The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of cadastral surveying of interest to land surveyors. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

In this issue we consider the “duty to consult” as understood by the Crown in its dealings with First Nations. Although “crown” is generally assumed to mean Canada, there has been an increasing awareness that “crown” also includes provincial crowns and that the implications of the duty to consult has had consequences for the crown at that level in Canada. So too, when professional land surveyors licensed, by provincial regulators, proceed with work in areas of a province that are the subject of a known or potential land claim, this duty is holding new implications. Two court cases in this year from Manitoba and Ontario are referenced as we explore what the duty to consult will mean for land surveyors.

The Crown’s Duty to Consult

Key Words: crown, land claim, First Nation, natural resources, land administration

Professional land surveyors working in Canada, but licensed by provincial regulators, have broadly assumed that the survey of “Canada Lands” is a matter for Canada Lands Surveyors and therefore of no concern to them. Of course this is true as a general proposition. However, there has resulted an unfortunate consequence flowing from an adoption of this proposition; namely, disinterest or rejection of the relevance of First Nation interests insofar as land surveyors who work at the provincial licensure level. In this issue of The Boundary Point, we consider the implications of First Nation interests and their impact on the approach taken by provincially licensed land surveyors in their work. Two recent decisions from the courts of British Columbia and Ontario give new insights for surveyors and how this consideration must be taken seriously.

Since 2004, the “duty to consult” has been recognized in Canada as a requirement for provincial Crowns when dealing with provincial assets\(^1\) which are the subject of an actual or potential First Nation land claim. In a decision from the Supreme Court of Canada which involved the Haida First Nation and the British Columbia government, the meaning of “duty to consult” was articulated as follows:

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\(^1\) Most commonly, crown land.
The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the Constitution Act, 1982, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.2

What has happened since 2004 when this clarification was made? More to the point, how have the provinces responded to the “new normal” in which the traditional assumption that the constitutional divide between provincial matters and “Canada lands” are of no interest or relevance to provincial crown activity which may potentially impact or affect First Nation interests?

Fortunately, we now have the benefit of recent cases that explain the scope of the “duty to consult”. Some provinces have responded by recognizing the 2004 decision in Haida Nation and adopted new regulations and legislation which are respectful of this new normal. From a legal perspective, there has been a long recognition in Canadian courts of the treatment of First Nation peoples as sovereign entities in their own right. The negotiating of treaties and the predecessor of Canadian and provincial governments entering into binding relationships with First Nation peoples is a fact of history that makes Canada’s legal landscape one of continuing obligations; the treaties were negotiated in good faith. As recently as this spring, the courts

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2 Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511
have had no hesitation in reaching to the “honour of the Crown” doctrine as a basis for asserting that these obligations remain very much alive today. The case law reports are replete with decisions that impose implications for all provincial crowns, similar to the engagement of the Crown in right of Manitoba in *Manitoba Metis Federation Inc.* This is no longer just a federal matter; we can see today that the provinces have been regularly engaged in litigation as a result of their place in Canadian history and their relationship to Canada within our constitution.

In the first case decided this year, *Keewatin v. Ontario (Natural Resources)*, involved the interpretation of “Harvesting Rights”. At the trial level, it was determined that Ontario was not entitled to take up land subject to Treaty 3 for the purpose of forestry without first obtaining approval from Canada. Treaty 3 was negotiated by the Crown in right of Canada and the Ojibway people in 1873. The history is complicated, but under Treaty 3, the Ojibway surrendered their interest in certain lands in exchange for reserves and other benefits. The treaty contained a harvesting clause, which gave the Ojibway the right to hunt and fish on the lands except on tracts required or taken up by Canada for settlement, mining, lumbering or other purposes. After decades of disputed jurisdiction and control of lands in northwest Ontario, most of the lands were eventually located inside the borders of Ontario. Recently, Ontario had issued a sustainable forest licence to a pulp and paper company allowing for a clear-cutting forest operation within a part of the treaty lands. The trial judge determined that Ontario did not have the power to deal with crown land within Treaty 3 and thereby could not have an impact on the harvesting rights — *without first obtaining Canada’s approval*. There

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3 See, most recently, the Supreme Court of Canada decision in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14. Although Metis interests in land arose from their personal history and not their shared distinct Metis identity, the court nonetheless resorted to the honour of the Crown as a duty that Canada and Manitoba owed to the Metis peoples. Quoting from the headnote,

> The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Canadian sovereignty. Where this is at stake, it requires the Crown to act honourably in its dealings with the Aboriginal peoples in question. This flows from the guarantee of Aboriginal rights in s. 35(1) of the Constitution Act. The honour of the Crown is engaged by an explicit obligation to an Aboriginal group enshrined in the Constitution. The Constitution is not a mere statute; it is the very document by which the Crown asserted its sovereignty in the face of prior Aboriginal occupation. An explicit obligation to an Aboriginal group in the Constitution engages the honour of the Crown.


were several reasons for this finding, including the Ojibway’s reliance on the federal
government to implement and enforce the Treaty 3 promises and protections in the past.

The Court of Appeal allowed the appeal and rejected the trial judge’s finding that Treaty 3
qualified Ontario’s rights with a requirement that Canada interpose itself and approve the
taking up of lands. The “Crown”, and not a particular level of government, signed the Treaty,
so the Ojibway could look to the Crown to keep Treaty 3 promises, but they had to do so within
the constitutional framework of the division of powers in order to determine which
government represented the “Crown” for this purpose. The individuals who negotiated Treaty 3
had no power to deprive Ontario of the beneficial ownership of the Treaty lands. A two-step
approval process for taking up lands was not contemplated by the parties in negotiating Treaty
3. In the end, the appeals court found that the trial judge had failed to apply the governing
constitutional principles. As a result, Ontario, as owner of the “crown land”, was not subject to
Canada’s overriding supervision in carrying out its duties. However, this is not absolute and
Ontario is still bound to manage and deal with crown land in a way so as to not deprive the
Ojibway people of a meaningful right to enjoyment of traditional harvesting in the Treaty 3
lands.

Keewatin has been the subject of a leave to appeal application to the Supreme Court of
Canada in May, 2013 but has not been decided as at the time of this publication. However,
Keewatin has already been cited in a second case in British Columbia that was released in June,

The association between Canada’s Aboriginals and the Canadian Crown is both statutory and traditional, the
 treaties being seen by the first peoples both as legal contracts and as perpetual and personal promises by
 successive reigning kings and queens to protect Aboriginal welfare, define their rights, and reconcile their
 sovereignty with that of the monarch in Canada. The agreements are formed with the Crown because the
 monarchy is thought to have inherent stability and continuity, as opposed to the transitory nature of populist
 whims that rule the political government, meaning the link between monarch and Aboriginals will theoretically
 last for “as long as the sun shines, grass grows and rivers flow.”

The relationship has thus been described as mutual—“cooperation will be a cornerstone for partnership
 between Canada and First Nations, wherein Canada is the short-form reference to Her Majesty the Queen in
 Right of Canada”—and “special,” having a strong sense of “kinship” and possessing familial aspects.

Constitutional scholars have observed that First Nations are “strongly supportive of the monarchy,” even if not
 necessarily regarding the monarch as supreme. The nature of the legal interaction between Canadian sovereign
 and First Nations has similarly not always been supported. [references deleted]


Chartrand v. The District Manager, 2013 BCSC 1068 (CanLII),
2013. *Chartrand* involved an application for judicial review of a number of decisions made by a provincial forestry official with respect to timber harvesting licences. The “duty to consult” issue was central in the court’s review of the process by which decisions were made affecting the land claim of the Kwakiutl First Nation (“KFN”) to a large area on Vancouver Island. The court attached a map\(^9\) to its decision to identify the territory:

The facts leading to this proceeding are summarised in the first half of the reasons in *Chartrand*. Of particular interest are the court’s considerations of the degree of consultation needed and the necessity of the provincial Crown to engage the Crown in right of Canada when discharging its “duty to consult”. There was no dispute that the “duty to consult” did exist, and that it applied to the provincial decisions that were made affecting KFN’s claims.

The degree of consultation that was needed was explained by quoting from *Wii’litswx*:\(^{10}\)

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\(^9\) *Ibid.*, at Appendix A:

This map represents the north eastern part of Vancouver Island. The dark circle extends around the KFN Traditional Territory. The shaded territory within the Traditional Territory along the coast line designates the KFN Treaty Lands.

The Crown’s obligation to reasonably consult is not fulfilled simply by providing a process within which to exchange and discuss information. The consultation must be meaningful. Meaningful consultation is characterized by good faith and an attempt by both parties to understand each other’s concerns, and move to address them in the context of the ultimate goal of reconciliation of the Crown’s sovereignty with the aboriginal rights enshrined in s. 35 of the Constitution Act. The Crown is not under a duty to reach an agreement, and must balance aboriginal interests against other societal interests. Nevertheless, where there is a strong aboriginal claim that may be significantly and adversely affected by the proposed Crown action, meaningful consultation may require the Crown to modify its proposed course to avoid or minimize infringement of aboriginal interests pending their final resolution. Ultimately, the adequacy of the Crown’s approach will be judged by whether its actions, viewed as a whole, provided reasonable interim accommodation for the asserted aboriginal interests, given the context of balance and compromise that is required.

In rejecting the necessity of the provincial Crown to exercise this consultation through the Crown in right of Canada, the court quoted from Keewatin, writing, “The Ontario Court of Appeal in Keewatin also rejected the notion that there is a residual role for the Federal Crown in respect of the implementation and operation of provincial authority on lands subject to treaty claims.” Furthermore,

The central issue over which this Court has jurisdiction is the question whether a duty to consult was triggered and whether it was adequately carried out. As laudable as the KFN’s proposed framework may be, I cannot lose sight of the fact that this is an application for judicial review of decisions of a statutory decision maker. As was stated by the Court in Haida, “the remedy tail cannot wag the liability dog” (Haida at para. 55). I have decided this application within the confines of the legal system and principles that bind me. When considering the issues of whether there was a duty to consult and if so, whether that consultation was reasonable, the court is confined to examining whether there were adverse impacts on the KFN’s asserted and treaty rights from those decisions. The consultation does not go beyond the proposed decisions and engage the larger issue of how outstanding issues related to the existence of Aboriginal rights and title should be negotiated. In my view, the Provincial Crown’s duty to consult, if properly undertaken, adequately protects the KFN’s asserted and treaty rights. [references deleted]

At this point, a licensed provincial land surveyor reading this newsletter may well ask, “How does this affect me and my practice?” As illustrations, we can see that these recent decisions have heightened the awareness of the potential impact that land development activity might

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12 Ibid., at para. 200
have on lands which are the subject of an actual or pending First Nation land claim. In Ontario, there is a new requirement to engage First Nations in consultation when developments that are proposed on public land owned by Crown Ontario (and also privately held land),\(^{13}\) as part of the “duty to consult”. New legislation came into force on April 1, 2013, under the *Mining Act*,\(^{14}\) which will require significant consultation with First Nations.\(^{15}\)

Other provinces across Canada have recognized this duty and implemented procedures to ensure compliance. In answer to the question, “How is [Saskatchewan’s] Duty to Consult with First Nations and Métis handled in the Environmental Assessment process?” the following response appears on its government website:\(^{16}\)

> Early in the Environmental Assessment process the EA Branch will undertake a pre-consultation assessment to determine if there is a duty to consult First Nations and Métis communities. Where there is a duty to consult, the Minister will ensure that this duty has been discharged consistent with the government's Consultation Policy Framework prior to making a decision on the development.

Likewise, New Brunswick has adopted the following policy statement: “The Government of New Brunswick will consult with First Nations before an action or decision is taken that may adversely impact Aboriginal and treaty rights.”\(^{17}\)

Land surveyors, irrespective of whether licensed provincially or as a CLS, face this requirement as part of discharging the responsibility to a client. As more provincial legislation is enacted to implement mechanisms for satisfying the crown’s “duty to consult”, land surveyors may well find themselves cautious about embarking on work without first ensuring that the client has

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13 Generally speaking, privately held land is not the subject of “prospecting” and First Nations do not regularly advance land claims in respect to privately held land. However, these are mere generalities and are not to be assumed to always apply.


15 Prospecting, the filing of a claim, and the survey of a mining location will be required to be conducted, “… in a manner consistent with the protection provided for existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*”. O. Reg. 308/12, s. 2. Some commentators have suggested that this is tantamount to passing the duty on to industry:

> …the new rules reinforce the image of a province washing its hands of its own duty to consult. “They’ve simply pulled a Pontius Pilate and downloaded the obligation to consult to the industry.”


17 [http://www2.gnb.ca/content/gnb/en/departments/aboriginal_affairs/duty_to_consult.html](http://www2.gnb.ca/content/gnb/en/departments/aboriginal_affairs/duty_to_consult.html)
complied with these obligations. If not, it may be the land surveyor who runs into difficulty. Future responses to the “duty to consult” by provincial crowns in Canada may see increased attempts to delegate this duty to the private entity that holds or is about to receive a licence, permit or other right to extract or harvest a natural resource. First Nations may not welcome such delegation, preferring instead to engage in consultations directly with a crown. This topic will likely be the subject of further litigation in coming years. Land surveyors need to monitor this topic and adopt their practices and due diligence accordingly.

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**Announcements**

**The Professional Land Surveyor in Canada as Expert Witness**

Developed with the support of ACLS and GeoEd, this self-paced course explores all aspects surrounding the preparation of the professional land surveyor in Canada to assist — as an expert witness — the decision maker in a legal proceeding.

**The Spatial Extent of Rights in Land**

This e-Monograph by Izaak de Rijcke is a collection of articles compiled around a central theme: the interplay between the nature of legal interests and the ability to represent their 3-D spatial extent. The nature of these modern interests calls for a re-think of how they are displayed. How we understand them may, in part, affect how we represent their spatial extent.

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Boundary Lines, Fences, and Encroachment Disputes: How to Deal With Them

This webinar explores several boundary line and encroachment scenarios and outlines solutions in working with lawyers and real estate agents to avoid and resolve disputes.

Researching Boundary Case Law and Resources for Surveyors

This webinar introduces open access case law resources and techniques for surveyors across Canada to conduct their own research to address complex surveying problems. The downloadable video is complemented with a resource book of basic concepts to understand what is authoritative, under appeal, or relevant.

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