

Crown Consultation **Pitfalls and Potential**

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New Brunswick First Nations Training Seminar & Strategy Session

Overview

- ❖ **What is the duty to consult?**
- ❖ **What are your consultation rights?**
- ❖ **What are the limits to the duty to consult?**
- ❖ **Making the most of consultation processes**
- ❖ **International Human Rights**
- ❖ **Proactive Steps to build your legal position**

What is the Duty to Consult?

- ❖ The Crown's duty to engage meaningfully with Aboriginal groups prior to making decisions that have the potential to adversely affect Aboriginal and treaty rights
- ❖ Recognized by the Supreme Court of Canada in the 2004 *Haida Nation* and *Taku River Tlingit First Nation* decisions (Aboriginal rights and title), and in the 2005 *Mikisew Cree First Nation* decision (treaty rights)
- ❖ Constitutional duty, held only by Crown (not proponents)
- ❖ Arises from the honour of the Crown
- ❖ Only part of the reconciliation process: consultation and accommodation are meant to protect s. 35 rights in the interim, pending more long-term resolution of rights claims via litigation, modern treaties, or other agreements

Know Your Rights:

Core Crown Obligations in Consultation

- 1. Early engagement**
- 2. Limited delegation to proponents**
- 3. Information reasonably required to understand proposed project/Crown decision**
- 4. Reasonable amount of time to consult**
- 5. Transparent decision-making process**

Know Your Rights:

Core Crown Obligations in Consultation

- 6. Crown representatives with mandates to discuss all relevant issues**
- 7. Two-way dialogue (i.e. Crown responds to Aboriginal information and views)**
- 8. Open-minded about final decision**
- 9. Reasonable accommodation of reasonably asserted rights, to address potential impacts of proposed project/Crown decision**

The Realities of Crown Consultation

- ❖ The focus is on interim “*compromise*”
- ❖ Rejection of major projects is very rare
- ❖ *Process*-focused rather than *outcome*-focused
- ❖ Securing meaningful outcomes can be challenging
- ❖ Piecemeal engagement on development – may not address the “big picture”
- ❖ Lack of capacity to engage effectively
- ❖ Often frustrating/disillusioning

Why Consult?

- ❖ **Boycotting consultation means losing *all* consultation rights and leverage**
- ❖ **Rigorous testing of projects depends on government, FNs**
- ❖ **Opportunity to mitigate impacts – better outcomes, if not ideal outcomes**
- ❖ **Expression of community concern/opposition**
- ❖ **Enhances negotiating position**

The Golden Rule

STRENGTH OF CLAIMS

+ SEVERITY OF IMPACTS

**SCOPE OF DUTY TO CONSULT
LEVERAGE TO SHAPE PROCESS &
OUTCOMES**

Building the Record: *Legal Foundation*

- ❖ **Consultation is triggered by credible claims to s. 35 rights, *not other interests***
- ❖ **Advance a *defensible, supported* position on your Aboriginal and Treaty Rights**
- ❖ ***Substantiate* your position on the record, e.g.:**
 - historical records
 - anthropological evidence
 - oral history

Building the Record: *Cultural Impacts*

***Capture* the full cultural importance & impact of proposed development, e.g.:**

- ***Time depth* of use & occupation**
- **Personal or family histories**
- ***Special cultural or spiritual values***
- **Cross-generational teaching**
- **Loss of other traditional areas/relative value**
- **rare species or cultural values**

Building the Record:

Present Use & Importance

- ❖ ***Present use*** is as important as *historic* use – what impact would this development have *today*?
 - How is the area actively used today?
 - Are alternative traditional use areas limited?
- ❖ It is critical to document and present information about *current use and importance* of the area

Building the Record: *Supporting Materials*

- ❖ **Your position is only as strong as the supporting evidence**

- ❖ **Build as strong a record as possible, *e.g.*:**
 - TK/TUS
 - Written statements/affidavits by members
 - Documentary footage/interviews
 - Archeology reports
 - Expert reports (wildlife, historical context, ethnographic, etc.)
 - Record of consultation meetings with Crown

Rules of Engagement:

Engage

- ❖ **As a general rule: take *every* opportunity for engagement with the Crown**
 - Respond in a timely way to referrals
 - Meet deadlines for response
 - Take opportunities to meet or raise concerns

- ❖ ***Or*: put very compelling reasons on the record for not engaging**

- ❖ **Otherwise: *consultation rights can be lost***
e.g. *Little Salmon/Carmacks (SCC)*

Rules of Engagement: *Process*

- ❖ Courts have said FNs cannot demand a *particular* process for engagement (*e.g.* Consultation Protocol) or a *separate* process of Crown engagement.
- ❖ Environmental assessment (EA) is often the *primary* engine of Crown consultation for major projects
- ❖ Courts have said EA may discharge Crown consultation duties in some cases (*e.g. Taku River, Brokenhead*) but in some cases *further* consultation may be needed.
- ❖ Boycotting EA can mean losing all rights and leverage.

Brokenhead Ojibway First Nation v Canada

“The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief ...”

- 2009 FC 484

Rules of Engagement:

Not Worth Fighting:

- Less than ideal process, not customized
- Low level Crown representatives
- Crown refuses to enter Consultation Protocol
- Delegation to Proponent

Worth Fighting:

- Process is unclear, or cannot address concerns
- Information not effectively conveyed to decision-makers
- Crown refuses to commit to process that will discharge DTC
- Crown fails to engage

Rules of Engagement:

Propose Accommodations

- ❖ First Nations right to “veto” is very limited
- ❖ It can be strategic to propose a range of possible accommodations
- ❖ Shows reasonableness and good faith
- ❖ Puts ball squarely in Crown’s court and forces further dialogue (or if they fail to respond, they began to look unreasonable)

Rules of Engagement: *Cumulative Impacts*

- ❖ **Caselaw: Crown is only obliged to consult on the proposed decision/course of action**
- ❖ **Cumulative impacts will sometimes lie outside of the scope of the decision (as a matter of law)**
- ❖ **But cumulative impacts *may* still be an issue in some cases, *e.g.*:**
 - **Very large projects**
 - **Diminishing land base to exercise s. 35 rights**

Community Engagement

- ❖ Major projects can be divisive & negative for communities
- ❖ Community engagement can be very important – position is only as strong as the community support
- ❖ Update community on progress & frustrations
- ❖ *Unity* is essential to effectively oppose a major project
- ❖ Try to provide the community with a *voice* in the process:
 - direct engagement with Crown decision-makers
 - site visits
 - strong community voice can be a game-changer

Funding & Resources

- ❖ **Government consultation/EA funding**
 - Far from sufficient, and recently slashed

- ❖ **Proponent funding**
 - Participation agreement/technical funding
 - Should not require FN to support project
 - Make sure no other unacceptable strings attached
 - Ideally pre-EA agreement
 - Use government/Panel for pressure

- ❖ **Foundations/Donors**
- ❖ **Public interest groups**

International Human Rights

Human rights of Indigenous peoples guaranteed in a number of binding treaties:

- ❖ International Convention on the Elimination of all Forms of Racial Discrimination**
- ❖ American Declaration on the Rights and Duties of Man**
- ❖ International Covenant on Economic, Social and Cultural Rights**
- ❖ International Covenant on Civil and Political Rights**

U.N. Declaration on the Rights of Indigenous Peoples

Article 3:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

U.N. Declaration on the Rights of Indigenous Peoples

Article 26(1):

Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

U.N. Declaration on the Rights of Indigenous Peoples

Article 28(1):

Indigenous peoples have the right to redress, by ...
restitution or, when this is not possible, just, fair
and equitable compensation, for the lands,
territories and resources which they have
traditionally owned or otherwise occupied or used,
and which have been confiscated, taken, occupied,
used or damaged without their free, prior and
informed consent.

U.N. Declaration on the Rights of Indigenous Peoples

Article 32(2):

States shall consult ... to obtain ... free and informed consent prior to the approval of any project affecting their lands or territories and other resources ...

Legal duties, *not* “aspirations”

- ❖ International instruments are “relevant and persuasive” for interpreting domestic law
- ❖ UNDRIP does not create new rights – it consolidates three decades of progress on international human rights
- ❖ Right to FPIC recognized by *American Declaration; International Covenant on Economic, Social & Cultural Rights; UNCERD*
- ❖ *American Declaration* – duty of state to “define, delimit and demarcate” Indigenous lands based on customary land use

Enforcing International Law

- ❖ **Canada is increasingly on the wrong side of established international norms**
- ❖ ***To date*, Canadian courts have not applied international human rights to s. 35 claims**
- ❖ **Limited options for enforcement:**
 - **Inter-American Commission on Human Rights**
 - **UN Special Rapporteur**
 - **UN CERD**
- ❖ **But progress may come with political, legal, international pressure**

Proactive Steps to Strengthen Rights

- ❖ Develop and support *legal position* on s. 35 rights
- ❖ Build *historical record* of treaty rights, land use, occupation
- ❖ Document *current* use of traditional lands
- ❖ Consider *electronic database* of TK/TUS materials
- ❖ Identify & prioritize core traditional use areas and natural resources in consultation and negotiations
- ❖ Engage in *strategic litigation*, where necessary
- ❖ Develop unified front with neighbouring Nations

Strong Culture = Strong Rights

- ❖ **Encourage and support members that are culturally active on the land, *e.g.*:**
 - **Culture camps**
 - **Hunting cabins**
 - **Community gatherings**
- ❖ **Support a strong youth voice on the future of traditional lands & resources**
- ❖ **Document ongoing, active use of the land**

Thank you.

Any questions?

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