

ABORIGINAL LAW & CONSULTATION

Best Practices and Leading Edge Strategies for Aboriginal Consultation

CHAIR

Ben A. Jetten

Partner
Blake, Cassels & Graydon LLP (Toronto)

KEYNOTE ADDRESS

Daniel Ricard

Acting Senior Assistant Deputy Minister
– Policy and Strategic Direction
Indian and Northern Affairs

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Tom Paddon

Manager, Aboriginal
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John Beaucage

Grand Council Chief
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E. Ria Tzimas

Counsel, Crown Law
Office – Civil
Attorney General
of Ontario

Bradford W. Morse

Professor of Law,
Common Law
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...and many more!

February 13 & 14, 2007

Interactive Workshops – February 12 & 15, 2007
The Sutton Place Hotel – Toronto, Ontario

Get critical updates, analysis and best practices
for project risk management, consultation and
litigation to help you:

- **CLARIFY** the practical meaning of the “duty to consult”
- **REFINE** your negotiation skills and techniques
- **ENSURE** that resource, environmental, water and fishing issues are not overlooked
- **GAIN** practical strategies for negotiating impact benefit agreements
- **HEAR** first-hand accounts of “accommodation”, including the employment of Aboriginal workers
- **ADDRESS** the claims process and backlog

PLUS! Sharpen your skills with our interactive workshops

- A** Mastering the Fundamentals of Aboriginal Law
- B** Conducting Interest-Based Negotiations: Hands-On Lessons for Industry, Government and Aboriginal Stakeholders



See inside for details



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AVOID UNDUE COSTS OF INADEQUATE ABORIGINAL CONSULTATION!

Are your projects in jeopardy of being derailed? Could you be facing substantial legal liability? In order to minimize the legal and financial risks associated with your projects, **you need to properly apply the duty to consult!** But, have you *really* considered all factors affecting the extent of required consultations? **Are you wondering how to turn theory into practice?**

You need to have a firm grasp on complex Aboriginal law concepts and developments to face whatever happens next in Ontario. Are you fully equipped to engage in negotiations? **Are you sure that your negotiation strategy is appropriate and effective** in light of recent events?

The Canadian Institute's "Aboriginal Law & Consultation" conference offers a substantive and practical opportunity to help you avoid your worst nightmares: undue costs and delays, dispute escalation and legal liability. Our expert speakers will provide you with what you need most – **practical tools for consultation**. Join an **impressive** faculty for key updates and cutting-edge analysis of critical issues, including the following:

- **Ensuring** adequate consultations: Analysing the duty to consult and the interplay of environmental law concerns
- **Getting** up to speed on water and fishing rights
- **Negotiating** impact benefit agreements and accommodation initiatives: Best practices, including insights on employing and training Aboriginal workers
- **Structuring** and implementing impact benefit agreements
- **Resolving** and preventing disputes: Practical strategies
- **Understanding** the claims process, backlog and compensation issues
- **Litigating** Aboriginal law cases: Demystifying advanced costs orders, evidentiary challenges and procedural hurdles

Join us and our distinguished faculty for an unparalleled two-day learning experience. As a special added-value, take advantage of our workshops, "**Mastering the Fundamentals of Aboriginal Law**" and "**Conducting Interest-Based Negotiations: Hands-On Lessons for Industry, Government and Aboriginal Stakeholders**".

Spaces will fill up quickly. Register today by calling **The Canadian Institute** toll-free at **1-877-927-7936**, by faxing your registration to **1-877-927-1563** or register online at **www.CanadianInstitute.com**.

We look forward to seeing you at the conference!

WHO SHOULD ATTEND

- **In-House Legal Counsel**
- **CEOs, VPs, Directors and Managers of Aboriginal/Stakeholder Relations**
- **Lawyers practicing Aboriginal law, mining, forestry, environmental, energy and constitutional law**
- **Litigation Lawyers**
- **Government Lawyers, Managers, Policy Officers, Researchers, Advisors and Regulators**
- **Negotiators and Mediators**
- **Band Council Members and Officials**
- **Chiefs and Councillors**



This program has been accredited by the Specialty Committee(s) of the Law Society of Upper Canada towards the professional development requirement for certification.

| | Conference | Workshop A | Workshop B |
|-------------------|------------|------------|------------|
| Environmental Law | 12.5 hours | - | - |
| Civil Litigation | 12.5 hours | 3 hours | 3 hours |

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TUESDAY, FEBRUARY 13, 2007

8:00 **Registration Opens & Coffee Served** ☰

8:30 **Opening Remarks from the Chair**

Ben A. Jetten

Partner

Blake, Cassels & Graydon LLP (Toronto)

8:45 **Deconstructing the “Duty to Consult”:
What Does It Really Mean for Industry,
Government and Aboriginal Stakeholders?**

Keith Bergner

Partner

Lawson Lundell LLP (Vancouver)

Alan Pratt

Alan Pratt Law Firm

- What triggers the duty to consult?
What is the latest legal definition?
 - how have courts applied *Mikisew Cree, Haida & Taku River*?
 - taking a page from *Kitchenuhmaykoosib Inninuwug* and *Platinex Mining*
- Exploring the practical implications of the “duty to consult” for Aboriginal stakeholders, industry and government
 - what are Aboriginal and federal/provincial government responsibilities in the consultation process?
 - what is the role of industry?
- Assessing the extent of required consultation
- Does the “duty to consult” require consensus on all points?
- Can parties contract out of the duty to consult? Can the duty to consult affect existing permits and approvals?
- Can the duty to consult imply a government or industry obligation to fund the consultation process?
 - how can funding obstacles be addressed?

9:45 **Networking Refreshment Break** ☰

10:00 **Integrating Environmental Regulatory
Compliance into Your Consultation Framework**

Juli Abouchar

Lawyer

Willms & Shier Environmental Lawyers LLP

Carol Crowe

Indigenous Visions Inc.

- Achieving sound environmental planning and management through a successful consultation program
- What are statutory consultation requirements?
- Assessing the impact of the duty to consult on your projects
- Analysing key case law and lessons learned from courts and tribunals
- Understanding the Aboriginal connection to the land: How can it be reconciled with industry and government objectives?

- Addressing Aboriginal concerns during the environmental assessment process: How and at what point in the process?
- Incorporating “traditional ecological knowledge” into environmental planning and management
 - what is “traditional environmental knowledge”?
 - how can it be utilized for environmental impact studies, management, assessment and protection?
 - can it facilitate the consultation process? is it compatible with current environmental management practices?

11:00 **Managing Risks through Impact Benefit
Agreements: Key Legal Considerations
and Practical Strategies**

R. Martin Bayer

Partner

Weaver Simmons LLP (Sudbury)

Caroline Findlay

Blake, Cassels & Graydon LLP (Vancouver)

- How does the duty to consult affect Impact Benefit Agreements (IBAs)? What is government’s role with respect to IBAs?
- Addressing changes in Band Councils: Can IBAs bind future Band Councils?
- Assessing the impact of past IBAs on current negotiations: Managing expectations at the negotiating table and avoiding past mistakes
- Understanding “Aboriginal customary law”: What is it? Can it affect the interpretation and implementation of IBAs?
- What’s up for negotiation?
 - exploring the possible range of Aboriginal, government and industry concerns
 - examining clauses to include and avoid
- Revenue sharing: Analysing concrete examples
 - what can we learn from past arrangements? from outside Ontario?
- Ensuring full understanding of IBAs by all parties: Best practices

12:00 **Structuring and Implementing Accommodation
Initiatives: Overcoming Key Challenges**

Carmen Diges

Partner

McMillan Binch Mendelsohn LLP (Toronto)

- How have courts defined “accommodation”? Are there limits?
 - analysing recent cases and their implications
- What does “accommodation” mean in practice? When do you need to accommodate?
 - taking a page from concrete examples
- Clarifying industry’s role in the accommodation process
- What can be subject to accommodation?
- Assessing the appropriate scope of accommodation: Tips and traps
- Accommodating treaty rights through tenure arrangements: Innovative strategies

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12:45 Networking Luncheon

Keynote Address

Daniel Ricard

Acting Senior Assistant Deputy Minister
– Policy and Strategic Direction
Indian and Northern Affairs

2:00 Employing Aboriginal Workers: Legal and Practical Strategies

Tom Paddon

Manager, Aboriginal Affairs & Labrador Human Resources
Voisey's Bay Nickel Company Limited

- Addressing jurisdictional and constitutional issues
- Collecting data in local communities to develop your Aboriginal employment strategy: Tips and traps
- **Case Study!** How can government and industry increase the participation of Aboriginal people in the workforce?
- Addressing the interplay of seniority and other collective agreement provisions with impacts and benefits commitments
 - facilitating the employment and advancement of aboriginal employees in a unionized environment
- Utilizing aboriginal sub-contracting as an accommodation mechanism

2:45 Networking Refreshment Break

3:00 Avoiding Key Mistakes During the Negotiation Process: Practical, First Hand Tips and Traps

Brian A. Crane, Q.C.

Partner
Gowling Lafleur Henderson LLP (Ottawa)

Nancy Kleer

Partner
Olthuis Kleer Townshend

Roll up your sleeves and gain practical tools for effective negotiating. Building on past sessions, this skills development session is specifically designed to teach you how to deal with the unexpected by way of real-life examples. Join leading negotiators for their frank perspectives on what works - and what doesn't!

- What are the most common mistakes made during negotiations? What critical items are typically overlooked?
- What kind of homework should be done before negotiations? How can you avoid cultural misunderstandings?
- Identifying the appropriate parties for negotiation
 - understanding elected vs. traditional Aboriginal leadership: who has authority at the negotiating table? what form of Aboriginal government is in place?
 - roles for the Crown, industry and Aboriginal government
 - how can you limit the risks resulting from absent parties?
- Developing an effective negotiation strategy
 - when should you start consultations? how can parties find common ground?
 - keeping your negotiating team on the same page

- assessing your bargaining strengths/weaknesses
- Negotiating dispute resolution mechanisms into agreements
- Developing fair and reasonable settlements: Tips and traps
- Addressing resistance to negotiations or failed negotiations: How can you manage the risks? Can projects go forward in the face of unresolved claims?

4:00 Defining the “Honour of the Crown” and the Crown’s Fiduciary Duties: Are You Truly Up to Speed?

Bradford W. Morse

Professor of Law, Common Law Section
University of Ottawa

- How has the “Honour of the Crown” been interpreted? What does it mean in practice?
- Will its breach become a *de facto* new cause of action?
- What is the “duty of good faith”?
- What are “fiduciary duties”? Who owes them? And to whom?
- What is the relationship between fiduciary duties and the Honour of the Crown? Do they overlap? How do they affect First Nations aspirations?
- How does the exercise of Aboriginal self-determination impact upon the fiduciary relationship and Honour of the Crown standard?
- Where do these issues leave the private sector and local non-Aboriginal governments?

4:45 Chair’s Closing Remarks and Conference Adjourns

WEDNESDAY, FEBRUARY 14, 2007

8:30 Coffee Served

9:00 Opening Remarks from the Chair

Ben A. Jetten

Partner
Blake, Cassels & Graydon LLP (Toronto)

9:15 Confronting Current Issues and Trends in Aboriginal Water Rights, Fishing and Hunting

John Beaucauge

Grand Council Chief
Union of Ontario Indians (Anishinabek Nation)

Kate Kempton

Olthuis Kleer Townshend

S. Ronald Stevenson

Senior General Counsel
Justice Canada

- Addressing the status of aboriginal title to water and waterbeds, and rights to use water: Getting up to speed on recent developments, key cases and jurisdictional issues

- What is the nature and scope of “aboriginal rights”?
 - what is the relationship between s.15 of the *Charter* and sections 25 and 35 of the *Charter*?
 - analysing *R. v. Kapp*, *Sappier and Gray*, and other key cases
- Understanding the nature of Métis rights: *Powley* and beyond
- **Case Study!** Coordinating relationships between industry, federal and provincial ministries, and Aboriginal groups to resolve water rights disputes
- Exploring other current issues
 - what is the status of the “night hunting” case? how will the decision affect industry and Aboriginal groups?
 - are fishing and hunting charges still being laid? in what context? how have these cases been resolved in and out of the courts?
 - what’s the latest on the Great Lakes Water Quality Agreement?
- Ensuring safe drinking water on reserves
 - what’s the latest?
 - who has jurisdiction to regulate water quality on reserves?

10:30 Networking Refreshment Break

10:45 Getting Beyond the Backlog: Understanding Aboriginal Title, the Claims Process, Compensation Issues and Implementation Challenges

Jeff G. Cowan

Partner
WeirFoulds LLP (Toronto)

John B. Edmond

Commission Counsel
Indian Claims Commission

Patrick Nadjiwan

Nadjiwan Law Office (North Bay)

Linda Rychel

Senior Counsel
Legal Services, DIAND, Specific Claims Section

Demystifying “Aboriginal Title”

- What is “aboriginal title”? Has the concept of title changed since *Delgamuukw*?
- What have courts required for proving aboriginal title?
- What is the impact of aboriginal title on private rights, including leasehold interests?
- Advising private property owners: Legal and equitable responses to Aboriginal title claims
- Can you assess the likelihood of a title claim?

Navigating the Claims Process

- What’s the latest on specific claims in Ontario? Does the comprehensive claims process apply in Ontario?
- Getting to know the Indian Claims Commission: What is its mandate? What’s new?
- Addressing backlog in the federal specific claims process: Why the delay? Can delays be minimized?

- Structuring agreements to facilitate resolution of specific claims: Creative strategies
- Interpreting treaties
 - exploring recent decisions
 - what is the role and weight of oral history and extrinsic evidence?
- Can provinces have jurisdiction to impact treaty rights?
- Evaluating the pros and cons of utilizing the specific claims process vs. litigation

Compensating Aboriginal Stakeholders

- Assessing damages and compound interest
 - deconstructing *Whitefish Lake Band of Indians v. Canada (Attorney General)*
 - what is the appropriate measure of damages for historical breaches?
- Tackling pre-confederation liability
 - who is on the hook- the federal or provincial government?
 - how has this been approached by federal and provincial governments?

12:15 Networking Luncheon

1:30 Is Another “Caledonia” on the Horizon? Legal and Practical Lessons on Dispute Resolution and Prevention

Ronald L. Doering

Partner, Gowling Lafleur Henderson LLP (Ottawa)

Kenneth R. Peel

Partner
Fraser Milner Casgrain LLP (Toronto)

- What’s the latest on Caledonia?
- What critical lessons have we overlooked? What are the signs you should be looking for now?
- Resolving disputes before they get started: Proactive strategies
 - how can recent case law, including *Mikisew Cree*, facilitate dispute resolution?
- How can land title holders or occupants protect its interests and seek to accommodate aboriginal interests?
- Examining the “Rule of Law”: Reconciling different interpretations
- Enforcing court orders: Legal concepts and practical perspectives
- What are the limits of courts’ jurisdiction in conflicts? Are there limits to the types of possible court orders?
- Tackling key challenges associated with burial sites: Preventing disputes and understanding the role of the *Cemeteries Act*

2:15 Networking Refreshment Break

2:30 Litigating Aboriginal Law Cases: Advanced Costs Orders, Evidentiary Issues and Procedural Hurdles

Mahmud Jamal

Partner
Osler Hoskin & Harcourt LLP (Toronto)

ABORIGINAL LAW & CONSULTATION

E. Ria Tzimas

Counsel, Crown Law Office – Civil
Attorney General of Ontario

- Getting up to speed on Canadian trends and developments
- Obtaining advanced costs orders: *Grassy Narrows* and beyond
 - which circumstances can give rise to these orders?
 - how should the quantum be determined?
 - what can we learn from the B.C. experience?
- Utilizing oral and elder history/testimony
 - analysing *Samson Cree* and other key decisions
 - how should this evidence be treated and presented in court?
 - overcoming challenges to accessing this evidence, and examining/cross-examining witnesses
 - what methodologies can be used to test these traditions? is it appropriate to test them?
 - what weight does this evidence carry relative to the documented historical record?
- Exploring the treatment and weight of expert evidence in court proceedings
- Asserting private rights and interests in judicial proceedings: Exploring the use of judicial intervention by industry
- Obtaining injunctions: What has been required to establish “irreparable harm”?
- Getting up to speed on class actions by First Nations: Examining *Grant v. Canada* and beyond

3:30

Taking a Page from the North: Aboriginal-Industry Relations North of 60°

Rodney A. Snow

Partner
Davis & Company LLP (Whitehorse)

- Examining concrete examples of recent developments in the North
- How does the “duty to consult” impact resource and development projects? What are the challenges?
- Establishing the rights of Aboriginals to benefit from resources: What degree of evidence is required?
- Understanding the legal and political environment in the North
 - examining settled vs. unsettled land claims and self-government agreements
- Preparing for meetings: Tips and traps
- When is an agreement necessary? When is it appropriate?
- Getting up to speed on issues of capacity, accommodation and consent
- Understanding the links between aboriginal environmental issues and project approvals
 - exploring the links between Aboriginal economic issues, project approvals, and financing
 - deconstructing the relationships between Aboriginal governments and public governments

4:15

Chair’s Closing Remarks & Conference Concludes

DISTINGUISHED FACULTY

Juli Abouchar

Willms & Shier Environmental
Lawyers LLP (Toronto)

R. Martin Bayer

Partner
Weaver Simmons LLP (Sudbury)

John Beaucage

Grand Council Chief
Union of Ontario Indians
(Anishinabek Nation)

Keith Bergner

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Brian A. Crane, Q.C.

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Carol Crowe

Indigenous Visions Inc.

Carmen Diges

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Justice Canada

E. Ria Tzimas

Counsel, Crown Law Office – Civil
Attorney General of Ontario

Workshop A

February 12, 2007 • 1:00 p.m. - 4:00 p.m.

Mastering the Fundamentals of Aboriginal Law: Essential Concepts for Negotiation, Consultation and Litigation

John Rowinski

Torkin Manes Cohen Arbus LLP

This workshop will provide delegates with a comprehensive session on key Aboriginal law concepts and practices. Get your “jump start” in mastering complex issues through an in-depth discussion of “need to know” legal principles and case law. Ensure that you are up to speed on critical Aboriginal law factors that can impact project risk management, consultation and litigation. By the end of this session, you will be well positioned to get the most out of the following two days of the conference.

- Exploring Aboriginal customs and traditions
- Getting up to speed on historical and ongoing developments in Aboriginal law
 - key statutes and constitutional provisions
 - the question of jurisdiction: which level of government is involved?
 - the role of the *Indian Act*
 - the seminal case law
- Understanding the concept of “Fiduciary Duty” and the “Honour of the Crown”

- Getting a handle on the basics
 - what is the difference between Aboriginal rights and Aboriginal title?
 - what are historical and modern treaties?
 - what is the “duty to consult”?
- Clarifying the distinction between specific and comprehensive claims
- Litigating Aboriginal law cases
 - choosing your jurisdiction: federal or superior courts?
 - strategic considerations: using pre-trial motions and procedures
 - rules and practical considerations governing evidence in Aboriginal proceedings
- Deconstructing the concept and role of Aboriginal self-government:

John Rowinski is a lawyer with Torkin Manes Cohen Arbus LLP in Toronto. His litigation practice includes a variety of commercial disputes and professional negligence matters, with a particular focus on Aboriginal legal matters. Through his broad experience at all levels of courts and tribunals, John has developed a particular expertise regarding the practice, procedures and strategies involved in the litigation process. John is currently the Chair of the Aboriginal Law Section of the Ontario Bar Association.

Workshop B

Thursday, February 15, 2007 • 9:00 a.m. - 12:00 p.m.

Conducting Interest-based Negotiations: Hands-On Lessons for Industry, Government and Aboriginal Stakeholders

Carol Crowe

Indigenous Visions Inc.

Building on the conference sessions, this interactive workshop will teach you how to capitalize on mutual interests through effective negotiating. Learn how to identify common goals through simulated negotiations and critiques from the expert workshop leader. Stay ahead of the game by registering now!

- Exploring the evolving relationship between industry, government and Aboriginal groups
 - exploring key business and taxation issues that could affect your negotiation strategy
- Finding common ground to begin negotiations: Successful strategies for opening up the lines of communication
 - how can you identify shared interests, and communicate needs and goals
 - are you really listening?
 - determining if it is appropriate to “bend”
- Avoiding failed negotiations
 - how can parties overcome an impasse?

- when should the parties “take a break”?
- restoring trust and communication
- Drafting memoranda of understanding and agreements: Best practices for achieving clarity and certainty
- Structuring the “deal”: Concrete examples of successes and failures
 - what should you be considering before signing on the dotted line?
- Implementing agreements
 - what are key challenges?
 - working through disagreements: practical strategies that can make a breakthrough
 - keeping the lines of communication open during tense times
- How treaties, land claims and title may affect negotiations and drafting
- How to deal with changing politics in Aboriginal Groups while fostering a long-lasting relationship

Carol Crowe brings 25 years of business experience and knowledge in Indigenous Government, community relations, as well as land and environmental management on traditional and treaty lands throughout Canada. Carol is a Negotiator, Facilitator and Educator on Aboriginal Policy issues for Provincial, Federal, and Indigenous Governments, industry clients and educational institutions.

ABORIGINAL LAW & CONSULTATION

Best Practices and Leading Edge Strategies for Aboriginal Consultation

Top Reasons to Attend

- ✓ Understand what the “duty to consult” means in practice
- ✓ Sharpen your negotiation skills and techniques
- ✓ Get up to speed on environmental, resource, water and fishing developments
- ✓ Understand “accommodation”, including best practices for employing Aboriginal workers
- ✓ Work within the claims process and backlog

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To expedite your registration, please mention your priority service code

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Fee Per Delegate

- Conference only \$1795 + \$107.70 (6%) GST = \$1902.70
 - Conference & Workshop A or B \$2290 + \$137.40 (6%) GST = \$2427.40
 - Conference & Both Workshops \$2785 + \$167.10 (6%) GST = \$2952.10
 - I would like to add the conference materials CD-ROM to my order - \$150 (plus applicable taxes and shipping)
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TEL.: 416-924-9221

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For information on hotel room availability and reservations, please contact The Sutton Place Hotel at 416-924-9221. When making your reservation, please ask for “The Canadian Institute’s Corporate Rate”.

Program Materials

Conference participants will receive a comprehensive set of conference materials prepared by the speakers. These materials are intended to provide the participants with an excellent reference source after the conference.

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Substitution of participants is permissible without prior notification. If you are unable to find a substitute, please notify **The Canadian Institute** in writing no later than 10 days prior to the conference date and a credit voucher will be issued to you for the full amount paid, redeemable against any other **Canadian Institute** conference. If you prefer, you may request a refund of fees paid less a 15% service charge. No credits or refunds will be given for cancellations received after 10 days prior to the conference date. **The Canadian Institute** reserves the right to cancel any conference it deems necessary and will, in such event, make a full refund of any registration fee, but will not be responsible for airfare, hotel or other costs incurred by registrants. No liability is assumed by **The Canadian Institute** for changes in program date, content, speakers or venue.

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STEP 1
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