LOCAL GOVERNMENT & FIRST NATIONS:

Some Foundational Legal Principles

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What will we Discuss?

1. Section 35(1) *Constitution Act*

2. Aboriginal Title Case Law
   - (i) Delgamuukw v. B.C.
   - (ii) Tsilhqot'in v. B.C.

3. Implications/Opportunities for Local Governments resulting from Tsilhqot'in Decision

4. Duty to Consult and Accommodate
   - (i) Haida Nation v. B.C.
   - (ii) Neskonlith Indian Band v. Salmon Arm

5. What does all this mean?
   - (i) Legal Principles
   - (ii) Practical Principles
   - (iii) Reconciliation

1. Section 35(1), *Constitution Act*

- Section 35(1) *Constitution Act, 1982* reads:

  "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

- 17 words
- This is our Constitution; supreme law

2. Aboriginal Title Case Law

(i) *Delgamuukw v. B.C. (1997)*

- Number of important cases before and after section 35(1) of the *Constitution Act, 1982* but all comes together in *Delgamuukw*
- first case to decide aboriginal title could exist which includes:
  - Like fee simple; better
  - Right to use land
  - Right to occupy land
  - Possess land
  - Economic benefits
  - Collective right

Delgamuukw v. B.C. (1997) cont.

- *Delgamuukw* did not decide:
  - Actual title to any land; or
  - Size of aboriginal title lands

- 17 years later comes *Williams* (or *Tsilhqot'in v. B.C.)*

(ii) Tsilhqot'in v. B.C. (2014)

- June 2014 SCC decision
- some legal scholars suggest most important case in B.C. history
- brief review of case
- firmly established aboriginal title exists; it was proven!!
- Court declared a large area of land (1700 square km) to the First Nation

Tsilhqot'in v. B.C. (2014) cont.

- Key points:
  - first ever case to prove aboriginal title; there will be more!
  - areas granted will likely be large
  - aboriginal title protected by s.35(1) of the *Constitution Act*; makes it a "super" fee simple
  - First Nation must protect for future generations; collective rights

3. Implications/Opportunities for Local Governments

- New neighbours; like new local governments
- Aboriginal Title is a real thing; cannot be taken away
- Negates past resource agreements; must renegotiate
- Economic implications moving forward
- Regulatory implications

- Questions/Discussion

4. Duty to Consult & Accommodate

(i) *Haida Nation v. B.C.*, 2004 SCC 73

- The Crown duty arises when:
  1. the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or claim;
  2. the Crown contemplates a decision or conduct that engages the Aboriginal claim or right; and
  3. the contemplated Crown decision or conduct may adversely affect the Aboriginal claim or right
- Remember, Crown duty arises pre-proof!!
- Talk about leading duty to consult case and how it affects local governments' duty to consult

(ii) *Neskonlith Indian Band v. Salmon Arm*, 2012 BCCA 379

- Facts
  - A proposed shopping centre project was sited on private land in a sensitive riparian area upstream of the Neskonlith's reserve
  - The Neskonlith considered the affected area their territory, but were not involved in litigation nor negotiations for aboriginal title; pre-proof

Neskonlith Indian Band v. Salmon Arm, 2012 BCCA 379 cont.

- Facts
  - The Developer applied to the City for an Environmentally Hazardous Area development permit
  - The City notified the Neskonlith and provided information as per usual policies (eg., s. 879, *Local Government Act*)
  - The City issued the development permit
  - The Neskonlith claimed they were not adequately consulted as per *Haida Nation* duty to consult

Neskonlith Indian Band v. Salmon Arm, 2012 BCCA 379 cont.

- BC Court of Appeal
  - Besides s.879 of the *Local Government Act*, local governments have neither the authority nor duty to consult with First Nations
  - Practically speaking, local governments do not have the resources to consult with FNs every time a decision affects their rights

Neskonlith Indian Band v. Salmon Arm, 2012 BCCA 379 cont.

- BC Court of Appeal
  - Local governments need only fulfill their statutory obligations when issuing DPs or building permits, or amending Official Community Plans or zoning bylaws
  - In the absence of a statutory obligation, local governments have no duty to consult
  - Reconciliation of aboriginal rights or title are the responsibility of the Crown, not local governments

5. What does this all mean?

(i) Legal Principles

- A local government does not have a *Haida Nation* duty to consult First Nations; no S. 35(1) *Constitution Act* underpinning
- *Neskonlith* is clear legal authority for local governments that their engagement obligations to First Nations when dealing with permit issuance or bylaw enactment are rooted in their statutory obligations
- The B.C. Court of Appeal is effectively saying in *Neskonlith* that these types of local government actions do not impact a First Nation's aboriginal rights or title

(ii) Practical Principles

- Does not mean we do not engage/consult
- Good neighbours (eg., “Walk a Mile in My Shoes” (LGMA & FNPSS)
- Governance interactions (eg., future treaties)
- Servicing agreements (eg., hard and soft services)
- Development interface opportunities/economic benefits (eg., Municipal Community Economic Development Initiative (CEDI))

(iii) Reconciliation

- *"What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society."*

  Chief Justice McLachlin, Tsilhqot'in Nation v. B.C. 2014 SCC 44

- We are all here to stay
- The concept of "reconciliation" underpins all we have discussed
- Legal duties owed to First Nations by local governments are minimal but an opportunity for significant role in "reconciliation" for local governments
- Questions/Discussion