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TAB 7

INDIGENOUS LAW

Issues 2016

Indigenous Rights and the Mining Industry

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November 14, 2016

cpd Continuing Professional Development

LAW SOCIETY OF UPPER CANADA
INDIGENOUS LAW ISSUES 2016
INDIGENOUS RIGHTS AND THE MINING INDUSTRY

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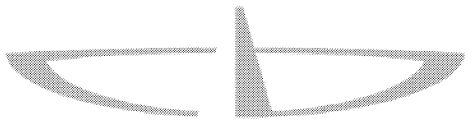

United Nations Declaration on the Rights of Indigenous Peoples

- The Government of Canada committed this year to fully implementing the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**" or the "**Declaration**").
- This has raised questions in Canadian legal circles and caused concern and potential confusion in the Canadian mining and extractive resource sectors due to the Declaration's provisions related to Indigenous "free, prior and informed consent" ("**FPIC**") and its potential interpretation as an Indigenous veto right over resource projects affecting Indigenous lands and/or rights and the potential impacts of FPIC on Canada's current legal framework for Indigenous consultation and accommodation
- UNDRIP's (and FPIC's) impact in Canada will depend on how they are implemented and interpreted (politically, legislatively, judicially or otherwise).

United Nations Declaration on the Rights of Indigenous Peoples

- Recently the Federal Minister of Justice acknowledged that the provisions of UNDRIP (and FPIC) may not be readily reconcilable with current Canadian law.
- This includes:
  - the existence in Canada of historic and modern (land claim) treaties (including surrenders),
  - established Indigenous land rights in Canada (including Indigenous traditional land use rights, treaty rights, land claim rights and Aboriginal title), and/or
  - the legal framework recognized and developed by the SCC in respect of the Crown's constitutional duty to consult and (potentially) accommodate Aboriginal and treaty rights and the right of the Crown to justifiably infringe.
- How can Indigenous groups and the mining industry reconcile this: **meaningful** consultation and accommodation.

Minerals, Mining Rights – Definitions: What Are We Talking About?

Consider the following in the Ontario context:

Meaning of "mining rights" (Ontario Conveyancing and Law of Property Act)

Unless the contrary appears to be the intent of the instrument, where in a conveyance the "mining rights" in respect of any land are granted or reserved, the grant or reservation shall be construed to convey or reserve the ores, mines and minerals on or under the land, together with such right of access for the purpose of winning the ores, mines and minerals as is incidental to a grant of ores, mines and minerals.

Meaning of "surface rights" (Ontario Conveyancing and Law of Property Act)

Unless the contrary appears to be the intent of the instrument, where in a conveyance the "surface rights" in respect of any land are granted or reserved, the grant or reservation shall be construed to convey or reserve the land therein described with the exception of the ores, mines and minerals on or under the land and such right of access for the purpose of winning ores, mines and minerals as is incidental to a grant of ores, mines and minerals.

Minerals, Mining Rights – Definitions: What Are We Talking About? cont'd.

Ontario Mining Act (Section 1.(1)):

"**minerals**" means all naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, gold, silver and all rare and precious minerals and metals, but does not include sand, gravel, peat, gas or oil (which are governed by other Ontario statutes).

"**mining rights**" means the right to minerals on, in or under any land.

"**surface rights**" means every right in land other than the mining rights.

Scope of Interest

- In the common law and under the CLPA, the holder of a fee simple or leasehold ownership interest in the surface rights has such interest in all of the dirt from the core of the earth to the surface.
- The holder of a fee simple or leasehold ownership interest in the mining rights has an interest in all of the minerals (however defined) from the core of the earth to and including the surface.
- This creates a broad potential scope of conflict between Aboriginal rights, surface rights interest holders and mining rights interest holders.

Minerals in Crown Lands

- The Crown owns all ungranted lands (including under onshore provincial waterways) subject to: federal properties, Aboriginal title and “settlement lands” under land claim agreements
- Title to ungranted mineral rights in Provinces are vested in the provincial Crown, subject to:
  - federal properties, Aboriginal title, settlement mining rights under land claim agreements
- Mineral rights in the Provinces are administered and controlled by provincial governments
- See Sections 92(5) (Management and Sale of Public Lands), 109 (Lands, Mines and Minerals) and 92 A (Provincial Non-Renewable Natural Resources and Forestry)

Minerals in Aboriginal Lands

- S. 35 of *Constitution Act, 1982*
  - **"35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
  - (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
  - (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
  - (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

Minerals in Aboriginal Lands - Aboriginal Rights

- An Historical Overview
  - As noted above, existing Aboriginal and treaty rights in Canada are constitutionally protected.
  - In addition, Canadian law recognizes a special trust-like relationship between the Crown and Aboriginal peoples of Canada.
  - This relationship contains both fiduciary obligations and, in situations when Aboriginal rights are unresolved, duties arising from the “Honour of the Crown”.
  - During the last decade, the courts have translated this constitutional protection and special relationship into a legal obligation of the Crown to consult with Aboriginal groups and, if warranted, accommodate Aboriginal and treaty rights.

Aboriginal Rights

- What are Aboriginal Rights?
  - Aboriginal rights refer to intrinsic collective rights that arise from Aboriginal peoples' historical occupation of what is now Canada and have legitimacy because they existed before European settlement.
  - Aboriginal rights are collective and group specific.
  - To warrant protection, these rights must be an element of a practice, custom, or tradition that is integral to the distinctive culture of a given Aboriginal group that was exercised prior to the arrival of Europeans. Examples of these rights include fishing, hunting, trapping, gathering, and traditional and sacred practices and uses.

Minerals in Aboriginal Lands – Aboriginal Title

- Aboriginal title, *Delgamuukw v. British Columbia*, SCC, 1997; Tsilhqotin Nation v. British Columbia SCC (2014):
  - Outlined the test for Aboriginal title as a subset of Aboriginal rights (see slides 22 and 23 below):
    - Land was occupied prior to assertion of British sovereignty
    - There is continuity of possession between present and pre-sovereignty occupation
    - Occupation is exclusive
- Title is held communally by the Aboriginal nation
- Includes mineral rights
- Can only be transferred to federal Crown

Minerals in Aboriginal Lands – Aboriginal Title

- To establish pre-sovereignty occupation, the First Nation must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes.
- There “must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship” the First Nation claimant.
- Sufficient occupation may be established in a variety of ways, such as construction of dwellings, cultivation of fields, and regular use of tracts of land for hunting, fishing or other resource exploitation.

Minerals in Aboriginal Lands – Aboriginal Title

- Rights Conferred by Aboriginal Title
  - The SCC held in Tsilhqotin that Aboriginal title constitutes a beneficial interest in the land.
  - Aboriginal title holders have the right to decide how the land will be used, the right to enjoy and occupy the land, the right to proactively use and manage the land, and the right to the economic benefits of the land.
  - Aboriginal title is a collective title that is held not only for the present generation but for all succeeding generations.
  - Accordingly, it cannot be alienated except to the Crown, and it cannot be encumbered, developed or misused in a way that would substantially deprive future generations of the benefit of the land.
  - Owing to extensive treaties with surrender provisions throughout Ontario, prospects for establishing Aboriginal title in Ontario are limited.

Minerals in Aboriginal Lands – Reserve Lands

- Section 91(24) of the *Constitution Act* "Indians, and Lands reserved for the Indians"
- Reserve land arises in two situations:
  - Reserves set aside by treaty
  - Reserves otherwise established by federal government
- *Indian Act* applies to reserve lands
  - s. 18.1: title to reserve lands and the minerals within are held by the federal Crown for the benefit of the Indian Band
  - s. 37-41: resources on reserve lands are inalienable unless the Band surrenders them to the Crown
    - Minerals rights in reserve land can only be granted by the Crown once the Band surrenders them
    - The Band cannot grant an interest in or transfer the mineral rights
- Regulation of the disposition of surrendered minerals and minerals designated by way of surrender through the *Indian Mining Regulations*
  - s. 4 – permit holders must comply with provincial law

Minerals in Aboriginal Lands – Modern Treaties and Land Claim Agreements

- Provide Indigenous parties (inter alia) cash settlement and title to certain negotiated "settlement" surface and/or mining rights in exchange for surrender of broader land base subject to claim
- Also provide for a role in the protection of the environment
- Agreements are each negotiated differently, but title to lands granted are generally inalienable, other than to the federal Crown
- Indigenous community has the right to grant lesser interests (i.e. leases over their lands and mineral rights)

Prospecting on Ontario Crown Lands – Prospecting Licenses

- Acquisition of Crown mining rights in Ontario is primarily governed by the **Mining Act**.
- In Ontario a prospector's license is a precondition to staking (ground staking, map staking) and mining claims staked by unlicensed persons are generally held to be invalid. Penalties may be imposed upon persons who prospect and/or stake without a license. Mining companies will hire licenced prospectors to stake in their own name and then transfer to the unlicenced company.
- Ontario requires individuals who apply for prospecting licenses to be 18 or older and does not grant licences to corporate bodies. The Ontario Mining Act requires an applicant for a prospector's licence to have completed a prescribed prospector's awareness program **(Sections 18 and 19 of the Mining Act)**.

Claim Maintenance – Assessment Work

- Ontario requires a recorded holder of a mining claim to complete and file certain mineral assessment work within prescribed time frames in order to maintain a mining claim in good standing.

- Failure to file work requirements (or make payments in some jurisdictions) within the required time periods results in a forfeiture of the mining claim with the ground re-opened for staking.

- The minimum value and type of work allowable for assessment work credits is prescribed in the legislation or regulations for each jurisdiction. For example, geophysical, geotechnical, geochemical, and geological surveys may be recorded as work in Ontario.

- A report on assessment work must be filed, in the prescribed form, for each assessment year, no later than each anniversary date of the staking of the claim.

- Extensions (one year) for filing may be applied for. The report must show the location, nature, and extent of the work, the persons who performed the work, the date of performance, and other prescribed information.

Exploration Plans and Permits

- The Ontario Mining Act requires that an exploration plan be submitted and an exploration permit acquired in accordance with prescribed requirements, **including prescribed Aboriginal consultation**, as a pre-condition to the entry upon, use or occupation of a staked mining claim or Crown mining lease for exploration purposes (**Sections 78.2 and 78.3 of the Mining Act**).

- The application for exploration permit must be made to the Director of who will determine whether to issue an exploration permit and upon what terms and conditions.

- In determining whether to issue an exploration permit, the Director of Exploration shall consider, among other things, the terms of the exploration plan and whether effective Aboriginal consultation has occurred.

- It should be noted that the foregoing permitting provisions also apply to government leasehold lands (grant of mining rights and/or surface rights leases).

Production Leases

Mining Lease

- A mining claim holder has the right to apply for a lease or permit of the claim at any time after the prescribed units of assessment work on the claim have been performed, filed, and approved **(Section 81 of the Mining Act)**.
- A mining lease is a leasehold interest in land and provides the lessee the right to enter upon the land and search for and produce the minerals, **coupled with a grant to any of the minerals that may be discovered (Section 90 of the Mining Act)**.
- The Mining Act, and every Crown lease, provide that the lessee's rights are subject to existing Aboriginal or treaty rights protected by Section 35 of the Constitution Act, 1982.

Protection of Aboriginal Lands

- The Ontario Mining Act provides that the Government of Ontario has discretion to determine lands that constitute sites of "Aboriginal cultural significance", which can form the basis of a withdrawal of such lands from mineral staking (**Section 35(2) of the Mining Act**) and the Ontario Mining Act also establishes an Aboriginal conflict dispute resolution process for resolving disputes with Aboriginal groups at the early exploration stage (**Section 170.1 of the Mining Act**).
- The particulars of this process are set out in Ontario Regulation 308/12 as is essentially a mediation process with ultimate decision making authority with the Minister (but still subject to legal challenge).

Recent Amendments to Ontario Mining Act and Ontario Far North Act cont'd.

Land Use Planning

- The Ontario Mining Act and the Ontario Far North Act effectively impose a moratorium on new mines in certain areas of the Far North (as defined - the northernmost third of Ontario's land mass) and create an additional regulatory requirement in the form of required community-based land use plans applicable in at least half of the Far North's boreal forest areas.
- Certain existing projects and mining rights tenures are grandfathered.
- Community-based land use plans have been/will be developed by First Nations, individually or collectively by neighbouring communities, working jointly with the Ministry of Natural Resources.
- These plans will establish land use designations and permitted uses, including protected areas within a planning area identified by First Nation communities.
- The planning areas would be administrative areas that are in part based on First Nation traditional-use areas, but which would not serve to define them. The community-based land use plans processes include jointly developed terms of reference, a draft plan and a final plan.

Recent Amendments to Ontario Mining Act and Ontario Far North Act cont'd.

- Community-based land use plans are approved by local First Nations through a Band Council resolution, and by the Government of Ontario. Plan reviews and amendments to planning areas follow similar processes.
- Specific activities are prohibited to proceed until a community-based land use plan is in place. These activities include:
  - A new mine
  - Commercial timber harvest
  - Wind power and waterpower facilities
  - Oil and gas exploration (and production)
  - Electricity transmission lines (and related facilities)
  - Construction of all-weather roads
  - Other activities that may be prescribed by the Government of Ontario.

Consultation and Accommodation

- Section 35 of the *Constitution Act* (Canada) provides:

  "35(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

  (2) In this Act, "Aboriginal Peoples of Canada" includes Indian, Inuit and Métis peoples of Canada.

  (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

  (4) Notwithstanding any other provisions of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

Duty to Consult and Accommodate

- Once a claim for Aboriginal title has been made and/or established, the Crown cannot use or develop the land without the consent of the First Nation title holders unless the Crown: (i) has discharged its duty to consult; and (ii) can justify the infringement of Aboriginal title under s. 35 of the *Constitution Act, 1982*.
- In addition, once Aboriginal title has been established, it may be necessary for the Crown to reassess its prior conduct. If the Crown began a project without the consent of the Aboriginal title holders before Aboriginal title was established, then the Crown may be required to cancel the project if the continuation of the project could not be justified. Further, if legislation was validly enacted before Aboriginal title was established, it may be rendered inapplicable if it unjustifiably infringes (abrogates) Aboriginal title.

Justifiable Infringement under s. 35 of the *Constitution Act, 1982*

- The SCC affirmed in Tsilhqotin its earlier decisions in *Delgamuukw v. British Columbia* and R. v. Sparrow and R. v. Badger (see slide 31 below) that certain Crown objectives can, in principle, **justify the infringement of Aboriginal title or treaty or other Aboriginal rights**, including the development of agriculture, forestry, mining and hydroelectric power, general economic development, protection of the environment or endangered species, the building of infrastructure, and the settlement of foreign populations to support these objectives.
- In order to justify an impairment or infringement (abrogation) of Aboriginal title, the Crown must:
  - (i) demonstrate a compelling and substantial governmental objective; and
  - (ii) demonstrate that its actions are consistent with the fiduciary duty it owes to the Aboriginal title holders.

- Proof that the Crown's actions in justifying infringement are consistent with the fiduciary duties it owes to Aboriginal title holders involves the consideration of a three-part test:
  - Rational connection: the infringement must be necessary to achieve the Crown's objective;
  - Minimal Impairment: the Crown must go no further than necessary to achieve its objective; and
  - Proportionality of impact: the benefits expected to flow from the objective must not be outweighed by the adverse effects on the Aboriginal interest.

Provinces Can Also Justifiably Infringe Aboriginal Rights

- The SCC held that provincial governments, acting within their legislative authority under Section 92 of the *Constitution Act* (in addition the federal government acting within its authority under Section 91 of the *Constitution Act*), may seek to justify an infringement of Aboriginal and/or treaty rights including, but not limited to, Aboriginal title.

The Nature of Canadian Aboriginal Rights – Aboriginal Title

- In addition, the SCC's Tsilhqotin decision has the potential to:
  - open the door for more claims of Aboriginal title;
  - put some existing and prospective projects at risk in areas where Aboriginal title has or can be asserted;
  - shift the balance in some ongoing land claim negotiations or in Crown consultations in favour of First Nation claimant(s);
  - increase the length of time it will take for governments and proponents to negotiate projects with First Nations that have existing or potential Aboriginal title claims, with a corresponding increase in negotiation, development and settlement costs; and
  - cause governments to have clear and specified objectives for any legislation that has the potential to impact Aboriginal rights in order to pave the way for justifying any infringements.

Treaty Rights

- The relationship between Aboriginal peoples and the Crown has developed in part through a myriad of treaties, which include both historical treaties concluded between 1701 and 1923 and modern treaties (land claim agreements).
- Early treaties, created during the period of military and political competition by European powers for trade and colonial influence, were a powerful tool for building alliances between the French or British on one side and First Nations on the other.
- Some treaties included mutual promises of peace and friendship and others carried important practical benefits dealing with such matters as trade, law, and even the extradition and exchange of prisoners.
- Yet another category of treaties provided for the surrender of land by Aboriginal peoples in exchange for goods and money and other consideration.
- Between 1871 and 1921, the Crown entered into several Canadian Aboriginal treaties numbered 1 to 11 (numbers 3, 5 and 9 applicable (in whole or in part) in Ontario's north).

Treaty Rights

- This treaty-making process followed a common pattern of delivering “benefits” to First Nations for the surrender of their land-based interests in a given territory.
- The package of such benefits consisted of (minimal) monetary grants, setting aside certain land as reserves, and recognition of traditional rights, such as fishing, hunting, gathering, and trapping, but subject to Crown take-up.
- As stated in Treaty 3 (as an example), the Aboriginal signatories:
  - “cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands.”
- In exchange, the Crown provided the Aboriginal parties with right to:
  - “pursue their avocations of hunting and fishing throughout the tract surrendered as described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada and saving and excepting such tracts as may be, from time to time, required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada…”

Treaty Rights – Justifiable Infringement

The SCC established the justification test for Crown infringement of treaty rights collectively in its earlier decisions of Delgamuukw v. British Columbia, *R. v. Sparrow and R. v. Badger* (the "*Sparrow/Badger* Test").

Consistent with its decision in *Tsilhqot'in Nation*, in which the SCC overturned prior case law in holding that provinces have the authority to justifiably infringe Aboriginal rights, the SCC ruled in *Grassy Narrows First Nation* that provinces acting within their authority under Section 92 of the *Constitution Act* (in addition to the federal government acting within its authority under Section 91 of the *Constitution Act*) have the authority to infringe treaty harvesting rights if the infringement can be justified under s. 35 of the *Constitution Act, 1982*.

In order to justify an infringement under the *Sparrow/Badger* Test, the Crown must: (i) demonstrate a compelling and substantial governmental objective; and (ii) demonstrate that its actions are consistent with the fiduciary duty it owes to Aboriginal people.

Proof that the Crown's actions are consistent with the fiduciary duties it owes to First Nations involves the consideration of a three-part test:

- Rational connection: the infringement must be necessary to achieve the Crown's objective;

Treaty Rights – Justifiable Infringement

- Minimal Impairment: the Crown must go no further than necessary to achieve its objective; and
- Proportionality of impact: the benefits expected to flow from the objective must not be outweighed by the adverse effects on the Aboriginal interest.

While the strength of Aboriginal rights and level of control the First Nations can assert over their traditional use lands is different under the various scenarios (Aboriginal title, treaty lands, traditional use lands), the common theme that arises is the duty of the Crown (and by extension, project proponents) to meaningfully consult with any First Nations whose interests may be affected by a proposed project or taking up of land.

Traditional Use Territory

- The SCC recognized in Delgamuukw v. British Columbia that in circumstances where the land can be established as historical traditional use territory of Indigenous groups, and notwithstanding that the lands have not been surrendered by a treaty with the Crown, or that Aboriginal title has not been established, the Crown is still compelled to consult with any Indigenous group whose rights (including traditional use rights) may be affected by a taking up of land or other decision of the Crown impacting traditional land use rights, and (potentially) accommodate those rights when appropriate.
- This may arguably be a stronger land use based right than a treaty land use right, as no surrender of rights has occurred.
- Doctrine of justifiable infringement applies.

Modern Treaties – Land Claim Agreements

- Broadly speaking, land claim agreements (modern treaties) attempt to resolve outstanding land claims issues between Aboriginal groups, Canada, and the relevant province or territory.
- Although each agreement contains unique provisions, most of them provide for financial settlement and most provide Aboriginal groups with ownership of distinct areas of land, which ownership may include title to mining rights in and to those lands, in consideration for surrender of land claim rights.
- Many of the comprehensive land agreements allow Aboriginal groups to participate in water, wildlife, land and resource management in respect of their own and their traditional use lands and to participate in review processes conducted by environmental or land/water use bodies; including on public lands.
- Generally, the overarching goal of many modern treaties is to promote economic development and protect Aboriginal culture and land rights on settlement lands.

The Duty to Consult and Accommodate

- The duty to consult is found in a trilogy of Supreme Court of Canada cases: *Haida* (*Haida Nation vs British Columbia*, [2004] 3 SCR 511), *Taku River* (*Taku River Tlingit FN vs British Columbia*, [2004] 3 SCR 550), and *Mikisew Cree First Nation* (*Mikisew Cree FN vs Canada*, [2005] 3 SCR 388). In these cases, the Supreme Court articulated a legal framework for this duty but left many unanswered questions that have been shaped by subsequent decisions.
- Consultation focuses on the potential for impact (adverse effect) or infringement (abrogation) of Aboriginal or treaty rights, such as:
  - hunting, trapping and fishing rights;
  - rights arising out of archaeological, burial or other sacred or traditional sites;
  - rights and claims related to patented private lands;
  - off-site or downstream impacts of projects on established Aboriginal or treaty rights;
  - impacts on future settlement of land claims.

The Duty to Consult and Accommodate

- The Far North Act and the Mining Act require mandatory consultation (and prospective accommodation) with Aboriginal communities as a prerequisite for proponents developing forestry, electricity and mining in Ontario.
- The duty to consult is grounded in the "Honour of the Crown" (*Haida*) and is embodied through section 35 of the *Constitution Act* (Canada).
- The Supreme Court of Canada has interpreted the Honour of the Crown to require Aboriginal consultation when government is making decisions or taking actions that may affect Aboriginal rights (legislative, grant of right, issue of permit or license).
- The Supreme Court of Canada (*Haida*) has held that the common law duty to consult applies exclusively to the Crown (federal and provincial).
- The Crown's duty to consult arises when the Crown knows or reasonably should have known (constructive knowledge) of the existence or potential existence of an Aboriginal right or title and where the Crown contemplates conduct that might adversely affect that Aboriginal right or title (*Haida*).

The Duty to Consult and Accommodate

- Where a Crown decision-maker is aware that a government decision might impact or infringe upon Aboriginal rights, **regardless of whether the Aboriginal right has been definitively proven**, the effect on Aboriginal or treaty rights and the substance of the Aboriginal party concerns must be considered and, if warranted, addressed (Haida).
- The duty can be delegated by statute or other lawful delegation of procedural aspects of consultation to proponents (private project developers) through the placement of pre-conditions (i.e. completion of adequate consultation) on licences or authorizations to carry out certain activities (Haida). (See Ontario Mining Act)
- The duty to consult can be satisfied through public regulatory processes (environmental assessment, energy board processes, as examples, wherein a Crown established regulatory body has statutory authority to determine questions of law (i.e. the adequacy of consultation))(Taku River) – this matter will be addressed again by SCC (Energy East, Nunavut Seismic testing).
- Consultation often leads to settled agreements (exploration agreements, socio-economic impact/benefit agreements) between proponents and Indigenous groups which may address (inter alia): financial provisions (accommodation), employment and contracting opportunities, environmental structuring provisions, permitting provisions, project participation, consultation and implementation provisions.

The Duty to Consult and Accommodate

- The Crown (and a proponent) must consider consultation in respect of any Crown decision that might adversely affect Aboriginal rights or title, including for a Crown grant of interest (i.e. lease, licence, permit, approval (including of a mine closure plan) or consent under authority of any statute or regulation), including (for example):
  - where the property is adjacent or proximate to a First Nation reserve;
  - where the property is adjacent to land owned in fee simple by a First Nation, Métis or Inuit community;
  - where the property is part of a land claim;
  - where the property is within or could affect a traditional land use territory (including lands subject to Treaty or Land Claim Agreement); or
  - where there is an known or possible Aboriginal cultural, archeological, burial or other sacred site adjacent to land.

The Duty to Consult and Accommodate

- The Crown's fiduciary duty and the duty to act honourably necessitates that the Crown work with Aboriginal rights or title to identify which Aboriginal groups may be affected, and the nature of the rights that will be affected, and then to respect and, if warranted, accommodate and reconcile those rights with the proposed project (*Haida*).
- The nature and scope of the required consultation will vary with the circumstances of each case: the proposed project/activity, the strength of the established or potential Aboriginal right or title; and the nature and scope of the potential adverse impact of the project (Crown decision) on the right or title (*Haida*).
- In addition to the duty to consult, the Crown may also have a duty to accommodate and/or mitigate (imposing terms and conditions to protect First Nations rights or interests, protecting certain lands or sites, providing for input to decision making, or paying compensation to the First Nation) (*Haida*).
- The Crown may seek to delegate the procedural aspects to a proponent.
- Consultation undertaken must be meaningful, in good faith and with a willingness to mitigate based on the information derived from the consultation process.
- The Crown (or proponent) is not bound to reach agreement; the commitment is to a meaningful process of consultation in good faith (*Haida*).

The Duty to Consult and Accommodate

- Aboriginal groups have a reciprocal duty to engage in the consultation in good faith, to present their concerns, to respond to the government's (proponent's) mitigation and/or accommodation proposals, and to seek a mutually satisfactory solution (*Haida*).
- The duty to consult as currently established under Canadian law does not provide Aboriginal groups with a legal veto right or the right to frustrate or delay reasonable good faith efforts at consultation (Haida).
- See however: United Nations Declaration on the Rights of Indigenous Peoples.
- The obligation to consult (and potentially accommodate) is an obligation and arises in respect of each application for Crown conduct (decision, approval, grant of interest) that could adversely affect an Aboriginal or Treaty right notwithstanding previous consultations (or accommodations) in respect of other matters.
- The obligations of consultation and accommodation arise in respect of each Aboriginal group whose Aboriginal rights may be affected notwithstanding consultation (or accommodation) with any other Aboriginal group.

Mine Closure Plans

- A mine closure plan under the Mining Act is a “a plan to rehabilitate a site or mine hazard that has been prepared in the prescribed manner and filed in accordance with the Mining Act and includes provision in the prescribed manner of financial assurance to the Crown for the performance of the closure plan requirements;” (**Section 139(1) of the Mining Act**) and must be filed and accepted for any mining operations that are “advanced exploration” or greater.
- A lessee or patentee of mining rights is, unless a contrary intention is shown, liable in respect of the rehabilitation under Part VII of the Mining Act of all mine hazards on, in or under the lands, regardless of when and by whom the mine hazards were created. (**Section 153.3 of the Mining Act**).

What is Advanced Exploration?

- Advanced exploration is defined in *s. 139(1) of the Act*:
  - "**advanced exploration**" means the excavation of an exploratory shaft, adit or decline, the extraction of prescribed material in excess of the prescribed quantity, whether the extraction involves the disturbance or movement of prescribed material located above or below the surface of the ground, the installation of a mill for test purposes or any other prescribed work;
- Advanced exploration is broadened in *s. 3(1) of the Ontario Regulation 240/00 (the "**Regs**")* to include the following types of work:
  - Exploration carried out underground involving the **construction of new mine workings** or **expanding the dimensions of existing mine workings**.

Aboriginal Consultation

- ***S. 8.1(1)(b) of the Regs.*** **requires a proponent conduct consultation with Aboriginal communities** as directed before filing a certified closure plan or a certified amendment.
- **The Director will provide written direction about consulting with Aboriginal communities** after receiving a notice of project status, notice of material change or an application to voluntarily rehabilitate a mine hazard (*s. 8.1(2) of the Regs.*).
- The written direction may require the proponent/applicant to prepare a plan for consultations, establish a schedule for interim reports to the Director or direct the proponent/applicant to do such things as part of the consultation as the director considers appropriate (*s. 8.1(3) of the Regs.*).
- The Director may also provide further direction with respect to consultation at any time (*s. 8.1(8) of the Regs.*).

Aboriginal Consultation

- Proponents/applicants may consult with Aboriginal communities prior to giving notice/submitting an application but shall first request the Director identify the Aboriginal communities to be notified of their proposed activity and include in their notice/application a consultation report detailing how comments from Aboriginal communities have been considered (*s. 8.1(8) of the Regs.*).
- Where a proponent has conducted consultation, they shall **submit a consultation report to the Director including any information with regard to any arrangement reached with an Aboriginal community** (*s. 8.1(9) of the Regs.*). Where an applicant has conducted consultation, the Director may require the submission of a consultation report (*s. 8.1(9) of the Regs.*).

Aboriginal Consultation and Dispute Resolution

- **The Director may refer a dispute relating to a consultation with Aboriginal communities to an individual or body designated by the Minister** (*s. 8.2(2) of the Regs.*).
- The dispute resolution process's **purpose is to facilitate consultation** and is not an appeal (*s. 8.2(3) of the Regs.*). The designated body or individual's report forms part of the record of the Minister and may disclosed in legal or other proceedings but the designated body or individual's work product are not subject to disclosure in any legal or other proceeding (*s. 8.2(6) and (7) of the Regs.*).

Consultation Best Practices

- The affect of all of the foregoing is that the Crown and proponents in the mining industry must reconcile proposed projects with Indigenous rights and interests. This is a given.
- Best practices for consultation call upon governments, proponents and Indigenous peoples to be at their best:
  - Understand that each of them is participating in the reconciliation of Indigenous rights and Crown authority and thus are nation building.
  - Identify affected Indigenous parties and understand their distinct histories, cultures, politics and the bases for the rights they have and/or that they claim.
  - Listen to and understand each other's goals and aspirations and the differences in those goals and aspirations. Find the common ground, pledge to grow together.
  - Recognize Indigenous peoples must meaningfully participate in resource development and share the opportunities and returns created but have resolved that development be done in a sustainable way that mitigates potential impacts. Understand that some Indigenous groups may not support development at all.
  - Push envelopes and take risks and enlist people with diplomatic skills and the knowledge and experience to identify conflicts and the energy and creativity to solve them.

Consultation Best Practices

- Provide financial resources, full information and sufficient rights of participation to enable informed and meaningful decision making by Indigenous groups. Empower: attend their communities, answer their questions, shoulder their burdens and address their concerns, but respect their differences.
- Finally, employ the best of humanity: be guided by principle and act in good faith and with respect in a timely way and be interested, informed, honest and generous of heart.