



OLTHUIS KLEER
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BARRISTERS AND SOLICITORS

Artwork by Robert Solomon

Managing lands for treaty rights: strategies for the duty to consult and cumulative impacts

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Overview

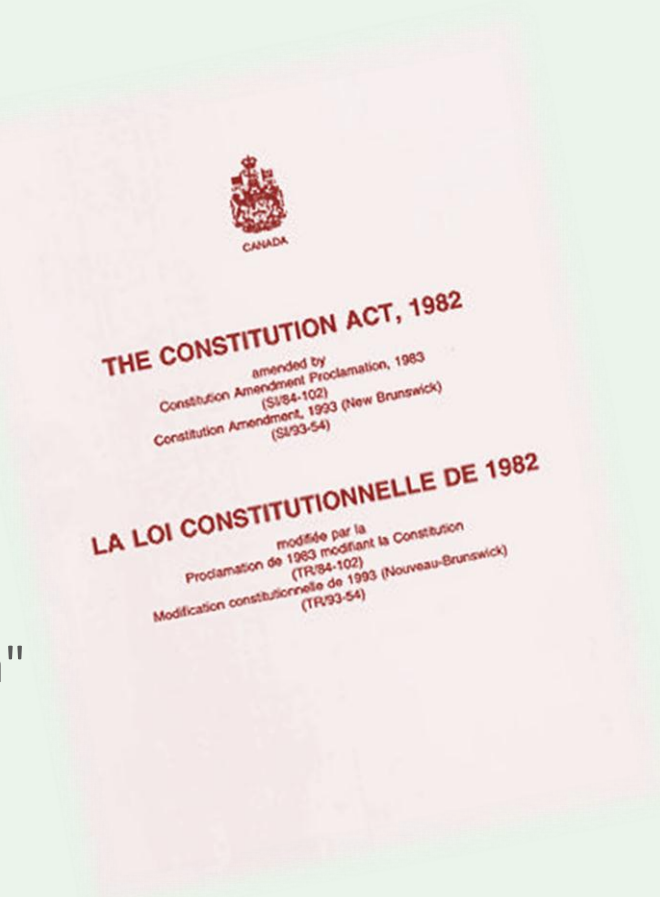
- Aboriginal and Treaty Rights & The Duty to Consult and Accommodate
- Just a Tool for Justified Infringement?
- Strategies for Using the Duty to Protect Rights



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Section 35 of the Constitution Act, 1982

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.



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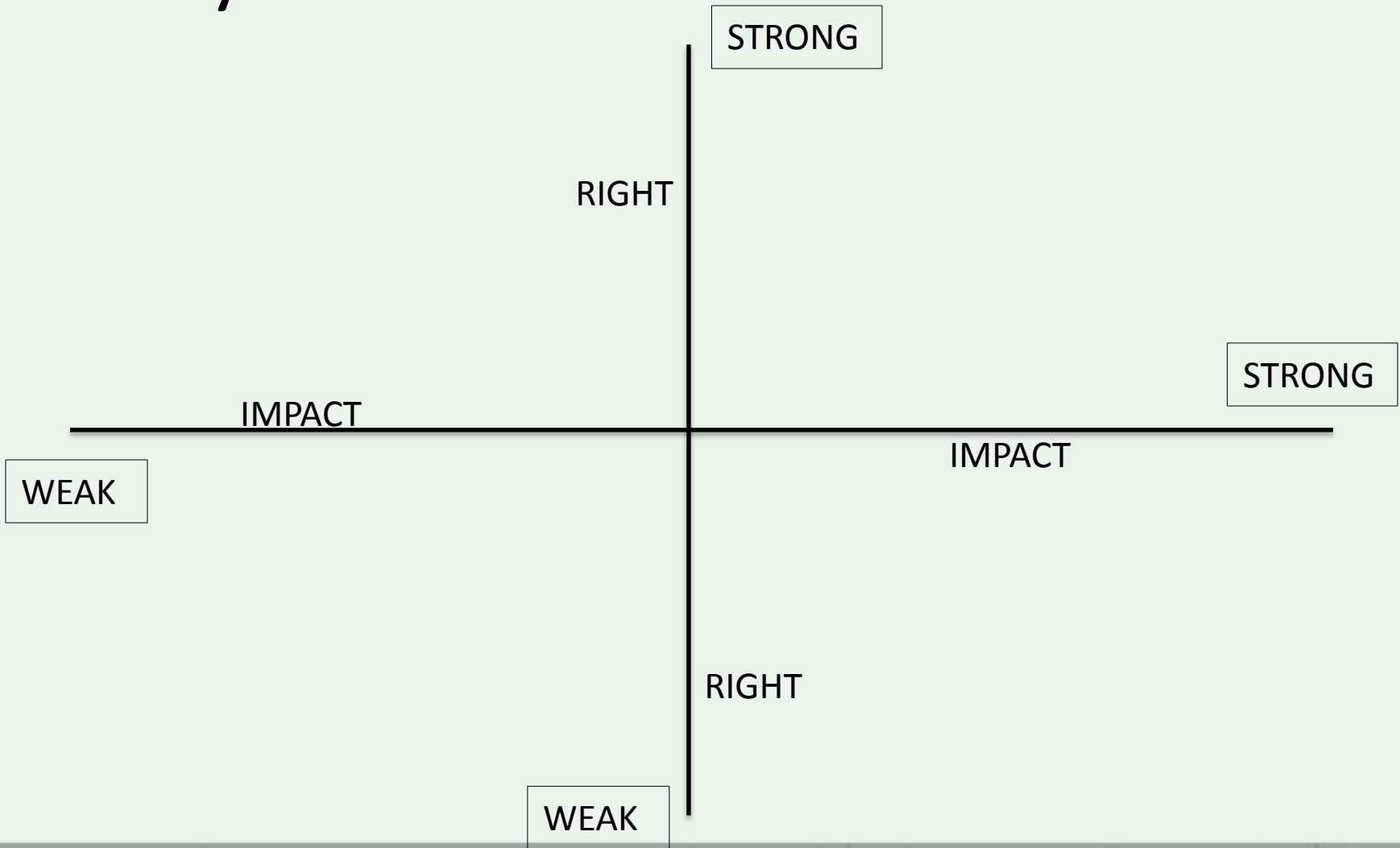
Duty to Consult and Accommodate

- The constitutional duty arises when...
 - A decision may impact existing or asserted Aboriginal, Treaty or Land Title Rights, the Crown has a Duty to Consult and Accommodate where necessary.
- The source is...
 - The honour of the Crown
- The purpose is...
 - Reconciliation, so the Crown must follow appropriate consultation procedures, e.g. no sharp dealing, make decisions that fairly balance Aboriginal concerns with other societal interests



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Duty to Consult and Accommodate



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Duty to Consult and Accommodate: Reconciliation

“PUT SIMPLY, CANADA’S ABORIGINAL PEOPLES WERE HERE WHEN THE EUROPEANS CAME, AND WERE NEVER CONQUERED. MANY BANDS HAVE RECONCILED THEIR CLAIMS WITH THE SOVEREIGNTY OF THE CROWN... OTHERS...HAVE YET TO DO SO...THE HONOUR OF THE CROWN REQUIRES THAT THESE RIGHTS BE DETERMINED, RECOGNIZED AND RESPECTED.”

HAIDA NATION V. BRITISH COLUMBIA, SCC 2004, AT PARA. 16



Duty to Consult and Accommodate: Infringement

- R v. Sparrow, SCC 1990
 - The Crown has a fiduciary duty where it acts (even when it legislates) in a way that impacts Aboriginal and treaty rights
 - Those rights can be infringed, so long as the government can justify that interference:
 - **Has there been consultation with all the potentially affected Aboriginal peoples?**
 - Is there is a valid objective to the interference?
 - Have the rights been given priority over competing interests?
 - Is there as little infringement of the rights as possible?

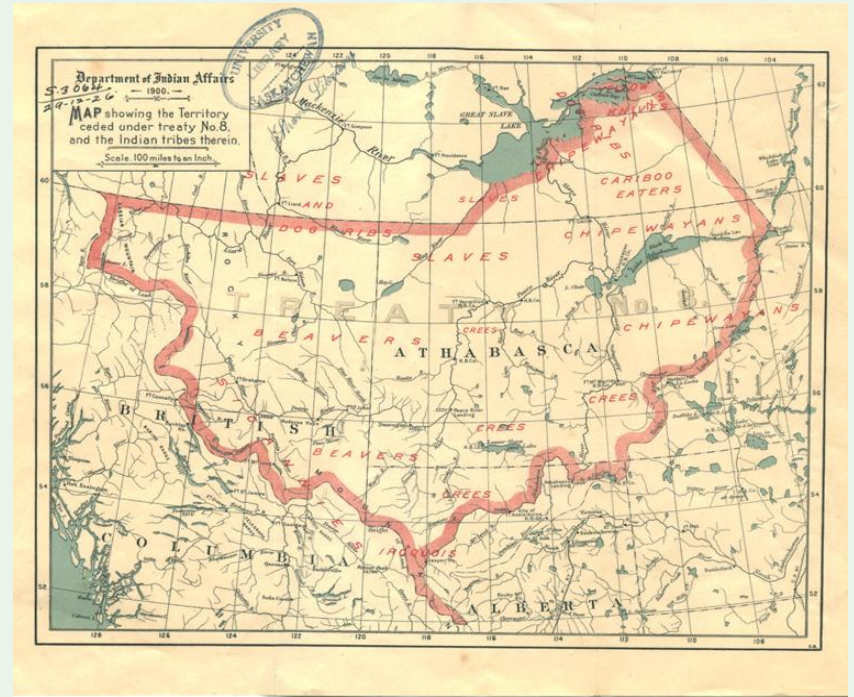


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Duty to Consult and Accommodate: Protecting Rights

THE MINISTER [ASSERTS] THAT THE TEST OUGHT TO BE “WHETHER, AFTER THE TAKING UP [PERMITTED UNDER TREATY 8], IT STILL REMAINS REASONABLY PRACTICABLE, WITHIN THE PROVINCE AS A WHOLE, FOR THE INDIANS TO HUNT, FISH AND TRAP FOR FOOD [TO] THE EXTENT THAT THEY CHOOSE TO DO SO” (EMPHASIS ADDED). THIS CANNOT BE CORRECT.”

MIKISEW CREE, SCC 2005, AT PARA.
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Duty to Consult and Accommodate: Protecting Rights

TREATY 8

“AND HER MAJESTY THE QUEEN HEREBY AGREES WITH THE SAID INDIANS THAT THEY SHALL HAVE RIGHT TO PURSUE THEIR USUAL VOCATIONS OF HUNTING, TRAPPING AND FISHING THROUGHOUT THE TRACT SURRENDERED AS HERETOFORE DESCRIBED, SUBJECT TO SUCH REGULATIONS AS MAY FROM TIME TO TIME BE MADE BY THE GOVERNMENT OF THE COUNTRY, ACTING UNDER THE AUTHORITY OF HER MAJESTY, AND SAVING AND EXCEPTING SUCH TRACTS AS MAY BE REQUIRED OR TAKEN UP FROM TIME TO TIME FOR SETTLEMENT, MINING, LUMBERING, TRADING OR OTHER PURPOSES.”



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Duty to Consult and Accommodate: Protecting Rights

West Moberly First Nations v. BC, 2011 BCCA 247 (leave to appeal to SCC denied 2012)

- Impacts of bulk mining sample exploration on a fragile herd of caribou and First Nations' Treaty 8 harvesting rights.
- How should past impacts be considered and how should the possibility of future impacts be considered?
- Past impacts should not be ignored, and it would be short-sighted to ignore the possibility of future impacts – i.e. full-scale mining.



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Duty to Consult and Accommodate: Protecting Rights

- Consultation is NOT the remedy for infringement
- What is 'justified' infringement needs to be determined in the context of first answering the question:
 - What is the right that we are seeking to protect?

NOT:

- What is the activity we are seeking to justify?



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Thank you

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