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THE DUTY TO CONSULT AND ACCOMMODATE ABORIGINAL RIGHTS HOLDERS

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THE LEGAL FOUNDATIONS

Where did the duty to consult and accommodate come from?

Why was it created?

What is it meant to achieve?

How is consultation different across Canada?

Where is consultation headed and what are the opportunities?



THE BEGINNING OF CONSULTATION – *SPARROW TEST*

- The Supreme Court of Canada in *Sparrow* established the test to justify an infringement of an established Aboriginal or Treaty right
- Consultation was a part of the justified infringement test (or *Sparrow* test) that could be relied upon by the Crown to support limiting a right
- Referenced in other cases such as *Delgamuukw*



WHERE DOES THE DUTY COME FROM?

Judge-made law stemming from a trilogy of Supreme Court (SCC) cases beginning in 2004, which interpret:

- *Section 35 of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada*

The duty is based on the **Honour of the Crown**, and seeks **Reconciliation**

DTC is a constitutional obligation, not a policy option!

“Government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples.”

-(Haida Nation), para. 16

SUPPORT CLAIM RESOLUTION

“[T]he honour of the Crown may require it to consult with an reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to the resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.”

(Haida Nation), para. 27

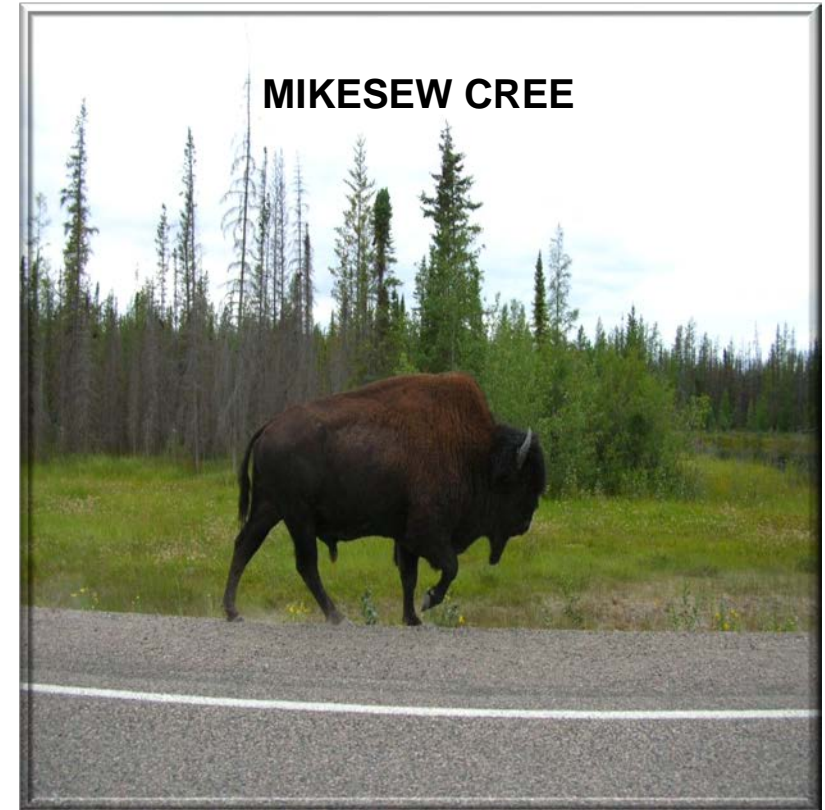
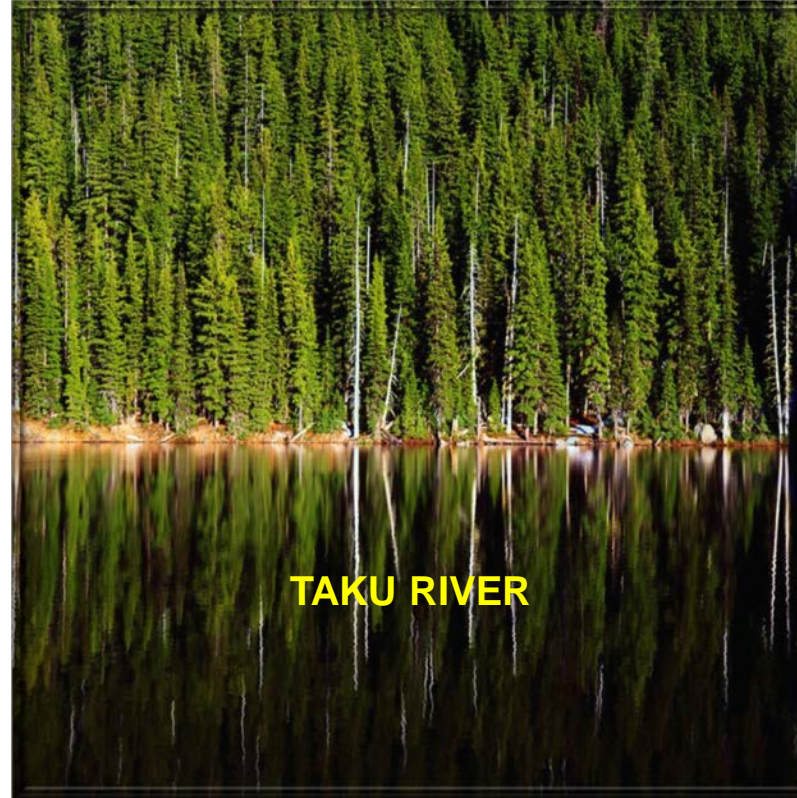
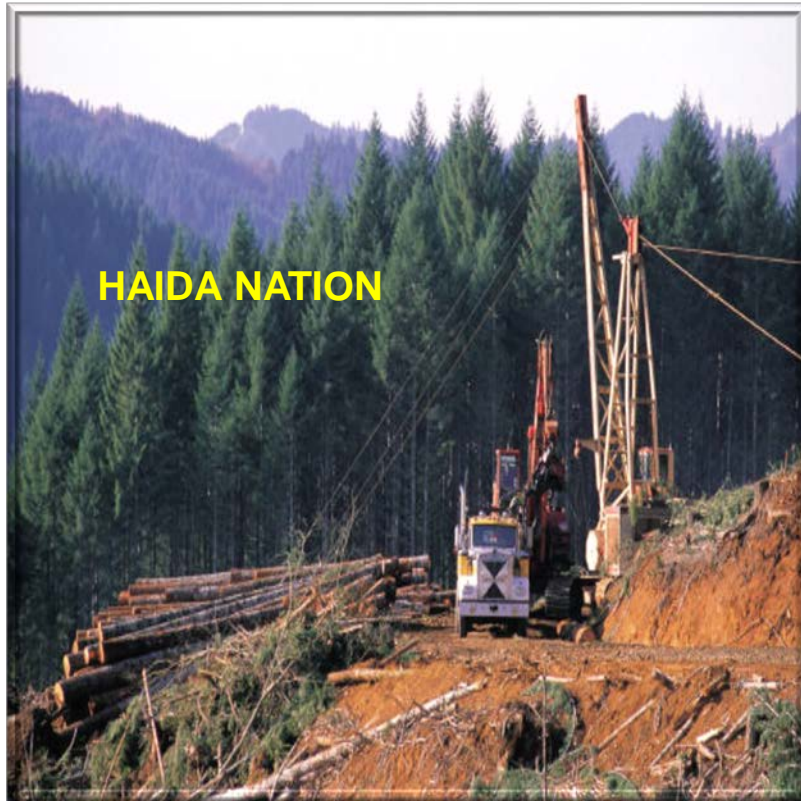
MANAGE LAND USE

“Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that [Treaty] context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely, reconciliation.”

(Mikisew, para. 63)



THE TRILOGY...



THE CANADIAN CONTEXT



CONSULTATION IN THE NUMBERED TREATY CONTEXT

- Distinct from non-Treaty areas and Modern Treaty areas
- *Mikisew Cree (2005)*, Consultation obligations extended to established Treaty rights
- *Grassy Narrows (2014)*, Crown's right to "take up" lands under Treaty for settlement purposes

WHO ARE SECTION 35 RIGHTS HOLDERS?

- First Nations, Métis and Inuit “rights bearing communities” (not individuals)
- Unique collective rights
- The Crown must consult with the collective, usually represented by elected leadership
- What about hereditary chiefs?



WHEN IS THE DUTY TRIGGERED?

The Crown (federal, provincial and territorial) has a duty to **consult** and **accommodate**:

with First Nation, Métis and Inuit communities;

in advance of decisions;

which may adversely impact;

established and asserted Treaty and Aboriginal rights such as the right to hunt, fish and trap and traditional uses of lands and resources



STATED ANOTHER WAY.....

The duty to consult arises when the Crown has knowledge, real or constructive, of an established or asserted Aboriginal or Treaty right and contemplates conduct that may adversely affect it.

1. Knowledge of an established or asserted Aboriginal or Treaty right
2. Crown conduct
3. Potential adverse Impacts to Section 35 rights



EXAMPLES OF DECISIONS THAT TRIGGER THE DUTY

- Fish and wildlife management
- Resource extraction
- Pipelines
- Land use planning
- Lease, grant, or sale of Crown land
- Changes to public access
- Environmental approvals
- Policy and strategic plans that may impact section 35 rights



WHAT DOES THE SCC TELL US?

- Low threshold
- Spectrum of consultation
- Scope of consultation must be correct, standard of consultation is reasonableness
- Consult early (e.g. strategic and higher level decisions)



WHAT DOES THE SCC TELL US?

- No consultation on past actions – But, door is open to damage claims and room for new and novel impacts arising from past actions
- Reciprocal responsibility for Nations to participate
- No veto for Aboriginal Nations
- Crown Consultation can be challenged through judicial review



WHO OWES THE DUTY?

1. **Provincial and Federal Governments**
2. **Crown Corporations** (*Carrier Sekani*, para. 81)
3. **Tribunals:** A tribunal's role in consultation depends on its statutory mandate. There must be express or implied authority to consult and an ability to deal with adverse impacts on Aboriginal and Treaty rights (*Carrier Sekani*)
4. **Statutory Bodies** that exist to exercise executive power as authorized by legislatures, such as the National Energy Board (*Clyde River*, para. 29)

THIRD PARTIES

- HOWEVER, the Crown may delegate procedural aspects of consultation to third parties, such as Industry
- Procedural aspects might include:
 - Providing project information;
 - Meeting to discuss the project and answer questions;
 - Discussing or designing measures to minimize the impact of the project on established or asserted rights
- All delegated activities must be carried out in good faith.



THIRD PARTIES

- The level of Industry engagement and participation in consultations varies across Canada
- Often includes impact benefit agreements, employment opportunities, etc.
- In Saskatchewan, delegation is mandatory for Environmental Assessments
- As a best practice, Industry should engage early and often to build relationships throughout the life-cycle of their projects (even where procedural aspects are not delegated)

OVERLAPPING INTERESTS = OPPORTUNITY

Industry

Legal certainty for Projects

- ❑ *Crown's fulfillment of DTC*
- ❑ *Clear procedural delegation of DTC*

Social licence to proceed and operate the Project - FPIC

Economic prosperity

Regulatory approval certainty

Dynamic and long term relationships with Indigenous partners

Rights Holders

Equitable role in the economy

Respect for culture and Traditional Knowledge

Environmental standards

Prosperous and sustained livelihood

Benefits that leave a legacy

Investment equal to extracted resources



ROLE OF THE CROWN

The Crown must:

- Determine whether the duty is triggered;
- Identify Nations to be consulted;
- Scope of consultation;
- Sufficiency of consultation; and determine whether accommodation is required and whether the accommodation provided is sufficient.

Consider all concerns raised with a view to ensure the consultation is reasonable and maintains the honour of the Crown.

ROLE OF THE CROWN

- The Crown must have the intention of substantially addressing concerns raised
- Outline the consultation process, including delegation, with clarity (i.e. notification letters).
- The Crown retains the ultimate responsibility to ensure that the duty to consult and accommodate is satisfied. The honour of the Crown can never be delegated.



SCOPE OF CONSULTATION

The scope of the duty is “proportionate to a **preliminary assessment of the strength of the case** supporting the existence of the right or title, and to the **seriousness of the potential adverse effect upon the right or title claimed.**” (*Haida Nation*, para. 39)

There is a **spectrum** (*Haida Nation*, paras. 43-45):

- A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties
- A **credible claim** of rights is sufficient to trigger the duty
- **Weak claim or potential minor impact:** lower end of the duty, may be appropriate to give notice, disclose information and discuss any issues raised in response to the notice

SCOPE OF CONSULTATION

- **A strong claim and high potential impact:** higher end of the spectrum, deeper consultation may include capacity funding, making submissions for consideration, formal participation in the decision making process, and provision of written reasons for the decision.
- **Established Treaty Rights:** The depth of consultation will depend on the potential adverse impacts to rights (numbered Treaty context).
- The consultation requirements will vary with the circumstances and it is more art than science

WHAT SHOULD CONSULTATION LOOK LIKE?

Although consultation varies with the facts, the SCC has said that:

- It requires good faith from all participants
- Consultation needs to be meaningful: not a mere opportunity for Nations to “blow off steam” (*Mikisew*, para. 54)
- Consultation may be carried out through other statutory or regulatory processes such as an environmental assessment (*Taku River*), (*Clyde River*)



WHAT SHOULD CONSULTATION LOOK LIKE?

Consultation should include:

- Sharing information about the proposed Crown action that is timely, provides sufficient detail and in an accessible form
- Sharing and obtaining information about potential adverse impacts to rights
- Allowing appropriate time for Nations to formulate views on the proposed action or decision
- The Crown should consider how to address these concerns with the Nation and accommodate where necessary

ACCOMMODATION

Where there is a strong claim and a significant adverse impact, addressing Nation's concerns may require taking steps to avoid irreparable harm or to minimize the effects of Crown action (*Haida Nation*, para. 47)

Accommodation may include:

- Changing a project's scope or location
- Changing time of construction
- Changing processes or methods
- Including Nations in project design
- Economic accommodation (resource revenue sharing, IBA's. etc.)



WHEN IS CONSULTATION OVER?

The Crown gets to determine when consultation is concluded....BUT, Nations can seek judicial review of the decision if there is disagreement.

The record is vital for ALL participants.

Remedies vary but usually the Crown is required to go back to the consultation table.

EMERGING ISSUES - FPIC

- How will consultation obligations be shaped by The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)?
- Free, Prior and Informed Consent (FPIC)
- Raised in most consultations and in the courts
- Little effect to date in legal decisions
- Strong policy effects

EMERGING ISSUES - MUNICIPALITIES?

- The SCC has not yet considered whether or how the duty to consult and accommodate applies to municipalities
- BC vs. Saskatchewan's policy approach
- *Neskonlith, para 70*, The BCCA held that municipalities are third parties that do not have a duty to consult (adopted by lower courts)

EMERGING ISSUES - ITK

- Indigenous Traditional Knowledge vs. Western Science
- Weight, acceptance, use.
- What happens when these clash?
- Policy or law?

Q&A

THANK YOU

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