



Aboriginal Consultation: A Legal Perspective (Latest & Greatest)

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Presentation Outline

1. Basic Legal Principles

2. Recent Developments

- Case law (BC and Yukon Courts)
- Tribunal Decision (BC Environmental Appeal Board)
- Federal consultation under new *Canadian Environmental Assessment Act*



Legal Principles

- Duty to consult (and potentially accommodate) if:

*Crown contemplates actions that
may adversely impact potential or established
Aboriginal or Treaty rights*

- Grounded in the Honour of the Crown:

Constitution Act, 1982:

- > s.35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed



Legal Principles

- **Level of Consultation – depends on:**
 - (a) nature of asserted right; and
 - (b) degree of impact
- **Duty to Consult rests with Crown**
 - Duty does **not** rest on:
 - > private citizens or industry
- **In practice:** role for project proponent



Ross River Dena Council v Government of Yukon

2012 YKCA 14

Decision issued:
December 27, 2012



Ross River Dena Council
(approx. boundaries of traditional territory)



Ross River Dena Council v. Government of Yukon

Background:

- Free-entry Mining System under Yukon *Quartz Mining Act*
 - No Crown discretion re. mineral claims
- Ross River Dena Council sought a declaration that:
Yukon has a duty to consult **before** recording a mineral claim on lands within Ross River Area
(Kaska Traditional Territory)



Ross River Dena Council v. Government of Yukon

Yukon Supreme Court:

- Duty to Consult = Constitutional principle that applies “upstream” of statutes

“[i]t would be surprising if a statute could be **sheltered** from a constitutional principle merely by **eliminating discretion** in government action or conduct.”

- Government of Yukon has a duty to consult **after** the recording of a mineral claim:

- Must **notify** First Nation that a mineral claim had been issued



Ross River Dena Council v. Government of Yukon

Yukon Court of Appeal:

- Lack of Crown discretion in recording mineral claims as source of problem:

“Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist.” [emphasis added]

- Requires modification of free-entry system



Ross River Dena Council v. Government of Yukon

Yukon Court of Appeal:

- Mere notice insufficient; more “elaborate” system required to allow for consultation *before* Aboriginal claims are adversely affected
- Suspended declaration (1 year):
 - Duty to consult before making mineral rights available to third parties
 - Duty to notify and where appropriate consult/accommodate before allowing mineral exploration activities



Canadian Forest Products Ltd v. Sam

BC Supreme Court:

- Logging blockade in Wet'suwet'en traditional territory
 - *Delgamuukw* plaintiffs (SCC 1997)



- 2001 Agreement between First Nation & Crown
 - First Nation claimed Agreement renders Cutting Permit unlawful
- Injunction application by each of Canfor & First Nation



Canadian Forest Products Ltd v. Sam

Injunction Test:

- 1. Serious Issue**
- 2. Irreparable Harm**
- 3. Balance of Convenience**

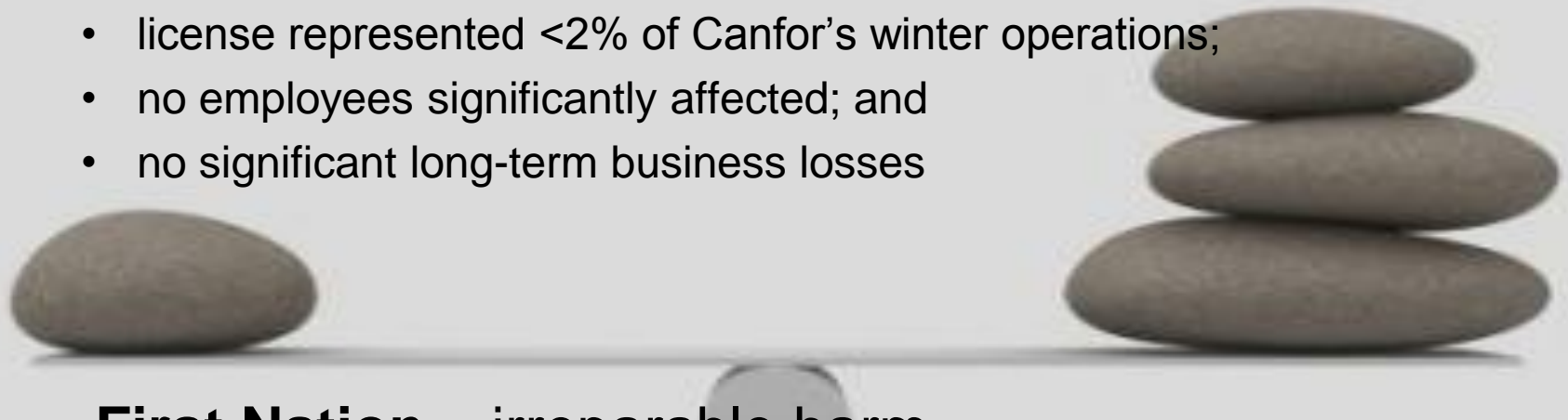
(branches 2 and 3 merge)



Canadian Forest Products Ltd v. Sam

Irreparable Harm:

- **Canfor** – no irreparable harm
 - license represented <2% of Canfor's winter operations;
 - no employees significantly affected; and
 - no significant long-term business losses
- **First Nation** – irreparable harm
 - Redtop = last untouched tract of land to preserve traditional identity
- **Balance of Convenience favours First Nation**



Canadian Forest Products Ltd v. Sam

BC Court of Appeal:

- Emphasised consultation and accommodation
- First Nation used wrong legal procedure (collateral attack on permit)
 - Can't combine Aboriginal rights & title claim with claim on validity of forest licence
- Injunction set aside
 - Order reserved for 2 months to permit conversion of action to a judicial review application



Fort Nelson First Nation v. Assistant Regional Water Manager

Fort Nelson First Nation

- Treaty 8
- Traditional Territory

Appeal of decision to issue Conditional Water Licence:

- Licence issued to Nexen Inc.
- Purpose = Oilfield Injection (fracking)



Tsea Lakes
NE of Fort Nelson
(Horn River Basin)



Fort Nelson First Nation v. Assistant Regional Water Manager

Preliminary Application to EAB:

- Stay of Licence pending resolution of appeal

Should stay be granted?

a. Serious Issue? → YES

- treaty rights, duty to consult, material facts in dispute

b. Irreparable Harm? → NO

- Insufficient evidence of harm to treaty rights or environment

c. Balance of Convenience → Favours denying the stay



William v. British Columbia

- Aboriginal rights and title case brought by Tsilhqotin FN and Xeni Gwet'in Band
- BC Court of Appeal:
 - “site specific” approach to Aboriginal title
 - Other Aboriginal rights substantial
- En route to the Supreme Court of Canada



NEW Canadian Environmental Assessment Act, 2012

- Canadian Environmental Assessment Agency = **Consultation Coordinator**
- Consultation on:
 - Potential “environmental effects” & how effects are included in the project
 - Potential project impacts on Aboriginal & Treaty rights
 - Mitigation measures & Follow-up programs



NEW Canadian Environmental Assessment Act, 2012

CEA Agency's Approach:

1. Identify groups whose Aboriginal or Treaty rights may be adversely affected
2. Invite Comments
3. Provide Information & Funding
(Participant Funding Program)
4. Consider Feedback Provided
5. Identify Mitigation & Accommodation Measures

Source: <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=ED06FC83-1>



NEW Canadian Environmental Assessment Act, 2012

Delegation to First Nations?

- Eligible: body created under a lands claims agreement or self-government legislation
- Exercise “*powers, duties or functions in relation to an assessment of environmental affects*”
- Minister decides if “*appropriate substitute*”



Thank-you!

Any Questions?



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