

The Constitutional Duty to Consult with Indigenous People

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Introduction

- The duty to consult, and where appropriate, accommodate, arises where a Crown action or decision has the potential to adversely affect a proven or credibly asserted s. 35 Aboriginal or treaty right.
- It is one of several standards to measure the conduct of the Crown in achieving the purpose of s. 35 and that flow from the constitutional principles of honour and reconciliation that inform s. 35.
- To fully understand the duty as well as legal issues informing contemporary challenges and reforms
 - S. 35 of the *Constitution Act, 1982*
 - Concepts of honour of the Crown and reconciliation
 - Fundamental principles of consultation law
 - Contemporary challenges, recent cases and law reform
 - **Adequacy of consultation in complex interprovincial projects (Northern Gateway, TMX, Coldwater)**
 - **Representative Authority (Coastal Gas Link)**
 - Implications of UNDRIP
 - New federal environmental and energy regulatory regimes (Bill C 68 and 69)

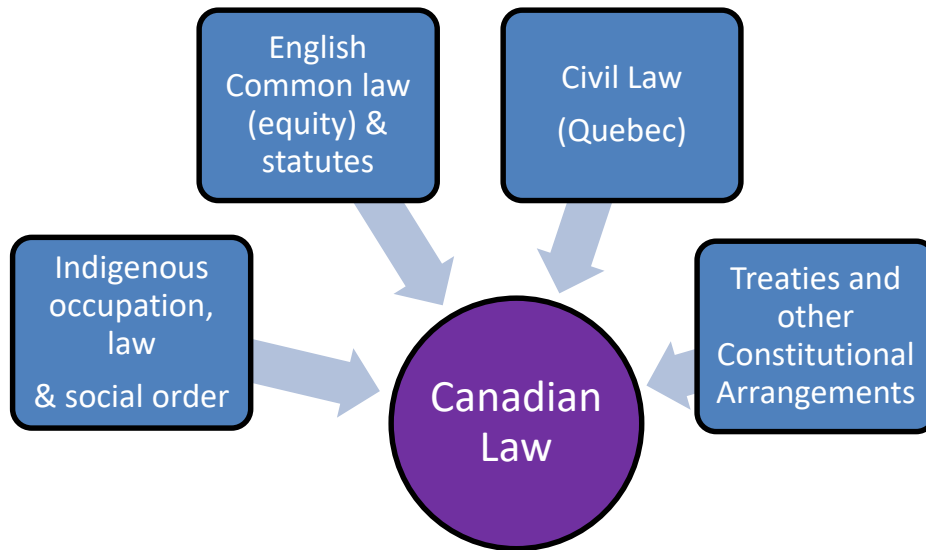
Section 35 Constitutional Rights

35(1) “The **existing aboriginal and treaty rights** of the aboriginal peoples of Canada are hereby **recognized and affirmed**”

- Empty box?
- S. 37 conferences
- Litigation
- Negotiation

What is “Recognized and Affirmed?”

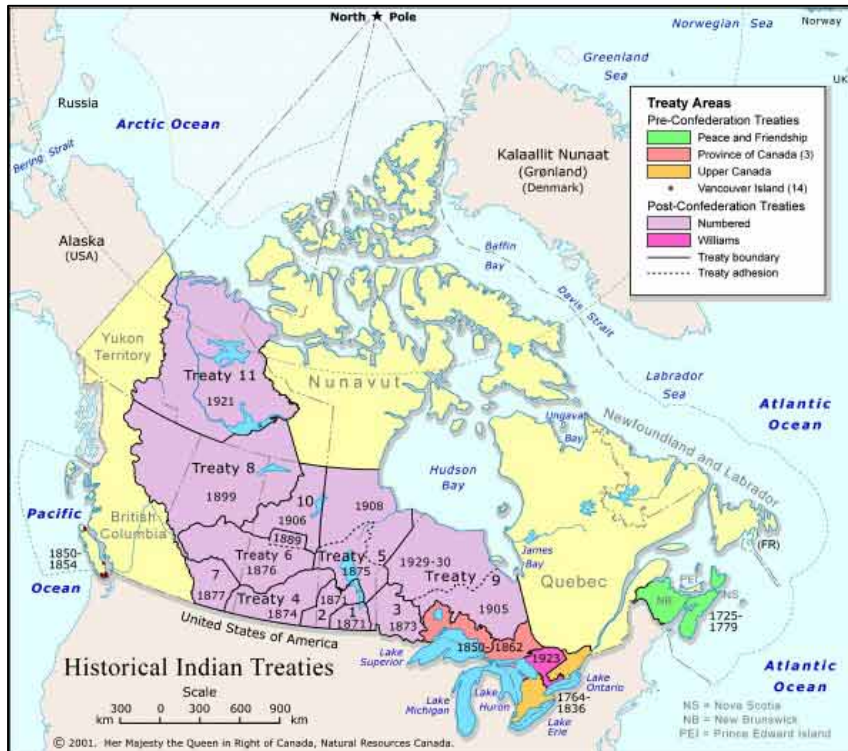
Common Law Doctrine of Aboriginal Rights



- **Informs content of s. 35**
- **Recognizes inherent** collective human rights grounded in prior possession, political, legal, social and landholding systems
- **Doctrine of continuity** - surrender, termination, incompatible with Crown sovereignty
- **Parliamentary sovereignty** (debate)
- **What rights are recognized in s 35 ?**
 - **Aboriginal title** (collective ownership and control, substantial ongoing connection)
 - **Aboriginal rights** grounded in specific practices, customs and traditions that continue to be integral to Indigenous societies
 - **Governance** (debate)

What is “Recognized and Affirmed?”

Treaty Rights



- Not all treaties address land.
 - The duty extends to treaty rights and credibly asserted aboriginal rights in these areas
- Royal Proclamation of 1763 set out process for surrender of “Indian” lands by treaty.
- There is disagreement on the nature of the treaty relationship and interpretation of treaty terms.
 - honour of the Crown requires purposive interpretation that includes oral promises and implied terms
 - consultation when government actions may potentially adversely affect recognized or credibly asserted treaty
- In 1973 (*Calder* case) most of BC, Northern Canada and Quebec were unceded territory
 - The duty extends to credibly asserted claims to title & rights in unceded territories.

Unceded territory 1973 – yellow

“Existing” Rights

Scope of s. 35 Rights

s. 35(1) “The **existing** aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”

- Provincial “buy in ”
- “Unextinguished” Aboriginal and treaty rights
- Pre-1982 termination
- Does not mean frozen at a historical point pre – contact. Interpret flexibly so as to permit meaning and evolution over time

What is “Recognized and Affirmed?”

Aboriginal rights and title in Unceded Territories

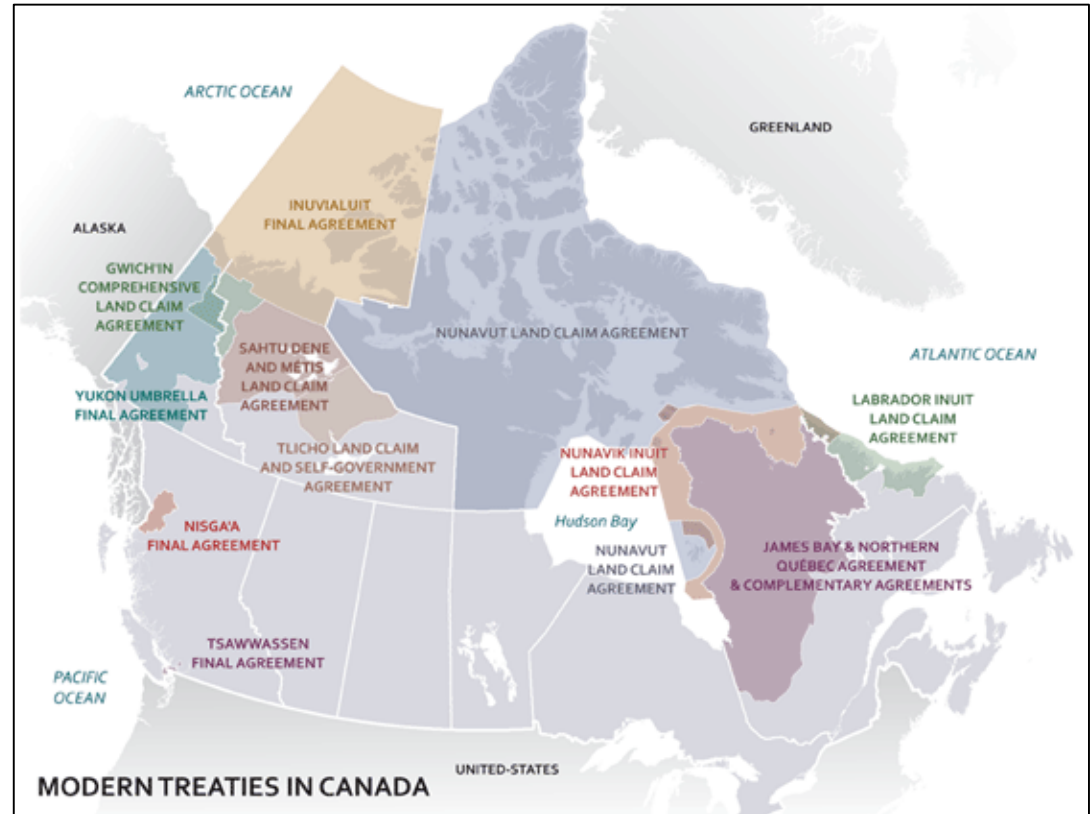
Example British Columbia

- Granted reserves
- Few treaties
- **Continuity** of Aboriginal title (*Calder* 1973; *Delgamuukw*, 1997; *Tshilqot'in* 2014)
- **Continuity** of Indigenous law (customary law) and institutions integral to distinctive Aboriginal cultures (*Delgamuukw*, 1997; *Van Der Peet* 1996)
- Hereditary Chiefs and *Indian Act* band councils.
- Implications for negotiation of s. 35 rights and consultation (Coastal Gas Link B.C. injunctions and protests)

What is Recognized and Affirmed?

- 35(3) “treaty rights include rights that now exist by way of land claims agreements or may be so acquired”
- Consultation & decision making mechanisms negotiated
- Honour of Crown still applies in interpretation and implementation

UNCEDED TERRITORIES 1973

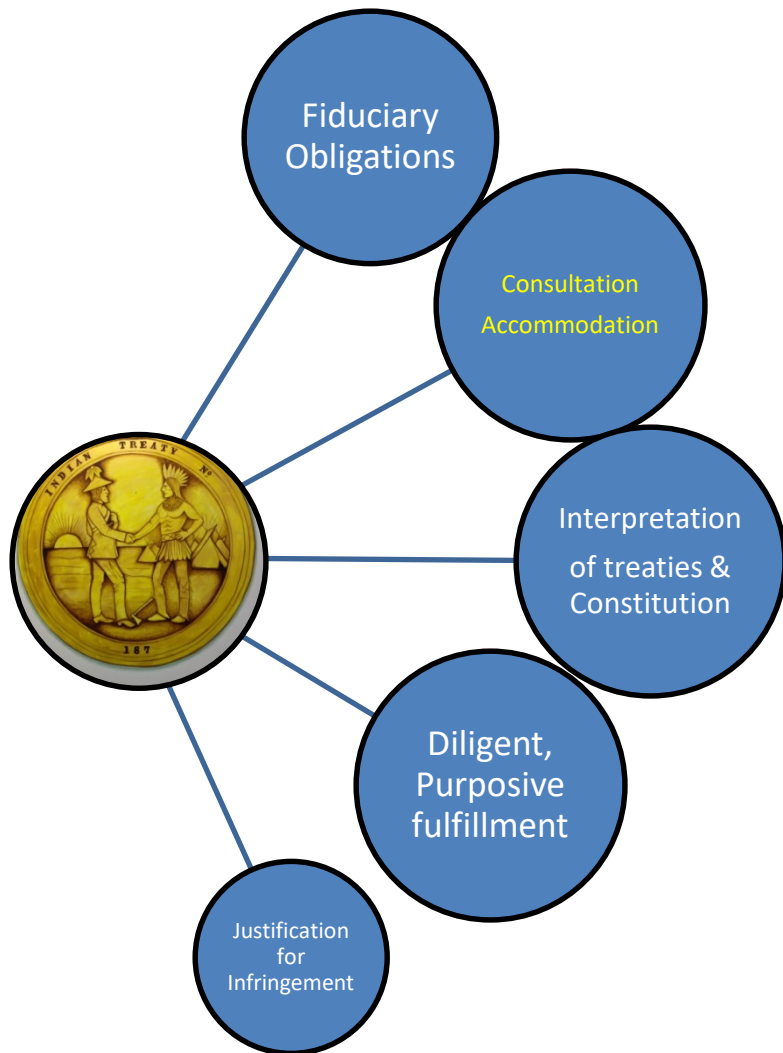


Honour of the Crown

What has the SCC said?

- Standard against which conduct by or on behalf of the Crown could be measured and limit on arbitrary exercise of power by the sovereign and its representatives over its subjects and their property (Early English law).
- Informs interpretation of s. 35 obligations and protections
- Has as its “ultimate purpose ... reconciliation of the Crown’s assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples.” (purpose of s. 35)
- Generates different duties and standards against which conduct by or on behalf of the Crown is measured in the process of reconciliation

Honour of the Crown



Where rights have not been negotiated through treaty honour requires that they be “determined, recognized and respected” through negotiation, consultation and where appropriate accommodation.



Reconciliation

What has the SCC said?

- The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act*
- **Reconciliation** ...takes as a starting point the historically based rights of the Aboriginal group concerned, as determined by the principles of **recognition**, but also takes into account a broad range of other factors, such as the modern condition of the lands and resources affected, the Aboriginal group's contemporary needs and interests, and the interests of third parties and society at large.
- **Modern treaties**... attempt to further the objective of reconciliation by addressing land claims and creating the legal basis to foster positive long-term relationships

Reconciliation and the Duty to Consult

(Coldwater Indian Band et al FCA 4/2020)

“Too often decisions affecting Indigenous peoples have been made without regard for their interests, ...with terrible neglect and damage to their lives, communities, cultures and ways of life. Worse, almost always no effort was made to receive their views and try to accommodate them—quite the opposite. **The duty to consult is aimed at helping to reverse that historical wrong.**”

- Reconciliation does not dictate a particular substantive outcome and takes into consideration interests of society and third parties at large.
- Veto in favour of Indigenous interests not consistent with this concept of reconciliation.

Duty to Consult

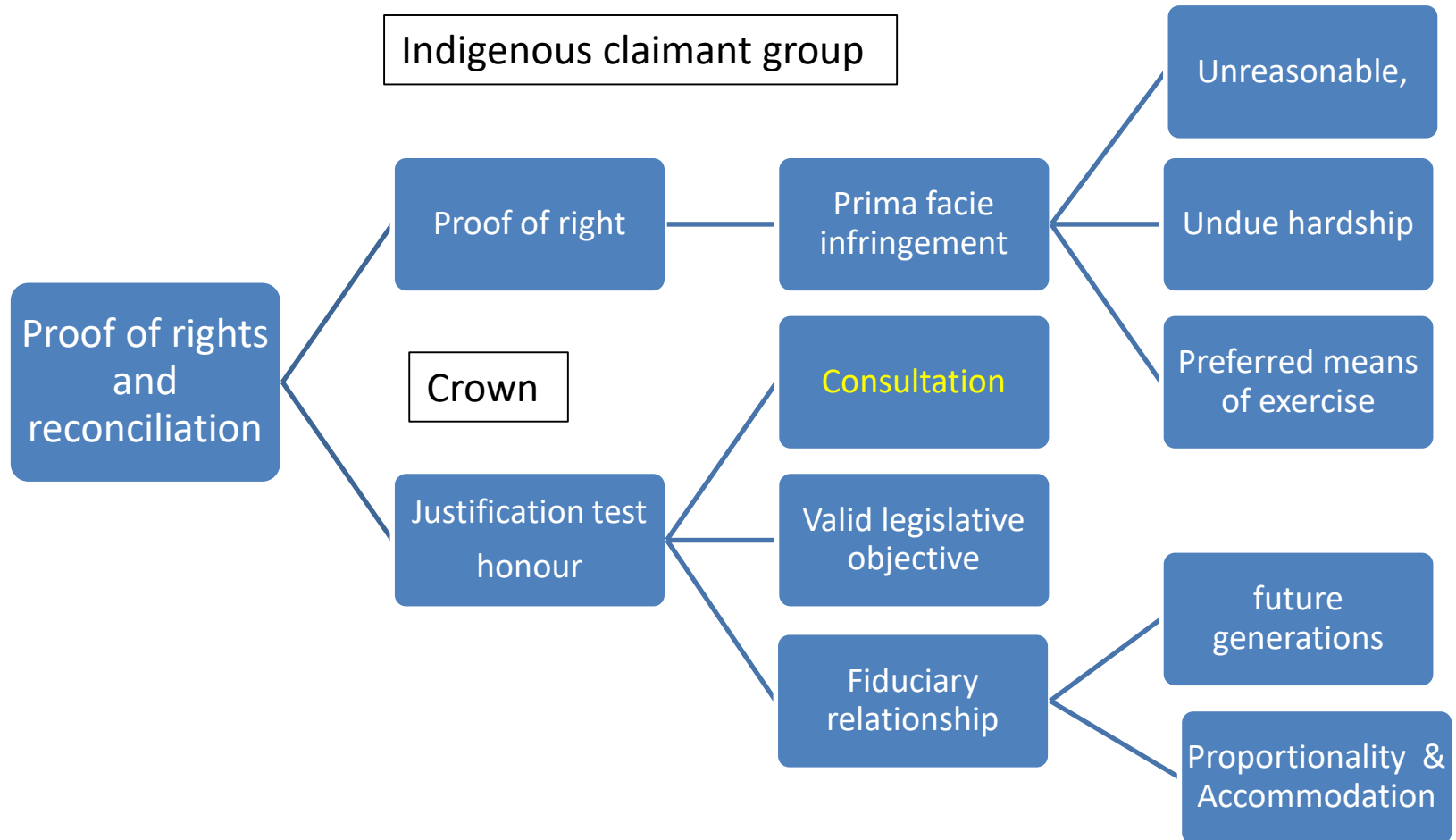
When does the duty arise?

(1) Justification for infringement of an **Aboriginal or treaty right proved before the court** and recognized in s. 35

(2) When the Crown has actual or constructive knowledge of the **potential existence of credibly asserted but not yet proven Aboriginal or treaty** rights or title and contemplates conduct that might potentially adversely affect those rights

- Application to pipelines and other large projects with geographically dispersed effects

Infringement of Proven Rights



Duty to Consult

Credibly Asserted Unproven Rights

Knowledge

- Knowledge, actual or deemed of s. 35 rights
 - Knowledge triggers – not strength or weakness
 - Crown deemed to know the contents of treaties
 - Knowledge may be construed where land is known or reasonably suspected to have been traditionally occupied

Decision or Action

- Conduct or decision contemplated by the crown
 - Strategic level higher decisions (e.g. regional land use policy and planning), and conduct that has immediate impact (e.g. issue permit for cutting trees).
 - Does not apply to development and enactment of legislation

Adverse Impact

- Potential adverse impact on rights
 - Causal relationship.
 - Issues – exploration permits and mineral leases, emphasis on site specific impact, revitalization of past projects

Duty to consult

What does the duty entail?

There is always a duty to consult with view to substantially addressing concerns through **meaningful** dialogue



Weak *prima facie* case for right

- Minimal potential for impact on right at this stage

Notice/disclose/
Discuss/dialogue

- Strong case
- Significant potential impact, high risk of non-compensable

Deep – aim of satisfactory resolution, may reveal a duty to **accommodate**

Reasonable and Meaningful

- Crown has the obligation to assess strength of asserted right, depth of consultation required and inform FN about potential impacts
- All consultation must be “reasonable” and “meaningful.” What is “reasonable” or “meaningful” consultation is “what is required to maintain the honour of the Crown and to effect reconciliation .
 - characterized by **good faith** and an attempt by both parties to **understand each other’s concerns, and move to address them** in the context of the ultimate goal of reconciliation of the Crown’s sovereignty with the Aboriginal [and treaty] rights enshrined in s.35
 - possessing a state of open-mindedness
 - existence of two-way dialogue
 - more than a process for exchanging and discussing information

What is the duty to accommodate? (Haida SCC 2004)

- “Where a strong *prima facie* case exists and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns **may require taking steps to avoid irreparable harm or to minimize the effects of infringement**, pending final resolution of the underlying claim”
- **Accommodation:** “seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation”
- It includes “**balancing of interests**” (*Haida*) Government may balance other societal interests against aboriginal interests in making those decisions.

Accommodation & Veto

- **No Aboriginal veto** (complete and arbitrary power to refuse consent without balancing of other interests)
- **Not duty to agree** to accommodations but coming to the table with predetermined accommodations and unwilling to explore other possibilities “unreasonable”
- Examples of accommodation:
 - Require industry to amend its plans (e.g. reroute a road), IBAs, other instruments if the Crown considers it inadequate
 - legislate or regulate accommodation (e.g. regulations that allow for fishing for a moderate livelihood)
 - impose additional conditions and withhold approvals (permits, certificates, regulatory decisions)

What does SCC say about obligations of Indigenous peoples?

- articulate their asserted rights /concerns with sufficient specificity so Crown can assess strength of claim
- not frustrate good-faith attempts at consultation by government by taking unreasonable positions in the consultation process.
- respond and participate in available processes as able
- engage in good faith meaningful dialogue

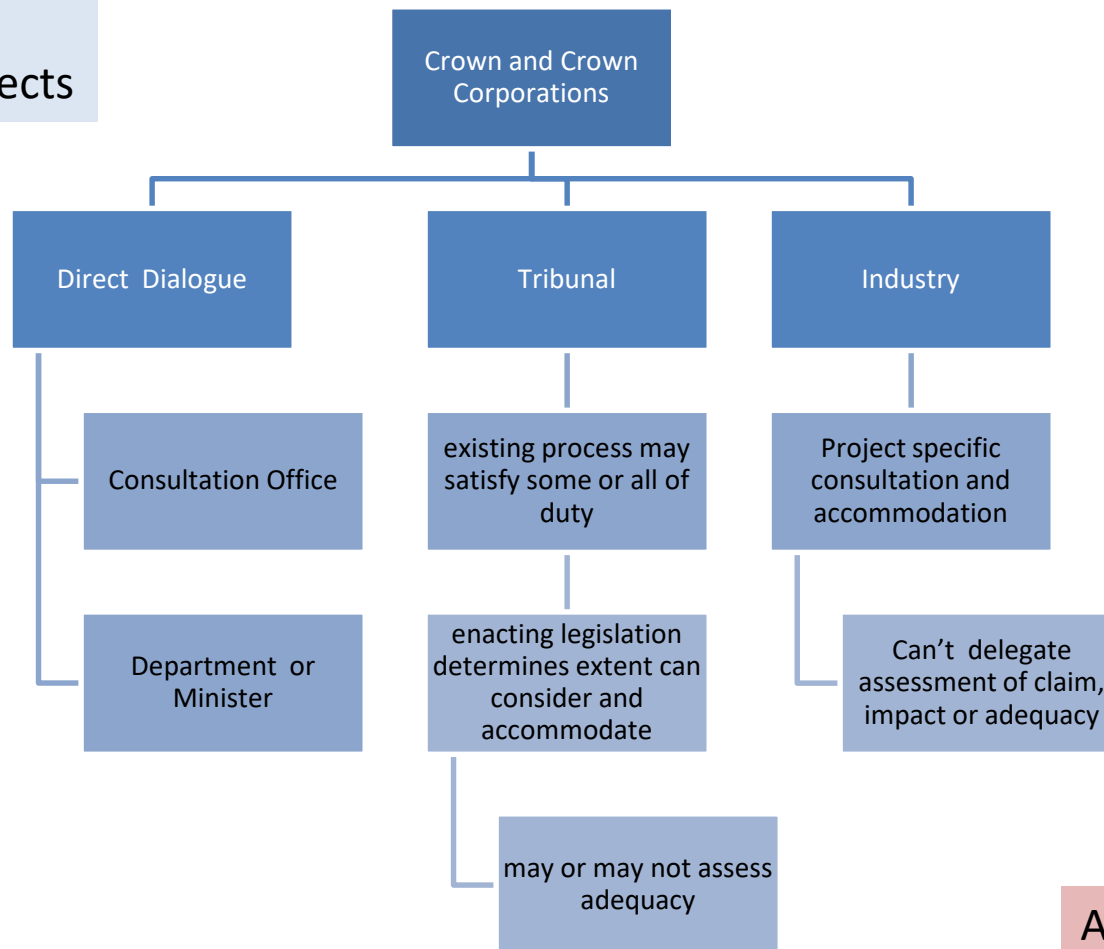
Is consent/agreement ever required?

Tsilhqot'in (2015) “the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land **must obtain the consent of the Aboriginal title holders**” where **Aboriginal title is established** by agreement or court order.

- **Consent is not a veto** –If the Aboriginal group does not consent, government’s may override consent but must meet s. 35 justification test which includes more than consultation and accommodation
- Incentive to negotiate toward consent and agreement on accommodations in these cases and strong cases for rights recognition.
 - if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.

Who carries out the duty for the Crown?

Delegation of procedural aspects



And combinations or phases possible

Standard to Measure Adequacy

Adequacy is determined by looking at the reasonableness of the process and accommodation given the relative strength of claim and significance of impact

Reasonableness not perfection

“In this cast, the subjects on which consultation was required were numerous, complex and dynamic involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfill the duty, there will be difficult judgement calls on which reasonable minds will differ.” (*Gitxaala* 2016 – Northern Gateway Pipeline)

Contemporary Challenges

- **Meaningful dialogue and adequacy of consultation in the context of large projects with geographically dispersed effects (Northern Gateway, Trans Mountain)**
- **Issues of representative authority (e.g. Coastal Gas Link litigation in B.C.)**
- Implications of commitments to implement UNDRIP
- Changing regulatory regime

Adequacy of Consultation

Gitxaala Nation et al v Canada (2016 FCA)

June 2014, Cabinet approved the Project, consisting of two 1,178 kilometer pipelines, a marine terminal and oil tanker routes, subject to the fulfillment of 209 conditions and 450 volunteer commitments - include ongoing opportunities for FN input.

Supported by 26 Aboriginal equity partners, representing almost 60% of the identified Aboriginal communities along the pipelines' right-of-way. Overturned by FCA.

Why was consultation inadequate?

Phases of Consultation Process

I Preliminary Phase – Consultation on draft JRP agreement and sharing information about mandates of CEA, NEB and JRP

II Pre-hearing Phase – Continue to provide information on JRP and encourage Aboriginal groups to participate. Identify CEA Agency as contact for project related matters outside mandate of JRP

III Hearing Phase – encouraged to participate in hearing

IV Report/Decision of JRP

- JRP to consider Aboriginal concerns within its mandate in its environmental assessment and may impose conditions to mitigate adverse impact
- Crown consultation on JRP report and matters outside JRP jurisdiction before it is approved by GIC

V Regulatory Permitting - if approved and consultation on further federal permits required a department would be designated for this

Inadequate Consultation

- 1) The Crown did not share sufficiently detailed and specific information concerning the strength of their rights and title claims that would be affected by the project,
- 2) Phase four post-report consultation efforts fell well short of the standard of meaningfulness required to fulfill its duty, and
- 3) The GIC when considering a project under the NEB must consider if Canada fulfilled its duty to consult. To fulfill this duty it also has the power to impose conditions on approvals for issuance of certificates
- 4) The GIC failed to give sufficient reasons why consultation was adequate and demonstrating that the First Nations' concerns were considered in reaching its determination

Result - FCA set aside approval and associated certificates, sent the matter back to GIC for redetermination

Inadequacies Phase IV

- Canada did not consider or respond to concerns that the imposed timeline was “arbitrarily short” (45 days) and “insufficient to provide for meaningful consultation”
- Canada’s representatives did not have decision-making authority . They were mandated to gather information for decision makers within strict timelines - “missing was a real and sustained effort to pursue meaningful two-way dialogue.”
- In three instances information put before the GC (Cabinet) to aid in its decision was inaccurate. Canada was not willing to discuss these inaccuracies or to correct the information.
- Concerns were left unaddressed. Many impacts of the Project, some identified in the Report of the JRP, some not – were left undisclosed, undiscussed and unconsidered
- Accommodation measures identified in letters to FNs after the meetings were not responsive to the specific concerns (e.g. Heiltsuk)

Tans Mountain (TMX)

Tsleiel – Waututh Nation v Canada (2018 FCA)

- Application made to NEB to expand existing pipeline with another roughly parallel pipeline
- Dec 2013 to Feb 2016 NEB undertakes consultation with stakeholders including Indigenous people
- In May 2016 NEB recommends to approve project with conditions and in Nov 2016 GIC accepts the recommendations and directs the NEB to approve the project
- **Crown did not have benefit of Northern Gateway decision.** Consultation and approvals given before Gitxaala (decided in June 2016)
- Number of challenges by affected Indigenous people and environmental groups

Trans Mountain

Environment

- NEB was in error when it concluded it did not have jurisdiction to consider species at risk and increased tanker traffic
- GIC did not have sufficient information required to make a decision on public interest, environmental effects and their justification.

Indigenous consultation

- TM engaged with more than 130 FN communities – 43 impact-benefit agreements
- NEB hearing process, included 129 FN communities - recommendation that the project be approved subject to 157 conditions
- Phase 3 - Fed reps engaged directly with 117 FN communities re: outstanding concerns

Trans Mountain Flaws

- Crown has discretion to determine consultation process and process was reasonable. If properly implemented it could have resulted in meaningful consultation and accommodation
- NEB entitled to make rules about conduct of hearings including cross examination, how oral evidence is received, issues it will hear and composition of panels so long as done in fair and impartial manner consistent with s. 35
- Phase Three “unacceptably flawed “
 - Canada required to engage in meaningful two way dialogue . Representatives were limited in mandate to gather information and send it to decision makers. Missing was someone who could discuss at least in principle accommodation measures
 - Canada unwilling to consider changes to NEB report on mistaken view GIC did not have power to impose additional conditions on certificates it directs NEB to issue
 - Late disclosure of assessment of impact on Indigenous groups until 3 weeks before GIC approval (all but one of the consultation meetings had ended)

Trans Mountain Approval

- **Sept 2018** NEB undertakes reconsideration hearing on environmental impact of oil tankers on species at risk and former SCC Justice Iacobucci hired to oversee new round of consultations
- **Feb 2019** NEB recommends approval again subject to 16 new conditions . Concludes oil spills could be significant but project provides significant benefits and measures can be taken to minimize environmental effects
- **June 2019** GIC approves (Federal revenue to be invested in clean energy and green technology)
- **May 2019** BCCA rejects BC's argument it has jurisdiction to regulate and prohibit transportation and trade of hazardous materials within its boundaries
- **Jan 202** SCC unanimously upholds decision of BCCA

Consultation Challenge

Coldwater et. al. v Canada (FCA 4/2/ 2020)

“Contrary to what the applicants assert, this was anything but a rubber stamping exercise. The end result was not a ratification of the earlier approval, but an approval with amended conditions flowing directly from the renewed consultation. It is clear applicants are of the view that their concerns have not been fully met, but to insist on that happening is to impose a standard of perfection, a standard not required by law.”

- Problems identified in TMX case addressed and proposed accommodations were meaningful and tangible

Coldwater (FCCA 04/02/2020)

Reconciliation and Indigenous Obligations

- Reconciliation can only be advanced through consultation when the respective parties commit to the process, avoid counterproductive tactics, get to the substance of the issues of concern and exercise good faith.
- Indigenous peoples can assert their uncompromising opposition to a project, they cannot tactically use the consultation process as a means to try to veto it.
Tactical behaviour aimed at ensuring that discussions fail within the time available for consultation is not consistent with reconciliation and would, if tolerated, allow for the effective use of a veto right.

Coldwater v Canada

Reconciliation and Veto

- The fact that consultation has not led the four applicants to agree that the Project should go ahead does not mean that reconciliation has not been advanced. The goal is to reach an overall agreement, but that will not always be possible. The process of consultation based on a relationship of mutual respect advances reconciliation regardless of the outcome.
- Put another way, reconciliation does not dictate any particular substantive outcome. Were it otherwise, Indigenous peoples would effectively have a veto over projects such as this one. The law is clear that no such veto exists.
- At some juncture, a decision has to be made about a project and the adequacy of the consultation. Where there is genuine disagreement about whether a project is in the public interest, the law does not require that the interests of Indigenous peoples prevail.

Representative Authority

Coastal Gas Link (BCSC 31/12/20)

Blockades and injunction applications by some Hereditary Chiefs and supporters

They argue Wet'suwet'en law and traditional governance requires their consent to enter upon and to construct works in unceded Wet'suwet'en lands.

- Held: alleged irreparable harm of the applicant does not outweigh the harm that could be suffered if the injunction is granted

Controversial Reasons

“...Indigenous customary laws do not become an effectual part of Canadian common law...until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law,....There has been no process by which Wet’suwet’en customary laws have been recognized in this manner. The aboriginal title claims of the Wet’suwet’en people have yet to be resolved either by negotiation or litigation. While Wet’suwet’en customary laws clearly exist on their own independent footing, they are not recognized as being an effectual part of Canadian law.”

Critique

S.35 & Delgamuukw (SCC 1997)

SCC confirmed

- Rules governing Aboriginal title draw on Canadian and Indigenous legal institutions.
- Look to Indigenous land tenure system and laws to ascertain content of Aboriginal title and control.
- Confirmed that the Wet'suwet'en never surrendered title to their ancestral lands, and accepted extensive evidence outlining their hereditary governance system.
- **Therefore** duty to consult and negotiate extends to bodies that hold rights under Indigenous legal institutions not just band council governments
- Open Letter to Prime Minister Trudeau (22 Jan 2020)

Alignment with UNDRIP

Is consultation same as FPIC? Some differences

- More circumstances in which FPIC is triggered
- Not limited to rights established by agreement or court order
- Self-determination – consent can only be given by legitimate representatives of the people affected (Coast Gas Link)
- No veto but requirement of consent harder to override
 - *strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the **just and most compelling requirements** of a democratic society*

Overriding FPIC

46.2 In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. *Any such limitations shall be non-discriminatory and **strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements** of a democratic society.*

46.3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Bill C 69

- Increased opportunities for Indigenous participation, cooperation and partnership with government in impact assessment processes and decision-making
- Enhanced recognition and consideration of Indigenous rights and interests in environmental assessment and regulatory decisions
- Enhanced consideration of the environmental, health, social and economic effects of designated projects and cumulative effects with a view to preventing certain adverse effects and fostering sustainability
- Prohibits proponents, subject to certain conditions, from carrying out a designated project if the designated project is likely to cause certain environmental, health, social or economic effects, unless the Minister of the Environment or GIC determines that those effects are in the public interest, taking into account the impacts on the rights of the Indigenous peoples of Canada, all effects that may be caused by the carrying out of the project, the extent to which the project contributes to sustainability and other factors
- Ministerial power to adjust some time limits for assessments,