The Duty to Consult

What Does It Really Mean For Project Proponents?

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INTRODUCTION

(1) Consultation and Accommodation
   I. Asserted Claims
   II. Historical Treaty Areas
   III. Modern Treaty Areas

(2) Agreements with First Nations
Traditional Territories of Yukon First Nations and Settlement Areas of Inuvialuit and Tetlit Gwich’in

YUKON TERRITORY
October 2005

Scale 1:5,000,000

Traditional territories of First Nations are depicted in the colour of their territorial flag. All other communities are in grey.

Department of Environment Map ID: EPSR003-047-52
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The Duty to Consult

What triggers the Duty to Consult?

- When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.
Haida Nation v. British Columbia

1. The Crown (both Federal and Provincial) has a legal duty to consult and, if necessary, accommodate in respect of asserted Aboriginal claims.

2. The source of the duty to consult is the “Honour of the Crown.”

3. Third parties do not have a duty to consult.
The Crown can delegate "procedural aspects of consultation"
Haida Nation v. British Columbia

Scope and content of duty on a “spectrum”

1. Strength of Claim
2. Seriousness of the Impact
Historic Treaties (The Numbered Treaties)

- 1871 and 1923
- 11 numbered treaties – Ontario, Manitoba, Saskatchewan, Alberta, Northwest Territories
Historical Treaties of Canada

- Peace & Friendship Treaties 1725 - 1779
- Robinson Treaties 1850
- Upper Canada Land Surveys 1764 - 1862
- Frontier Treaties 1861 - 1921
- Northeastern Treaty 1871 - 1921
- Williams Treaties 1923

Map showing various treaties and territories in Canada.
“And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered...saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”
Mikisew Cree First Nation v. Canada

Background:

• winter road proposed to connect three aboriginal and one non-aboriginal communities to Alberta highway system
• did not talk to Mikisew Cree
Mikisew - Supreme Court of Canada

Power to Take Up Land Confirmed

• not limited to express purposes stated in treaty

Requires Consultation Where Taking Up Infringes Treaty Rights
Mikisew Cree First Nation v. Canada

Spectrum

1. Specificity of the Treaty Promise

2. Seriousness of Potential Impact
Consultation under Modern Land Claims Agreements

Since 1973

- Sixteen (16) comprehensive land claims in Yukon, NWT and Nunavut
- Four (4) other comprehensive land claim in the rest of Canada
Consultation under Modern Land Claims Agreements

- Lands in fee simple
- Management Area participate in:
  - land use planning
  - land and water use
- Still larger tract of land
  - Hunting, fishing, and trapping
  - May be overlapping with other groups
Consultation under Modern Land Claims Agreements

Does a modern land claim agreement displace the common law duty to consult?

*Little Salmon/Carmacks First Nation v. The Gov’t of Yukon (Min. of Energy, Mines and Resources), 2007 YKSC 28*

(Under Appeal – heard in June 2008)
Summary

Asserted Claims - *Haida* and *Taku*

Duty to consult applies to asserted (not yet proven) claims

Historic Treaties - *Mikisew Cree*

Duty to consult applies in the context of the historic numbered treaties

Modern Land Claim Agreements – *Little Salmon*

Expressly define consultation obligations
When is Accommodation Required?

“When the consultation process suggests amendment of Crown policy, we arrive at the stage of Accommodation” (*Haida*, at para 47).

Accommodation is Not Required in Every Situation
LEGAL PRINCIPLES: ACCOMMODATION

Accommodation May Include:

(1) Avoidance of Specific Areas
(2) Minimizing Impacts
(3) Compensation
Types of Agreements

Binding Agreements

• Access/Benefit Agreements
• Impact/Benefit Agreements
• Impact Management and Benefit Agreements
• Participation Agreements
• Cooperation Agreements
Building Better Access and Benefit Agreements

Who?

- Project Proponent
  - Parent company/subsidiaries
  - Contractors/subcontractors
  - Successors and assignees
Building Better Access and Benefit Agreements

Who?

- First Nation
  - Band (*Indian Act*)
  - Tribal Council
  - Nation
  - Corporations or societies
  - Land claim/self-government agreement entities (governments)
- Metis
Building Better Access and Benefit Agreements

Who?

- Government
  - Canada
  - Provincial government
  - Territorial government
Why Not The Crown?

• Duty to consult and accommodate is a legal duty of the Crown (Haida)

• Crown can delegate “procedural aspects of consultation” to Project Proponents

• Industry seeking “sign-off” on Crown’s duty
Building Better Access and Benefit Agreements

How?

- Employment opportunities
- Contracting opportunities
- Financial consideration
- Communications Committee
- Legal certainty
Building Better Access and Benefit Agreements

Why?

- Industry: Proceed with the Project and Legal Certainty
- First Nation: Share in the benefits and provide input on the Project
- Both parties: Build relationships
Building Better Access and Benefit Agreements

The Alternatives

• Judicial review
• Appeal
• Injunction
• Litigation (nuisance, etc.)
• Delay in permit authorization
• Lack of access
The Bottom Line

- Timely
- Cost-effective
- Competitive Advantage
Building Better Access and Benefit Agreements

Past Grievances/Infringements

- Gitxsan v. British Columbia (Minister of Forests)
- Gwasslam v. British Columbia (Minister of Forests)

“If a...licence has been issued in breach of the Crown’s duty to consult, the duty continues and the Crown is obliged to honour its duty each time it has a dealing with the licence.” (Gitxsan, p. 81)