

# Lorne Joseph Ternes Lorne J Ternes Professional Corporation – 2018 IRWA

## INDIGENOUS (ABORIGINAL) CONSULTATION

MONDAY, JUNE 25, 2018 - EDMONTON, ALBERTA CANADA

#### ABORIGINAL PAST AND PRESENT

#### THE SOURCE OF ABORIGINAL RIGHTS

Canada is a young nation with ancient roots. Manitoba Métis Federation Inc. Vs Canada (AG) – 2013 Supreme Court of Canada

\* Sublimis Deus – Papal Bull 1523
Indians are truly men. They may
and should, freely and legitimately enjoy
their liberty, and the possession of their
property. Nor should they in anyway be
enslaved. Should the contrary happen
it shall be null and of no effect



#### ABORIGINAL PAST AND PRESENT

#### THE ROYAL PROCLAMATION OF 1763

The theme that aboriginal people have rights that are recognized and enforced by the state was adopted by the British Crown and applied in the Royal Proclamation of 1763. This Proclamation is part of Canada's Constitution

- Set aside a huge tract of land in North America for the several Nations or Tribes of Indians with whom We are connected:
- Reserved lands for Hunting Grounds
- Grants, purchases, or settlements had be made through the Crown
- Permitted purchase of these lands only through the Crown
  - License to trade with the Indians only through the Crown

#### Fythe Kings Reproclamation Whereas we have taken into were a light to swideration the Extensive and valuable arquinting an Amoura scource to our crown by the late determined through the out of the late of the test with the total determined through the test of the subjects as well of our designs that all our designs subjects as well of our designs to the test of our colonies and the test of the great begins the out of th daructure from to their commisso dit amfachus and Elavugation We trave thought fit with the Advance of our fring commit to your triss our allowal proplamation trouby to publish and detrate to all purchased from the form of our down of their safety that we shall the thought the Advance of our said priva Council speaked our defice parontunder our from to said of Erect distrature to Erectioning the condition our Island to Erection of the condition our State of Erect distration to Erection of the condition our Islands out to the form of the form of the four of the form of the form of the condition of the form of th Equate as forement of ductor bounder on the dabrader Coast butte Huver & Boin and from thought a sure from the Advant of the Print through the Advant of the Print through the Advant of the Print through the Advant on the first through the Advant on the said. And, the said from the Advant of the Advant of Print of the Said of the Print of the Said of th thouselves who the san Diver St Lawrence from those which fall who the sea and also along the Mosta Coast of the Diago des Chalenes and the Coast of the Lippe of St Lawrence to Capalisans fursipartof parents of the fourth year of the dicion of thing becoulted

#### ABORIGINAL RIGHTS CAN BE MODIFIED INTO TREATY RIGHTS

Aboriginal rights: Legal rights that some Aboriginal peoples of Canada hold as a result of their ancestors' long-standing use & occupancy of the land.

Calder vs. BC (AG) 1973 SCC (Indigenous and Northern Affairs Canada)

**Aboriginal Rights** 

Treaty rights: Special rights to lands and entitlements that Indian people legally have as a result of treaties. (Alberta Indigenous Relations)

Treaty
Right...hunting,
fishing, trapping,
etc.

Cede, Release & Surrender

# HISTORICAL & MODERN LAND CLAIMS PRECONFEDERATION TREATIES, HISTORICAL TREATIES, COMPREHENSIVE CLAIMS AND LANDS UNDER CLAIMS



#### CONSTITUTION ACT, 1982

- \* RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
- **×** 35 (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.
- \* THESE ARE UNDEFINED RIGHTS

\* \*\*\*\*

- **×** GENERAL
- \* 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

# SUPREME COURT OF CANADA (1990) SPARROW

# Prove the Right & Infringement Step 1:

Is there an existing aboriginal right?
Is the legislation or gov. action
unreasonable?
Has the gov. caused undue hardship?

Have you been denied your preferred measovereignty of the of exercising the right?

Crown

The purpose of s. 35 of the *Constitution Act, 1982* is to reconcile Aboriginal prior occupation with the assertion of asovereignty of the Crown

Charged under the BC fishing regulation

## Justify the Infringement Step 2:

Is there a valid legislative objective?

If harvesting, do Indians have priority?

Mitigation?

If expropriation, adequate compensation?

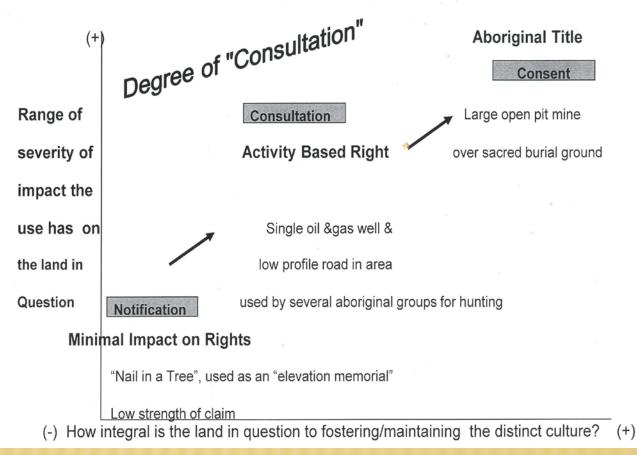
Has there been appropriate consultation?





### THE CALIBRATION TEST

## 1997 Delgamuukw Justification/Consultation Calibration in an Aboriginal Rights Context



### **PRINCIPLES**

- \* S. 35 of the Constitution Act, 1982 requires the Crown act with Honour towards aboriginal peoples (object is reconciliation Sparrow). Any potential infringement of an asserted or established aboriginal or treaty right requires consultation with the affected peoples. Legal remedies such as injunctions, mandamus, quashing of authorities and damages are available to ensure potential rights and substantive are not infringed.
- The Crown must demonstrate reasonable responsiveness to satisfy the procedural and substantive duty.
- The duty to consult applies in both aboriginal and treaty rights.

#### **PRINCIPLES**

- The Crown must act with honour (demonstrate reconciliation) when exercising the treaty "taking up process". (All "Alberta treaties" provide the right to take land up out of treaty for "development".)
- The duty also applies towards Métis aboriginal rights bearing communities.
- The duty is held by the Crown but procedural elements may be delegated to industry.
- If the impact of the infringement cannot be mitigated reasonably through accommodation then the process moves to negotiation and compensation.
- There is no aboriginal veto, but satisfying the duty is a substantial challenge.

### WHAT NEXT?

- The case law continues to develop at a furious pace and all players struggle with capacity and process
- Major projects in particular are susceptible to delays and cancellations
- Canada is also trying to apply many of the principles behind the articles of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). Application of these principles such as the "free, prior and informed consent" to Indigenous communities in the regulatory process, will continue to change the consultation landscape in fundamental ways