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* 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
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.

- 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
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