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PITS, QUARRIES, AND CONSULTATION

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Is it important?

The duty to consult and to accommodate the rights and claims of Indigenous peoples is a permanent part of the fundamental constitutional law of Canada and has to be considered by everyone in the aggregate community. It can arise at any time, including just before and after the issuance of a licence. In law, it trumps everything, including legislation coming out of Queens Park and Ottawa, affects rights in private property, and the failure to deal with it in a meaningful way will have disastrous consequences for a proponent: you will lose time, money, damage relationships with Indigenous communities, and, in cases in which a licence has already been granted, you could see it set aside.

What should I do?

Be proactive. By addressing the issue of consultation early and, where possible, reaching an agreement with the affected communities before even applying for a licence, you will save time, money, and significantly reduce the risk of the process going awry.

You should consider the following:

- Before even submitting a licence application, do some preliminary research to find out which communities in or around the proposed project might be affected.
- Reach out to the Ministry (the Crown acts through its ministries) about the project, making specific inquiries about whether a duty may be triggered. Ask it about the communities and rights which might be in play and the best way in which to approach this.

- Inform the communities about what it is you are proposing and ask for their feedback.
- Provide them with all reports and technical information relating to the project.
- Consider providing the communities with some funding, including for experts, to defray the cost of participating in consultation.
- Try to address any concerns and reach an agreement where you can integrate any agreed-to mitigation and accommodation into the licence application.
- Send a copy of the licence application to the communities which may be affected.
- Periodically ask the Ministry about consultation. In this respect, ask it whether the duty has been triggered, its scope and what is required to fulfill it.
- Document everything. Keep very detailed records of your communication with the communities in question (including messages, telephone calls, etc.) and prepare fair-minded minutes of meetings, showing who was present, what was discussed and what agreements were reached. Send a copy of the minutes to all participants. At the end of the day, the Ministry will be reviewing the written record in order to evaluate the sufficiency of consultation. It will do so before it issues a licence.
- Be transparent, straight forward and fair with the communities with which you engage. Copy them on communications with the Ministry about the progress of the application.
- If the Ministry tells you that it is delegating aspects of the duty, make sure that you get, in

writing, a clear statement of what it is you are expected to do and then do it, making sure that you document how you are doing so.

- Keep the Ministry informed, copying it on all correspondence and inviting it to participate in meetings.
- Be mindful of the fact that your actions and documentation will form part of what is evaluated by the Ministry and may find itself into a public court record should things go sideways.

Where does the duty come from?

A unanimous Supreme Court of Canada recognized the duty to consult in 2004 as part of the process of “honourable negotiation” mandated by s. 35(1) of the *Constitution Act, 1982*. It is an evolving area of the law and has been acknowledged in recent additions to the *Aggregate Resources Act*.

The duty applies to both the federal and provincial Crown. Technically, it is not, at least from a constitutional and legal point of view, a duty imposed on proponents although, practically speaking, the Crown can delegate “procedural” aspects of it to others (more about this below).

How does it work?

The duty 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 it”. Every situation is approached individually and “the scope of the duty is proportionate to a preliminary assessment of the strength of the case . . . and to the seriousness of the potentially adverse effect . . .”

Aboriginal, or Indigenous, rights can include the right to hunt, fish, and gather traditional medicines, and title may be claimed on land which is part of or near a proposed project.

The Crown has to have, in effect, a meaningful consultation with the potentially affected communities by first assessing whether a duty exists, making a preliminary assessment of its scope (something which can change as new facts come to light), consulting with the relevant communities, and accommodating them where necessary.

The scope of the duty is on a spectrum and depends on the nature and strength of the right and the seriousness of the impact on it. On the low end, the duty may include notice to the affected communities and the provision of information about the project in question. At the higher end, the communities should be part of the decision-making process. At somewhere in between, it is likely that the duty includes an obligation to provide funding to communities to allow them to participate in the consultation. There is no duty to come to an agreement nor do communities have a veto. That said, the Crown “must act with honour and integrity” and the communities “must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting. . .”


Although a part of the duty can be delegated to proponents, the Crown must still assess the level of consultation and make a final decision. As part of any delegation, the Ministry may require a proponent to deal directly with the relevant

communities to notify them of the proposed project, provide them with information, fund some aspect of the communities’ participation in consultation, and modify the project to address any concerns raised. Any delegation should be documented, the Ministry’s expectations should be clearly laid out, and the proponent must, as set out above, keep very detailed records. These records will be shared with the affected communities and reviewed by the Ministry as part of determining whether consultation and, where warranted, accommodation have been properly completed.



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What happens if the consultation is insufficient?

Everything can go wrong: a proposed project can be derailed, delayed, and, in some cases, effectively be stymied.

This newsletter is to inform our clients and friends. Its content does not constitute legal advice and should not be relied on by readers. Please see a lawyer about the duty to consult and your licence application. Each case is unique and a lawyer with good training, experience, and sound judgment can provide advice and guidance tailored to your specific situation and needs. If you would like to receive future newsletters but are not yet on our mailing list, please send your name and e-mail address to: info@devrylaw.ca

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Devry Smith Frank *LLP*'s Planning and Development Team specializes in aggregate resource matters. We have worked with aggregate producers and their consultants on over 30 successful licence applications and related official plan and zoning amendments, appearing before the Ontario Municipal Board, the Environmental Review Tribunal, and the courts. We have represented clients on provincial offences matters under the *Aggregate Resources Act*, negotiated haul route agreements with municipalities, and dealt with matters involving First Nations consultation with Indigenous communities including at the judicial review level.



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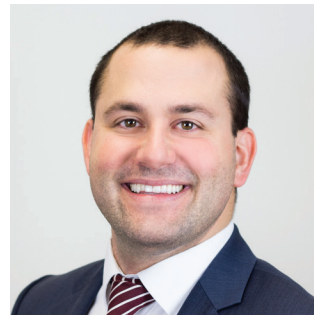
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