IMLA in Canada 2009
Critical Issues in a Time of Change

Aboriginal Law: Duty to Consult Update for Municipal Practitioners

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Aboriginal Law 101

Consultation trigger

- Crown has a duty to consult with Aboriginal peoples when it:
  - Has knowledge, real or constructive, of an established or asserted Aboriginal or treaty right

    - and -
  - Contemplates conduct that might adversely affect the right in question.

Aboriginal Law 101

Content of consultation

- Will depend upon circumstances – no one-size-fits-all answer.
- Need to look at factors such as:
  - Strength of claim to asserted Aboriginal or treaty right.
  - Seriousness of potential impacts of proposed government action or decision on the right, etc.

Aboriginal Law 101

Relevance to Municipalities

- Municipal duty to consult currently before Ontario courts in the Brantford By-laws litigation and Six Nations Elected Council (SNEC) action.
- Ontario's position in defence to SNEC action is that municipalities have a duty to consult, in some circumstances.
- Practical implications, e.g. project delays.

Aboriginal Law 101

Suggestions for Further Reading

- SCC trilogy: *Haida, Taku River* and *Mikisew Cree*
- Ontario's *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples,* June 2006 (http://intranet.mah.gov.on.ca/AssetFactory.aspx?did=9066)
- Canada's *Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult,* February, 2008 (http://www.ainc-inac.gc.ca/ai/mr/is/acp/intgui-eng.pdf)

Duty to Consult and the Courts
What to watch: Brantford Litigation

Value of Negotiation

"Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve…the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown…Let us face it, we are all here to stay."

[*Delgamuuk* at para 186]

Ontario Litigation Context

- Ontario's trilogy: *Henco*, *Frontenac* and ongoing Brantford litigation.

- Likely to have significant implications for Ontario municipalities:
  - When, where and how they want to grow.
  - "Rule of law" principles (e.g. blockades)
  - Municipal duty to consult.

Rule of Law: That was Then

1994 *RJR-MacDonald* decision (SCC)

- Three-part test for interlocutory injunctions:

1. Serious issue;
2. Irreparable harm; and,
3. Balance of convenience.

Rule of Law: This is Now

2006 *Henco* decision (Ont. CA)

- Rule of law has many dimensions, “highly textured”:
  - One dimension: court orders are enforced and court process respected.
  - Other dimensions include: respect for minority rights; reconciliation of Aboriginal and non-Aboriginal interests through negotiations; respect for the separation of the executive, legislative and judicial branches of government; etc.
- CA held that motions judge did not adequately consider these other important dimensions of the rule of law.

Rule of Law: This is Now

2008 *Frontenac* decision (Ont. CA)

- Where constitutionally protected Aboriginal rights are asserted, injunctions sought by private parties to protest their interests should only be granted where every effort made by court to encourage consultation, negotiation and accommodation and reconciliation among competing rights and interests. (Obiter)

- Court must be satisfied that every effort has been made to obtain negotiated or legislated solution to the dispute before it. (Obiter)

- Leave to appeal application to the SCC dismissed.

Rule of Law: This is Now

2008 Brantford By-Laws

- May 2008: Brantford Council passed two by-laws.
- One by-law prohibits interference with construction on, or access to, certain properties in Brantford.
- The other by-law prohibits the charging of fees for development or construction except as authorized by statute, regulation or by-law

Rule of Law: This is Now

Ongoing Brantford By-Laws Litigation

- June 2008: Court awards interim interlocutory injunction based upon three-part *RJR-MacDonald* test.
- July 2008: Court of Appeal releases reasons for decision in *Frontenac.*
- August 2008: Notice of Constitutional Question, delivered in Brantford court action, challenges the "common law test concerning availability of interlocutory injunctive relief".

Rule of Law: This is Now

Ongoing Brantford By-Laws Litigation (cont.)

- March, 2009: Court adds Ontario as a party, adjourns the motion for interlocutory injunction, and further orders that Ontario:

> "…initiate, arrange and commence meaningful, consultation, negotiation, accommodation and reconciliation among the competing rights and interests of the City of Brantford, the Haudenosaunee people and itself."

- May 19, 2009: Parties to advise court as to progress on their discussions.

Rule of Law: This is Now?

- **2008 *R. v. Manuel*:** BCCA blockade case; "'self-help' remedies are not condoned anywhere in Canadian law, which includes aboriginal law…and they undermine the rule of law"; criminal, not an interlocutory injunction case; leave to appeal to SCC dismissed.

- **2008 *1536412 Ontario Ltd.*:** Ontario lower court decision; interlocutory injunction granted; applied *RJR-MacDonald* test; no one present for defendants who were ultimately subject to the injunction; predates release of reasons for decision in *Frontenac*.

Rule of Law: This is Now?

- **2009 *John Voortman & Associates Ltd.*:** Ontario lower court decision; interlocutory injunction granted; applied modified *RJR-MacDonald* test; Six Nations leadership not present; certain defendants attended but were not represented by counsel; “All people in Canada are governed by the rule of law…[and] all people in Canada are entitled to know that every other person in Canada will be required to obey the law…”.

Rule of Law: Looking Forward

- Bye, bye *RJR-MacDonald*?
- Stay tuned for developments in Brantford's By-Laws litigation.
- Value of negotiations – no downside to talking.

Cases

- *1536412 Ontario Ltd. v. Haudenosaunee Confederacy Chiefs Council*, [2008] OJ No. 2286 (Ont. SCJ).
- *Brantford (City) v. Montour*, [2008] OJ No. 2453 (Ont. SCJ) (this is the citation for the June, 2008 interim interlocutory injunction matter; the March, 2009 decision is unreported).
- *Delgamuuk v. British Columbia*, [1997] 3 SCR 1010 (SCC).
- *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 91 OR (3d) 1 (Ont. CA); application for leave to appeal to the SCC dsimissed (without reasons, [2008] SCCA No. 357.
- *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.
- *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] OJ No. 4790 (Ont. CA).
- *John Voortman & Associates Ltd. v. Haudenosaunee Confederacy Chiefs Council*, [2009] OJ No. 1350.
- *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, 2005 SCJ No. 71.
- *R. v. Manuel*, [2008] BCJ No. 557 (BCCA); application for leave to appeal to the SCC dismissed (without reasons), [2008] SCCA No. 265.
- *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] SCJ No. 17 (SCC).
- *Six Nations Elected Council v. City of Brantford and Ontario*, Ontario Superior Court of Justice File No. CV-08-361454.
- *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] SCJ No. 69.

Duty to Consult and the OMB

Applicable *Planning Act* Requirements

- Section 2 of the Act provides that:

  "The Minister, the council of a municipality, a local board, a planning board and the Municipal Board, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest such as,

  . . . .

  (d) the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest.

Applicable Provincial Policy

Section 2.6 of the PPS provides:

2.6.1 *Significant built heritage resources* and *significant cultural heritage landscapes* shall be conserved.

2.6.2 *Development* and *site alteration* shall only be permitted on lands containing *archaeological resources* or *areas of archaeological potential* if the *significant archaeological resources* have been conserved by removal and documentation, or by preservation on site. Where *significant archaeological resources* must be preserved on site, only *development* and *site alteration* which maintain the heritage integrity of the site may be permitted.

2.6.3 *Development* and *site alteration* may be permitted in *adjacent lands* to *protected heritage property* where the proposed *development* and *site alteration* have been evaluated and it has been demonstrated that the *heritage attributes* of the *protected heritage property* will be *conserved.*

Mitigative measures and/or alternative development approaches may be required in *order to conserve the heritage attributes of the* protected heritage property affected by the *adjacent development* or *site alteration.*

Duty to Consult

Planning Act Notice

- O. Reg. 543/06 & O. Reg. 544/06:

  In the case of official plans and official plan amendments and subdivisions the requirement is that notice be given to the,

  > "*Chief of every First Nation council, if the First Nation is located on a reserve any part of which is within one kilometre of the area to which the proposed official plan or plan amendment would apply*".

Duty to Consult and the OMB

Brent v. Brantford [1994] O.M.B.D. No. 1001 (O.M.B.)

- Appeal of a zoning by-law in City of Brantford. Objections from First Nations that development inappropriate until land claims settled.

- First Nations objectors did not participate in hearing and insufficient evidence to determine if legitimate land claim.

- ". . .*this Board … has no statutory power to halt development of land on the basis that the land is subject to a claim by aboriginal peoples. … the Board feels comfortable taking official notice that there are a number of land claims outstanding in the Province, which are under active negotiation between First Nations representatives and both the Federal and provincial governments*."

Duty to Consult and the OMB

***Arber* v. *United Counties of Prescott and Russell* - Decision #1919 dated December 13, 2004. (OMB Case PL030382)**

- Appeal of OPA and claim of ownership of Algonquin land in area of proposal and because development could give rise to land claims.
- Appellant sought to add land claim issue and challenge the legality of the *Planning Act*.
- Request denied to bring the motion to determine the legality of the *Indian Act* and the *Planning Act* on the basis that should be made in a court of competent jurisdiction.
- OMB struck out aboriginal rights issue, "*such issues are not relevant to the determination by this Board of what constitutes appropriate land use planning policies to be included in an official plan. Such rights should be determined in the appropriate judicial forum.*"

Duty to Consult and the OMB

***Canadian Hydro Developers* v. *Melancthon* – Decision dated August 9, 2007 (OMB Case PL060653)**

- Proposal to add 69 wind turbines to an existing wind farm in the County of Dufferin.
- Douglas Fisher, representing Mohawk Nation claimed a share of the revenue and improved consultation with the Mohawk Nation based on Haldimand Proclamation of 1784.
- Board: "… *wrong forum to advance a land claim. The Board has authority … to decide questions of law when they are related to planning matters. Land claims are unrelated and must be decided first before Planning Act considerations are taken into account*"

Duty to Consult and the OMB

***Kimvar Enterprises Inc*. v. *Nextnine Limited* – Decision #2350 dated August 20, 2007 (OMB Case No. PL050290)**

- Appeals for proposed official plan amendments, zoning by-law amendments and draft plan of subdivision for a proposed resort project at Big Bay Point, Innisfil.

- Settlement reached between all parties except two landowners and resident's group. There had been 11 pre-hearing conferences and the hearing was about to commence.

- Motion brought for an adjournment and a constitutional challenge to regulations under the *Planning Act* on the eve of the hearing.

Duty to Consult and the OMB

- Basis for the adjournment request included prematurely based on grounds which included that the relevant First Nations people were not contacted or consulted by the proponent with respect to the proposed development.

- In dismissing the motion to adjourn, the Board stated that "notice to the First Nations is not a basis upon which to delay commencement of the hearing. First, all requisite notices have been given under the Planning Act . . ."

- Board noted that "there remain several opportunities to provide for preservation of site in an appropriate manner and further opportunity for consultation with Huron-Wendat Nation"

Duty to Consult and the OMB

Where are we and where do we go?

- *Carrier Sekani Tribal Council* v. *British Columbia (Utilities Commission)*, 2009 B.C.C.A. 67.

- *Kwikwetlem First Nation* v. *British Columbia (Utilities Commission)*, 2009 B.C.C.A. 68.