Municipal Aboriginal Consultation

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Aboriginal Law: The Basics

Who are the Aboriginal Peoples of Canada?

- "Aboriginal peoples of Canada" is defined under the *Constitution Act, 1982*, s. 35(2)
  - Includes the Indian, Inuit and Métis peoples of Canada
- Terminology: Aboriginal, First Nation, Indigenous

Who has Jurisdiction Over Aboriginal Peoples in Canada?

- *Constitution Act, 1867*, s. 91(24):
  - Federal government has exclusive jurisdiction over "Indians and lands reserved for the Indians"
- Aboriginal peoples are immune from provincial regulations that encroach on federal jurisdiction
- But provincial laws of general application may apply

The *Indian Act*

- The *Indian Act* is the primary federal statute dealing with matters governing the affairs of Indians
- Includes a registration scheme for “status Indians”
- Basic governing unit is the “band”
- “Band” is defined under the *Indian Act* as a body of Indians that:
    - has a reserve set apart by the Crown
    - has government trust funds held by the Crown for its use; or
    - was declared to be a Band by the federal cabinet
- Each band is governed by Chief and Council and are elected by band members

What Are Aboriginal and Treaty Rights?

- Aboriginal peoples have constitutionally protected Aboriginal rights and treaty rights that serve to recognize and protect their land-based lifestyles

Constitutional Protection of Aboriginal and Treaty Rights

- Existing Aboriginal and treaty rights are constitutionally protected (*Constitution Act, 1982*, s. 35(1))
- Section 35(1) provides that:

  > existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed

- Purpose of s. 35: To reconcile the prior occupation of Aboriginal peoples with the assertion of Crown sovereignty

What are Aboriginal Rights?

- Rights held by Aboriginal peoples because they are independent, self-governing entities who were once in possession of most of the lands now making up Canada
- Are “inherent rights”; they are not dependent on the acts of government
- Cover a spectrum from Aboriginal land title to Aboriginal practices, customs or traditions

Aboriginal Title

- Arises by virtue of Aboriginal people's occupation of the lands
- Is a special kind of Aboriginal right
- Premised on the fact that Aboriginals live on the land in distinct societies and cultures with their own practices, customs and traditions

Nature of the Aboriginal Title to the Land

- Aboriginal title in land is *not* the same as fee simple title
- Aboriginal title is *sui generis*, or unique
- If Aboriginal title to the land is proven, the Aboriginal group would have a *proprietary interest* in the land
- This means the Aboriginal group would have the exclusive use and occupation of the land and includes both surface and subsurface resources

What is the Duty to Consult?

Supreme Court of Canada Decision

- SCC held that the Federal and Provincial Crown have a duty to consult
- The duty may be triggered even prior to proof of existence of right in court
- Third party proponents do not have such duty
- Crown may delegate procedural aspects of consultation to third party proponents
- But the ultimate legal responsibility for fulfilling the Crown's duty to consult rests with the Federal and Provincial Crown

Source of the Duty to Consult

- Duty is grounded in the honour of the Crown, which is always at stake when dealing with Aboriginal peoples
- Goal of reconciliation as mandated by s. 35(1) *Constitution Act*

When Does the Duty Arise?

"When the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it."

McLaughlin, C.J.
Haida Nation v. British Columbia

Determining the Depth of Federal/Provincial Consultation Required

Characteristics:	**Factors**	**Characteristics:**
• Weak Aboriginal claim • Potential for infringement is minor **Actions:** • Give notice • Disclose information • Discuss any issues raised in response to the notice	• Specificity of promises made • Seriousness of potential impact on right asserted • Strength of claim to asserted right	• Strong Aboriginal claim • Right and potential for infringement is high • High risk of non-compensable damage **Actions:** • Deep consultation • Opportunity to make submissions • Formal participation in decision-making process • Written reasons showing how Aboriginal concerns were considered • **Accommodate** • **Consent**

Low **Amount of Consultation** **High**

Guiding Consultation Principles

- Guiding question: What is required to maintain the honour of the Crown and effect reconciliation between the Crown and Aboriginal peoples?
- Consultation must be meaningful, in good faith, with a willingness to make changes based on information emerged from the consultation
- Sharp dealing is not permitted but mere hard bargaining is permissible
- Crown duty can be met by consultation conducted by independent regulatory agencies or municipalities

Reciprocal Onus of Aboriginals

- First Nations have a reciprocal onus to:
  - Make their concerns known
  - Respond to the government's attempt to meet their concerns and suggestions
  - Try to reach some mutually satisfactory solution
  - Cannot frustrate the Crown's efforts consult in good faith

Do Municipalities Have a Duty to Consult?

Do Municipalities Have a Duty to Consult?

- Unresolved issue in Ontario courts
  - OMB refused to extend the duty to consult to a municipality in *Sifton v. Brantford*, 2014
- Resolved in British Columbia with a “no”
- Municipalities may not have a legal duty to consult however having a respectful relationship with the local First Nation is nonetheless essential
- The Crown may delegate procedural aspects of consultation to a municipality

How are Municipalities Impacted by the Crown's Duty to Consult?

City as Proponent vs. Approval Authority

- The City may be involved in Aboriginal consultation as a project proponent or approval authority
- For example, the City as a **proponent** in the EA process may be involved in consultation (as delegated by the Crown)
- In the planning context, the City as an **approval authority** may be involved in consultation

Duty to Consult vs. Engagement & Relationship-Building

- Important to distinguish duty to consult from engagement & relationship-building
- Duty to consult is a constitutional duty, grounded in s. 35
- In some circumstances, even if the duty to consult is not triggered, the City may wish to “engage” with an Aboriginal community
- Reasons for doing so include a desire to have a respectful relationship
- Relationship-building initiatives may include:
  - Summer solstice celebrations
  - Inviting Chief to Council as an honorary speaker
- Important to be consistent in approach

Examples of When Aboriginal Communities May be Engaged

- Environmental assessments & archaeological assessments
- Land-use planning and development processes (including strategic plans)
- Infrastructure planning
- Policies related to cultural protection and development (i.e. protection of archaeological and burial sites, allowing for Aboriginal ceremonies)
- Preparation of archaeological master plans

Provincial Policy Statement, 2014

- 1.2.2. Planning authorities are encouraged to coordinate planning matters with Aboriginal communities
- 2.6.5. Planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources
  - Definitions of “built heritage resource” and “cultural heritage landscapes” now include references to Aboriginal communities
- 4.3. PPS shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in the *Constitution Act*, s. 35

Aboriginal Consultation vs. Public Consultation

- Important to distinguish between “Aboriginal consultation” and “public consultation”
  - Constitutional duty to consult vs. statutorily-mandated public consultation
- For example, public consultation may be required under environmental assessment processes
- The duty to consult may be discharged through the EA process, however, following the same public consultation process as for all other stakeholders will not be sufficient to discharge the duty
- Remember that the amount (or depth) of Aboriginal consultation required to discharge the duty to consult is scaled. It depends on the strength of the claim and potential for infringement

Collective vs. Individual Rights

- Important to distinguish collective rights from individual rights
- Aboriginal and treaty rights are collective rights in nature; they belong to the collective group
- Aboriginal consultation occurs with the collective – the Aboriginal community as a whole, not with individuals
- Who represents and can speak on behalf of the Aboriginal community can also be an issue
    - Elected Chief and Council (constituted under the *Indian Act)* vs. Hereditary Chief (traditional governance)