

Reconciliation and Infringement of Aboriginal and Treaty Rights: What is 'Justified'?

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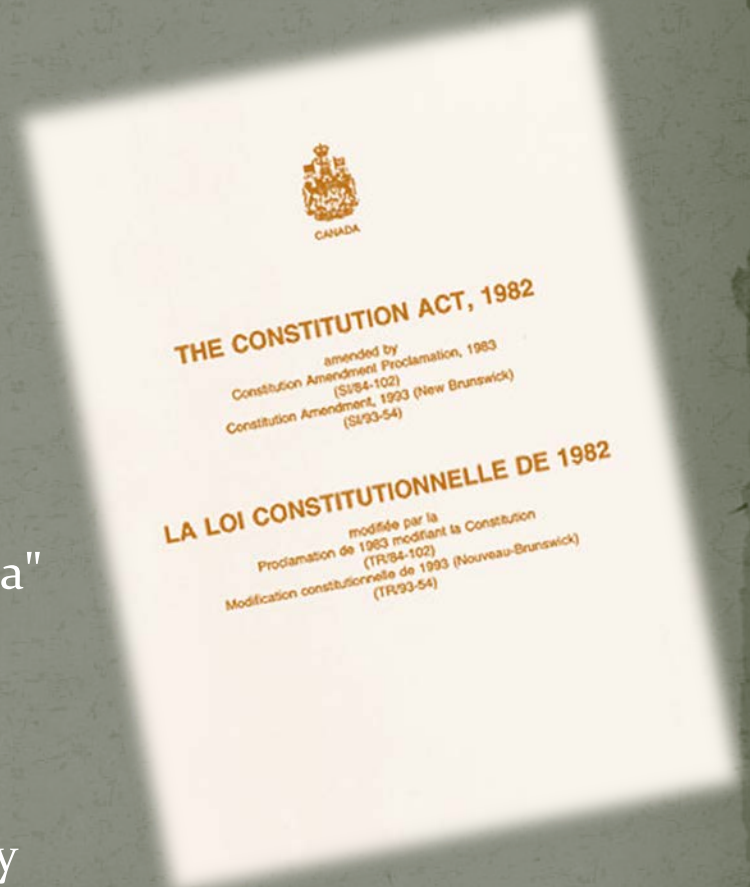
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Overview

- The Objectives and Purposes of Section 35 of the Constitution Act, 1982
- Aboriginal and Treaty Rights & The Duty to Consult and Accommodate
- A Tool For Reconciliation or for Justified Infringement?

Section 35 of the Constitution Act, 1982

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.



Section 35 of the Constitution Act, 1982

Aboriginal Rights are...

- Practices that were exercised at first contact, integral to First Nations' distinctive cultures;
 - ❑ Typically, people think that Aboriginal Rights are hunting/fishing/harvesting/spiritual practices/protection of archaeology
 - ❑ The Aboriginal perspective is normally broader, e.g. rights include responsibilities to land/family/environment or right to self-government
- Collectively held by the First Nations, and exercised by individuals;
- Subject to 'justified' infringement by the government.

Section 35 of the Constitution Act, 1982

Treaty Rights are...

- Practices that are recognized and guaranteed by agreements between Aboriginal Nations and the Crown (both historical – discussed earlier – and current);
- Aboriginal perspective is that these agreements are sacred and contain solemn promises, including a guarantee of protection of rights and way of life;
- Subject to ‘justified’ infringement by the government.

Duty to Consult and Accommodate

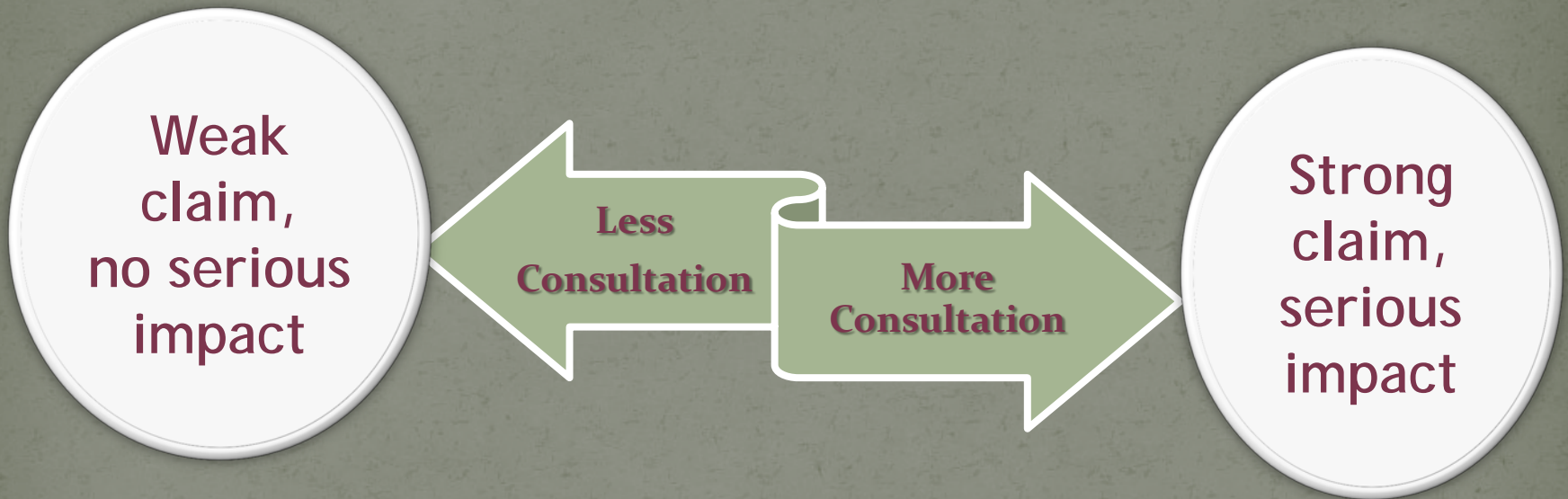
- The constitutional duty arises when...
 - A decision may impact existing or asserted Aboriginal, Treaty or Land Title Rights, the Crown has a Duty to Consult and Accommodate where necessary.
- The source is...
 - The honour of the Crown
- The purpose is...
 - Reconciliation, so the Crown must follow appropriate consultation procedures, e.g. no sharp dealing, make decisions that fairly balance Aboriginal concerns with other societal interests



Duty to Consult and Accommodate

- Consultation includes:
 - A meaningful opportunity to discuss First Nations' interests and address concerns;
 - Accommodation of interests where necessary; and
 - Where the Crown does not accept a First Nation's position, providing reasons why the course of action they had proposed was not necessary, impractical or unreasonable (*West Moberly First Nations v. B.C.*, 2011 BCCA 247 (CanLII), at para. 144).

Duty to Consult and Accommodate



Duty to Consult and Accommodate

“CONSULTATION THAT EXCLUDES FROM THE OUTSET ANY FORM OF ACCOMMODATION WOULD BE MEANINGLESS. THE CONTEMPLATED PROCESS IS NOT SIMPLY ONE OF GIVING THE MIKISEW AN OPPORTUNITY TO BLOW OFF STEAM BEFORE THE MINISTER PROCEEDS TO DO WHAT SHE INTENDED TO DO ALL ALONG.”

MIKISEW CREE V. CANADA, SCC 2005 AT PARA. 54

Reconciliation

“PUT SIMPLY, CANADA’S ABORIGINAL PEOPLES WERE HERE WHEN THE EUROPEANS CAME, AND WERE NEVER CONQUERED. MANY BANDS HAVE RECONCILED THEIR CLAIMS WITH THE SOVEREIGNTY OF THE CROWN... OTHERS...HAVE YET TO DO SO...THE HONOUR OF THE CROWN REQUIRES THAT THESE RIGHTS BE DETERMINED, RECOGNIZED AND RESPECTED.”

HAIDA NATION V. BRITISH COLUMBIA, SCC 2004, AT PARA. 16



Reconciliation

- Consultation as a tool for reconciliation?
 - **Emphasis on early engagement and involvement**
 - The duty is triggered at the earliest possible planning stages for a project or decision, before any operational decisions are made
 - E.g. transfer of ownership or control of tree farm licences (Haida Nation); sale or sub-leasing of lands subject to a claim (Musqueam Indian Band v. Richmond, 2005 BCSC 1069); change in regulatory regime applicable on privately owned lands (Hupacasath First Nation v. B.C., 2005 BCSC 1712)

Reconciliation

- **The duty is ongoing**
 - The duty has not been satisfied by previously negotiated treaties
 - The duty will be engaged on an ongoing basis when there are proposed actions will affect Treaty or Aboriginal rights. (Mikisew Cree v. Canada, SCC 2005)
 - The mere existence of a modern treaty does not constitute a 'complete code' for the Crown-Aboriginal relationship, and does not fulfill the duty to consult about unknown future actions. (Little Salmon/Carmacks First Nation v. Yukon, SCC 2010)



Reconciliation

- Consent may be required, *Delgamuukw v. British Columbia*, SCC 1997
 - There is always a duty to consult where the Crown is making a decision impacting on a First Nation's Aboriginal Title to land;
 - Some cases may require consent, e.g. when provinces enact hunting or fishing regulations in relation to Aboriginal Title lands.

Infringement

- *R v. Sparrow*, SCC 1990
 - The Crown has a fiduciary duty where it acts (even when it legislates) in a way that impacts Aboriginal and treaty rights
 - Those rights can be infringed, so long as the government can justify that interference:
 - **Has there been consultation with all the potentially affected Aboriginal peoples?**
 - Is there is a valid objective to the interference?
 - Have the rights been given priority over competing interests?
 - Is there as little infringement of the rights as possible?

Infringement

- Consultation as a tool for infringement?
 - Consultation is one step that needs to be satisfied to justify infringement on s. 35 rights
 - There is no requirement to come to an agreement, so consultation is merely a procedural box that needs to be checked off

Reconciliation v. Infringement

- Argument #1 – Consultation is not the remedy for infringement
 - “In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed...” *Delgamuukw*, SCC 1997, at para. 169
 - “...a breach of the duty to consult may be remedied in various ways, including the awarding of damages.” *Rio Tinto v. Carrier Sekani Tribal Council*, SCC 2010, at para. 49

Reconciliation v. Infringement

- Argument #2 – The principles set out in case law (including reconciliation) should guide how we define what is ‘justified’ infringement
 - Checking off consultation does NOT = justification
 - The question we must start with: what is the right we are seeking to protect?
 - “...aim at identifying the practices, traditions and customs central to aboriginal societies that existed in North America prior to contact with the Europeans.” *R v. Van der Peet*, SCC 1996, para. 44

Reconciliation v. Infringement

- The question we must start with: what is the right we are seeking to protect?
 - The Minister [asserts] that the test ought to be “whether, after the taking up [permitted under Treaty 8], it still remains reasonably practicable, within the Province as a whole, for the Indians to hunt, fish and trap for food [to] the extent that they choose to do so” (emphasis added). This cannot be correct.” *Mikisew Cree*, SCC 2005, at para. 44
 - We must begin with the premise that First Nations are entitled to the what was confirmed in treaty, *West Moberly First Nation v. British Columbia*, BCCA 2011, at paras. 137-140.



What is Justified?

- Can consultation ever justify...
 - Fundamentally compromising a right or practice so that it no longer resembles what existed pre-contact or what was guaranteed by the treaty?
 - E.g. circumstances vary who can exercise rights, developments impacting where rights can be exercised, activities that diminish resources necessary for exercise of rights
 - When infringement = extinguishment?

Consent

- Unilateral extinguishment is no longer permitted after 1982. Consent would be required.
- Consultation cannot replace free, prior and informed consent
- Where consultation is used as a tool to justify infringement/extinguishment, it is being misused because its proper role is to promote reconciliation

Conclusion

- What is the purpose of consultation?
 - Case law is clear: Reconciliation
 - It is not a means to placate First Nations while pushing through conduct that infringes on s. 35 rights
 - In practice, this side of consultation – a tool for reconciliation – is what needs to be the focus

Questions?

