Legal Framework For Consulting Aboriginal Groups

IAIA 2017 - Practical implications of UNDRIP for Canadian EA Session

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Note the opinions and views expressed are my own and not that of the Province of BC.
Treaties in British Columbia

**Douglas Treaties**
14 treaties signed in 1850-1854

**Treaty 8**
Various BC bands signed in 1900-1914, McLeod Lake Indian Band adhered in 2000

**Modern Treaties**
Nisga’a Nation: 2000
Tsawwassen FN: 2009
Maa-nulth FNs: 2011
Tla’amin Nation: 2016
Constitution Act, 1982

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
Aboriginal Title Declared:
*Tsilhqot’in Nation v. BC*, Supreme Court of Canada 2014
Constitutional Duty to Consult

*Haida Nation v. BC*, Supreme Court of Canada, 2004:

The duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.
Duty to Consult

Deep consultation (*Haida*):

- “aimed at finding a satisfactory interim solution”
- “may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision”
Haida:

• “Where a strong *prima facie* case exists for the claim, 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.”

• “The process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal ‘consent’ spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case.”
Consequence of Not Meeting Duty to Consult

Federal Court of Appeal (June 2016): *Gitxaala Nation v. Canada*

- Federal approvals for project were **quashed** by the court
- Although Federal decision was reasonable, duty to consult FNs was not adequately fulfilled
Consulting BC Aboriginal Groups in EAs

Collaboration between EAO and Aboriginal group:

- **Seek consensus** on potential project impacts on Aboriginal/treaty rights and accommodations
- Collaborate on development of draft conditions
- Timely and effective participation
- Fair, clear, neutrally administered, transparent, predictable process
- Interest-based issues resolution
Collaboration on Kemess Underground Mine EA

- EAO – TKN Collaboration Plan
- Collaborated throughout EA – including collaborative drafting of TKN section of assessment report
- Collaborated on methodology of assessing impacts on Aboriginal title, rights and interests
- Consensus on measures to mitigate impacts on Aboriginal title, rights and interests at EA stage
- TKN letter of support (February 7, 2017)
- EA Certificate issued (March 8, 2017)
United Nations Declaration on the Rights of Indigenous Peoples

Article 32(2)

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral water or other resources.