

## A superior line of thought



# Introduction

- Crown has legal duty to consult with First Nation, Inuit and Métis communities (when it has knowledge, real or constructive, of established or asserted Aboriginal rights and contemplates conduct that might adversely affect these rights)
- Duty is grounded in principle of honour of Crown, thus requiring Crown's honourable dealings with Aboriginal people
- Scope of Crown's duty is generally proportionate to assessment of strength of asserted right and seriousness of potentially adverse effect upon such right
- In addition, Crown and industry have certain statutory and policy-based obligations to consult Aboriginal people
- Consultation must be meaningful, in good faith and with willingness of Crown to make changes based on information that emerges during consultation process; should be two-way exchange of information
- However, no legal duty to reach agreement (*i.e.*, Aboriginal groups don't have "veto") – rather, it is complex process of balancing interests

# Duty

- While legal duty to consult generally rests with Crown, proponents play important role in consultation process
- Crown often delegates procedural aspects of consultation to proponents including day-to-day consultation activities
- Properly consulting with Aboriginal communities decreases risk of legal and regulatory obstacles to projects; failure to fulfill consultation obligations can cause project delays and increase costs
- In Ontario, Aboriginal consultation continues to become part of normal course of doing business
- Consultation process often results in impact/benefit and participation agreements with Aboriginal groups

# New Renewable Energy Approval ("REA")

- Aboriginal consultation mandatory for proponent requiring REA (O.Reg. 359/09)
- Nature of consultation varies depending on project
- MOE gives proponent, on behalf of Crown, list of communities that may have potential interest in environmental effects of project or Aboriginal/treaty rights that may be affected by project
- If project on Crown land, list will reflect what was already required by Ministry of Natural Resources as part of site release process
- Depending on size of project, proponents may be required to develop Aboriginal consultation plan
- Aboriginal consultation report must be included in proponent's REA application
- MOE may request further consultation to assess whether project may have adverse impacts

# New Archaeological Assessment Requirements

DAVIES

- New *Standards and Guidelines for Consultant Archaeologists* take effect January 1, 2011; replaces 1993 guidelines
- Includes new standards and guidelines for engaging Aboriginal communities during archaeological fieldwork process and reporting on such engagement
- Ministry also released draft technical bulletin *Engaging Aboriginal Communities in Archaeology*
- In general, archaeologists must conduct consultation with Aboriginal communities as part of Stage 3 and Stage 4 archaeological assessments regarding Aboriginal archaeological sites of cultural heritage value/interest