The Aboriginal Role in the Development of Alberta’s Oil & Gas

February 25th, 2005

Presented by:
Sherry Norton and Shelley Zwicker
Presenter Introduction

**Sherry Norton**
- General Manager, EZRA Consulting Ltd.
- MBA/Master Forestry, NRE Specialization, University of Alberta (2006)
- Registered Professional Forester (2000)
- B.Sc. Forestry, University of Alberta (1997)

**Shelley Zwicker**
- Business Analyst, Shell Global Solutions
- MBA, NRE Specialization, University of Alberta (2005)
- Professional Engineer (2001)
- B.Sc. Chemical Engineering, University of New Brunswick (1995)
Presentation Topics Overview

- Canadian & Albertan role in energy supply
- Overview on Aboriginal Rights
  - Legal and Political Framework
  - Federal vs. provincial authority/jurisdiction
- Hot Topic: Duty to Consult
  - Impact on Alberta’s Energy Development
  - Approaches to Consultation
- Conclusions
Canadian & Albertan Energy Contribution

- **Canada’s contribution:**
  - 3rd largest natural gas & 9th largest crude oil producer

- **Canadian reserves:**
  - Represent 15% of global oil and 1% of global natural gas reserves

- **Albertan perspective:**
  - 80% of oil & 75% of natural gas reserves in Canada
Canadian Position in Perspective II

- From the US perspective: #1 US importer

<table>
<thead>
<tr>
<th>Measure</th>
<th>Natural Gas</th>
<th>Crude Oil*</th>
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<tbody>
<tr>
<td>Share of US consumption</td>
<td>15%</td>
<td>10%</td>
</tr>
<tr>
<td>Share of US imports</td>
<td>87%</td>
<td>17%</td>
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</tbody>
</table>

*Includes refined products
Source: Canadian Association of Petroleum Producers
Overview on Aboriginal Rights

- Who are Aboriginal peoples?
  - Collective name for the original peoples of North America and their descendants; refers First Nations (Status and Non-status), Inuit and Métis

- Aboriginal rights in Canada are derived from:
  - Treaties (Legal agreements between the Crown and the First Nations)
  - Canadian Constitution, 1982
  - Case law
Aboriginal Treaty Rights

- Treaties signed in “Canada” between 1701 and 1921, under which
  - Indian Bands ceded, surrendered and yielded all their rights, titles and privileges to land
  - Received reserve lands, farm equipment, animals, annual payments, ammunition, clothing & certain rights to hunt, trap and fish
- Treaty making continues today; settlement of comprehensive & specific claims
  - Comprehensive claims: address rights to lands/resources where Aboriginal title and rights were not previously addressed by treaties
  - Specific claims: address grievances related to unfulfilled obligations from an existing treaty or breach of statutory responsibilities by the Crown
Alberta Perspective on Treaty Rights

- Outstanding claims complicate regulatory decisions and development!
- Alberta is entirely covered by Treaties 6, 7 and 8 (known as the Numbered Treaties)
  - No outstanding comprehensive claims!
  - Outstanding specific claims exist!
Canadian Constitution

- Treaty rights, which either existed in 1982 or arose afterwards, are recognized and affirmed in Section 35 of Canada's Constitution (Constitution Act, 1982);
  - 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
The Canadian legal system is based on common or judge-made law.

Relevant case law include:

- *R. v. Sparrow* [1990]
- *R. v. Badger* [1996]
- *Copps v. Mikisew Cree* [expected March 2005]
Case Law: *R. v. Sparrow* (1)

- **Case significance:**
  - Established a duty to consult when projects have impacts upon First Nations and other aboriginal communities
  - Aboriginal rights are not absolute and may be infringed upon by a constitutionally competent government, if justified!
  - Established a test to gauge “justification”, known as the Sparrow Test
Case Law: *R. v. Sparrow* (2)

- The Sparrow Test
  - First, is the limitation unreasonable?
  - Second, does the regulation impose undue hardship?
  - Third, does it deny the holders of the right their preferred means of exercising that right?
Case Law: *R. v. Sparrow* (3)

- **Practical implementation:**
  - Establish a legitimate purpose for the infringing legislative or regulatory measure
    - Such as conservation or resource management!
  - Demonstrate that the infringement is consistent with the honour of the Crown and the fiduciary nature of the relationship between the Crown and the aboriginal peoples, considering:
    - Priority in allocating the resource after conservation objectives have been met is given to First Nation people;
    - There has been as little infringement as possible to achieve the desired result;
    - In an expropriation situation, fair compensation is available;
    - Consultation with the aboriginal group has occurred in relation to the restriction.
Case Law: *R. v. Badger*

- **Case significance:**
  - Geographical restriction on treaty rights
  - As land “is taken up for settlement, mining, lumbering, or other purposes by Her said Government the Dominion of Canada”, this incompatible use would restrict the exercising of the right to hunt on those lands
  - Consultation occurred at Treaty Making, and does not need to occur with each development!
Case Law: *Copps v. Mikisew Cree*

- **Case significance:**
  - Where a “taking up” occurs in accordance with treaty, no infringement, therefore no requirement to justify under Sparrow, and thus no need to consult.
  - Still, court likely to encourage consultation!
Federal vs. Provincial Authority

- Canada is a federal state;
  - Operates as ten largely self-governing provinces and three territories controlled by the central government.

Federal Jurisdiction:
- Indians and Land reserved for Indians
- Inter-provincial and international transport and export (NEB regulates pipelines, power lines)

Provincial Jurisdiction:
- Public lands and resources including non-renewable energy resources and forestry resources
- Environment
Federal vs. Provincial Authority

- Provincial government authority re: development of oil and gas reserves in Alberta,
  - Managed by Alberta Energy and Utilities Board (AEUB)
  - AEUB outlines its requirements for public consultation in specific guides (Guide 56, 71, 60, 65, 28, etc)

- The Federal government authority re: interprovincial or international transport and export of natural gas and oil
  - Managed by National Energy Board (NEB)
  - NEB also has requirements for public consultation!
Hot Topic: Duty to Consult

- Development of energy projects *clearly* impacts First Nations and other Aboriginals treaty rights to hunt and fish on public lands.

- The Crown has a fiduciary duty to consult where there is an infringement of an existing aboriginal or treaty right (as per the Sparrow Test)!
Impact on Alberta’s O&G Development

- Alberta experienced record drilling activity in 2003:
  - 14,966 conventional oil and gas wells completed
  - Plus associated pipeline, power line and road developments!
- Consulting on every single disposition site would cause the system to grind to a complete standstill!
  - This is not the intention of the legal or legislative systems
- This sounds “sorted”, but what is the practical reality?
Impact on Alberta’s O&G Development

- Developers must still negotiate with Aboriginals to access reserve land for exploring/drilling

- Reality: Alberta is in an era of mega projects; for which consultation is required!
  - Each impacted band must be consulted!
  - Geographic, cultural and other practical barriers to consultation!

- Resources are the cornerstone of Alberta’s economy; forestry, oil, gas, oil sands, coal, minerals and forestry….
  - Competing interests for the same land!
Approaches to Consultation

- The petroleum industry has recognized a need for increased public involvement, including Aboriginal stakeholders due to:
  - Stakeholder expectations
  - Regulatory requirements
  - Increased focus on corporate responsibility

- The Aboriginal community especially values the development of relationships, prior to any discussions regarding a particular project....
Approaches to Consultation

- Many companies have ongoing initiatives to cultivate a strong, long-term and mutually beneficial relationship!
- Such programs, may include:
  - Workforce development initiatives
  - Business development initiatives
  - Community relations efforts
  - Collaborative resource management
  - Demonstrating corporate commitment
Conclusions

- Requirements governing consultation are continuously evolving based on new legal decisions! However, thus far:
  - Judicial & regulatory bodies have increased requirements for Aboriginal involvement
  - Clearly recognized that failure to adequately engage and consult Aboriginal people will lead to intervention & jeopardize projects

- Advisable for industry to meet or exceed the currently accepted practices, in order to ensure timely development of their mineral rights holdings

- Future developments….
  - Taxation implications from aboriginal self government?
  - Increased funding to aboriginals to support participation in consultation
Thank-you for your time.

ARE THERE ANY QUESTIONS?