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TAB 3

INDIGENOUS LAW ISSUES

Duty to Consult

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cpd Continuing Professional Development

The Duty of Consultation & Accommodation

Reconciling the perspectives of proponents and Indigenous communities

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The Goal of this Talk

- To provide insight on Indigenous and mainstream perspectives on the Duty of Consultation & Accommodation
- To provide a high-level overview regarding the Crown's Duty to Consult and Accommodate First Nations before engaging in conduct that adversely affects existing or asserted Aboriginal rights and title.
- To provide a snapshot of overarching judicial principles and relevant case law highlights regarding the Duty to Consult.

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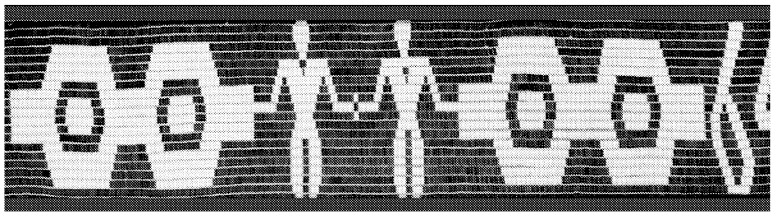
Genesis of the Duty to Consult & Accommodate

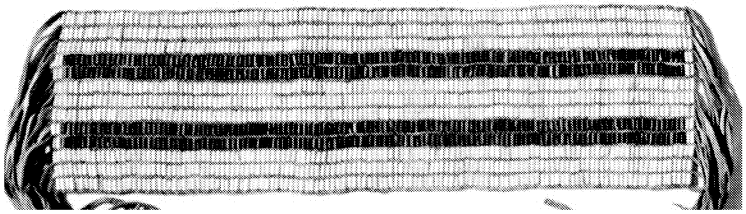
- From a First Nations perspective, the duty of consultation is hundreds of years old.
- Many scholars have traced the genesis of consultation to the Royal Proclamation of 1763. While the Royal Proclamation was notably the first formal legal pronouncement concerning the protection of “Indians” by British North America, it was born from a unilateral declaration of sovereignty by the British. In this context, it was a unilateral declaration - without consultation.

Genesis of the Duty to Consult & Accommodate



From a First Nations perspective, the genesis of the Duty to Consult & Accommodate comes from a Nation-to-Nation relationship that was born through a mutual benefit & consent, most notably codified through the Treaty of Niagara of 1764.

Genesis of the Duty to Consult & Accommodate



The Two-Row Wampum was one of the belts exchanged at Niagara, symbolizing two vessels traveling down the same river; however, the vessels travel independently of one another, never interfering on the others' path. This wampum is widely known to depict the principle of non-interference.

Genesis of the Duty to Consult & Accommodate

- From an Indigenous perspective, the Treaty of Niagara was the constitutional birth of Canada, establishing a mutually beneficial Crown/First Nation relationship, that has been largely ignored by successive Canadian governments since prior to Confederation.

Genesis of the Duty to Consult & Accommodate

- The Supreme Court of Canada has traced the Duty to Consult & Accommodate to Section 35 (1) of the Constitution Act, 1982, which states:

"the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Purpose of the Duty to Consult & Accommodate

- The purpose of Section 35 (1) of the Constitution Act, 1982, is interpreted by the SCC as the requirement to reconcile contemporary Crown sovereignty with the historic pre-existing occupation of Aboriginal peoples in Canada.
- The duty to consult obliges the Crown to pursue meaningful consultation with First Nations prior to engaging in conduct that could adversely impact existing or asserted Aboriginal rights and title.

Legal Test for the Duty to Consult & Accommodate

- The Duty to Consult is triggered when:

1. The Crown holds actual or constructive knowledge of a First Nation's existing or asserted Aboriginal rights or title;
2. The Crown contemplates conduct; and,
3. That contemplated conduct may adversely affect the First Nation's existing or asserted Aboriginal rights or title.

The Scope of Consultation Required:

- After the Duty to consult is triggered, the scope of consultation that the Crown must provide an affected First Nation is determined based on:

1. The strength of the existing or asserted Aboriginal rights or title of the affected First Nation; and,
2. The severity of the adverse effects on the existing or asserted Aboriginal rights or title of the affected First Nation.

- Strong prima facie claims to Aboriginal rights or title and severe adverse effects require what is referred to as "deep consultation" and, likely, accommodation. Conversely, weaker claims may only require notice of the contemplated conduct to the affected First Nation.

Judicial Principles re: the Duty to Consult & Accommodate

- The Duty to Consult entails reciprocal obligations for the Crown & Aboriginal peoples, requiring fair, reasonable, and good faith efforts; however, there is no requirement for the parties to reach agreement when consultation concludes.

Judicial Principles re: the Duty to Consult & Accommodate

- Consent is not a requirement for the duty of consultation and accommodation to be met. The Duty to Consult does not represent a "veto power" for First Nations over whether project development can proceed.

Judicial Principles re: the Duty to Consult & Accommodate

- The Duty to Consult represents a procedural right: there is no substantive right of First Nations to receive accommodation when a consultation concludes. "Accommodation" means making adjustments to a proposed project to mitigate impacts on affected First Nations interests .

Judicial Principles re: the Duty to Consult & Accommodate

- There is no legal requirement for the Crown (or Proponents) to provide Economic Accommodation to First Nations; "accommodation" means modifying a project to address First Nations interest and concerns, rather than offering payment to First Nations.

Consequences of the Duty to Consult:

- When a proponent submits a project proposal to a government agency for review and approval, the duty to consult will apply if that project has the potential to affect Aboriginal interests.

Consequences of the Duty to Consult:

- The Crown can delegate procedural aspects of the consultation to proponents; however, proponents are expected to bear the procedural costs of their involvement in the consultation process.

Consequences of the Duty to Consult:

- Though there is often significant cost consequence, it is in the best interests of proponents to commence meaningful consultation at the earliest stages of a project (to avoid surprises).
- Proponents can voluntarily engage with First Nations prior to submitting a project proposal for government review, or, after a proposal is submitted the Crown can instruct proponents to participate in consultations with First Nations.

Further case law re: the Duty to Consult on Aboriginal Communities

- *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 – Set out the legal test for the duty to consult & confirmed that the duty applies to Aboriginal rights and title that are asserted but not yet proven. The Court applied a "strength of claim" analysis, determining that the Crown was required to provide "deep consultation" on a spectrum between "mere notice" and "deep consultation".

Further case law re: the Duty to Consult on Aboriginal Communities

- *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74 – The Crown can discharge the duty to consult through a governmental regulatory process (such as an environmental assessment), as long as the EA process is adapted to address First Nations interests and enable meaningful consultation

Further case law re: the Duty to Consult on Aboriginal Communities

- Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 2005 SCC 69 – The duty of consultation is triggered by the "taking up" provisions in numbered treaties; a treaty does not signify the end of consultation, but rather one step in the process of reconciliation moving forward. A minimum of notice is required once the duty is triggered. Treaty infringement occurs if the Crown's taking up of treaty lands is sufficiently extensive to deprive First Nations of meaningful Harvesting rights on their treaty lands.

Further case law re: the Duty to Consult on Aboriginal Communities

- *Little Salmon / Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines, & Resources)* 2010 SCC 53 – The Court clarified the *Mikisew* case that the duty to consult can be triggered when the Crown exercises its rights under modern treaties, such as the LSCFN Final Treaty, that are intended to be comprehensive. Although the Crown and First Nations can predetermine the terms of consultation in modern treaties, they cannot "contract out" of consultation obligations altogether. The duty will still apply to modern treaties even if not expressly stated.

Further case law re: the Duty to Consult on Aboriginal Communities

- *Carrier Sekani Tribal Council v British Columbia (Utilities Commission)* 2010 SCC 43 – When proponents modify existing projects, fresh consultation obligations only apply to additional adverse effects on existing or asserted Aboriginal rights and title. Therefore, a minor change to an existing project will trigger less onerous consultation obligations than the approval of the project.

Further case law re: the Duty to Consult on Aboriginal Communities

- *Moulton Contracting Ltd. v. British Columbia* 2013 SCC 26 – The Crown owes a duty of consultation to Aboriginal communities as collectives, rather than to members of those communities in their individual capacities. Aboriginal communities can designate specific individuals to represent their interests under Section 35 (1) however they must have explicit authorization.

Further case law re: the Duty to Consult on Aboriginal Communities

- *Xeni Gwet'in First Nations v. British Columbia* 2014 SCC 44 – Known as the *Tsilquot'in* case, the Courts took the opportunity to advance the law of Aboriginal title, rather than solely the duty to consult.

- Arguably, the Court relaxed the standard of proof for First Nations to establish Aboriginal title to an area:

1. Aboriginal title can exist over broad areas of land, subject to First Nations occupation at the time Europeans asserted sovereignty over Canada, and,
2. The term "occupation" means regular and exclusive use of land, such as hunting & fishing, not necessarily inhabiting settled village sites.

Further case law re: the Duty to Consult on Aboriginal Communities

- *Tsilqot'in* (continued)

- Once a First Nation establishes Aboriginal title, the Crown must meet three requirements to justify infringements on that title, one of which is the duty to consult. As well, if a project is undertaken without Aboriginal consent on lands that later become subject to Aboriginal title, the project can be canceled if it is 'unjustifiably infringing'.

Further case law re: the Duty to Consult on Aboriginal Communities

- Keewatin v. Ontario (Minister of Natural Resources) 2014 SCC 48 – The Court reaffirmed Mikisew, but clarified that for the purposes of historic treaties, references to 'the Crown' include both federal and provincial governments. Proponents can rely on licenses and authorizations validly issued by provincial governments to conduct natural resource development projects on lands subject to historic treaties. Federal approval is not required.

Conclusion

- While the principles of independence & non-interference remains central tenets of the Two-row Wampum, the Crown cannot make fair, & equitable decisions about lands, resources, and revenue in a vacuum – as though they would not impact the ongoing & future exercise of Aboriginal & Treaty rights. The Wampum depicting the Silver Covenant Chain of the Treaty of Niagara provides the contextual basis for Indigenous approaches to consultation – which should address land & resources, but also revenue sharing period.
- Indigenous traditions and mainstream science has taught us the interconnectedness of land, air, waterways, ecosystems, etc. One government decision that licenses a proponent to move forward on any given project will inevitably affect the lives of its nearby First Nations populations.
- To have a truly symbiotic Crown-First Nations relationship, consent must be the underlying spirit and intent of the Two-Row Wampum.

Conclusion

To provide greater certainty to First Nations & proponents, a few basic steps may be followed:

- Conduct Research on affected First Nations and seek general information from the First Nation how they use the area (past, present, and future intended uses)
- Adapt project plans accordingly
- Adopt a Voluntary engagement strategy, with early notice and consultation efforts
- Determine scope of consultation through a strength of claim assessment, taking into account the First Nation perspective
- Encourage Crown participation and input at every stage but never forego the question of possible accommodations even in the absence of a strong prima facie claim – think outside the box and provide solutions.

Conclusion

- Draw upon the spirit and intent of consultation from the perspective of the Aboriginal community in question and work your way ahead.
- Taking an approach based on minimum legal requirements will create barriers to an ongoing relationship of mutual benefit
- Take stock of the broader public interest, but urge the Crown not to always think in these terms in balancing or reconciling the interests of Aboriginal peoples with the rest of Ontarians (the larger body politic will inevitably win out).