



## **Reconciling the duty to consult with other law**

Lexpert Aboriginal Law – Consultation and Other Emerging Issues

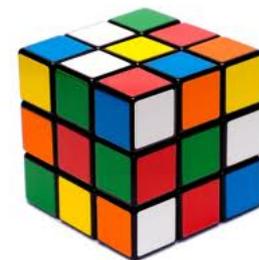
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# Introduction

- Presentation will discuss challenges of reconciling the duty to consult and other law
- Two specific areas will be examined:
  - *Canadian Environmental Assessment Act, 2012*
  - Common law principles of administrative fairness in permitting processes



# Duty to consult – the constitutional basis

- Based on *Haida* test for asserted but unproven rights and title
- Requires consideration of strength of claim and potential impacts
- These factors determine where on the spectrum the duty lies, from notice to deep consultation
- Ultimately requires government to balance aboriginal and non-aboriginal interests



# Duty to consult – the constitutional basis (cont.)

- Requires resulting decisions to be structured in this manner
- Standard of review is correctness for some parts, reasonableness for others
- Courts have described this duty as "upstream" of any statute
- Corresponding tests exist in respect of treaties and established aboriginal rights

# Can statutory frameworks discharge the duty to consult?

- In *Haida*, C.J. McLachlin encouraged development of regulatory regimes to meet the duty
- In *Taku*, the SCC held that the EA process had been adequate to meet the duty to consult
- Other similar cases: e.g. *Kwikwetlem First Nation v British Columbia Transmission Corporation*, 2009 BCCA 68 at para 57



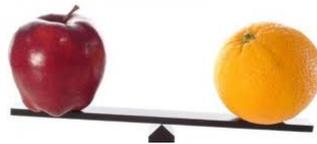
# Will compliance with the CEAA, 2012 fulfill the duty to consult?

- Unfortunately - “No”
- Significant differences (albeit with significant overlap) makes for a very complex situation



# How do aboriginal requirements of CEAA, 2012 differ from the duty to consult?

- Assessment focuses on matters other than rights and title (s. 5(1)(c))
- Purposes section does not include reference to consultation (s. 4(1)(d))
- Relevant test is “significant adverse effect” not balancing of interests (s. 52)



# Scope of assessment

*5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are...*

*(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on*

*(i) health and socio-economic conditions,*

*(ii) physical and cultural heritage,*

*(iii) the current use of lands and resources for traditional purposes, or*

*(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance*

# Purposes

*4 (1) The purposes of this Act are...*

*(d) to promote communication and cooperation with aboriginal peoples with respect to environmental assessments;*

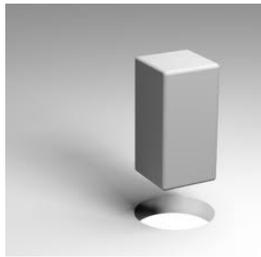
# Decision-making standard

*52 (1) For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project*

*(a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and*

*(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).*

\* See also *CEAA Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects*



## What then is required?

- Separate analysis of *Haida* obligations and related reasons are required
- Can borrow from information and analysis that would otherwise occur in EA but that will not be enough
  - EA would not otherwise result in aboriginal interests being expressed in terms of rights and title
  - EA would not otherwise include a strength of claim assessment
- Panel reviews will be particularly complex

# Will substitution trigger the duty to consult?

*32 (1) Subject to sections 33 and 34, if the Minister is of the opinion that a process for assessing the environmental effects of designated projects that is followed by the government of a province — or any agency or body that is established under an Act of the legislature of a province — that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project would be an appropriate substitute, the Minister must, on request of the province, approve the substitution of that process for an environmental assessment.*

# Will substitution trigger the duty to consult? (cont.)

- Unlikely because:
  - Decision does not itself authorize conduct that can affect aboriginal rights
  - Requires that provincial assessment consider same key elements as CEAA, 2012
  - Substitution decision is not discretionary
  - Federal government retains decision-making authority at the end of the day anyway

# Administrative fairness and the duty to consult



- Administrative fairness requires that where a statutory decision-maker is making a decision that affects the interests of a party, that party
  - has a right to know the evidence that the decision-maker will consider and to submit his or her own, and
  - to have the right to know and respond to submissions of other parties who are trying to influence the decision-maker.
- Nothing about the aboriginal consultation process renders these principles inapplicable

# Sara Blake, *Administrative Law in Canada*, 5th Edition, LexisNexis Canada Inc., 2011

*“Fairness requires that a party who will be affected by a decision must first be informed of the case to be met. Without knowledge of the matters in issue one cannot effectively exercise one’s right to be heard. Disclosure enables a party to review the alleged facts, to prepare to challenge them with evidence that rebuts them or reduces their impact and to prepare submissions explaining how they should be weighed and analyzed.*

*...It is especially important that disclosure be made of any information which may be prejudicial to the party’s interests and which will be put before the decision maker.”*

# Circumstances that may violate principles of fairness in the duty to consult context



- Crown fails to disclose evidence about strength of claim to the applicant, or to request proponent submissions on same
- Crown receives information in confidence from aboriginal groups about potential impacts
- Crown develops accommodation measures with aboriginal groups, without giving the applicant an opportunity to comment on them

# Administrative law allows exceptions, but...



Let's not throw the baby out  
with the bath water.

- Case law is clear that exceptions must be based on compelling and extraordinary circumstances – not mere assertions of confidentiality or cultural interests
- Proper process for considering such requests must be followed (including *ex parte* requests)
- Administrative law rules are fully able to deal with the unique circumstances of aboriginal consultation

## Case law to date

- Not yet aware of any cases where a decision has been challenged by a proponent and quashed on these grounds
- Likely only a matter of time
- Comments of SCC in *Little Salmon* provide very strong support

# Duty to consult and access to information legislation

**WRONG  
ANSWER**

- Often wrongly cited by government as prohibiting disclosure during aboriginal consultation process
- Legislation typically does not limit access otherwise available
- Exceptions to disclosure typically apply only in respect of requests under those acts, and are usually permissive in any case

# Recourse and remedies

- Help regulators frame the issues appropriately from the outset and draft submissions accordingly
- Do not be shy about citing administrative fairness principles and preventing unfairness before it happens
- Challenge decisions after the fact if and as necessary

# Conclusions



- The duty to consult interacts with other areas of law in complex ways
- Differences have often been ignored to date, but it is unlikely that can continue
- We need to work on reconciling these principles through clear and candid dialogue

# Questions?



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