TRENDS IN ABORIGINAL ENGAGEMENT

From Consultation to Consent

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INTRODUCTION

* 10+ years since the Supreme Court of Canada issued decision in *Haida Nation v. BC* recognizing a governmental duty to consult and, where appropriate, accommodate Aboriginal peoples

* Rationale is the 'honour of the Crown' – consultation is a process of reconciliation between Crown and Aboriginal peoples

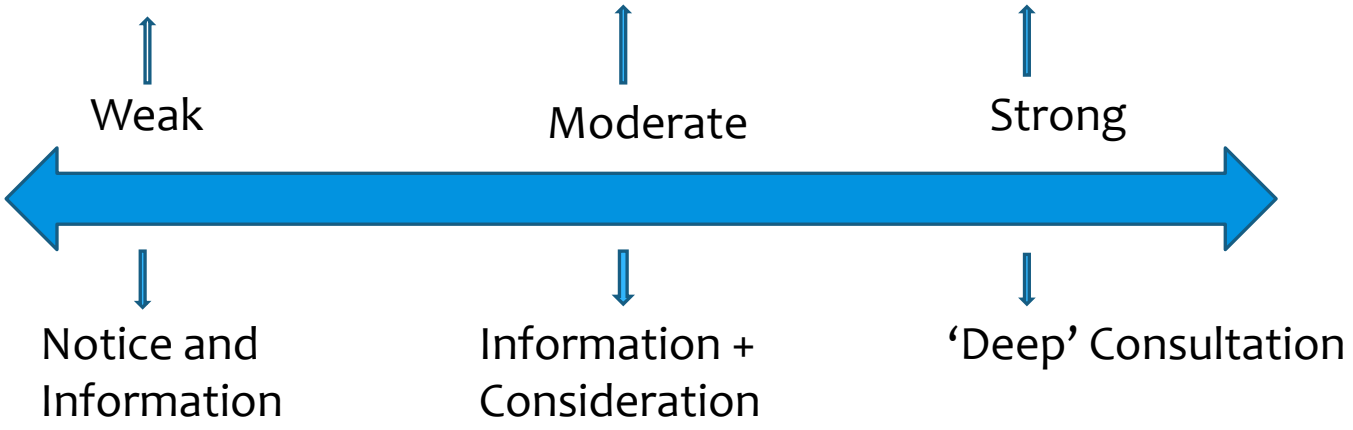
* Duty is instrumental -- consultation is not an end in itself
  * Part of fostering of governmental-Aboriginal reconciliation
  * Mechanism to encourage Aboriginal participation in sustainable development and equitable resource distribution

DUTY TO CONSULT AND ACCOMMODATE– THE BASICS

* **Purpose of duty:**
  * Proven rights: To fill in any gaps (treaty) and protect established Aboriginal rights
  * Asserted Aboriginal rights: protection from irreversible harm
* **Trigger:** Crown must consult where aware of the potential/actual existence of Aboriginal/treaty rights which might be adversely affected by governmental action
* **Result:** take Aboriginal views into account and where necessary, mitigate or eliminate adverse effects through accommodation

OPERATION OF DUTY

* Spectrum of Consultation -- highly fact dependent on strength of claim and seriousness of potential impact



Scope of duty – provide information/consider views and accommodate adverse impacts through mitigation/access to benefits

OPERATION OF DUTY

* Consultation must be meaningful – not just an opportunity to 'blow off steam'
* Consequences of failure to consult:
  * Injunctions against proponents preventing activities that had been permitted by Crown
  * Requiring Crown to reconsider decisions
  * Issuing orders to provide for consultation
* Result: delay, increased cost, erosion of social licence

RECENT TRENDS

* Scope of duty may be clear but its operation is in flux
* Over the past year a number of important and related issues:
  * Clarification of scope of consultation during regulatory processes, such as EA
  * Scope of permissible delegation to third parties and accountability of the Crown
  * Imbalance of power as between Crown and proponent and First Nations during the consultation process
  * Relationship of consultation to consent

EA PROCESS AND CONSULTATION

Consultation Process:

* Aboriginal peoples entitled to a distinct consultation process (*Taku River Tlingit v. BC*, 2004, SCC) which is open, transparent and timely and which provides for possible accommodation
* Existing statutory processes may be sufficient if meet this criteria and Aboriginal groups not entitled to unilaterally impose conditions on Crown's consultative process or attempt to frustrate process: *Cook v British Columbia (Minister of Aboriginal Relations and Reconciliation), 2008*
* Duty can be discharged through EA process – e.g. *Council of Innu of Ekuanitshit v. Canada, 2014*: Canada can rely on findings of a Joint Review Panel conducting EA to discharge its duty to consult and accommodate

EA PROCESS AND CONSULTATION

Scope of EA Consultation
Limited to Impacts on Aboriginal Rights?

* Conventional wisdom – consultation directed to identification and assessment of potential impacts of governmental decision on asserted Aboriginal rights
* However, this view may be unduly narrow
* 2014 decision in *Ehattesaht First Nation v. B.C.* -- judicial review of ministerial decision respecting timber allocation which reduced amount of unharvested volume potentially available to FN
* Court held duty to consult applies to situation where government decision affects economic interests as opposed to an asserted Aboriginal right
* Implications for EA – attention not only to biophysical but to socio-economic impacts of a proposed project

EA PROCESS AND CONSULTATION

Scope of EA consultation

Past Effects?

* *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, SCC 2010: consultation addresses novel impacts and is not intended to redress historic wrongs or revisit authorizations
* However, past impacts are not irrelevant: *West Moberly First Nations v. BC*, 2011 BCCA – "historic context is essential to a proper understanding of the potential impacts…" where there is a link between adverse effects and past wrongs
* *West Moberly* may stand for the proposition that consultation must address not only immediate and direct effects but also existing cumulative impacts in an appropriate case

EA PROCESS AND CONSULTATION

Scope of EA consultation
Potential future effects?

* Subject of duty to consult must be specific Crown proposal at issue: *Halalt First Nation v. BC*, 2012
* No requirement to consider speculative effects
* However, increasing willingness to consider future impacts:
  * *West Moberly*: impact of future mining was within the scope of duty to consult about impacts
  * *Sambaa K'e Dene Band v. Duncan*, FC 2012 – Canada involved in land claims negotiations with 3 groups; signed framework agreement with one group and no planned consultation with other groups until after AIP. Duty to consult prior to reaching AIP. Non-derogation clause did not negate duty to consult on possible future effects of treaty

CONSULTATION AND THIRD PARTIES

* See increasing regularization of consultation processes through the development of governmental consultation policies and protocols across country
* Key feature is delegation of procedural aspects to third party proponents – SCC has recognized that Crown may delegate procedural aspects of duty to third parties
* Delegation a common feature of EA processes across country

CONSULTATION AND THIRD PARTIES

* Result is an increasing ‘outsourcing’ or ‘privatization of duty to consult

* Proponent has finances and other interests at stake, most knowledgeable about impacts of proposed development; in proponent’s interest to establish a forum to build long-term, mutually beneficial relationship with potentially affected Aboriginal communities (social licence)

* However clear risks associated with broad-based delegation and many issues -- What are limits of permissible delegation? Who is responsible when process is deficient?

LIMITS ON DELEGATION

* Some clarification provided by courts in recent cases

* *Wabauskang First Nation v. Minister of Northern Development and Mines* (Ontario, 2014)
* WFN challenge to Director's decision re: Production Closure Plan
* Proponent had engaged in consultation under direction of Ministry consistent with preference of WFN
* Subsequent assertion by WFN that Crown had improperly delegated duty to consult

LIMITS ON DELEGATION

* Court upheld adequacy of consultation: regular contact between Crown and proponent and FN; FN involved in development of work plan and budget and had received capacity funding from proponent
* But court stated that had it found consultation by proponent to be inadequate, remedy against Crown not proponent (although consequences of failure may be borne by proponent through delay)

LIMITS ON DELEGATION

* Implications
* Duty to consult resides with Crown – no privatization or outsourcing can alter this principle so when consultation inadequate, remedy lies against Crown
* Crown must be actively involved in proponent-led consultation processes
* *Fort McKay First Nation v. Alberta, 2013*– some delegation acceptable but mere 'oversight' of process may not be sufficient to discharge the Crown's duty

LIMITS ON DELEGATION

* Risks to Crown resulting from ‘outsourcing’ duty to third parties are not confined to legal action by particular First Nation or Aboriginal group

* Recent cases and legal actions suggest that failure by Crown to adequately discharge the duty may also ground Crown liability vis-à-vis proponent

LIMITS ON DELEGATION

* $110 million lawsuit by Northern Superior Resources (NSR) for loss of access to mining claims due to alleged Crown failure to consult
* NSR claims on traditional lands of Sachigo FN
* Extensive consultation with Sachigo but failure to reach exploration agreement; another FN emerged claiming exploration was conducted on its traditional land – FN denied access to lands
* No evidence that Ontario had consulted any FN or provided capacity funding to any FN in respect of disputed claims
* Case raises a number of interesting issues:
  * Who is responsible for resolving competing Aboriginal claims? Is there a duty to warn a proponent of the existence of competing claims?
  * Is government liable to proponent for failure to consult?

LIMITS ON DELEGATION

* At least one decision supporting liability of Crown to proponent in the event that Crown fails to adequately discharge duty to consult
* In December 2013, the B.C. Supreme Court ordered the province to pay $1.75 million to Moulton Contracting, a logging company which sued B.C. for failing to meet its DTC obligations before a First Nation blockade halted operations
* Implications for EA:
  * Potential liability of Crown to proponent where EA approval delayed or withheld due to lack of Crown consultation
  * Potential proponent challenges to provincial policies mandating broad-based delegation
  * Push-back from industry and increasing demands for a tripartite consultation process

IS CONSULTATION ENOUGH

* In addition to concerns respecting limits of permissible delegation, also increasing attention to what might be termed the limits of consultation itself
* Is consultation sufficient to ensure meaningful consideration of Aboriginal rights and interests in the context of a proposed development?
* Aboriginal concerns with consultation in EA process:
  * Project specific focus – limitations on assessment of cumulative effects
  * Perception that consultation is simply a formal process requirement with few substantive outcomes
  * Resource imbalance as between Aboriginal groups and Proponents and government
  * Consultation fatigue

IS CONSULTATION ENOUGH

* Concerns have been acknowledged by courts
* *Fort McKay* and *Wabauskang* – resource imbalance may prevent meaningful consultation process
* Incorporation of administrative law principles of fairness and good faith not sufficient to equalize positions of parties
* Imbalance exacerbated by increasing consultation demands on groups with limited human and financial capacity
* Increasing focus on issue of consent

IS CONSULTATION ENOUGH

* Duty to consult as defined in *Haida* and *Taku River* does not amount to a veto over development
* However recent developments related to the issue of consent have enhanced ability of Aboriginal groups to effectively challenge projects and implicitly raise requirement of consent
* Support for Consent from two perspectives:
  * Domestic law
  * International law

CONSULTATION AND CONSENT

* **Domestic Law:**
* 2014 SCC decision in *Tsilhqot'in Nation v. British Columbia*
* Aboriginal title confers on Aboriginal groups the exclusive right to decide how the land is used and the exclusive right to benefit from those uses
* Aboriginal title can be proved over large areas of land that were used nomadically or seasonally by Aboriginal groups, not just over discrete parcels of intense use and occupation such as traditional village sites
* Where Aboriginal title is proved, provincial and federal laws do not automatically cease to apply; rather, these laws continue to be valid provided that any infringements of Aboriginal **title are either consented to by Aboriginal groups or are justified**

IMPLICATIONS OF TSILHQOT'IN

Implications of Tsilhqot'in

Expansion of Consultation Obligations:

* Predicted that in many cases where Aboriginal title is asserted but not yet proved, government and by extension proponents may be held to a higher standard of consultation – see challenges to Northern Gateway Project

IMPLICATIONS OF TSILHQOT'IN

Increased Litigation:

* Clarification of process to establish Aboriginal title may lead to the launching of claims as a strategy to halt or delay proposed or actual developments
* SCC:
  * "Once title is established it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. … **If the Crown begins a project without consent prior to Aborigiinal title being established it may be required to cancel the project** upon establishment of title if continuation of the project would be unjustifiably infringing"

IMPLICATIONS OF TSILHQOT'IN

Reopening of Existing Consents

* Consent to project most commonly evidenced through conclusion of agreement – e.g. IBA
* In return for benefits, Aboriginal group agrees to project proceeding
* However, is consent given to proponent in IBA or otherwise binding on Crown or must Crown also obtain separate consent?
* Is consent language in a proponent-Aboriginal agreement really indicative of consent to infringements of Aboriginal rights and title?

EFFECT OF INTERNATIONAL LAW

International Law

* Free, prior and informed consent (FPIC)
* FPIC: a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use
* FPIC is a key principle in international law and jurisprudence related to indigenous peoples -- ILO 169, UN Declaration on Rights of Indigenous Peoples

EFFECT OF INTERNATIONAL LAW

* Canada has not ratified principle of "free, prior, informed consent" – stated to be 'aspirational' goal only
* **But** see increasing reference to international law principles by Aboriginal peoples in the context of domestic resource extraction/development
* Supported by 2014 report to the UN Human Rights Council on consultation in Canada

EFFECT OF INTERNATIONAL LAW

Findings of 2014 Report of UN Special Rapporteur on rights of Indigenous Peoples in Canada:

* That domestic consultation processes inadequate, not designed to address Aboriginal or treaty rights and take place at a stage when project proposals have been developed and formalized – no substantive results
* That lack of consistent policy or framework for consultation contributing to a mistrust that hinders economic and social development
* That Aboriginal groups 'bombarded' with paperwork, unduly short time lines and proponents have little understanding of Aboriginal rights

EFFECT OF INTERNATIONAL LAW

* **Rapporteur's Recommendation:** that developments must be fully consistent with Aboriginal and treaty rights and as much as possible allow for indigenous control over and benefits from extractive operations on traditional lands
* FPIC consistent with concept of honour of the Crown and nature of nation-to-nation relationship with Aboriginal peoples
* May be trend towards de facto acceptance of FPIC where strong proof of title or evidence of serious impacts on rights viewed as means of addressing power imbalance

EFFECT OF INTERNATIONAL LAW

* But if FPIC consistent with the consent referred to in *Tshilhqot'in*, certain issues arise which will be the subject of future litigation:
  * Who is competent to give such consent and how is consent evidenced?
  * In case of overlapping claims, must all groups consent or merely a majority?
  * Is consent truly informed? Do Aboriginal group(s) have access to all relevant information?

IMPLICATIONS OF RECENT TRENDS

Effect of these trends

* Strengthened role for Aboriginal communities in approving or rejecting projects
* Greater demands on Crown to develop a formalized consultation process that preserves Crown accountability and responsibility
* Increased challenge for resource companies that have not developed sufficiently strong relationships with Aboriginal communities