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Meeting the Unique Demands and Challenges of Consulting with Aboriginal Communities

Aboriginal Consultation and Business Law Checklist: Business and Aboriginal Interests in British Columbia's Resource Sector

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Introduction

The British Columbia Court of Appeal's two reasons for judgement in 2002, on the duty of consultation, in *Haida Nation v. B.C. and Weyerhaeuser* impacts all British Columbia resource industries. The duty placed on industry regarding consultation, combined with the additional duty to seek accommodation with affected aboriginal peoples, is a paramount operational matter for any company carrying on resource based business in British Columbia.

The duty of aboriginal consultation now placed on industry must be considered at every phase of business development. Forestry, mining, energy (including oil & gas and coalbed methane development), alternate energy industries (such as wind, tidal and run-of-the-river power generation), real estate development and even tourism must now reevaluate their lines of business where aboriginal interests are, or potentially may be, directly or indirectly, involved (aboriginal interests include aboriginal title and aboriginal rights). Business plans will need to be reshaped to reflect contingencies and risks related to companies' businesses intersecting with aboriginal interests.

Clark, Wilson has created the Aboriginal Consultation and Business Law Checklist which will allow for a more accurate assessment of business risks where aboriginal interests are involved. Utilization of this checklist will in turn generate questions regarding legal strategy and positioning of companies as they pursue business in British Columbia, especially on lands not settled by treaty. In the energy, and in particular the oil and gas, sector, Clark, Wilson provides hands on, accurate and timely legal advice.

The Checklist

As with any checklist, caution must be employed in any conclusions arising from the use of this checklist. The checklist is tripartite with each part in turn further broken down into components that may or may not be applicable to a given line of business.

1. Preparation for Consultation

The Crown

- a. Check if the provincial and/or federal governments (the “Crown”) has commenced consultation regarding your project. Aboriginal people have a legal right to be consulted by government as well as by industry. The legal duty of consultation of aboriginal peoples now placed on industry is very new and is rooted in judicial interpretation of the Canadian *Constitution Act* and the law of equity where companies may well be deemed to be in a trust-like relationship with aboriginal peoples regarding resource projects. Certain industry sectors also have a statutory duty to identify and consult affected or potentially affected aboriginal peoples (e.g., forestry companies as regulated by the British Columbia *Forest Act* or oil and gas exploration companies involved with pre-tenure plans in the highly prospective Muskwa-Kechika Management Area).
- b. If the Crown has not consulted the affected aboriginal peoples (or if consultation appears to be cursory), then be aware that any license, permits or other government regulatory approvals obtained by your company may be “clogged” in that, unless you conduct the required consultation, your company may be held potentially liable for any infringement of aboriginal interests. The scope of liability may include punitive and aggravated damages and, potentially, liability may accrue to directors and officers of your company.
- c. If the Crown has consulted affected aboriginal peoples then request all records from the Crown containing information on the scope of the Crown’s consultation. The Crown, through the Ministry of Sustainable Resource Management, published in October 2002 a First Nations Consultation Policy. The Policy is an excellent roadmap and touchstone in your assessment if the Crown has discharged its consultation and accommodation obligations.
- d. Meet in person with the appropriate Crown representative(s), from the affected ministry(s). Work with and keep the Crown informed at every reasonable opportunity.

Yourself, as Industry

- a. Review the current state of the law of the duty of consultation and aboriginal interests generally, particularly as it relates to industry. The law is in such a state of flux that keeping up to date is imperative. Obtain preparatory legal advice early and obtain it often. A gram of prevention may well translate into a kilo of cure.
- b. Commence consultation with affected aboriginal peoples as early as possible. This will vary on the size and scope of your project and the anticipated impact of the project on aboriginal

interests – use of a 800 metre stretch of road for a week of shooting seismic versus construction of a gas processing plant involve different degrees of consultation. A large project may entail months or years of consultation; a small project, commensurately less. Be prepared however, to receive and seriously consider responses from aboriginal peoples for comprehensive consultation even where the impact of your project is minimal. The subjective nature of what is important, and what is not, forces you, as industry, to err on the side of more consultation. You can never “over-consult”.

c. Create a consultation team, both for aboriginal peoples and for the Crown. Communications/media, legal counsel (in-house and external), government relations, your board of directors’ chair or vice-chair, president and appropriate vice presidents, need to be in the loop and on the team. Not all may be involved in face-to-face consultation but the skill sets of team individuals will ultimately be required.

d. You need to build goodwill with aboriginal peoples affected by your project. This is absolutely vital. Every month of personal friendship building may save one year of effort after the fact. Aboriginal peoples routinely have expressed the view that industry simply does not take the time to foster strong ties and linkages and to attempt to absorb and understand, in a *bona fide* manner, the culture, history and unique qualities of aboriginal peoples. The more a company can articulate a desire to *want* to build ties with an aboriginal people, and the less it shows it *needs* to build ties can be critical. This is a subtle point; of all the points in this checklist, this is perhaps the most crucial. For example, consider residing in the affected aboriginal villages or traditional territories to build goodwill, and be prepared to provide financial aid or in-kind support to the affected aboriginal community in relation to education, training, cultural awareness and alike.

e. Accept the legal fact that consultation must occur. Ultimately discharging your duty to consult may be relatively inexpensive when compared to your overall exploration and/or development budget.

f. Consultation, in and of itself, does not result in a derogation of your company’s legal rights.

2. Consultation Itself

a. Ensure you have identified all aboriginal peoples that may be affected by your project. If utilizing the services of an anthropologist or similar researchers who may interact with affected aboriginal people in collecting data, ensure he/she is well versed in dealing with aboriginal peoples. Contractors and employees are the public face of your company and a *faux pas*, no matter how inadvertent or minor, can have serious negative repercussions.

b. Let the Crown(s) know exactly what you are doing. Where reasonable, copy them confidentially on all aspects of your consultation. Invite, perhaps pay for expenses of the Crown to participate in your consultations. Insist, in writing, on the highest level of representation from the Crown.

c. Send to consultations your highest ranking officer, or chair of your board of directors. This sends a message that your company is taking the consultation process seriously. If the Crown(s) or the aboriginal peoples concerned do not, at least you have attempted to set a high standard. Note, that the courts have stated a reciprocal duty on the part of aboriginal peoples with the Crown, but by inference also with industry, to consult in good faith and not to “frustrate the consultation process by refusing to meet or participate or by imposing unreasonable limitations...”.

d. Keep in mind that consultation must be conducted in “good faith”. In law, this is a high standard, appropriately attributable to a fiduciary, which in essence is what your company is to aboriginal peoples who are in turn beneficiaries.

e. The aboriginal peoples consultation process must not be part and parcel of consultation with non-aboriginal groups. The courts have ruled that, for the Crown, public consultation does not include aboriginal consultation and that to be constitutionally valid, consultation must be a distinct process separate from public consultation.

3. Post-Consultation

a. Keep full and complete notes or logs of all meetings, conversations and any relevant (direct or indirect) information regarding the consultation process, whether with the Crown(s) or the affected aboriginal people. Evidence in the form of accurate and reliable documentation may be critical if matters become adversarial and you determine to pursue a court remedy, or to inform, or defend, your position to your investors and shareholders.

b. The duty to seek accommodation, is separate and distinct from the duty to consult. The law provides little guidance on the scope of accommodation. Every situation, every project, every aboriginal people you consult and accommodate, is different; where possible taking the “high road”, however that may be defined in your context, is the only practical route to follow.