



First Nations and Major Projects

Van Horne Institute

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OUTLINE

- ② Background
- ② Legal Update
 - ② When does the Duty arise ... and Stop?
 - ② Who is to be Consulted?
 - ② The Scope of the Duty
 - ② Who Can Consult
 - ② Accommodation
 - ② Remedies

BACKGROUND

- ⑥ ***CONSTITUTION ACT, 1982***

- ⑥ **Section 35**

- ⑥ The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed
- ⑥ Aboriginal peoples include Indians, Inuit, Métis and other aboriginal peoples

BACKGROUND

- ⑥ **ABORIGINAL RIGHTS**
- ⑥ ***Sparrow* (SCC 1990)**
- ⑥ Aboriginal rights are constitutionally protected under section 35
 - ⑥ Aboriginal rights are not absolute – can be infringed by government
 - ⑥ Government must be able to justify *infringement* – duty to consult

BACKGROUND

- ⑥ **TREATY RIGHTS**

- ⑥ ***Badger* (SCC 1996)**

- ⑥ Alberta Treaty 8 hunting case
- ⑥ Treaty rights also constitutionally protected
- ⑥ Government must also justify infringement of treaty rights

BACKGROUND

- ⑥ **MÉTIS RIGHTS**

- ⑥ ***Powley* (SCC 2003)**

- ⑥ Métis are aboriginal people – section 35(2)
- ⑥ Métis rights are constitutionally protected
- ⑥ Government must also justify infringement

BACKGROUND

- ⑥ **ASSERTED RIGHTS**

- ⑥ ***Haida* (SCC 2004)**

- ⑥ Consultation (and, if appropriate, accommodation) is a process by which the Crown recognizes and affirms s.35 rights and reconciles those rights with the interests of others within the broader social, political, and economic community

BACKGROUND

- ⑥ **ASSERTED RIGHTS (cont'd)**
- ⑥ ***Haida* (SCC 2004)**
 - ⑥ Grounded in the “honour of the Crown”
 - ⑥ Scope and content of duty varies with strength of claim and seriousness of impact
 - ⑥ No duty on industry but can be delegated “procedural” aspects
 - ⑥ Existing regulatory schemes may satisfy obligation

BACKGROUND

⑥ TREATY RIGHTS REVISITED

⑥ *Mikisew* (SCC 2005)

- ⑥ Crown may “take up” lands under Treaty 8
- ⑥ “Honour of the Crown” imposes *procedural* obligation to consult
- ⑥ Content varies with circumstances
- ⑥ Does not require agreement
- ⑥ *Substantive* duty may arise where “no meaningful right” remains

WHEN DOES THE DUTY ARISE?

- ② Duty can arise as early as the strategic planning stage of the decision or contemplated conduct, particularly on larger projects, or those with multi-stage processes. It is a continuing duty. (***Squamish v. B.C.; Haida; Platinox; Dene Tha'***)
- ② Duty can arise with respect to a variety of government decisions, depending on the nature of the aboriginal right. Courts will not be “pedantic” about the nature of the government decision. (***Huu-Ay-Aht v. Minister of Forests***)
- ② Where sale of land could affect claims of aboriginal title. (***Musqueam v. B.C.***)
- ② Where commercial dealings with land could affect claims of aboriginal title. (***Musqueam v. Richmond***)

WHEN DOES THE DUTY ARISE?

⑥ *Dene Tha' v. Canada (2006, FCTD)*

- ⑥ Duty to consult based on *Haida*
- ⑥ Consultation is to be given “broad interpretation”
- ⑥ Duty arose from treaty rights and potential impact of Mackenzie Gas Project
- ⑥ Applied to “strategic planning” in establishing review process for MGP
- ⑥ Enjoined JRP and ordered “remedies hearing”

WHEN DOES THE DUTY ARISE?

- ② **Duty to consult on private lands?**
 - ② *Paul First Nation v. Parkland (2006, AB CA)* – no duty.
 - ② *Hupacasath First Nation v. British Columbia (Minister of Forests) (2005, BCSC)* – duty found where Crown holds decision-making power over lands.

WHEN DOES CONSULTATION END?

- ⑥ ***Chicot (Ka'a'Gee Tu) v. Canada (2007, FCTD)***
 - ⑥ Regulatory process under modern treaty.
 - ⑥ Extensive consultation in review process, but Ministers re-opened recommendations under “consult to modify” process – did not involve First Nation.
 - ⑥ Permit set aside.

WHO IS TO BE CONSULTED?

- ⑥ ***Red Chris v. Quock (2006, BCSC)***
 - ⑥ Injunction application against roadblock.
 - ⑥ Argument that consultation was inadequate because did not consult with actual users of land.
 - ⑥ Court determined consultation must take place with elected representatives.
 - ⑥ Had not brought challenge of governance nor environmental harm.

WHO IS TO BE CONSULTED?

⦿ *Komoyue Heritage Society v. B.C.* (2006, BCSC)

- ⦿ Society claimed failure to consult separate from aboriginal community to which they continued to belong.
- ⦿ No efforts to “de-amalgamate”.
- ⦿ Aboriginal rights communal in nature and cannot be transferred or assigned to incorporated body.
- ⦿ Determined on basis of “standing”.

WHO IS TO BE CONSULTED?

- ② ***Labrador Métis Nation v. NFLD (2006, NLTD)***
 - ② Representative of Métis Nation was proper party for consultation
 - ② Obligation to consult found based on test in *Powley*

THE SCOPE OF THE DUTY

- ⑥ For asserted rights, the scope of the duty to consult is proportionate to the strength of the case supporting the existence of the right or title and the seriousness of the potentially adverse effect upon the right or title.
- ⑥ For treaty rights, the scope varies with the specificity of the treaty, rather than the strength of the claim.
- ⑥ Case by case analysis – not one size fits all. (*Huu-Ay-Aht*)

THE SCOPE OF THE DUTY

- ⑥ Crown has to be correct about the strength of the claim and seriousness of impact
- ⑥ Crown has to be reasonable about process
- ⑥ Degree of consultation required may change as new information comes to light and the parties gain a better understanding of each other's positions and concerns
- ⑥ The facts ultimately dictate where in the spectrum the case falls (e.g., *Mikisew* – low; *Haida* – high; *Homalco* – middle)

THE SCOPE OF THE DUTY

- ⑥ The Crown must have the intent of substantially addressing the concerns raised by the aboriginal group, as they are raised.
- ⑥ Good faith required on both sides (information exchange, First Nation must engage and explain rights asserted and potential impacts).

WHO CAN CONSULT (Industry)

- ⑥ No duty on private parties to consult *but* may be delegated “procedural aspects”.
- ⑥ Crown may rely on consultation by proponents to the extent that it is aware of that consultation. (*Kelly Lake, Heiltsuk*)
- ⑥ May be required to provide information about the project subject to protection of confidentiality.
- ⑥ May have a formal role in consultation process “where appropriate”. (*Squamish v. B.C.; Platinex; Homalco*)

WHO CAN CONSULT (the Crown)

- ⦿ Provincial Crown constitutionally unable to infringe treaty rights (anything more than an insignificant interference) (*R. v. Morris* (SCC))
- ⦿ Provincial Crown constitutionally unable to infringe Aboriginal title (*Tsilhqot'in Nation (Roger William) v. B.C.* (BCSC))

ACCOMMODATION

- ⑥ ***Law is currently less developed than the law on consultation***
 - ⑥ *Consultation* may lead to accommodation (a level of responsiveness to First Nation concerns)
 - ⑥ Requires good *prima facie* case and significant adverse impacts

ACCOMMODATION

- ⑥ Avoid irreparable harm or minimize effects of infringement pending resolution of the final claim
- ⑥ Does not require agreement

REMEDIES

- ◉ Flexibility in remedies, with some cases involving ongoing court supervision of consultation.
- ◉ Decision may be quashed. (*Labrador Metis v. Nfld.*; *Squamish*; *Ka'a Gee Tu v. Canada*; *Mikisew v. Canada* (2005))
- ◉ Decision sent back for consultation. (*Chicot v. Canada*; *Huu-Ay-Aht v. B.C.*; *Homalco v. B.C.*; *Squamish*)

REMEDIES

- ⑥ Decision suspended and sent back for consultation. (*Dene Th'a v. Canada*; *Musqueam v. B.C.*; *Platinex*)
- ⑥ Activity may continue while consultation is undertaken. (*Gitanyow v. B.C.* (2004); *Musqueam v. Richmond* (2005); *Hupacasath v. B.C.* (2005))
- ⑥ Court supervision of consultation. (*Platinex*)

REMEDIES (*Platinex*)

- ⑥ Order requiring the establishment of a consultation committee *to develop agreement.*
- ⑥ Order to implement a Consultation Protocol, timetable and MOU.
- ⑥ Order imposing a Consultation Protocol, timetable and MOU.
- ⑥ Order imposing timetable for provision of information.

RISKS AND RISK MANAGEMENT

- ⦿ While the trigger for the duty is clear; its application to large projects is not as clear.
- ⦿ The application of the scope of the duty is still uncertain – reasonable people may differ on the same set of facts.
- ⦿ Little judicial guidance exists on appropriate accommodation.
- ⦿ Recognition of need for consultation and accommodation in project planning (timing and design) – avoid tyranny of the Gantt chart.

RISKS AND RISK MANAGEMENT

- ⦿ Early engagement with Crown preferable.
- ⦿ Careful assessment of strength of claim and seriousness of impact – every case unique.
- ⦿ Internal commitment and integration into project team.
- ⦿ Plan, be flexible, be upfront.
- ⦿ Plan for the worst.

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