

Presentation to Interface 2010 Conference

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Overview

- The Fiction of Canadian Property Rights
- The Reality of Aboriginal Title
- The Question of Crown title
- The Duty to Consult and Aboriginal Title Lands

The Fiction of Canadian Property Rights

- Based on British property law
- Crown granted interest to landholders and retained underlying title
- Recognized the existing feudal system

Crown's Interest in Lands of Indigenous People

- International law—acquire interests by:
 - discovery and settlement vacant lands or
 - conquest or cession of populated lands
- With possible exception of Douglas Treaties and Treaty 8, no cession in BC

Indigenous Land Rights

- Aboriginal title exists based on:
 - Long existing Indigenous legal systems; or
 - Exclusive occupation and control of the land

Aboriginal Title

Aboriginal title includes:

- Interest in the land itself;
- Right to decide what uses made of the land

Settlement of BC contrary to Rule of Law

- Under British law, existing land rights to be recognized unless expressly extinguished
- *Magna Carta* – Crown cannot unilaterally abrogate vested rights
- At best, Crown acquired only underlying title—no beneficial interest

Ignored Indigenous Property Rights

- In Canada, Crown assumed to be original occupier
- Crown's *de facto* control of Indigenous lands
- Crown granted interests/tenures to 3rd parties

BC's Suspect Crown Title

- Section 109 Constitution Act, 1867 all lands belong to the provincial Crown:
 - “subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same”
- 1888 Privy Council -- Aboriginal interest equals pre-existing interest “other than that of the Province”

BC Land Act

- Section 1 “Crown land” equals:
 - “land, whether or not it is covered by water, or an interest in land, vested in the government”
- “vested interest” equals interest that can be completely enjoyed – it’s neither contingent or conditional

Duty to Consult & Accommodate

- What to do while Aboriginal title remains unrecognized?
- Crown cannot run roughshod over Aboriginal interests
- Must consult and, where appropriate accommodate.

When does the Duty Arise

- When Crown contemplates making a decision that may adversely affect Aboriginal title and rights
- Arises at an early stage
- Includes strategic level decisions, not simply operational decisions

Scope of Duty to Consult

- Proportionate to strength of claim plus seriousness of possible infringement
- Strong claim plus serious adverse affects equal requirement for 'deep consultation'

Requirements Include

- Proposals cannot have been finalized
- Sharing information
- Interactive process
- Willingness to alter original proposal

Consultation Includes

- Willingness to address First Nation concerns
- Demonstrably integrate responses to First Nation concerns
- Accommodate through negotiation

Accommodation

- More than just mitigation
- May include shared-decision with First Nations
- May include revenue and benefit sharing

Conclusion

- First Nations have outstanding interests in Interface lands
- Government cannot run roughshod over these interests
- First Nations must be consulted and accommodated at early stages of planning

Thank you

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