intention of interring human remains in the site.

- Similar to the *Cemeteries Act*, the registrar makes the determination under as to whether the site is an “aboriginal peoples burial ground,” a “burial ground,” or an “irregular burial site.” There is no requirement in making this determination for the registrar to seek input or consult with any First Nation or Aboriginal organization.

Under s. 96(1) of the FBCSA, the registrar may order the owner of land on which a burial site is discovered to cause an archaeological investigation to be made to determine the origin of the site.

- If the Registrar determines that the site is an “irregular burial site,” there is no requirement for the Registrar to provide any notice to any First Nation.<sup>21</sup>
- Where the Registrar determines that the site is an aboriginal peoples burial ground, the Registrar is to serve notice of the declaration on “the representative of each person whose remains are interred at the site”. Regulation 30/11 provides that the representative is either the nearest First Nations government or “another community of aboriginal peoples that is willing to act as a representative and whose members have a close cultural affinity to the interested person.” However, there is no means by which to distinguish when to notify which group or what to do in the case of a discrepancy.
- There are no provisions in the new Act that require any consideration by the registrar, or by an arbitrator or arbitration panel in case arbitration is needed to reach a site disposition agreement, of Aboriginal values or which set out any duty to consult Aboriginal peoples.
- Where a representative (First Nation or other aboriginal community) is served by the Registrar with notice, it is required to enter into negotiations with the property owner with a view to creating a site disposition agreement.<sup>22</sup> If no site disposition agreement is reached within the time prescribed (30 days after the registrar gives notice of the declaration that it is an aboriginal peoples burial ground), the matter is referred to arbitration before an arbitrator or arbitration board.

<sup>21</sup> An “irregular burial site” is defined in s. 97 as “a burial site that was not set aside with the apparent intention of interring human remains in it”.

<sup>22</sup> Section 99(2) of the *Funeral, Burial and Cremation Services Act, 2002*. The contents for a site disposition agreement are set out in s. 184 of O. Reg. 30/11.

- For aboriginal peoples burial grounds, unless the “representative” consents, no person shall remove the remains or associated artifacts from the site, or conduct scientific analysis of the remains or associated artifacts.<sup>23</sup>
- Pursuant to s. 99(5) of the new Act, the persons named in an arbitrated settlement who have been given the opportunity to fully participate in the arbitration process are bound by the settlement whether they chose to participate or not.
- There is no explicit recognition of Aboriginal values or any duty to consult in the legislation

The amended legislation will undoubtedly result in continuing concerns regarding (and, given the emotional volatility of such matters, even confrontations or occupations of) Aboriginal burial sites. The legislation does not recognize the unique cultural aspects of many Aboriginal burial sites, including the different physical methods of dealing human remains historically (such as tree scaffold burials where the remains may be widely dispersed bone scatter, or secondary bundle burials where the remains of several individuals may be contained in one small pit), or the implications for the type and size of protected areas which may be needed for such sites.

#### **D. Environmental Assessment and the Duty to Consult and Accommodate**

There are a number of situations unfolding in 2012 which may affect the law regarding the duty to consult and accommodate in the context of environmental assessment law.

Is a joint review panel, rather than a comprehensive study, required for proper consultation and accommodation?

In Ontario, several First Nations launched a judicial review application late in 2011 in connection with one of the Ring of Fire mining projects, a chromite mine proposed by Cliffs Natural Resources Inc. In their application, they have asserted that a joint review panel under the *Canadian Environmental Assessment Act* is required in order for adequate consultation and accommodation, arguing that a comprehensive study is not a sufficient mechanism to consult and accommodate the First Nations in respect of this particular project because, among other things:

- the comprehensive study is a largely paper-based assessment process that does not offer the same opportunities for public participation as a Review Panel, particularly oral hearings.
- the comprehensive study is directed by Crown officials, and not by an independent panel, and it may therefore result in a narrower approach to the examination of potential impacts and mitigation measures.

---

<sup>23</sup> General, O Reg 30/11, (*Funeral, Burial and Cremation Services Act, 2002*).

- the comprehensive study process has short, inflexible deadlines established under regulation.
- although the federal comprehensive study and the provincial environmental assessment requirements may be 'harmonized', they are not fully integrated and proceed as separate processes, imposing additional requirements and burdens on First Nations communities with limited capacity.

Accordingly, the First Nations are seeking, among other things, (a) an order that the chromite project must be referred to a Review Panel; (b) a declaration that, in the circumstances, a comprehensive study is an inadequate mechanism to fulfill the Crown's duty to consult and accommodate the applicants; (c) a declaration that, in the circumstances of this case, it would be unreasonable for the Minister of the Environment to fail to refer the project to a Review Panel.

Is a Joint Review Panel sufficient to meet the duty to consult and accommodate?

Since *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), [2004] 3 SCR 550 was decided by the Supreme Court of Canada eight years ago, it has been clear that it is possible (although not necessarily the case) that an environmental assessment process can fulfill the requirements of the Crown's duty to consult and accommodate. Where the EA or other regulatory process is deficient or does not provide an avenue to accommodate First Nations' concerns, then the Crown will need to ensure through some other means that the duty is met. See *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 FC 1139 at para. 102 and *Rio Tinto* at para. 63.

The Northern Gateway pipeline project EA is being conducted by a joint review panel, but the First Nations in the area are not happy with that process. Before the establishment of that panel, the First Nations who have unsettled aboriginal claims in the area had demanded a separate review process, explicitly set up to address their aboriginal rights and title. However, a joint review panel for Northern Gateway has been established and is now conducting the EA process. It is possible that the First Nations in this particular fact situation will claim that they are not being properly consulted and accommodated, although an EA is being conducted by a Joint Review Panel.<sup>24</sup>

---

<sup>24</sup> See media coverage in "How First Nations Are Gearing Up for Legal Battle Against Gateway: Native groups likely to cite evidence they weren't consulted as required by Supreme Court decisions" found online at [http://theyee.ca/News/2012/01/30/First-Nations-Gateway-Battle/?utm\\_source=mondayheadlines&utm\\_medium=email&utm\\_campaign=300112](http://theyee.ca/News/2012/01/30/First-Nations-Gateway-Battle/?utm_source=mondayheadlines&utm_medium=email&utm_campaign=300112)

### Strategies to avoid litigation about the EA process

Litigation to determine whether an EA process meets the duty to consult and accommodate is of course the choice of last resort. There are a variety of strategies that companies and First Nations and government agencies responsible for EAs can pursue to avoid litigation and ensure an EA process does the job it is designed to do: assess need and alternatives, identify potential impacts on the aboriginal parties rights, claims and interests and find avoidance and mitigation strategies that will mitigate adverse environmental effects. I suggest a few strategies for consideration based on experience with different projects:

1. Negotiate a process agreement for preparation of the EIS where the aboriginal parties have significant input into the scope of environmental studies that will support the EIS.
2. Ensure that the results of traditional knowledge studies are actually integrated into different parts of the EIS, rather than simply appended as information that has not informed the conclusions reached in the EIS.
3. Proponents should adequately fund the aboriginal parties to hire their own independent experts to assist them in carrying out their obligations under the process agreement.
4. Proponents should articulate in writing precisely how the aboriginal parties' inputs have influenced the design of the studies and the design of the project.
5. Negotiate a clear consultation agreement between the aboriginal parties and the government agencies who are part of the EA process that provides the aboriginal parties with the right to meet with the governmental decision makers at key decision-making points, before they make decisions under the governments' legislation, and places an obligation on the decision-makers to actually discuss the aboriginal parties' views on the matter that is to be decided.
6. Negotiate particular mitigation strategies to mitigate potential impacts, before the EIS is finalized.
7. Negotiate an impacts and benefits agreement to address impacts and provide benefits, but don't require the IBA to be ratified before the EA process is done, and ensure that the aboriginal people who are being asked to ratify the EA have had the opportunity to fully participate in the EA as well.