

# **DUTY TO CONSULT AND ABORIGINAL ENGAGEMENT**

**Juli Abouchar**

*Specialist in Environmental Law  
Certified by the Law Society of Upper Canada*

**Willms & Shier Environmental Lawyers LLP**  
**[www.willmsshier.com](http://www.willmsshier.com)**

**February 23, 2011**

# Outline

---

- **Duty to Consult “101”**
- **Delegation of Procedural Aspects of the Duty to Consult in Ontario**
- **Getting Ready: Developing a Municipal Aboriginal Engagement Protocol**
- **Case Studies**

# Duty to Consult “101”

---

- **What you need to know about the duty to consult?**
  - Crown owes duty
  - Duty triggered by government conduct with potential to affect existing/asserted Aboriginal rights
  - Crown can delegate procedural aspects of the duty to third parties
  - Third party consultation efforts may be considered by the Courts to determine if the Crown duty is met
  - Depth of consultation varies depending on seriousness of impacts and strength of claim

# Content of the Duty

## Characteristics:

- Weak Aboriginal claim
- Potential for infringement is minor

## Actions:

- Give notice
- Disclose information
- Discuss any issues raised in response to the notice

## Factors

- Specificity of promises made
- Seriousness of potential impact on right asserted
- Strength of claim to asserted right

## Characteristics:

- Strong Aboriginal claim
- Right and potential for infringement is high
- High risk of non-compensable damage

## Actions:

- Deep consultation
- Opportunity to make submissions
- Formal participation in decision-making process
- Written reasons showing how Aboriginal concerns were considered
- **Accommodate**
- **Consent**



# Who Owes the Duty?

---

- **Federal governments**
- **Provincial governments**
- **Agents of the Crown**
- **Third parties to whom procedural aspects of the Crown duty are delegated (municipalities, industry)**
  - Delegates' actions referred to as "engagement"
  - Crown retains the duty to consult which cannot be delegated

# Role of the “Delegatee”

---

- **Responsible for procedural aspects of consultation**
- **Courts provide no bright line between procedural and non procedural aspects**
- **Crown generally does not provide details about expectations but sometimes seeks to approve a proponent’s consultation plan**
- **The process for third party-First Nation engagement is frequently agreed on ahead of time and written in a protocol agreement**
- **Protocol agreement usually satisfies the Crown that the procedural aspects have been discharged**

# Delegation of Procedural Aspects of Duty to Consult

---

- **Federal**

- *Canadian Environmental Assessment Act*
- *Infrastructure \$\$*

- **Ontario**

- *Environmental Assessment Act*
- *Planning Act*
- *Cemeteries Act*
- *Heritage Act*
- *Green Energy Act*
- *MOE Approvals expectations*
- *Mining Act*
- *Infrastructure \$\$*

# Delegation of Procedural Aspects of Duty to Consult

---

- ***Canadian Environmental Assessment Act***
  - Triggers of EA: federal proponent, \$\$, lands, certain approvals (ie. *Fisheries Act*)
  - Projects or prescribed activities
  - The EA proceeds by screening or comprehensive study
  - If by screening, public consultation discretionary
  - If by comprehensive study, potential for a Panel Review Hearing
    - Participant funding available including Aboriginal funding
  - Federal decision maker must determine environmental effect and mitigation



# Delegation of Procedural Aspects of Duty to Consult

---

- ***Canadian Environmental Assessment Act***
  - “environmental effect” includes effects on:
    - physical and cultural heritage
    - current use of lands and resources for traditional purposes by aboriginal persons
    - any thing of historical, archaeological significance
  - For “Major Projects”: Cabinet Directive and *MOU for Improving the Regulatory performance for Major Natural Resource Projects*
    - Requires an Aboriginal consultation and engagement work plan for each project
  - *Aboriginal Engagement: a Guide for Proponents of Major Resource Projects (MPMO)*

# Delegation of Procedural Aspects of Duty to Consult

---

- **Ontario *Environmental Assessment Act***
  - Trigger: public undertakings or designated private undertakings (enterprise, activity, proposal, plan or program for an enterprise or activity)
  - Two levels:
    - (1) Class EA / Environmental Screening
      - Municipal Projects Class EA, Guides for Electricity, Waste, Transit
    - (2) Minister may order proponent to conduct Individual Environmental Assessment
  - Obligation to consult with interested parties, including Aboriginal Communities in developing Terms of Reference
  - Terms of Reference will set out consultation during preparation of the environmental assessment

# Delegation of Procedural Aspects of Duty to Consult

---

- **Ontario *Planning Act***
  - First Nations are “public bodies” for the purpose of the *Planning Act*
  - Minister may require consultation with public bodies on policy statements, by-laws, subdivision agreements, OP policies
  - MMAH is requiring municipalities to consult with Aboriginal Communities prior to approving Official Plans and Official Plan Amendments
- **Official Plan and Official Plan Amendments**
  - *Planning Act* Regulation requires notice of public meetings and open houses to Aboriginal Communities located on a reserve within one kilometre of where official plan or amendment would apply

# Delegation of Procedural Aspects of Duty to Consult

---

- **Ontario *Cemeteries Act***
  - Recognizes Aboriginal burial sites and prescribes steps to be taken upon discovery of human remains
  - Site disposition agreement to be negotiated between proponent and affected Aboriginal Community
- **Ontario *Heritage Act***
  - Proposed new standards and guidelines will require Aboriginal engagement in archaeology
  - *Engaging Aboriginal Communities in Archaeology* draft technical bulletin (Ontario, June 2009)

# Delegation of Procedural Aspects of Duty to Consult

---

## ***Green Energy and Green Economy Act***

- Contact Crown for a list of Aboriginal communities to be consulted
- Provide description of proposed project, including potential adverse impacts to the identified Aboriginal communities
- Request in writing any adverse impacts that the project may have on constitutionally protected Aboriginal or treaty rights and any measures for mitigating those adverse impacts
- Director may request additional consultation
- Consultation details to come from Province

# Delegation of Procedural Aspects of Duty to Consult

---

## ***Ontario Environmental Protection Act, Ontario Water Resources Act***

Consultation expected prior to Ministry of Environment issuing Certificates of Approval where potential impacts on aboriginal communities

An expectation communicated by the Director of Approvals; not specifically in the statutes

# Infrastructure Funding

---

- **Contribution Agreements set out responsibilities of Crown and Recipient in relation to Aboriginal consultation and delegate procedural aspects**

# **Getting Ready: Developing a Municipal- Aboriginal Consultation Protocol**



# Getting Ready

---

- **Understand when you could be the recipient of delegated authority for procedural aspects of duty to consult:**
  - Passing or amending Official Plans
  - Environmental assessment under Ontario EA
  - Decisions affecting road allowance, permanent closing of roads or acquiring or disposing of interest in land over which a land claim exists
  - Finding archaeological artifacts or remains
  - Seeking MOE Certificate of Approval/ or amendment
  - Seeking permission from Conservation Authority/DFO to work in or near water
  - Signing a contribution agreement for infrastructure funding with federal or provincial government

# Getting Ready

---

- **Determine Aboriginal interests in the area**
- **Be pro-active – don't wait till you need "engagement"**
- **Consider friendly outreach to discuss a protocol**
- **Find out if Aboriginal community has an existing consultation process**
- **Find out communities' interests and concerns and build good will**
- **Understand processes, contact person, timing of council meetings, community meetings, elections, means of outreach**
- **Meet with Crown, determine Crown's role, expectations, and ability to provide capacity (Province, Feds, CA)**
- **Negotiate engagement protocol with FN**

# Components of a Protocol

---

- **Notice (when , to whom , two-way)**
- **Information exchange (level of detail, scope, process , timeframes )**
- **Getting input from Aboriginal community (impacts , mitigation)**
- **Need for capacity**
- **Response to concerns  (mitigation, accommodation)**
- **Implementation , monitoring and follow-up (taking care of the relationship)**

# Case Studies

# Teston Road Case Study

---

- **During construction to widen Teston Road, crews discovered an ossuary**
- **Municipality contacted 3 closest Aboriginal Communities (the Mississaugas of Scugog Island, Six Nations of the Grand River, and the Huron-Wendat in Quebec)**
- **Municipality worked with Huron-Wendat to redesign project to keep ossuary in place**
- **Project completed without major delays to the municipality**

# Town of Saugeen Shores North End Sewer Project

---

- **Town expanding sewer system**
- **Sewer to run through an area with potential Aboriginal significance**
- **Town negotiated protocol agreement with Saugeen Ojibwe Nation (SON) before contracting for work**
- **During construction, SON artifacts were discovered**
- **SON was informed of discovery**
- **Construction halted at the site**
- **Archeologists began processing and unearthing artifacts**
- **SON and Town negotiating protection of the area while project is continuing**

# Projects are More Likely to Work When

---

- **Open communication**
- **Effective dispute resolution**
  - Immediate meetings between chiefs and mayor whenever needed or requested
  - Start with staff to staff, and when things become serious, elevate to chief to mayor/leader
- **Community support**
  - Need to engage community so a change in leadership does not jeopardize the project
  - Ensure community is consulted and supportive before proceeding with project
  - Consider a ratification vote

# Projects are More Likely to Work When

---

- **A good relationship is in place**
  - A negotiated protocol supports the relationship
  - Good relationships take work, give and take and commitment
- **Crown/Agency Role**
  - Government stays involved



# Contact Information

---

**Juli Abouchar**

Phone: (416) 862-4836

**[jabouchar@willmsshier.com](mailto:jabouchar@willmsshier.com)**

**Willms & Shier Environmental Lawyers LLP**

**[www.willmsshier.com](http://www.willmsshier.com)**