

# Drivers of Change – How We Practice Impact Assessment

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**Willms  
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Aboriginal  
Energy Law**

# Overview

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- **Duty to consult**
- **Regulatory changes**
- **Recent Supreme Court Cases**

# DUTY TO CONSULT

# What is the Duty to Consult?

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- **Common law principle from Supreme Court of Canada**
- **Duty of the Crown to consult with Aboriginal groups**
- **Accommodate where appropriate**
- **Affects proponents as Crown can delegate “procedural aspects” through legislation**

# What Triggers the Duty to Consult?

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- **Crown has knowledge of potential existence of Aboriginal right or title**

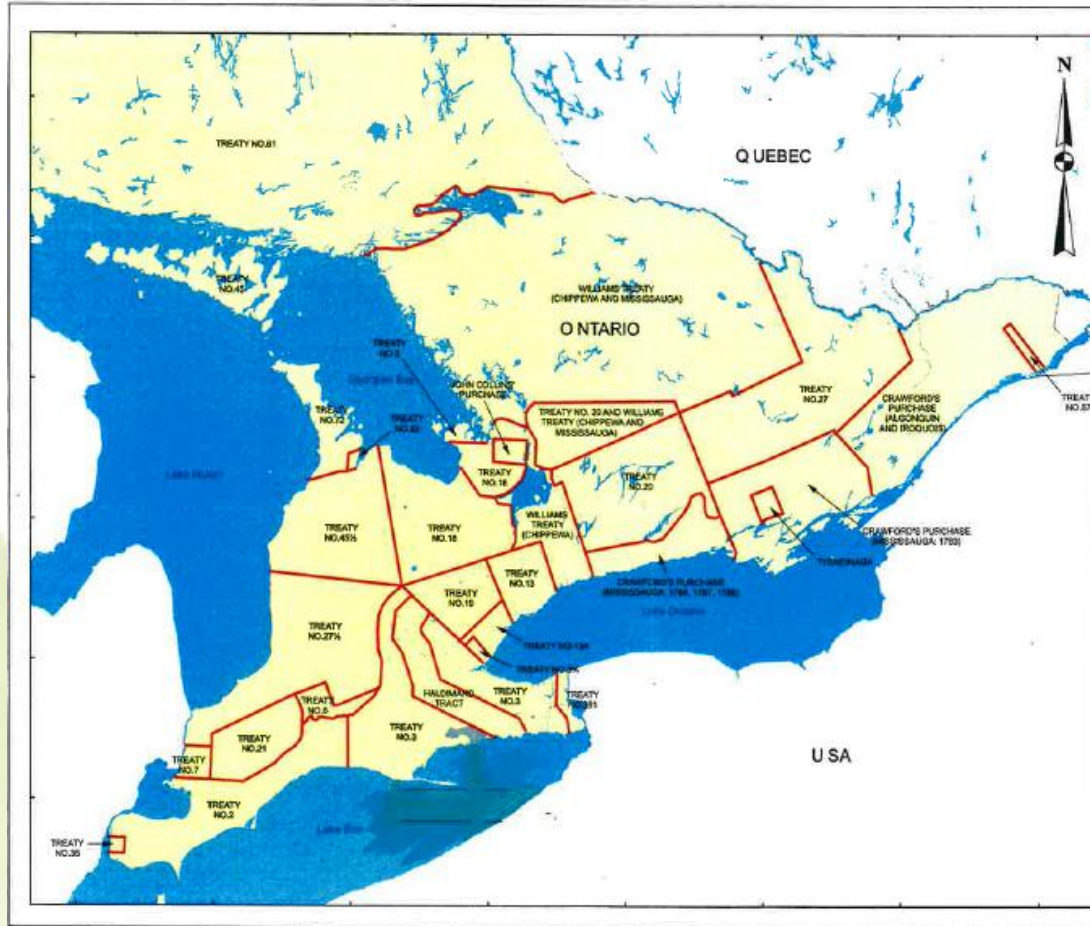
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- **Contemplates conduct**

3

- **Which might adversely affect Aboriginal right**

# Treaties and Land Disputes



# Consultation Triggers

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## Federal Statutes

- ***Canadian Environmental Assessment Act, 2012***
- ***Fisheries Act***
- ***Species At Risk Act***
- ***Navigation Protection Act***
- ***Historic Canals Regulation and National Parks Act***

# Consultation Triggers

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## **Federal – CEA Agency Policy**

- **As the Crown Consultation Coordinator, the Agency provides Aboriginal communities with the opportunity to comment on:**
- **Potential environmental effects of the project**
- **Potential impacts of a project on potential or established Aboriginal or Treaty rights**
- **Mitigation measures**
- **Follow-up programs**



# Consultation Triggers

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## Ontario Statutes

- *Environmental Assessment Act*
- *Lakes and Rivers Improvement Act*
- *Public Lands Act (Crown lands)*
- *Provincial Parks and Conservation Reserves Act*
- *Endangered Species Act*
- *Ontario Water Resources Act*
- *Mining Act*
- *Ontario Heritage Act / Cemeteries Act*

# Consultation Triggers

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## Ontario Duty to Consult Policy

- **Legal obligation to consult with Aboriginal peoples where it contemplates decisions / actions that may adversely impact asserted / established Aboriginal or treaty rights**
- **Duty to consult & rooted in Honour of the Crown & protection of Aboriginal and treaty rights – s.35 , *Constitution Act, 1982***

# Consultation Triggers

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## Ontario EAs – Duty to Consult Policy

- **“Under provincial environmental laws, you must consult with First Nation and Métis communities during the environmental assessment process”**
- **“Where the Crown’s duty to consult is triggered, procedural aspects of rights-based consultation are delegated to the proponent**

# Consultation Triggers

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## Other

- **Government funds (e.g., infrastructure grants)**
- **Renewable energy incentives (e.g., Ontario's FIT program)**

# REGULATORY CHANGES – IMPLICATIONS FOR THE DUTY TO CONSULT

# CEAA, 2012

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- **Purpose of CEAA, 2012 is to**
  - “promote communication and cooperation with Aboriginal people with respect to environmental assessments”
  - implications for Crown and for proponents
  - larger role for Aboriginal communities in CEAA process

# CEAA, 2012

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- **Does Agency screening trigger duty?**
- **Likely “yes” if asserted Aboriginal right is affected**
  - Crown Conduct
  - public consultation

# CEAA, 2012

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- **Does Minister's decision to approve substitution trigger duty to consult?**
- **Does the duty to consult remain with the federal Crown?**
- **Likely "yes" if asserted Aboriginal right is affected**
  - Crown conduct



# CEAA, 2012

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- **Does Minister's decision to recommend exemption from CEAA, 2012 trigger duty to consult?**
- **Does duty to consult remain with federal Crown where Governor in Council orders equivalency under the Act?**

# CEAA, 2012

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- **Report of the Commissioner of the Environment & Sustainable Development – Fall 2014**
  - Chapter 4 CEAA, 2012 – Agency has not undertaken systematic approach to engagement with Aboriginal peoples on policy issues
  - make publicly available internal guidance documents

# RECENT SUPREME COURT OF CANADA CASES

# *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44

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- **SCC found Aboriginal title over 1,700 km<sup>2</sup> in BC**
- **Clarifies test for and meaning of Aboriginal title**



Source: cbc.ca

# *Tsilhqot'in Nation v. British Columbia*

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## **What is Aboriginal Title?**

- **Includes ownership rights similar to fee simple**
  - use of land in modern or traditional ways
  - enjoyment & occupancy of the land
  - possession of the land
  - economic benefits of the land
  - right to proactively use & manage the land

# *Tsilhqot'in Nation v. British Columbia*

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## **Limitations on Aboriginal Title**

- **Can only be alienated to the Crown**
- **Cannot be used/encumbered in any way that prevents future generations from benefit of land**
- **Can be infringed if justified under clarified *Sparrow* test**
  - consent required where infringement not justified

# *Tsilhqot'in Nation v. British Columbia*

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## Test for Aboriginal Title

- Occupation must be **sufficient, continuous, exclusive**
- **“Sufficient” – based on cultural context**
  - type, frequency & intensity of land use
  - inform 3rd parties that FN held land for a purpose
- **“Continuous” – unbroken continuity not necessary**
- **“Exclusive” – requires intention/capacity to retain exclusive control over**

# *Tsilhqot'in Nation v. British Columbia*

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## Infringement Test Clarified

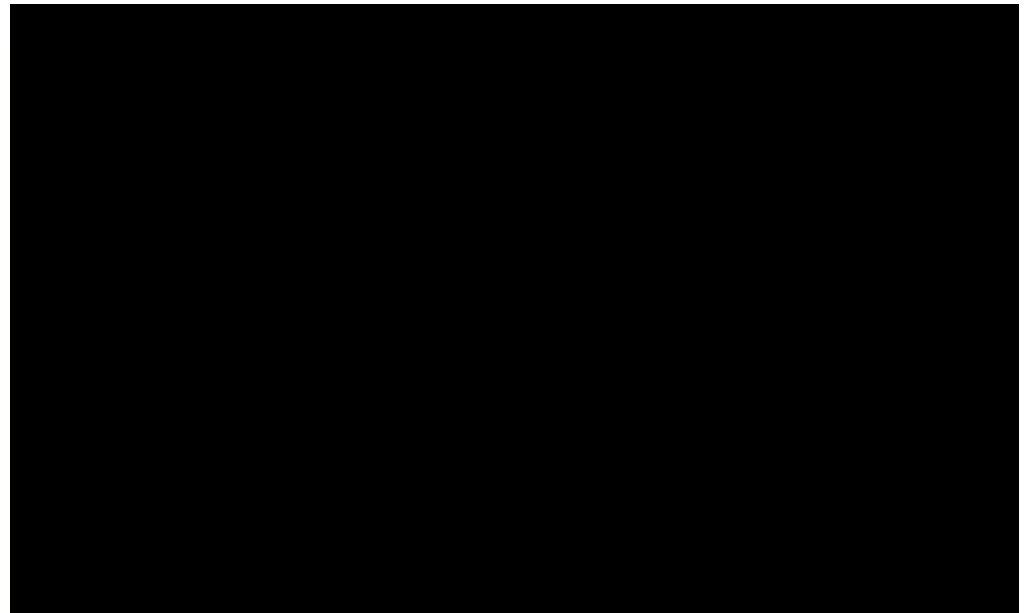
- **Crown must establish compelling & substantial objective for infringing title**
  - must be consistent with Crown's fiduciary duty to FN
  - must be considered from both FN & Crown perspectives
  - must further goal of reconciliation
  - rational connection between government objectives and infringement
  - proportionality of impact & minimal impairment to title
- **consent required if infringement cannot meet test**



# *Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48*

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- **Also known as “Keewatin”**
- **Ontario wanted to take up Treaty 3 lands for forestry**
- **FN alleged Province needed consent of federal Crown**
- **FN argued Treaty 3 obligations did not devolve to Province**



# *Grassy Narrows First Nation v. Ontario (Natural Resources)*

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## **SCC Decision**

- **Province can take up treaty lands under Treaty 3 without federal consent**
- **Provincial Crown has right to infringe treaty rights if it meets justification test**

# IMPACTS OF SCC DECISIONS

# Aboriginal Title

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- **Potential Aboriginal title claims in Ontario**
  - unsettled land claims – current largest is 36,000 km<sup>2</sup>
  - Métis - most do not have treaties
  - numbered treaties – disagreement about meaning
- **Aboriginal title claims available to semi-nomadic groups**
  - many FN groups were nomadic pre-contact

# Aboriginal Title

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- **Aboriginal groups already considering title claims to further interests**
  - Atikamekw First Nation declaration of sovereignty (Quebec)
  - Gitksan First Nation “eviction” notices (BC)
- **If there is a possibility of unresolved title, SCC recommends obtaining FN consent as best way to move projects forward**

# Treaty Rights

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- **Some clarification**

- provincial resource permits can infringe treaty rights if they meet justification test
- provinces can take up lands under treaties but only in conformity with honour of the Crown

- **BUT**

- Do provinces now have other obligations under treaties?
- new court challenge to “taking up” clause validity

# IMPLICATIONS OF SCC DECISIONS

# Implications for Provinces

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- **Provincial rights & responsibilities clarified**
  - rights – to take up land & legislate generally
  - responsibilities – justification test for infringement renewed
- **Uncertainty persists**
  - when to apply justification test?
  - when to apply duty to consult?
- **FN consent/partnership reduces risks to a project proceeding**



# Contact Information

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