

Duty to consult with First Nations: A municipal obligation?

January 1, 2008

By Jill Dougherty

The Canadian federal government and all provincial governments have a duty to consult with the First Nations before taking any steps that may infringe on aboriginal or treaty rights which are claimed or have been established. The case law on this point is clear. What isn't so clear is whether the duty to consult with the First Nations applies to municipalities when making land-use or other decisions that may impact these rights.

Duty to consult explained

The aboriginal and treaty rights of the aboriginal people of Canada are protected under Section 35(1) of Canada's *Constitution Act, 1982*. Courts have held that when there is any possibility that these rights may be infringed, the federal or provincial government involved has a duty to consult with the affected First Nations group. This duty to consult exists with respect to established aboriginal or treaty rights and in situations where such rights have been claimed but are not yet determined or established. It exists independent of any statutory provision which may require consultation with First Nations or other public bodies or individuals.

Consultation must be carried out in good faith, with the goal of addressing the concerns that affected First Nations may have and reconciling interests where possible. But the scope of this duty and the extent of consultation required will depend on the circumstances, including:

- ❑ the seriousness of the potential impact on rights;
- ❑ the extent to which the First Nation has asserted a claim to such aboriginal and treaty rights which may be affected, and the status of the claim;
- ❑ the merit or strength of the claim; and
- ❑ whether the aboriginal or treaty rights potentially affected are already existing or established, or simply claimed but as yet undetermined.

If the **potential** impact on rights is minor, the scope of the consultation can reflect this. For more substantial impacts, the nature and scope of the consultation will be broader and more intensive.

While the Crown is not under a duty to reach an agreement during **such** consultations, it has a duty to consult in good faith and maintain the "honour of the Crown" in reconciling the interests of the Crown and First Nations in the matter at stake.

Duty at the municipal level

Like the federal and provincial governments, municipalities also have the power to make decisions that may impact aboriginal or treaty rights. But municipalities are not Crown entities they are created by provincial statute, not constitutional authority. Are they bound by this same duty to consult? While the Supreme Court of Canada has concluded that third parties (such as, for example, a corporation which is not a government agency) are not responsible for discharging the Crown's duty to consult and accommodate, it has not specifically commented on the obligations of municipalities and the question is still unsettled.

One recent British Columbia Court of Appeal decision, *Gardner v. Williams Lake (City)* 2006 B.C.C.A.307, suggests that the Crown's duty to consult may not extend to municipalities. However, the *Gardner* case did not involve any claimed aboriginal or treaty rights and cannot be treated as a definitive ruling on the duty to consult with First Nations.

In the *Gardner* case, the city was contemplating by-law amendments on a parcel of land to accommodate the building of a retail store. An area resident claimed that the consultation process in advance of the by-law change was inadequate.

While the process in that case was related to consultation required under a provincial statute and did not involve aboriginal or treaty rights, the Court referred to the scope of the duty to consult in cases where such aboriginal rights were concerned. In her reasons, Justice Saunders stated that "Local governments are the creatures of the provincial legislature, bound by their provincial enabling legislation. This case, therefore, does not engage the honour of the Crown or the heightened responsibility that comes with that principle in cases engaging Aboriginal questions."

Factor rights into decision making

Since the question of whether duty to consult applies to local governments has not been directly settled by a court dealing with a potential aboriginal rights infringement, municipalities would be wise to bear this in mind and seek legal advice on their option when making a decision which may affect First Nations' interests. There may also be situations where consultation is a preferred and cost-effective step, even if it is not legally required.

For more information or inquiries:



Jill Dougherty

Toronto
416.947.5058

Email:
jdougherty@weirfoulds.com

Jill Dougherty is a Partner in the firm's Regulatory Practice Group. She has over 35 years of experience acting on behalf of both private and public sector clients. Jill appears regularly as counsel before the trial and appellate courts and administrative tribunals in many aspects of public law.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035