Nunavut Mining Symposium

The Duty to Consult:
A Northern Project Development Perspective

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BUSINESS LAW

Overview

1. Know the Territory

2. Source & Purpose of the Duty:
    - Honour of the Crown
    - It's about a right to a process

3. Trigger for the Duty:
    - Crown conduct that might adversely affect an Aboriginal right

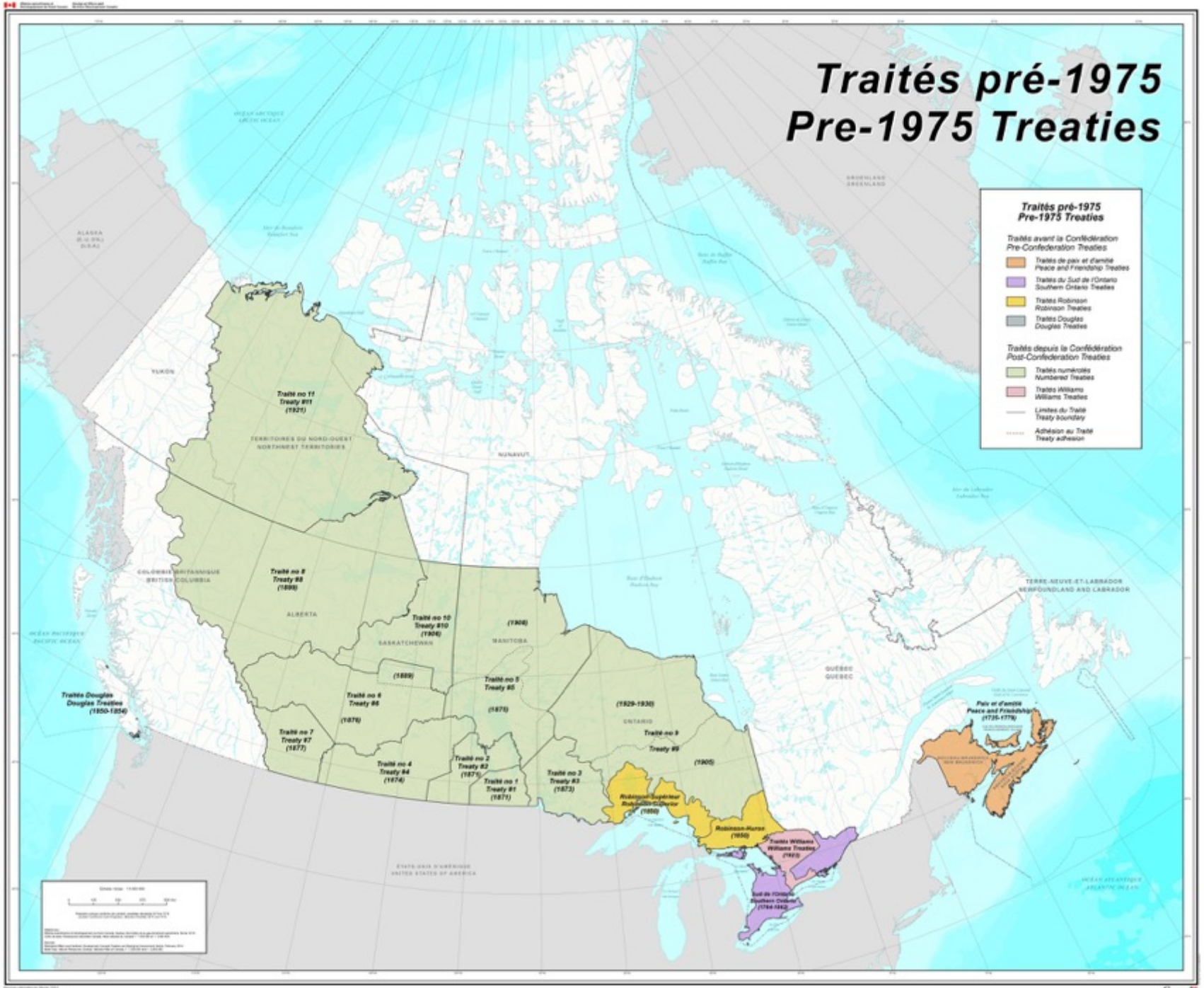
4. Scope and Content:
    - A Spectrum
    - Affecting Treaty Rights, and Treaty Implementation
    - UNDRIP/FPIC

5. Agreements

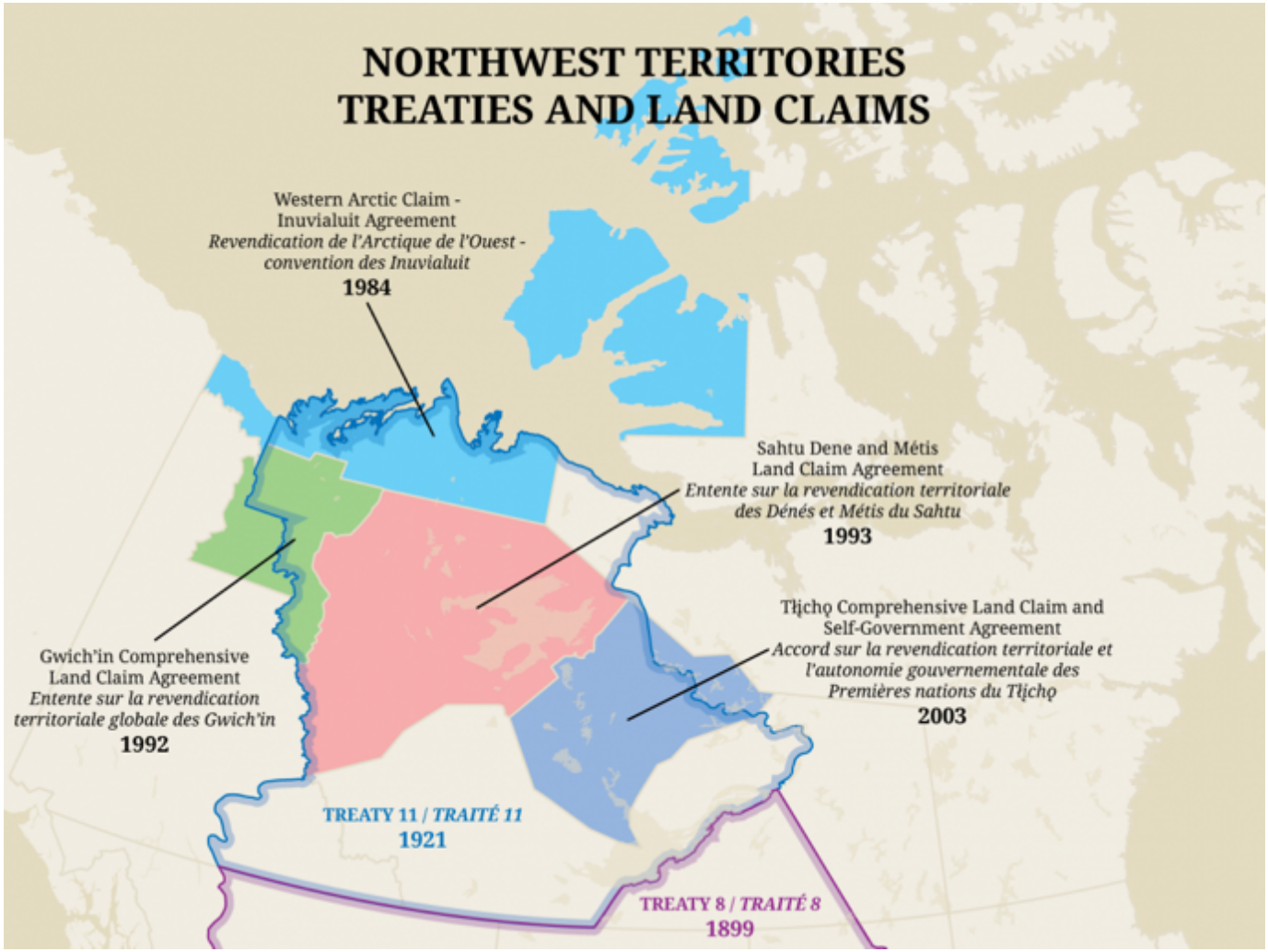
1. Know the Territory

Three legal regimes in Canada:

- Historic Treaties
  - between the early 1700's and the early 1900's in the regions covering southern Ontario, parts of the Maritimes and the Prairie provinces
- Modern Land Claim Agreements
  - Nunavut Land Claims Agreement
- Non-treaty areas
  - Far eastern portion of NWT bordering Nunavut
  - Overlapping claims in southern Kivvaliq


Traités pré-1975
Pre-1975 Treaties
Traités pré-1975
Pre-1975 Treaties
Traités avant la Confédération
Pre-Confederation Treaties
Traités de paix et d'amitié
Peace and Friendship Treaties
Traités du Sud de l'Ontario
Southern Ontario Treaties
Traités Robinson
Robinson Treaties
Traités Douglas
Douglas Treaties
Traités depuis la Confédération
Post-Confederation Treaties
Traités numérotés
Numbered Treaties
Traités Williams
Williams Treaties
Limites du Traité
Treaty boundary
Adhésion au Traité
Treaty adhesion
Traité no 11
Treaty #11
(1921)
Traité no 8
Treaty #8
(1899)
Traité no 10
Treaty #10
(1906)
(1908)
(1889)
Traité no 5
Treaty #5
(1875)
Traité no 6
Treaty #6
(1876)
(1929-1930)
Traité no 7
Treaty #7
(1877)
Traité no 9
Treaty #9
(1905)
Traité no 4
Treaty #4
(1874)
Traité no 2
Treaty #2
(1871)
Traité no 1
Treaty #1
(1871)
Traité no 3
Treaty #3
(1873)
Traités Douglas
Douglas Treaties
(1850-1854)
Robinson-Supérieur
Robinson-Superior
(1850)
Robinson-Huron
(1850)
Traités Williams
Williams Treaties
(1923)
Sud de l'Ontario
Southern Ontario
(1764-1862)
Paix et d'amitié
Peace and Friendship
(1725-1779)
YUKON
TERRITOIRES DU NORD-OUEST
NORTHWEST TERRITORIES
NUNAVUT
COLOMBIE-BRITANNIQUE
BRITISH COLUMBIA
ALBERTA
SASKATCHEWAN
MANITOBA
ONTARIO
QUÉBEC
QUEBEC
TERRE-NEUVE-ET-LABRADOR
NEWFOUNDLAND AND LABRADOR
ÉTATS-UNIS D'AMÉRIQUE
UNITED STATES OF AMERICA
OCÉAN ARCTIQUE
ARCTIC OCEAN
OCÉAN PACIFIQUE
PACIFIC OCEAN
OCÉAN ATLANTIQUE
ATLANTIC OCEAN
GROENLAND
GREENLAND
ALASKA
(É.-U.)
(U.S.A.)

1. Know the Territory



- All 3 contexts (non-treaty, historic and modern)

2. Source & Purpose

- What is the source of Aboriginal Consultation?
  - "The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown." (*Haida Nation* at para. 16)
  - "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. " (*Haida Nation* at para. 17)
  - Section 35 of the *Constitution Act*

2. Source & Purpose

- **Non-treaty areas**: "…the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed." (SCC, *Rio Tinto*, 2010)
- **Historic treaty areas**: "Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably." (SCC, *Mikisew*, 2005)
- **Modern treaty areas**: "consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people" (SCC, *Little Salmon*, 2010)

2. Source & Purpose

In all cases, despite the duty to consult being judge made law:

- “True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation before project approval is always preferable to after-the-fact judicial remonstration following an adversarial process … No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.” (SCC, *Clyde River*, 2017)
- Importance of agreements: seeking legal certainty, building relationships, fostering reconciliation

2. Source & Purpose

- The s. 35 obligation to consult and accommodate regarding unproven claims is a **right to a process, not to a particular outcome.** The question is not whether the [Indigenous group] obtained the outcome they sought, but whether the process is consistent with the honour of the Crown. While the hope is always that s. 35 consultation will lead to agreement and reconciliation of Aboriginal and non-Aboriginal interests, *Haida Nation* makes clear that in some situations this may not occur, and that s. 35 does not give unsatisfied claimants a veto over development. Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group. (SCC, *Ktunaxa*, 2017)

3. Trigger

- When is the Crown's duty to consult triggered?
  - "When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida Nation,* para. 35)
  - Three part test:
    1. Crown has knowledge of a potential Aboriginal claim or right;
    2. Crown contemplates conduct; and
    3. the conduct contemplated has the potential to adversely affect an Aboriginal claim or right.

3. Trigger

- Does the '**Crown**' include Regulators?
  - In our Northern regulatory framework, "ultimate decision maker" is often a Minister, but there are situations where a regulator is the "ultimate decision maker"

Clyde River and *Chippewas of the Thames*

  - If a tribunal is the final decision maker of delegated authority, then the tribunal's decision is 'Crown Conduct' that triggers the duty

4. Scope and Content

- Varies with the circumstances:

"Scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed." (*Haida Nation,* para. 39)

4. Scope and Content

Spectrum of Consultation:

Low

Weak case and/or minimal negative effects:

– notice

– disclosure of information

– discussion of any issues raised

High

Strong case and/or substantial negative effects:

– the opportunity to make submissions

– formal participation in the decision-making process

– written reasons to show how concerns were considered and their impacts on the decision

– accommodation of interests

4. Scope and Content

- Consultation is not a veto
  - *Non-treaty areas (Haida)*

    "This process does not give Aboriginal groups a veto over what can be done with land …Rather, what is required is a process of balancing interests, of give and take."
  - *Historic Treaties (Mikisew)*

    "Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. …will not always lead to accommodation, and accommodation may or may not result in an agreement."
  - *Modern Treaties (Little Salmon)*

    -"The First Nation does not have a veto over the approval process. "

4. Scope and Content – IOL access under NLCA

- Many court cases from other jurisdictions are about access. Access to IOL has been codified in the NLCA

- *21.2.1 Except where otherwise provided in the Agreement persons other than Inuit may not enter, cross or remain on Inuit Owned Lands without the consent of the DIO.*

- *21.7.8 An operator may exercise rights to explore, develop, produce or transport minerals, in, on or under Inuit Owned Lands only in accordance with the Agreement.*

4. Scope and Content – Clyde River: Affecting NLCA rights

- *Clyde River* case (2017 SCC)
- Challenge to NEB authorization of offshore seismic testing
- Under the *NLCA*, Inuit ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

4. Scope and Content – Clyde River: Affecting NLCA rights

- Process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required here
- Limited opportunities for participation and consultation
- No oral hearings, no participant funding
- While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation
- While proponents eventually responded to questions raised during the EA process, they did so in the form of a practically inaccessible document months after the questions were asked

4. Scope and Content - Peel River case: Treaty Implementation

- Duty to consult can still arise in the implementation of modern treaties
- Dispute between Yukon government and First Nations regarding land use plan for Peel River
- Multi-stage land use planning process in Agreement:
  - Yukon had early opportunity to comment but did not raise significant concern
  - Only after Final Recommendation circulated (which restricted mineral exploration) did Yukon government propose significant changes
- To what extent may Yukon propose changes to the Final Recommendation?

4. Scope and Content – Peel River case: Treaty Implementation

- Supreme Court of Canada (2018) says:

  > [61] … Yukon must bear the consequences of its failure to diligently advance its interests and exercise its right to propose access and development modifications to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time.

- Implications:
  - Reconciliation is achieved not only by negotiating modern treaties, but in how they are implemented
  - Courts will still supervise Crown conduct in the implementation of modern treaties, and can strike down government decisions not consistent with the honour of the Crown
  - Modern treaties define and constrain the processes that governments must follow in making decisions about Crown lands and resources

4. Scope and Content – UNDRIP/FPIC

- But what about UNDRIP?
  - UNDRIP passed by United Nations in 2007
  - Canada voted against the Declaration
  - Requires states to "consult" with indigenous peoples concerned to obtain their **free, prior and informed consent** prior to the approval of any project affecting their lands or territories and other resources
  - endorsed by Canada in 2010

"The Declaration is an **aspirational document**..."

"... the Declaration is a non-legally binding document that **does not** reflect customary international law nor **change Canadian laws** ..."

4. Scope and Content - UNDRIP/FPIC

- 2016 — Canada becomes "full supporter, without qualification"
  - commitment to "adopt and implement the Declaration **in accordance with the Canadian Constitution**"

    "Simplistic approaches such as adopting the United Nations declaration as being Canadian law are unworkable…"

    (Hon. Jody Wilson-Raybould, July 2016)

Does "free, prior and informed consent" mean a "veto"?

- Most political statements are heavily qualified — references to "consistent with Constitution" could mean "consistent with Court decisions" which do not provide for a veto
- Still unclear how Canada and/or Territories will implement UNDRIP

5. Agreements

- Granting certainty where the law cannot
- Determine what the land claim in your area says:
  - NLCA Art 26: Mandatory IIBAs for Major Development Projects
- Agreements: Legal certainty, timely approvals, cost-effective, competitive advantage
- Risk Management: Compare your agreement to your next best alternative (Court & Regulatory process)

Thanks for Listening

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