DUTY TO CONSULT

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LOCAL GOVERNMENTS & THEIR DUTY TO CONSULT

1. Two aspects to duty to consult.
2. Legal Duty to Consult (Statute & Common Law)
3. Good neighbour duty to consult

LOCAL GOVERNMENTS & THE LEGAL DUTY TO CONSULT

- Constitutional Duty Lies with the Federal and Provincial Government and their agencies and delegates. (*Haida Nation v. BC* (2004) SCC and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (2010) SCC)

- Local Governments do not have a common law or constitutional duty to consult (*Neskonlith v. Salmon Arm* (2012) BCCA)

- Local Governments may have statutory obligations to consult

LOCAL GOVERNMENTS AND THE GOOD NEIGHBOUR DUTY TO CONSULT

- Good neighbour duty is built on growing a relationship.
- Protocols are useful tools in building relationships.
- Benefits include good planning and a better relationship.

Scenario

What should the municipality do?

THE SCENARIO

- You are legal counsel for Municipality "A" (the **"Municipality"**), which has planning authority over official plans and zoning by-law amendments.
- A recreational complex on private servicing has operated for 40 years on a property in a rural/semi urban part of the Municipality designated Agriculture and zoned Parks & Recreation, which is adjacent to a neighbouring major urban municipality.
- The property is zoned "as of right" for a recreational complex.
- The property has been sold and the new owner/developer wishes to rebuild the outdated recreational complex on the property and add a medical clinic. Doctors are needed in the community.

SCENARIO cont…

- Neighbours appealed a Zoning By-law Amendment to a Parks and Recreation Exception Zone, with Holding requiring Site Plan Control to the Land Tribunal with jurisdiction over the matter and have presumtively appealed a potential Official Plan Amendment to an Agriculture Special Policy Area that if passed, would allow for the additional medical clinic use.
- The appeals come at a time when there is no legislation in place dismissing third party appeals.
- The neighbouring estate-lot owners do not like the idea of a medical clinic and engage the local media, stating the rebuild with an addition of a medical clinic/ associated parking/traffic are unacceptable in terms of scale. Such is a mask for a nimby appeal.
- The expert Planner and Engineer for the Municipality confirm that in each of their applicable opinions, scale/servicing/traffic etc. are all non-issues and can be appropriately be addressed through site plan control

The OFFICIAL PLAN

- The Municipality's Official Plan recognizes:
  - the Municipality is located on the Treaty and Traditional Territory and Ancestral Lands of many Indigenous peoples and is covered by several Upper Canada Treaties
  - and celebrates the contributions of Indigenous Communities in our shared cultural heritage
  - the Municipality is now home to many First Nations, Métis, and Inuit peoples and communities that have a unique relationship with the land and its resources, which continue to shape the history and economy of the Municipality
  - the unique role Indigenous Communities have in land use planning and development, and the contribution of Indigenous Communities' perspectives and traditional knowledge to land use planning decisions.

OFFICIAL PLAN cont…

- the importance of consulting with Indigenous Communities on planning matters that may affect their Treaty rights and interests and seeks to build constructive, cooperative relationships through meaningful engagement to facilitate knowledge-sharing in land use planning processes, inform decision-making, and build partnerships.

- Most importantly, the Official Plan states that the Municipality:
  - **recognizes the unique role Indigenous Communities have in land use planning and development, and the contribution of Indigenous Communities' perspectives and traditional knowledge to land use planning decisions. The municipality and local municipalities <u>shall consult</u> with Indigenous communities on planning matters that <u>may affect</u> treaty rights and interests.**

NEIGHBOURLY AGGRANDIZEMENT

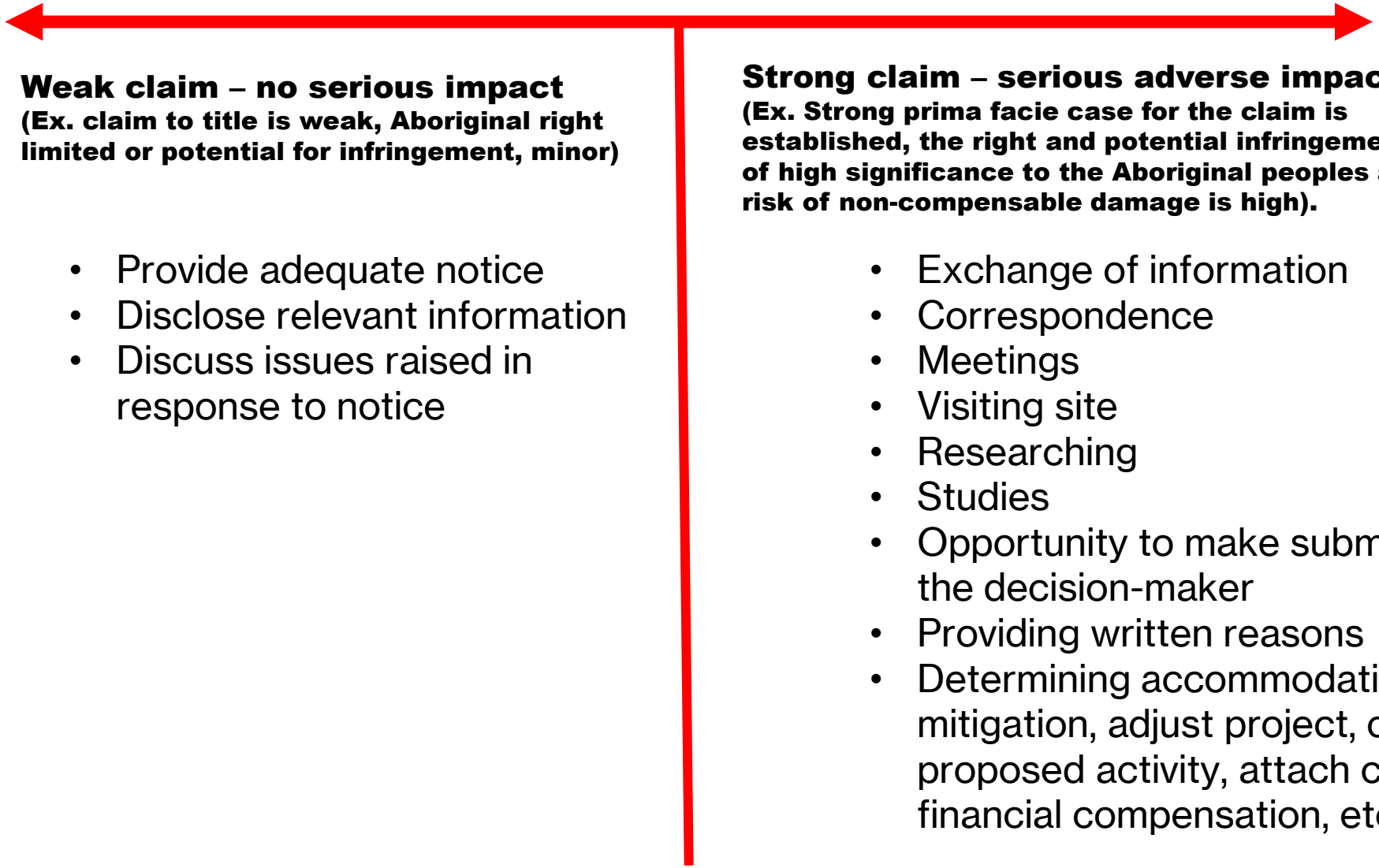
- Without knowledge of the Municipality until immediately before the expected Council vote on the OPA, the neighbours had contacted a nearby Indigenous Community which has a reserve located 13km from the property (outside the statutory circulation range), suggesting to the community that the Municipality was trampling the Indigenous Community's respective rights and requests that they become part of the Appeal
- Immediately prior to the Council vote on the OPA, the Municipality received a letter from legal counsel for the Indigenous Community alleging *inter alia*, that the property was in the heart of the First Nation's traditional territory recognized in a particular historic claim settlement and that the Municipality failed to consult the Indigenous Community as required by the Municipality's Official Plan and applicable planning legislation

Haida Nation v British Columbia (Minister of Forests) |[2004] 3 SCR 511

- Duty arises when a government knows about or ought to know about the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it.
- Crown, alone remains legally responsible to consult.
- Procedural aspects may be delegated
- Scope of the duty is largely dependent on the result of a ‘strength of claim assessment.’

*Chart from: Association of Municipalities Ontario, “Municipal Governments and the Crown’s ‘Duty to Consult’ Towards a Process that Works for Local Communities” (2019)

Haida Nation – Consultation Spectrum



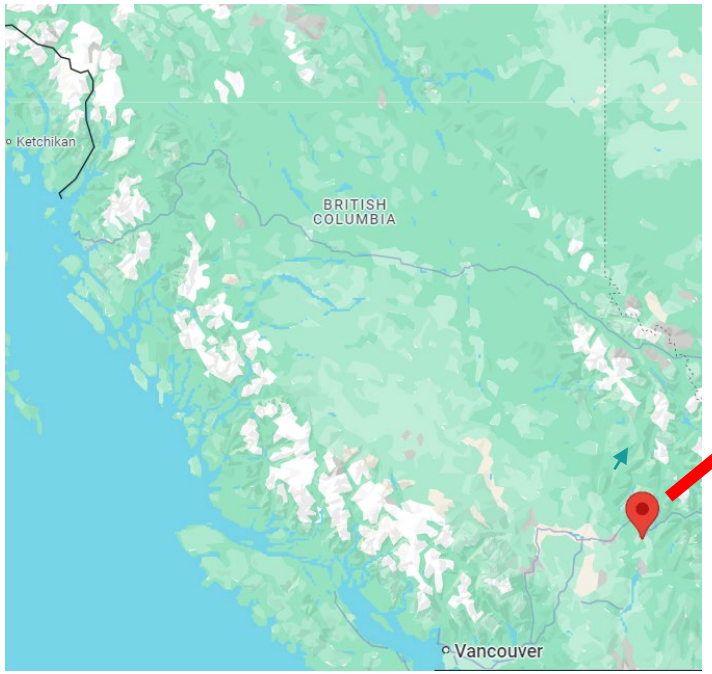
Weak claim – no serious impact
(Ex. claim to title is weak, Aboriginal right limited or potential for infringement, minor)

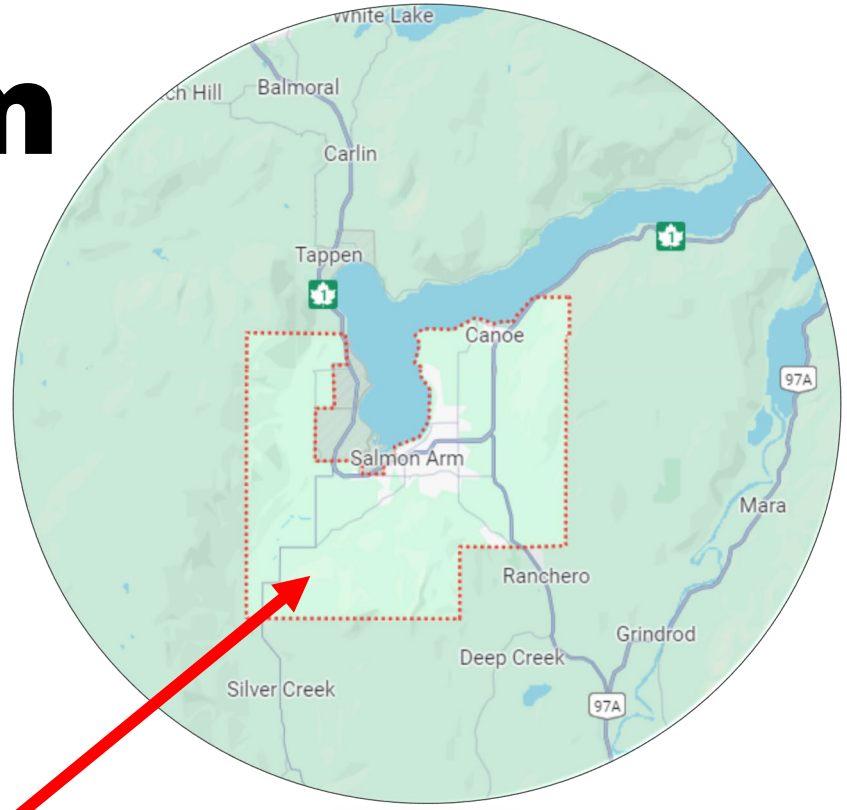
- Provide adequate notice
- Disclose relevant information
- Discuss issues raised in response to notice

Strong claim – serious adverse impact
(Ex. Strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples and risk of non-compensable damage is high).

- Exchange of information
- Correspondence
- Meetings
- Visiting site
- Researching
- Studies
- Opportunity to make submissions to the decision-maker
- Providing written reasons
- Determining accommodation: mitigation, adjust project, changing proposed activity, attach conditions, financial compensation, etc.

Neskonlith Indian Band v Salmon Arm (City) |2012 BCCA 379





- Municipalities <u>do not</u> have an independent duty to consult.
- Municipalities are not delegated the remedial powers to do what consultation may require.
- “push down” of consultation obligations is impractical, given the volume of decisions municipalities undertake.
- Daily life would be “bogged down” if consultation was added to the range of decision municipalities are required to make (ie: licenses, permits, zoning restrictions, bylaws).

Municipalities are not a protected order of government

Section 92(8), 1867 Constitution Act

> **92** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> (8) Municipal Institutions in the Province.

“Creature of Statute”

Chippewas of the Thames First Nation v Enbridge Pipelines Inc |2017 SCC 41

Clyde River (Hamlet) v Petroleum Geo-Services |2017 SCC 40

- Regulatory processes can partially or completely fulfill the duty only if the delegated body has the procedural and remedial powers to consult and if needed, accommodate.
- If the Crown is delegating the consultation to an administrative or statutory body, the Crown must also provide adequate notice of same.
- The Crown bears responsibility for the adequacy of the consultation.

Ontario Provincial Policy (Planning) Statement

2014 PPS – 1.2.2	2020 PPS – 1.2.2	2024 PPS – 6.2.2
Planning authorities are encouraged to coordinate planning matters with Aboriginal communities.	Planning authorities shall engage with Indigenous communities and coordinate on land use planning matters	Planning authorities shall undertake **early** engagement with Indigenous communities and coordinate on land use planning matters to **[1]** facilitate knowledge-sharing, **[2]** support consideration of Indigenous interests in land use decision-making and **[3]** support the identification of potential impacts of decisions on the exercise of Aboriginal or treaty rights.

Brantford (City) v Montour |2010 ONSC 6253

- Municipal governments can carry out procedural aspects of duty to consult.
- Crown can rely on statutory municipal planning process to fulfill its duty to consult where the strength of the claim is on the light end of the spectrum.
- Cost, legal, and timing risks associated when Aboriginal claims are asserted.

Burleigh Bay Corporation v. North Kawartha (Township)|[2017] 1 OMBR (2d) 361

- Ontario Municipal Board confirmed the duty to consult and accommodate is an obligation of the federal or provincial Crown and not third parties, or even the Township. – though both municipalities and developers have an interest in facilitating the consultation process.
- The Board determined it had no jurisdiction relating to treaty rights.
- The scope of the duty will vary from scenario to scenario.
- Being owed a duty to consult does not mean Aboriginal communities have a veto power over decisions.

CAMPP Windsor Essex Residents Association v Windsor (City) | 2019 CarswellOnt 20198

- Need for more direction in the Provincial Policy Statement.
- Outlined the thresholds for where public consultation processes accommodating the public at large will be insufficient in satisfying the duty.
- While LPAT noted more could have been done to consult, it nonetheless concluded the duty had been satisfied.

OTHER BC GOVERNMENT CONSULTATION REQUIREMENTS

- Common for province to require consultation by local governments with First Nations when:
  - Land transaction with province
  - Financial grant from province that may impact First Nations
  - Local government requires approval from provincial decision-making agency
- Province maintains webpage with resources for consultation guidance: https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations
- The *Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c. 44*
  - Affirms the application of the United Nations *Declaration on the Rights of Indigenous Peoples* (the "Declaration") to the laws of British Columbia
  - Requires the government to take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

Scenario:
What actually happened?

- The Municipality obtained a legal opinion and legal advice on the Duty to Consult from their solicitor:
  - that there is no municipal duty to consult; such rests with the Crown (Federal and Provincial Government)
  - that the Crown can require that others whose decisions and actions may impact indigenous rights also take certain steps and be involved in carrying out the Crown's responsibility
  - that the Province does through Provincial Policy, encourage municipalities to engage early in the planning process with those Indigenous Communities that may be impacted by such decisions

Scenario:
What actually happened, cont...

- that legal letter received did not identify what indigenous rights and/or claims may be impacted by the proposed development, which was outside of the statutory distribution range.

- recommending deferral of the matter and the scheduling of an in person engagement discussion with the Indigenous Community at the political and staff level.

- recommending the Municipality not commence the engagement from “too legal” or “rights based” framework, and focus on “interests” instead.

Scenario:
What actually happened, cont…

- The Municipality followed the advice and conducted the engagement conversation, focusing on learning the “interests” of the Indigenous Community
- The Indigenous Community highlighted the core elements for consultation for them going forward, being:
  - their practice of incorporating traditional knowledge into evaluation processes
  - their joint decision-making in resource management
  - their wish explore potential mutual economic benefit, and
  - their wish for early engagement going forward

Positive outcome

- The discussion set the beginning of a protocol or parameters of how the Municipality would go about furthering its consultation statement from its Official Plan
- The Indigenous Community provided the Municipality with a return letter confirming that it had no interest in being involved in the appeal and confirming that its interests could all be addressed through the site plan control stage of the development

Dismissal of the appeal

- The Municipality returned to Council and Council passed the OPA
- The return letter assisted the Municipality's position on the appeals and was going to play a major part in the Municipality's planned Motion to Dismiss
- The appeals came to ultimately be dismissed on other grounds – planning legislation dismissing third party appeals

ADDITIONS TO RESERVE

- An Addition to Reserve (“ATR”) = a parcel of land added to an existing reserve or the creation of a new reserve

- Four Stages of ATR process:
  1. Initiation
  2. Assessment
  3. Completion
  4. Approval (or Rejection)

CANADA'S ATR POLICY

- Canada’s ATR Policy provides details for process.
- CIRNAC promotes a “good neighbour” approach and views of province/territory and local governments, considered.
- Approval if all concerns addressed, cost effective and budgeted.

ATR BEST PRACTICES

- Be proactive.
- Address important issues: services, land use planning, bylaw enforcement, fees and charges, and property taxation.
- Focus on finding reasonably practical solutions that strike a fair balance between the interests of the local government and the First Nation.

BEST PRACTICES FOR CONSULTATION

- Know the details of the applicable treaties.
- Obtain legal advice so that the Municipality is aware of its legal rights and obligations.
- Establish a protocol for communications, meetings and decision making.
  - Have an engagement dialogue that does not begin with “too legal” of a framework.
- Neutral or alternate locations.
- Focus on the interests of Indigenous Communities and listen.
- Process for dispute resolution.
- Create a Truth and Reconciliation Action Plan (TRP) beginning with an opportunity for all community members to engage in meaningful public dialogue by sharing insights and contributing ongoing efforts of reconciliation - vital in shaping future of community (Cornwall September 25, 2024).