Duty to Consult:

The Duty to Consult Aboriginal Peoples – What does it mean?

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TABLE OF CONTENTS

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Over the past several years, there have been significant developments in the law as it relates to Crown obligations to consult with Aboriginal peoples and, where appropriate, to accommodate Aboriginal interests prior to making decisions that may affect these interests. [1] Given the extent and scope of Aboriginal and treaty rights across Canada, development and resource based projects may adversely affect such rights and therefore trigger a duty to consult with Aboriginal peoples. Therefore, it has become increasingly important for all interested parties in project or resource development to have an appreciation of the issues involved in the duty to consult with Aboriginal peoples. This paper will address the current state of the law in this area, including (1) the source of the duty; (2) when the duty to consult is triggered; (3) who owes the duty; (4) the nature and content of the duty; (5) who is to be consulted; (6) what it means to accommodate Aboriginal interests; and (7) practical considerations.

At the outset, a brief review of the nature and scope of Aboriginal interests is necessary in order to put the duty to consult in context and to understand the obligations of the Crown. This paper will provide a brief overview of treaty and Aboriginal rights, including Aboriginal title.

1. ABORIGINAL INTERESTS

A. Treaty Rights

Treaties are unique legal instruments entered into by the Aboriginal peoples of Canada and the Crown. Aboriginal treaties create positive rights for the adherent First Nations. Common to all treaties is an intention to create legal obligations, the presence of mutually binding obligations, and a measure of solemnity.[2]

While treaties contain various rights, the rights under later historical treaties (particularly the numbered treaties in the prairie provinces) tended to consist of the Crown granting or assuring various rights to Aboriginal peoples in exchange for the extinguishment of Aboriginal title and related rights to land. In Alberta, the applicable treaties are numbers 6, 7, and 8. Each of these treaties contains a provision which provides that there is a right to hunt, trap and fish in the surrendered

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[1] This paper draws upon earlier papers of the author, including, *The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development* (2007) 44 *Alta. L. Rev.* (No. 3) 571.

[2] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025.

tracts of land, saving and accepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

The numbered treaties in the prairie provinces were modified by the Natural Resources Transfer Agreements (NRTA).[3] The NRTA transferred Crown lands and natural resources from the federal government to the provincial governments of Manitoba, Alberta and Saskatchewan. In *R. v. Badger*, the Supreme Court of Canada held that the NRTA modified but did not extinguish the Treaty No. 8 right to hunt in Alberta.[4] The Supreme Court of Canada further held that while signatory First Nations could continue to hunt for food, they could no longer hunt commercially but could hunt "on all unoccupied Crown lands and any other lands to which the said Indians may have a right of access".[5]

It is important to note that treaties may take various forms and the written document representing a treaty may not contain all the treaty terms. In addition to the written terms, treaties may also contain oral terms. Over the past 25 years, the Supreme Court of Canada has developed fundamental principles of treaty interpretation. The most comprehensive review of these principles by the Supreme Court of Canada is set out in its leading decision in *Marshall v. Canada*[6] While a thorough review of these principles is beyond the scope of this paper, it should be noted that historical treaty rights will always be interpreted liberally and in a *sui generis* manner, which takes into account the historical context under which the treaty was negotiated. For example in *Marshall*, a treaty term that on its face forbade the Aboriginal party from trading except at British "Truck Houses" was found to imply a treaty right to fish and trade fish.

B. Comprehensive Land Claim Agreements

Comprehensive land claim agreements or modern treaties differ significantly from historical treaties. Each comprehensive land claim agreement must be considered on its own terms, given the broad scope of the agreements and the fact that the language and terms in each agreement can be different.

In general, comprehensive land claim agreements are extensive and detailed agreements between an Aboriginal group and the Crown intended to resolve outstanding land claim issues. These agreements generally provide the Aboriginal group with ownership of large tracts of land, including subsurface title to some of the lands. They generally provide for participation in resource

[3] *Natural Resources Transfer Agreements*, being Schedules to the *Constitution Act*, 1930 (U.K.), 20 and 21 Geo. V, c. 26, s. 13, reprinted in R.S.C. 1985, App. II, No. 26.
[4] *R. v. Badger*, [1996] 1 S.C.R. 771.
[5] *Ibid*. para. 33. See also *R. v. Horseman*, [1990] 1 S.C.R. 901.
[6] *Marshall v. Canada*, [1999] 3 S.C.R. 456, rehearing dismissed [1999] 3 S.C.R. 533.