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## Duty to consult: An Overview

- The duty to consult arises when the Crown has knowledge of potential or established Aboriginal or Treaty rights, and contemplates conduct that may adversely affect those rights.
- Three elements are required:
  - Contemplated Crown conduct
  - Potential adverse effect(s)
  - Asserted or established Aboriginal or Treaty rights
- Assessing whether a duty is triggered (low threshold; requires a credible claim), and the scope of that duty, will evolve throughout the consultation process, as information is gathered about each element. The Crown may need to reassess the situation.
- When interpreting consultation in the context of modern treaties, courts have adapted the analysis to that context (as shown in the Little Salmon/Carmacks decision).

## Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (2011)

- **MODERN TREATIES**
- *Some modern Treaties include consultation provisions in relation to Crown activities and officials must consult in accordance with the consultation terms of those Treaties. Implementing Treaties is a responsibility of the Crown as a whole.*
- *The duty to consult operates in law independently from the terms of a Treaty and can therefore apply where Crown actions have the potential to adversely impact Treaty rights provided for under a Treaty or Modern Land Claims Agreements. However consultation can be shaped and even fully addressed by the terms of an agreement for specific situations where such is made clear. Therefore, the first step for federal officials is to determine whether there are relevant consultation provisions within the Treaty itself.*
- *Departments and agencies should contact the Aboriginal Affairs and Northern Development Canada Implementation Branch, Justice Canada and, in some cases, the AANDC regional offices to obtain advice and assistance in developing approaches for consulting Treaty groups.*
- *Treaties are an important part of the process of reconciliation and provide guidance for the on-going relationship of the Crown and Aboriginal groups. (Updated Guidelines, page 23).*

## Upholding the Honour of the Crown

- In treaties, Aboriginal groups and the Crown give shape to their relationship. This informs the assessment of consultation requirements.
- In all three situations covered in this presentation, officials must maintain the honour of the Crown:
  - 1. Relevant consultation provision in the treaty
  - 2. No relevant consultation provision in the treaty
  - 3. Provisions in the treaty excluding consultation for an activity or substituting other mechanisms
- *“Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in Haida Nation and affirmed in Mikisew Cree, it is a doctrine that applies independently of the expressed or implied intention of the parties.” (Little Salmon/Carmacks, para 61).*
- You always have to remember, Crown has to act honourably (whether 1, 2 or 3 above).

### 1. When Consultation provision is in the treaty:

- *When a modern treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. If a process of consultation has been established in the treaty, the scope of the duty to consult will be shaped by its provisions. (Little Salmon/Carmacks, SCC, 2010, para 67).*
- Identify the consultation provision tied to the Crown activity/decision at hand.
- **Clear provision, reasonable/upholding of the honour of the Crown:** deference by courts that will rely heavily on the provision:
  - “Consultation can be shaped and even fully addressed by the terms of an agreement for specific situations where such is made clear” (Updated Guidelines)
  - Officials are to abide by the consultation provision and related process
- **Unclear provision:** in addition to general treaty interpretation principles, officials and courts may look to other aspects of the treaty to interpret the provision and the scope of consultation (such as the definition of consultation, general provisions – certainty language, rights and obligations of the parties with respect to certain lands or similar activities, implementation plan, etc.)
- *Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork: Quebec (Attorney General) v. Moses, 2010 SCC 17, [2010] 1 S.C.R. 557. (Little Salmon/Carmacks, para 54).*
- If unclear, resort to treaty interpretation principles. What else is in the treaty that the parties may have intended?

## 2. When no consultation provision is in the treaty:

- If there is no relevant consultation provision in the treaty and there is a potential adverse effect of the Crown conduct to a treaty right, then the duty to consult is triggered.
  - Treaty is not a “complete code”
  - Treaty is part of the relationship
- (...) *And the content of meaningful consultation “appropriate to the circumstances” will be shaped, and in some cases determined, by the terms of the modern land claims agreement.(...).* (Little Salmon/Carmacks, para 46).
- Scope of the consultation:
  - Courts would look to other aspects of the treaty to interpret the scope of the consultation (general treaty interpretation principles and other provisions)
  - In the *Little Salmon/Carmacks* case, it was found to be at the lower end of the spectrum.
  - Based on that court decision, elements to be considered may include: negotiated definition of consultation, certainty clauses, legislation in place to implement the treaty, decision of the parties not to incorporate a more general consultation process in the treaty itself, authority of the Crown to manage the lands, etc.
- Court found that the terms of the treaty provided insight into what parties considered as appropriate regarding consultation (para 74) or a useful indication of what the parties themselves considered fair (para 75).

## 3. Provisions in treaty excluding consultation for an activity or substituting other mechanisms:

- In *Little Salmon/Carmacks*, the Court also mentioned the following possibilities:
  - “Parties can “negotiate a different mechanism” (para 71)
  - “Honour of the Crown may not always require consultation” (para 71)
  - Parties may decide to “exclude consultation altogether in defined situations” (para 46)

- These possibilities would need to be further explored by the Crown and Aboriginal groups, but they must ensure that, in doing so, they maintain the honour of the Crown. Parties will also seek to strengthen the treaty relationship.

### **Conclusion**

- *Reconciliation in the Yukon, as elsewhere, is not an accomplished fact. It is a work in progress. (Little Salmon/Carmacks, para 52).*
- Negotiating treaties, implementing them and managing consultation requirements are all part of the **ongoing relationship** between the government and the Aboriginal community.
- When assessing consultation requirements, officials must seek to strengthen that treaty relationship, pursue reconciliation and uphold the honour of the Crown.
- To obtain advice and assistance in developing approaches for consulting Treaty groups, departments and agencies should contact the Aboriginal Affairs and Northern Development Canada Implementation Branch, Justice Canada and, in some cases, the AANDC regional offices.