



ENERGY PROJECTS IN ONTARIO: ABORIGINAL CONSULTATION

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**Distributed Generation and
The Future of Ontario's Electricity Grid
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Roadmap

- **Duty to consult – what, who, when, why?**
- **Duty to Negotiate and Accommodate**
- **IPSP: First Nations Consultation**

Why Consult?

- **Required by statute and public policy**
- **Canada's Constitution requires consultation**
- **Identify potential claims and concerns that may delay project plan**
- **Establish good relations with local population**

What is the Duty to Consult?

- **A constitutional duty grounded in the “honour of the Crown”**
 - SCC trilogy of cases (*Haida*, *Taku River*, *Mikisew*)

When Does the Duty Arise?

- **Arises when the Crown has**
 - Knowledge, real or constructive
 - Of the potential existence of an Aboriginal right or title, and
 - Contemplates conduct that might adversely affect that right or title

When Does the Duty Arise?

- ***Statutory Triggers***
 - *Canadian Environmental Assessment Act*
 - Federal proponent, federal funding, federal permits, federal lands
 - “Environmental effects” includes effects on FN interests
 - *Ontario Environmental Assessment Act*
 - Electricity Projects Guide
 - Waste Management Projects Guide
 - EA Codes of Practice
 - Municipal Class EA New Part D – Transit Projects

When Does the Duty Arise?

- ***Statutory Triggers (cont'd)***
 - *Planning Act*
 - Part III – Official Plans
 - Regulation 543/06
 - *Ontario Heritage Act, Cemeteries Act*
 - Draft Standards and Guidelines for Consultant Archaeologists

Who Has the Duty?

- **Duty is on federal and provincial governments, and their agents**
 - Municipalities?
- **Crown may delegate “procedural aspects” of consultation to industry proponents**
- **Private proponents who fail to ensure consultation will be subject to project delays, conditions**
 - *KI v. Platinex*
 - *HALT v. Ontario MOE*

What are the Elements of Consultation?

- **Scope of the Duty**
 - Proportionate to a preliminary assessment of
 - The strength of the asserted Aboriginal right or title, and
 - The seriousness of the potential adverse effect upon right or title

What are the Elements of Consultation?

Content of the Duty

Characteristics:

- Weak Aboriginal claim
- Potential for infringement is minor

Actions:

- Give notice
- Disclose information
- Discuss any issues raised in response to the notice

Factors

- Specificity of promises made
- Seriousness of potential impact on right asserted
- Strength of claim to asserted right

Characteristics:

- Strong Aboriginal claim
- Right and potential for infringement is high
- High risk of non-compensable damage

Actions:

- Deep consultation
- Opportunity to make submissions
- Formal participation in decision-making process
- Written reasons showing how Aboriginal concerns were considered
- **Accommodate**
- **Consent**



What Are the Elements of Consultation?

- **Consultation Must be Meaningful**
 - *Platinex v. KI FN (#1)*
 - Exploration company had leases and claims on traditional lands
 - KI asserted Treaty Land Entitlement Claim
 - KI had hunting and harvesting rights
 - Platinex had discussed its proposed drilling program with KI for 7 years but then terminated discussions
 - Crown consultation was triggered by mining leases but none took place
 - Court prohibited drilling program and required all three parties to consult

What Are the Elements of Consultation?

- **Duty to Consult Doesn't Give Veto**
 - *Platinex v. KI FN (#2)*
 - KI-Province-Platinex consultations took place after injunction
 - KI sought extended injunction because consultations did not resolve issues
 - Court did not grant a second injunction
 - While negotiation must be meaningful, each party must make bona fide efforts to resolve issues
 - No duty to agree
 - Reciprocal duty
 - Make concerns know
 - Try to resolve concerns

What Are the Elements of Consultation?

- **Courts May Intervene to Require Parties to Negotiate**
 - *Platinex v. KI FN (#2)*
 - Reconciliation achieved through negotiation rather than adjudication of rights
 - Court ordered that the parties continue to negotiate and set a timeline after which court would craft an agreement
 - *Platinex v. KI FN (#3)*
 - Court imposed agreed Consultation Protocol, MOU through Order
 - Court to maintain supervisory role

Duty to Negotiate and Accommodate

- **Duty to Negotiate**
 - “Moral, if not a legal, duty to negotiate in good faith” (*Delgamuukw*)
 - Duty to consult may evolve into duty to negotiate & accommodate where it becomes clear that impacts are more serious and there is stronger evidence of the claim
 - Good faith = overarching principle guiding consultation/accommodation/negotiation duties
- **Duty to Accommodate**
 - Seek compromise to harmonize conflicting interests and move towards reconciliation (*Haida*)
 - In-depth discussion and accommodation where impact more serious
 - Full aboriginal consent required where right already proven or well accepted (*Delgamuukw*)

IPSP: First Nations Consultation

- **Ontario's Integrated Power System Plan (IPSP)**
 - *Electricity Act*
 - Requires Ontario Power Authority (OPA) to prepare IPSP
 - Achieve goals in Ministerial Directive
 - Subject to Ontario Energy Board (OEB) approval
 - Ministerial Directive (June 13, 2006)
 - OPA filed the IPSP (August 29, 2007)
 - OEB Hearing (EB-2007-0707)

IPSP: First Nations Consultation

- **First Nations Concerns:**
 - Consultation
 - Have the government and the OPA carried out adequate consultation?
 - Participation
 - Does the IPSP make adequate provision for First Nations participation in Ontario's energy and transmission industry?
 - Impact
 - How will the IPSP impact First Nations land?

IPSP: First Nations Consultation

- **“Enabler” Lines**
 - Need for new transmission lines (enabler lines) to service renewable energy in the north
 - First Nations issues include cost, impact and distribution
 - Cost prohibitive for most generation projects
 - Impact of transmission lines on First Nations land
 - Distribution – opportunity to connect remote communities to the grid
 - OEB Consultation (EB-2008-0003) considers methods of cost allocation for enabler lines

IPSP: First Nations Consultation

- **Ministerial Supplemental Directive (Sept. 17, 2008) requires of OPA**
 - Additional renewable energy
 - Enhanced consultation with Aboriginal communities
 - Principle of Aboriginal partnership to be considered for generation and transmission
- **OEB adjourns hearing indefinitely (October 2, 2008)**

Final Thoughts

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... a basic purpose of s. 35(1) -- “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”.

Let us face it, we are all here to stay.

- Chief Justice Lamer, *Delgamuukw v. B.C*



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