

Informing the Duty to Consult: Mapping Aboriginal Spatial Demands in Canada

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Abstract

The duty to consult with Aboriginal peoples is founded in the honour of the Crown. Research to aid in this effort, aimed at producing a national map of Aboriginal spatial demands, allowed the following observations: that government departments dealing with aboriginal spatial demands applaud the idea of such a map; that the depiction of the spatial extent of land in which rights are claimed can be problematic, in terms of potentially compromising the Crown's position at court or within land claims processes; that, although necessary, difficulty exists in both obtaining a national overview of the location and extent of lands currently claimed; and that the map is of little value in supporting the duty to consult.

Introduction

NRCan's 2004 map, *Treaties and Comprehensive land Claims in Canada* ("the map"; Canada, 2004), has been acknowledged as a key resource, depicting an overview of the location of agreements (treaty lands), and areas subject to negotiation (via accepted comprehensive claims). The historic treaties dataset includes agreements between the Crown and various groups of Aboriginal peoples, as represented by the peace and Friendship treaties in eastern Canada, the numbered treaties throughout central and western Canada, the Vancouver Island treaties, and the various adhesions to treaties. This paper examines the duty to consult, the potential for including additional themes to the map, and assesses the usefulness of the map in supporting the government's response to the direction of the courts.

"[T]he duty arises when the Crown has knowledge, real or constructive, of the potential existence of [an] Aboriginal right or title and contemplates conduct that might adversely affect it." (*Haida*) This statement, issued by the Supreme Court in *Haida* no less than directs all federal and provincial government agencies to scrutinize their processes and to respond where their activities may adversely affect the rights of Aboriginal peoples. Such response may require consultation and, where necessary, accommodation of the Aboriginal interest. The Crown has recently issued the *Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult*. (Canada, 2008) The *Guidelines*, which cite the map as a resource, are meant to ensure a consistent government-wide approach to consultation by managers and consultation practitioners.

The Canada Centre for Cadastral Management's (CCCM) strategic planning over the past five years has focused on re-aligning the organization in support of management of property rights on behalf of the Government of Canada (GOC). As the Crown's corporate surveyor, CCCM identifies GOC's interests in land and dispositions thereof, and is responsible for the systems used to spatially reference interests in Canada Lands. Bolstering GOC's ability to contend with the duty to consult by illustrating the location of agreements and asserted rights in land is consistent with a flexible and adaptable cadastral management mandate.

CCCM's role in mapping Aboriginal spatial demands

CCCM is the primary land surveying agency within the GOC, composed of some 110 staff across ten regional offices. Within its purview are Canada Lands, which include lands held in trust for the public at large (e.g. National Parks, Historic Sites), or for specific groups such as

Indian Bands (First Nations), lands in the three northern territories, the offshore, and certain classes of lands created pursuant to land claims agreements.

CCCM is responsible for maintaining records of the location and boundaries of Indian Reserves (IR) – a dataset that includes current reserves, additions to reserves through Treaty Land Entitlement, and records of extinct reserves. Although infrequent in eastern Canada, changes to IR boundaries do occur, with additions to reserve via treaty land entitlement requiring more regular updates in Saskatchewan and Manitoba. As a land inventory, CCCM's maintenance of IR boundary data is important to Indian and Northern Affairs Canada (INAC); it is updated daily and made publicly available through CCCM's web server, and to GeoGratis, NRCan's free internet downloading service.

CCCM is also involved, on an *ad hoc* basis, in defining the location and extent of parcels subject to asserted and affirmed Aboriginal interests in land. Such knowledge is useful in both the formal process of establishing an Aboriginal land base, and benefits the process of disposing of Crown property where, for example, knowledge of the location of Aboriginal interests relative to the asset being sold is relevant to the negotiations. Both CCCM and Public Works and Government Services Canada (PWGSC) provide confidential mapping in support of land claims negotiations.

The map

The map is currently offered on CCCM's website for downloading (free of charge). Hardcopies are available for a fee of some \$35. Recent demand for hardcopies has been slight: thirteen copies were printed for sale over the past 22 months. The number of maps downloaded is not easily ascertained, but it is suspected to be much higher than the volume of hardcopies delivered. Drawing on a sample of 17 web inquiries addressed over the past 13 months, the range and specializations of originating agencies offers insights into the user community:

- 8 queries from federal government agencies (law enforcement, legislation research & policy, duty to consult in relation to petroleum resources policy, comprehensive claims, environmental assessment, procurement & assets management);
- 2 queries each from digital mapping companies, educational institutions, and environmental consultants;
- 1 query from provincial government (duty to consult in relation to land-related development applications); and
- 1 query from an Aboriginal human resource agency.

Whether as an educational tool for display in post-secondary school libraries, or a search tool in support of government procurement policy granting priority to suppliers within settlement areas, the current map is acknowledged by this sample of users as valuable in disseminating knowledge of these land parcels. Anecdotal evidence also points to the popularity among INAC officials, of the tabloid format in illustrating general locations for discussion purposes. (Perrin, 2008)

Duty to consult: the motivating factor

Recent judgments of the courts have highlighted the necessity of rigorous, meaningful consultation with Aboriginal peoples, on a uniform basis Government of Canada (GOC)-wide. The key Supreme Court of Canada (SCC) message motivating the duty to consult is the need to

reconcile Aboriginal rights with those of all other Canadians, as articulated, for example, in the *Haida* and *Mikisew Cree* judgments. The *Taku River* judgment underscores the low threshold indicating the presence of a duty to consult:

“The Crown’s duty to consult and accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title, is grounded in the principle of the honour of the Crown...”

The duty is incumbent on the Crown when it has “knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.” The duty rests with the Crown and is also incumbent upon provincial governments. The scope of consultation depends on the strength of the assertion of Aboriginal interests, and on the “seriousness of the potentially adverse effect on the right or title claimed.” (*Haida*)

GOC response and requirements

To be clear, consultation did not begin with the recent judgments, as government agencies have engaged with Aboriginal peoples on permitting issues; it is the government’s approach that was found as needing revision. Based on the signals from the courts, in November 2007, the Government of Canada (GOC) launched an Action Plan to consult First Nations, Métis and Inuit groups. Its stated goals suggest the standard of cooperation set by the courts:

The plan will ensure that:

- Federal officials receive interim consultation guidelines and related training;
- Federal officials begin monitoring and improving the coordination of consultation and accommodation practices across departments;
- A **repository of information** is created to track the location and nature of Canada’s established and potential Aboriginal and Treaty rights; and
- First Nations, Métis and Inuit groups, as well as provinces, territories and industry groups are engaged in the development of a policy on consultation and accommodation beginning in winter 2008. (INAC, 2007a) [emphasis added]

The urgency of a concerted consultation strategy among federal departments was emphasized at the Aboriginal Consultation Workshop convened by NRCan in October, 2007. Again, the importance of geographical information was recognized:

The courts will deem GOC to know, even if only department ‘A’ or [the Canadian Environmental Assessment Agency] know of Aboriginal interests in isolation...How do we share information?

Where are asserted [and] established rights? Through what processes does GOC issue permits or licenses? Ways must be found to gather, weigh and share this information.

(Cadorette, 2007) [emphasis added]

The Federal Interdepartmental Committee on Aboriginal Issues (FICAI), which directs implementation of the Action Plan, has identified the usefulness of geomatics as a basis for coordinating the thousands of projects involved, underscoring the centrality of geographic knowledge in managing consultation:

The development of a repository may build upon an existing electronic inventory system, such as a **geomatics system or an informational database**, to link and/or map information from departmental databases and other sources. (Ricard, 2008) [emphasis added]

Within Natural Resources Canada (NRCan), the Major Projects Management Office (MPMO) is

being developed to coordinate and track the GOC's response with respect to major projects requiring permits from federal government agencies. The MPMO will use "project agreements" to coordinate consultation among key regulatory departments and, ultimately, provincial agencies as well. (MPMO, 2007) A map of Aboriginal spatial demands would support the mandate of the Consultation Reference Centre which is part of the MPMO design. There is, however, no clear indication of MPMO's geospatial data needs as yet.

What is clear is the desire expressed by potential map users interviewed at the Aboriginal Consultation Workshop; this diverse range of government consultation specialists would welcome an up-to-date desktop consultation management tool with GIS query capabilities, one that would identify the parties who must be consulted in a given area. Such a system would provide contact data and possibly links to ancillary data pertaining to the FN and its locale such as available traditional use studies. Indeed, this mode of information delivery is consistent with the geospatial data strategy indicated by FICAI.

What would an updated map include?

The prospect of updating the map to depict a broader range of "Aboriginal spatial demands" was investigated in the interest of enhancing the GOC's capacity to comply with the duty to consult. "Aboriginal spatial demands" include territorial interests **asserted** and, if successful, **affirmed** through formal means: comprehensive and specific land claim processes, and litigation.

Assertions of Aboriginal interest vary in strength, their objects being to advance claims to:

- territories as described in unilateral declarations by a First Nation (FN) (Tsuu T'ina, 2005);
- territories implied by Traditional Land Use and Occupancy Studies produced either in support of industrial developments or as part of provincial consultation initiatives (Axys, 2005);
- territories as described in Statements of Intent to negotiate comprehensive claims (INAC, 2007b);
- territories as described in Protective Writs filed in the courts (INAC, 2007c); or
- territories subject to alleged inappropriate actions in the past being addressed within INAC's specific claims process.

Affirmations, in this context, refer to judgments of the courts declaring Aboriginal title over a specified territory. Definitive findings of Aboriginal title are rare, declared only once by the Supreme Court of Canada (SCC), in the judgment in *Baker Lake*. In *Tsilhqot'in*, Vickers J. of the BC Supreme Court opined that Aboriginal title existed over a limited area, albeit in a non-binding opinion. Less rare are decisions that have defined the conditions necessary to prove Aboriginal title.

What aboriginal spatial demand mapping is available from GOC and provincial agencies?

In terms of existing mapping to support duty to consult, historical treaties and settled comprehensive land claims are available elsewhere, in the form of interactive map browsers on NRCan (Minerals & Metals Sector (MMS)) websites which allow users to produce and print custom maps by selecting thematic layers of their choice. Such utilities are close to the type of query tool identified by constituents interviewed at the Aboriginal Consultation Workshop.

Based on Autodesk MapGuide, MMS's map browser depicts a variety of statistical data related to the mining industry, against six Aboriginal-themed datasets: Aboriginal communities, First Nations (including Indian Reserve boundaries), historical treaties, settled land claims, Yukon settled traditional territories, and Yukon unsettled traditional territories. (NRCan, n.d.) Treaty area mapping is also available online via the Treasury Board of Canada's Directory of Federal Real Property map browser (TBS, 2002).

Public Works & Government Service's Professional and Technical Services (PTS) unit maps individual land claim areas within Ontario and Québec on an *ad hoc* basis for INAC; its former British Columbia component, some of which has joined INAC's geomatics team, maps the extent of lands subject to statements of intent pursuant to the BC Treaty Process.

Traditional use studies (TUS's) inform the strategy of provincial governments, such as Alberta and Ontario; indeed, Alberta's philosophy directs the thrust of that province's Aboriginal spatial demands information-gathering at TUS's (Alberta, 2007b):

Gathering and preserving traditional use information is at the very heart of meaningful consultation. (Calahasen, 2006)

Related to consultation, the vision for the traditional use study initiative is to provide comprehensive coverage for all First Nations in Alberta and to ensure that valid and reliable TUS data is available for use in regulatory processes. This will allow First Nations, Alberta and industry to work together in resolving land use conflicts. (Laren, 2006)

Pursuant to this policy, 32 TUS's are underway, involving 42 communities, buoyed by provincial funding of \$11.25 million. (Alberta, 2007a) In a similar vein, Ontario engages First Nations Elders in traditional ecological knowledge (TEK) mapping to identify Aboriginal interests. TEK studies identify burial grounds, sites for harvesting plants, terrestrial animals and fish, language distribution, etc. and benefit from a high-level integration of the government's approach to Aboriginal peoples, its Biodiversity Strategy and the Crown's duty to consult. (Ontario, 2007)

Discussion

In the absence of a concerted GOC mapping strategy in support of duty to consult, it is difficult to forecast the appropriate role of CCCM as a supplier of geomatics support. CCCM has opened a dialogue with INAC's Consultation and Accommodation Unit and the MPMO. Both MPMO and the Consultation and Accommodation Unit are in the midst of building capacity and are as yet uncertain of its spatial data needs, having appointed a new Director in late February.

Although the *Treaties and Comprehensive Land Claims in Canada* map is perceived by GOC users as a valuable resource in its depiction of Aboriginal spatial demands, it contains areas open to improvement. The depiction of historical treaty boundaries is imprecise, given the difficulty of first interpreting, and then selecting, the correct referent of treaty terms. These difficulties are compounded by the ability of the user of the digital file to enlarge the image, lending an unwarranted air of precision to the treaty boundary lines. For example, INAC has identified a problem with the plotting of the 1923 Williams Treaty boundary at Lake Ontario. Treasury Board's mapping of the Toronto Purchase boundary is wrong, and the location of the westerly boundary of Treaty 8 is currently before the courts.

In the interest of ensuring provision of complete authoritative information on comprehensive claims data, INAC's Claims and Indian Government Branch (CIGB) has recently asserted business ownership of the comprehensive claims dataset, essentially halting updating of the map.

CIGB's reticence is explained by both their pending re-organization and an internal review of this business line.

TUS data are of strategic importance to Aboriginal peoples and are not freely available. The Ontario, Alberta and Saskatchewan TEK/TUS datasets, for example, are bound by data sharing agreements and are not available publicly. Any proposed access would have to be negotiated with the respective First Nation, potentially complicating the incorporation of TEK/TUS data into a national map of Aboriginal spatial demands.

Alternatively, mapping the components of the related theme of fur management areas or trap lines registered with provincial and territorial governments (some of which data are publicly available) may assist duty to consult. Mapping the individual components of registered trapping areas may be useful in providing notice, as between First Nations involved in land selection pursuant to Treaty Land Entitlement, of Aboriginal trapping interests. Coordinating and maintaining trap line data on a national basis would be onerous.

It is debatable whether such data will suitably represent the full range of Aboriginal interests in the territory depicted: for example, even where trap lines are registered in favour of Aboriginal parties, as DOJ counsel cautioned, representing registered trap line data to the exclusion of other traditional uses such as berry picking, use of ceremonial sites, etc. would be inadvisable. Complicating the issue of traditional use is the poor ability of (static) paper maps to reflect the changing extent of FN land use depending on seasonal cycles of both terrestrial and aquatic plants and animals.

Within the Specific Claims process, although a particular parcel may be identified in a specific claim, the description of lands subject to a given claim is typically vague. Specific Claims policy does not require that the FN's identify the coordinates of the subject parcel and, because these claims rely on oral histories, the landmarks referred to are either long gone or difficult to reconcile with current mapping. More to the point, the specific claims process aims at financial compensation and non-disturbance of third parties currently in possession of the subject lands. Thus, there is not necessarily a parcel that is being claimed and, in terms of Aboriginal spatial demands, no parcel to be depicted on an updated map. Specific Claims Branch's geospatial needs appear to be supported by widely available utilities such as Google maps.

Although the full range of Aboriginal spatial demands mapping would be regarded "extremely valuable" were it restricted to GOC only, DOJ would have "serious concern" about the map's potential to prejudice Canada's position at court. (Bosscha, 2007) DOJ has also raised questions about the value of mapping areas subject to litigation, because these parcels: (i) may not be identified precisely, and (ii) are typically identified not in the interest of acquisition, but to establish a negotiating position at court.

Conclusions

In the absence of an explicit GOC-wide methodology to fulfill geospatial resource needs, the incentive and intention to respond meaningfully will persist and will require that mapping agencies retain an adaptable approach. CCCM's basic responsibility for maintaining Indian Reserve mapping will persist. Likewise, providing timely mapping of the spatial extent over which the courts have assessed Aboriginal title, as in the recent *Tsilhqot'in* decision, is valuable to GOC agencies.

Developments in the MPMO, FICAI, INAC's CIGB and Consultation and Accommodation Unit

should be monitored to ascertain the appropriate role for CCCM as a provider of geospatial data. FICAI's identification of the necessary resources serves to heighten GOC's focus on developing the appropriate response. Having made these agencies aware of CCCM's area of expertise and its willingness to support their efforts, these links should be nurtured.

It would be inadvisable to depict areas subject to active litigation. Nor may spatial demands pursuant to specific claims be mapped, absent data on parcels implicated in that process. Areas of affirmed Aboriginal title are non-existent at the moment, and data on traditional land use appear to be proprietary and are being gathered by separate provincial mapping efforts. Furthermore, the datasets represented on the map are currently available online via the website of NRCan's MMS Sector.

Given the ambiguities identified in the map, its value is dubious, and the uncertainty of comprehensive claims data availability make updating it problematic. The contribution of the current map to GOC's efforts in consulting First Nations is thus limited.

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