

# ABORIGINAL LAW & CONSULTATION

Cross-Canada Insights and Best Practices for Meaningful Consultation

## NEW TOPICS FOR 2008!

- ✓ Aboriginal Capacity Building for Consultation
- ✓ Should Municipalities Consult with Aboriginal Stakeholders?
- ✓ Consulting with Métis Communities: What is the Law?
- ✓ Resolving Disputes: Learning from Recent Mistakes

## NEW SPEAKERS FOR 2008 INCLUDE

### Sylvia Duquette

Indian and Northern Affairs Canada

### Lynn Beak

BC Ministry of Aboriginal Relations and Reconciliation

### David Chartrand

Manitoba Métis Federation

### Grant Wedge

Ontario Ministry of Aboriginal Affairs

Get critical legal updates on consultation and other hot button issues to help you to:

- **GET UP TO SPEED** on the Specific Claims Action Plan and federal/provincial consultation guidelines
- **BUILD** Aboriginal capacity for consultation
- **SECURE** project approvals by reconciling environmental and Aboriginal law concepts
- **ENSURE** that all the right parties are at the negotiating table
- **RESOLVE** disputes arising from land claims and impact benefit agreements

**PLUS! Don't miss crucial, Interactive Workshops**

February 11 and 14, 2008

- A** Aboriginal Law 101: Understanding Fundamental Concepts and Case Law Affecting Consultations
- B** Resolving Disputes at the "Crisis" Stage: New and Practical Strategies



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# HAS YOUR CONSULTATION STRATEGY RESULTED IN LOST OPPORTUNITIES?

With growing **financial and socio-economic opportunities** at stake, **getting up to speed** on Aboriginal law developments is a **business need for Aboriginal communities, government and industry**. **Now more than ever**, the **costs** of inadequate consultation can be **staggering** – unending delays, litigation and negotiation breakdowns!

At **The Canadian Institute's "Aboriginal Law & Consultation"** conference, an outstanding, **diverse speaker faculty** will delve into core issues affecting the **fate of your projects, regulatory approvals and litigation**. Hot topics will include:

- Understanding the legal, practical and financial impact of **key case law developments**
- The latest on the **Specific Claims Action Plan** and **federal/provincial consultation guidelines**
- Reconciling **environmental** and Aboriginal law concepts in securing project approvals
- **Aboriginal capacity building**: Creating a level playing field for consultation
- **Do municipalities have a duty consult?** What could this mean for your projects?
- **Métis consultation**: Have you consulted with all affected communities?
- Amending and enforcing **impact benefit agreements**

Strengthen your grasp of law and practice by attending our critical **workshops, Aboriginal Law 101 and Resolving Disputes at the "Crisis" Stage**.

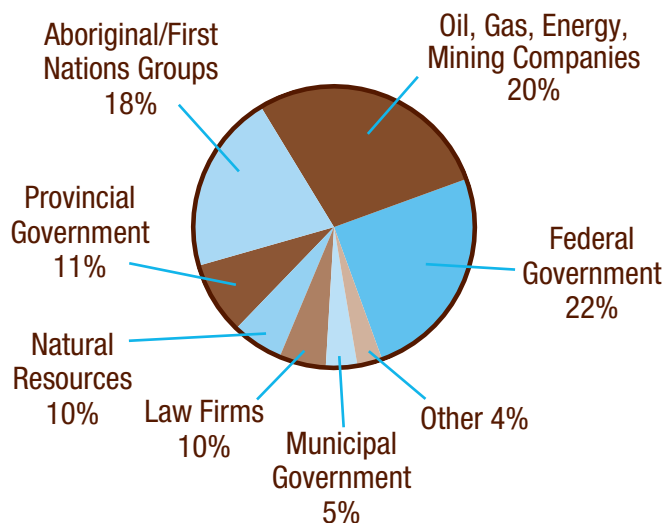
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*We look forward to seeing you at the conference!*

## WHO SHOULD ATTEND

- **In-House Legal Counsel**
- **VPs, Managers and Directors of Environmental Management, Planning and Projects**
- **Lawyers practicing Aboriginal law, mining, forestry, environmental, energy and constitutional law**
- **Litigation Lawyers**
- **Government Lawyers, Managers, Policy Analysts, Researchers, Advisors and Regulators**
- **Negotiators and Mediators**
- **Band Council Members, Officials and Elders**
- **Chiefs and Councillors**

## INDUSTRY PARTICIPATION



(Aboriginal Law & Consultation 2007 Attendee Profile)

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

	Conference	Workshop A	Workshop B
Civil Litigation	10.5 hours	3 hours	3 hours
Environmental Law	10.5 hours	-	-

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Partner  
Willms & Shier Environmental Lawyers LLP

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Grand Council Chief  
Union of Ontario Indians  
(Anishinabek Nation)

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President  
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Commission Counsel  
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Six Nations of the Grand River

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#### Michael McCulloch

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#### James A. O'Reilly

O'Reilly & Associés (Montreal)

#### Cliff Proudfoot

Partner  
Lawson Lundell LLP (Vancouver)

#### Ria Tzimas

Counsel, Crown Law Office – Civil  
Ontario Ministry of the Attorney General

#### Cynthia Vanier

Senior Mediator  
Dispute Resolution Services LP

#### Grant Wedge

Legal Director  
Ontario Ministry of Aboriginal Affairs

## Day One • February 12, 2008

8:00 Registration Opens & Coffee Served ☞

8:45 Opening Remarks from the Chair

#### Ben Jetten

Partner  
Blake, Cassels & Graydon LLP

9:15 Assessing the Impact of Critical Case Law  
Developments: Cross-Canada Update  
and Roundtable Discussion

#### Kate Kempton

Partner  
Olthuis Kleer Townshend

#### Michael McCulloch

Counsel, Aboriginal Law  
Department of Justice

#### Cliff Proudfoot

Partner  
Lawson Lundell LLP (Vancouver)

### *Platinex, Whitefish Lake, Frontenac Ventures and More!*

- What is the criterion for triggering the duty to consult? What does the duty to consult mean in practice?
- Deconstructing *Platinex*
  - what does this case mean for industry and Aboriginal stakeholders?
  - could judges be assuming a more activist role in the consultation process?
- Bringing forward historic damages: *Whitefish Lake Band of Indians v. Canada (Attorney General)*
  - when will the decision be rendered? why the delay?
  - how will this case affect the quantum of historic damages?
  - applying interest: compounded or simple interest?
  - how will this case impact land claims and settlements?
- Assessing the legality of the free entry mining system: *Frontenac Ventures*
- What is the latest word on the meaning of the "Honour of the Crown"?
- Looking beyond *Sappier & Gray*: What is the current law on Aboriginal title?
- What are the latest developments out of Quebec?
- Getting up to speed on other key cases and issues, including:
  - *Hiawatha First Nation v. Ontario (Minister of the Environment)*

- does the Crown have a fiduciary duty with respect to the investment of trust monies?
- *Shipman and Meshake*: To what extent can First Nations hunt and fish in other Aboriginal communities?

#### Securing License Renewals

- What have courts and regulators expected with respect to consultation?
- When is consultation necessary? To what extent?

#### Navigating Water and Fishing Rights: The Latest Word

- Consulting on water rights: Great Lakes and other case law developments
  - does the consultation process differ from land claims? how?
  - addressing the interplay of “exclusive use and control” and asserted water rights
- Analysing recent cases on fishing rights, including *The Ahousaht Indian Band et al. and the Minister of Fisheries and Oceans*

#### Q & A

**10:45 Networking Refreshment Break**

**11:00 Getting Up to Speed on Federal and Provincial Initiatives: What’s New? What’s Working?**

#### **Lynn Beak**

Director of Cross-Government Initiatives  
Strategic Initiatives Division  
BC Ministry of Aboriginal Relations and Reconciliation

#### **Sylvia Duquette**

Executive Director, Specific Claims Reform Initiative  
Indian and Northern Affairs Canada

#### **John B. Edmond**

Commission Counsel  
Indian Claims Commission

#### **Grant Wedge**

Legal Director  
Ontario Ministry of Aboriginal Affairs

#### Federal Developments and Their Aftermath: Specific Claims, Consultation Guidelines and More!

- What is the federal government’s current approach to the duty to consult?
  - have new guidelines been issued? what do they contemplate?
  - how do guidelines impact industry and Aboriginal stakeholders?
- The latest on the new Specific Claims Action Plan: Will it *really* accelerate the process?
  - what is the status of proposed legislation? how does it change the statutory landscape?
  - anticipating statutory interpretation issues
  - revamping the Indian Claims Commission: how have things changed? how will its new role affect government relationships with Aboriginal communities?
  - what happens to inquiries in progress by the Commission?
  - how will the new system be funded?
- Anticipating challenges associated with the new Specific Claims Tribunal
  - who will appoint judges?

- will decisions bind government, Aboriginal communities- and *all* third parties?
- will the new system improve or weaken Aboriginal communities’ access to justice?

#### Analysing Provincial Consultation Developments

- What is the status of the new Ontario consultation guidelines? What do they contemplate?
- “How is the B.C. “New Relationship” working?”
- What is the impact of the Ipperwash Report?
- Consulting with federal vs. provincial governments: What are the differences?
- How have federal and provincial governments been working together?

#### Q & A

**12:30 Networking Luncheon**



**1:45 Aboriginal Capacity Building: Creating a Level Playing Field for Consultation**

*Capacity building is an important business issue for all stakeholders. In the absence of adequate resources, Aboriginal communities cannot get to the negotiating table, resulting in stalled projects, lost opportunities and heightened costs. Don’t miss this candid discussion of the challenges facing Aboriginal communities and how stakeholders can work together to accelerate the process.*

#### **Bernd Christmas**

Senior Vice President  
National Practice Leader, Aboriginal Affairs  
Hill & Knowlton Canada

#### **David General**

Six Nations of the Grand River

- What is “capacity building”? How can it be interpreted?
- What resources are required for consultation?
- What is the relationship between federal and provincial funding arms? How do they work?
- What is the role of industry in capacity building?
- Implementing on-reserve fiscal accountability initiatives: Are they working?
- Contribution agreements for services between the Crown and First Nations: Successes and failures
- Conducting a “needs analysis” for Aboriginal communities
- Employing Aboriginal workers
  - developing skills
  - how to train a workforce
- Demystifying infrastructure and housing challenges: How do they affect the consultation process?

#### Q & A

**2:45 Networking Refreshment Break**

**3:00 Turning Theory into Practice: Applying Key Case Law to Real-Life Consultation Challenges**

#### **John Beaucage**

Grand Council Chief  
Union of Ontario Indians (Anishinabek Nation)

#### **Caroline Findlay**

Senior Counsel  
Blake, Cassels & Graydon LLP (Vancouver)

## Demystifying the Practical Impact of Recent Developments

- Industry vs. Crown: Who does what?
  - procedural vs. substantive consultation: what are the differences?
- What are the key difficulties with the current consultation model?
- Applying recent decisions to real life: What are the challenges?
- How has industry addressed the duty to consult?
- How does the latest case law affect the resource and energy sectors?

## Developing a Successful Consultation Strategy: Lessons Learned

- Understanding different Aboriginal interpretations of consultation
  - can they be streamlined/reconciled when consulting with multiple communities?
  - reaching a consensus on the meaning of “consultation” in light of recent case law
- How do you find out if lands are subject to a land claim?
- Hammering out a consultation framework with stakeholders in advance: Can this help to facilitate consensus?
- Building collaborative relationships
  - engaging Aboriginal communities
  - approaching Aboriginal leadership
  - understanding community characteristics and politics
- Ensuring that decision-makers are at the negotiating table: Who from the Crown and Aboriginal communities do you have to talk to?
- Reconciling multiple interests and overlapping claims
- Tailoring consultation to the specifics of the project and unique Aboriginal community

## Q & A

### 4:00 Should Municipalities Consult with Aboriginal Stakeholders? Expert Insights on Law & Practice

#### Juli Abouchar

Partner

Willms & Shier Environmental Lawyers LLP

#### Ria Tzimas

Counsel, Crown Law Office – Civil

Ontario Ministry of the Attorney General

- Do municipalities have a legal duty to consult? If not, should they still engage in the consultation process?
  - examining *Musqueam Indian Band v. Richmond (City)* and *Paul First Nation v. Parkland (County)*
- Could municipalities have a duty to consult as an agent of the provincial government? What’s the latest?
- What is the role of municipalities in the consultation process?
- How can municipalities work with provincial and federal governments?
- What are other municipal jurisdictions doing with respect to consultation?
- Concluding servicing agreements between First Nations and municipalities: Do’s and don’ts

## Q & A

### 5:00 Chair’s Closing Remarks & Conference Adjourns

## Day Two • February 13, 2008

8:30 Coffee Served ☕

### 9:15 Chair’s Opening Remarks

#### Ben Jetten

Partner

Blake, Cassels & Graydon LLP

### 9:30 Securing Project Approvals: Managing the Interplay of Environmental and Aboriginal Law

#### Sandra Gogal

Partner

Miller Thomson LLP

#### Steve Lindley

Vice President, Aboriginal & Northern Affairs

SNC-Lavalin Inc.

## Understanding the Legal Hurdles

- When is industry required to go through a formal environmental assessment process?
- How have regulators approached consultation in the context of environmental approvals?
- When is there a duty to consult prior to obtaining approvals? What are the requirements?
- What is “traditional knowledge”?
- To what extent can “traditional use” be incorporated into environmental approvals processes?
- Assessing cumulative effects
  - how to determine the cumulative effects of projects
  - what is the required scope of consultation?
  - how to mitigate
  - multi-stakeholder groups: what is their role? what are the challenges?
  - developing and monitoring environmental limits
- Addressing cross-jurisdictional environmental impact: What are governments doing? Can co-management be the solution?
- How can the *Species at Risk Act* affect project approvals?

## Avoiding Excessive Costs, Delays and Liability

- Developing a risk management strategy: Checklist
  - what approvals are required for projects?
  - what Crown duties are being triggered?
  - which Aboriginal communities are involved? what are their interests?
  - gauging the level of legal risk of a given project
- Negotiating IBAs
  - addressing cumulative effects in IBAs
  - dealing with other environmental costs and benefits: best practices

## Q & A

10:45 Networking Refreshment Break

### 11:00 Is Your IBA Working? Amending and Enforcing Impact Benefit Agreements

#### Carmen Diges

Partner

McMillan Binch Mendelsohn LLP

## Enforcing and Amending IBAs

- Can IBAs be enforced? If so, how? What makes sense in practice?
- Reconciling conflicts between the duty to consult vs. IBAs: What happens to the IBA?
- Reconsidering sections of an IBA: Is this a growing trend?
- Amending/revisiting dispute settlement mechanisms in IBAs
- Are IBAs reflecting critical corporate/commercial concerns? What's missing?
- What are the key barriers to implementing IBAs?
- Implementing specific IBA clauses: Analysing concrete example of successes and failures
  - which clauses have worked in practice?
  - which haven't? why?
- Can Corporate Social Responsibility (CSR) principles guide IBA negotiations?
  - overview of CSR principles and their application
  - comparing successful and failing IBAs
  - examples of "enlightened" IBAs

## Interim Arrangements: A Short-Term Solution?

- What are interim arrangements? Can they minimize the risk of IBA implementation challenges?
- Are they a growing trend?
- When do you negotiate them? What is required?
- Should they set out a consultation framework?

## Q & A

### 12:00 Networking Luncheon



### 1:15 Consulting with Métis Communities: What is the Law?

**David Chartrand**  
President  
Manitoba Métis Federation

**Joan Holmes**  
President  
Joan Holmes & Associates Inc. (Ottawa)

**Jason Madden**  
JTM Law

- Is there a duty to consult with Métis? What are the Crown's obligations?
- What are the current federal and provincial approaches/policies with respect to Métis consultation?
- Assessing the aftermath of *Powley*: What's new? What are the emerging issues? What's on the horizon?
  - factoring mobility into understanding Métis harvesting rights
  - the 'legal enforceability' of Métis harvesting policies and agreements: *R. v. Laurin* (Ontario), *R. v. Kelley* (Alberta)
  - how do Métis-created harvesting regimes interact with federal and provincial regulatory regimes?
  - exploring upcoming cases: *R. v. Belhumeur* (Saskatchewan), *R. v. Goodon* (Manitoba)
- Understanding the next big Métis case: *Manitoba Métis Federation v. Canada and Manitoba*
  - is the *Manitoba Act, 1870* a treaty with the Métis?
  - were the promises to the Métis in the *Manitoba Act, 1870* fulfilled?
  - how to deal with the issue of Métis lands?
  - is there a need for a federal Métis claims policy?
- How do you identify Métis rights-holders?
- Accommodating Métis harvesting rights: Status report on negotiations and agreements across the country

- What is a "Métis community"?
- How do you consult with Métis?
  - understanding Métis governance structures
  - clarifying Métis consultation in the context of environmental assessments
  - challenges and best practices in consulting with Métis
- Do Métis and First Nations rights co-exist or collide?

## Q & A

### 2:30 Networking Refreshment Break

### 2:45 Learning Lessons from the North: Demystifying Key Legal Issues and What They Mean For You

**Kevin O'Callaghan**  
Partner  
Fasken Martineau DuMoulin LLP (Vancouver)

- Navigating recent case law and their practical impact, including *Ka'a' Gee Tu First Nation v. Canada (Attorney General)*
- What's the latest on the Mackenzie Valley Pipeline?
- How is consultation in the North different? What elements can be applied to consultation in the south?
- Understanding the jurisdictional framework in the North: Who does what?
- What is a territorial government's duty to consult? Does the Honour of the Crown apply?
- Do boards and tribunals have a duty to consult? If so, to what extent?
- What is the constitutional status of Aboriginal governments: Are they a "crown"? Are they subject to a duty to consult?

## Q & A

### 3:30 Learning Lessons from Recent Disputes: Avoiding Critical Legal and Tactical Mistakes

**James A. O'Reilly**  
O'Reilly & Associés (Montreal)

**Cynthia Vanier**  
Senior Mediator  
Dispute Resolution Services LP

- Making sense of the Ontario Court of Appeal's decision in the Caledonia dispute
- Deconstructing the Ipperwash Report
- Understanding the implications of the *Bernard* decision: Is there a duty to consult during litigation? Does the current legal framework encourage settlement?
- Getting injunctions: Legal and practical considerations
  - what happens after a court order is obtained?
  - separating theory vs. practice:
- Concrete examples of successes and failures in dispute resolution
- Lessons learned from Caledonia, including:
  - getting to know community leadership and dynamics
  - can we draw upon new dispute resolution techniques going forward?

## Q & A

### 4:30 Chair's Closing Remarks & Conference Concludes

# ABORIGINAL LAW & CONSULTATION INTERACTIVE WORKSHOPS

WORKSHOP A • FEBRUARY 11, 2008 • 2:00 P.M. – 5:00 P.M.

## Aboriginal Law 101: Understanding Fundamental Concepts and Case Law Affecting Consultations

**Colin Feasby**

Partner

Osler, Hoskin & Harcourt LLP (Calgary)

**JoAnn Jamieson**

Osler, Hoskin & Harcourt LLP (Calgary)

*This workshop will provide delegates with a comprehensive session on key Aboriginal law concepts and practices. Get your “jump start” in mastering complex issues affecting the success of your projects, regulatory approvals 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.*

- What is the “duty to consult”?
- Getting up to speed on historical and ongoing developments in Aboriginal law
  - key statutes, constitutional provisions and case law

- determining jurisdiction: which level of government is involved?
- understanding the role of the *Indian Act*
- Demystifying “Fiduciary Duty” and the “Honour of the Crown”
- Clarifying the concepts of Aboriginal rights and title
  - what are Aboriginal water, fishing and hunting rights?
  - what is the difference between Aboriginal rights and Aboriginal title?
  - what are historical and modern treaties?
- Aboriginal rights and regulatory proceedings
- Judicial review of government decisions impacting Aboriginal rights
- Clarifying the distinctions between specific and comprehensive claims
- Deconstructing the concept and role of Aboriginal self-government

## WORKSHOP B • FEBRUARY 14, 2008 • 9:00 A.M. – 12:00 P.M.

### Resolving Disputes at the “Crisis” Stage: New and Practical Strategies

**Cynthia Vanier**

Senior Mediator

Dispute Resolution Services LP

*Whether you are an ADR professional or not, everyone needs to know how to facilitate constructive dialogue and tackle contentious issues with sensitivity – especially in worst case scenarios!*

*Building on the conference sessions, this interactive workshop will provide you with a hands-on learning experience, including case studies and practical exercises that will help to refine your approach to dispute resolution and prevention.*

- **Interactive Exercises!**
- What can we learn from recent disputes across Canada?
  - examining key mistakes to avoid in dispute resolution
  - how does the nature of the dispute impact the choice of ADR mechanism?
- Which dispute resolution strategies have worked? Which have not?
- Which unconventional ADR techniques could help to diffuse conflict?
- Examining the evolving relationship between industry, government and Aboriginal stakeholders

- how has this impacted dispute resolution?
- which ADR mechanisms are appropriate under which circumstances?
- Understanding the impact of Aboriginal cultures on the dispute resolution process
  - adapting ADR mechanisms to reflect traditional values
- Utilizing effective communication strategies for minimizing conflict
- How can the parties agree on an appropriate dispute resolution forum? What happens when the parties cannot agree?
- What are the pros and cons of utilizing arbitration?
- Settling disputes during the litigation process
  - how do these negotiations differ from those outside litigation?
  - will the Crown negotiate during the litigation process?

*Cynthia Vanier is a Chartered Mediator, who has worked with The First Nations communities in both Canada and the U.S. Cynthia is a specialist in high risk and unconventional dispute resolution, with focus on high-risk mediation, including fraud, money laundering, asset recovery, kidnap, ransom, as well as anti-terrorist strategies and negotiation.*

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February 12 & 13, 2008 • The Sutton Place Hotel, Toronto

FULLY  
UPDATED  
FOR 2008!

# ABORIGINAL LAW & CONSULTATION

Cross-Canada Insights and Best Practices for Meaningful Consultation

## 5 Reasons to Attend!

- 1 Get updates on new **case law**, the **Specific Claims Action Plan** and federal/provincial **consultation guidelines**
- 2 Learn how to build **Aboriginal capacity** for consultation
- 3 Facilitate project approvals by reconciling **environmental** and Aboriginal law concepts
- 4 Gain best practices for getting all the **right parties at the negotiating table**
- 5 Hear innovative strategies for **dispute resolution**

## REGISTRATION FORM

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<input type="checkbox"/> Conference & 1 Workshop <input type="checkbox"/> A <input type="checkbox"/> B	\$2390 + 6% GST = \$2533.40	\$2590 + 6% GST = \$2745.40
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STEP 2

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