Aboriginal Duty to Consult
Challenges Faced by Industry

Calgary
April 17, 2014
Peter L Miller
Constitution Act, 1982

• 35(1) The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed.
Challenge #1
Government Involvement
Crown’s Duty

• The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

• *Haida*
Passively Watching

• “We cannot withdraw our cards from the game, were we as silent and mute as stones, our very passivity would be an act.”

• Jean-Paul Sartre
Alberta Discussion Paper
First Nations Consultation

Greater Role for Alberta

Centralized Consultation Office
- Set Standards and best practices
- Assure quality in process
- Monitor implementation of Policy
- Determine adequacy of consultation
- Support Departments
- Support industry
Challenge #2
Trigger to Consultation
Trigger to Consult

• The duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

• Halfway River
Trigger to Duty to Consult

• There is no at-large duty to consult that is triggered solely by the development of land for public purposes. There must be some unresolved non-negligible impact arising from such a development to engage the Crown’s duty to consult.

• *Broken Head Ojibway*
Trigger to Duty to Consult

• The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on Aboriginal claims or rights. Mere speculative impacts will not suffice.

• The duty to consult is triggered by an appreciable adverse effect stemming from current Crown conduct or decisions.

• Rio Tinto v. Carrier Sekani  SCC 2010
Trigger to Duty to Consult

• Not every subsequent “taking up” by the Crown constitutes an infringement of a treaty right. Treaty rights are expressly limited to lands, not “required or taken up from time to time for settlement, mining, lumbering, trading or other purposes”. The Courts have rejected the argument “that any interference with the right to hunt is a *prima facie* infringement of the Indians’ treaty right as protected by Section 35 of the *Constitution Act 1982*. This argument “presupposes that Treaty 8 promises continuity of 19th century patterns of land use. It does not…”

• *Mikisew Cree*  *para 32*
Challenge #3
Scope of Consultation
Scope of Duty

• At one end of the spectrum lie cases where the claim to title is weak, the aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to a notice. …at the other end,… lie cases where a strong *prima facie* case where the claim is established, the right and potential infringement is of high significance to the aboriginal peoples, and the risk of non-compensable damage is high. In such cases, deep consultation, aimed at finding a satisfactory interim solution, may be required. …between these two extremes… will lie other situations.

• *Haida* para 43
“… given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the “taking up” limitation, I believe the Crown’s duty lies at the lower end of the spectrum.”

• Mikisew SCC 2005
Alberta Discussion Paper
First Nations Consultation

• Consultation Process Matrix

  – Categories of impact
  – Understand expectations
  – Effectively manage timelines
  – Ensure transparency of government decisions
Challenge #4
Duty to Provide Information
Duty to Provide Information

• The Crown is under an obligation to provide all necessary information to the Aboriginal peoples in a timely way so that they may have an opportunity to express their interest and concerns.

• Halfway River
Duty to Provide Information

• To facilitate a determination of rights, claimants should outline their claim with clarity, focusing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements.

• *Haida* para 36
Duty to Provide Information

• Any future consultative process will require the applicants’ sharing their traditional knowledge and full meaningful participation in the consultation process.

KA’A’GEE TU First Nation
• The First Nation also contended before us, it had **no duty to tell the Board specifics**, and that the Board should have frozen all development while deciding the question. We **cannot agree**, and we have seen no authority, constitutional or otherwise, requiring such a logical impasse.

Bidson
What is Consultation?

• Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ...

• ...genuine consultation means a process that involves:

• gathering information to test policy proposals
• putting forward proposals that are not yet finalized
• seeking (FN) opinion on those proposals
• informing (FN) of all relevant information upon which those proposals are based
• not promoting but listening with an open mind to what (FN) have to say
• being prepared to alter the original proposal
• providing feedback both during the consultation process and after the decision-process

• Haida SCC para 46
Challenge #5
Refusal to Engage
Duty to Provide Information

• First Nations have a reciprocal onus to carry their end of the consultation, to make their concerns known, to respond to the Government’s attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution.

• *Mikisew*  para 65
REFUSE TO ENGAGE

• Refusal to meet or participate as well as setting unreasonable conditions frustrates the process.

Halfway River
REFUSE TO ENGAGE

• Since the applicants have not justified their failure to participate, the applicants cannot now complain that their concerns were not considered in the preparation of the TK study.

KA’A’GEE TU First Nation
Refuse to Engage

• 117 … Given that the Stellat’en was not prepared to participate in consultation except on its own terms, however, the MEMPR cannot be faulted for not having engaged in more comprehensive or deeper consultations.

• Louis B.C. C.A 2013
Challenge #6
Unreasonable Demands
Unreasonable Demands

- First Nations must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart the Government from making decisions or actions in cases where agreement is not reached.

*Haida* para 42
Unreasonable Demands

• “... He implies that the Xats’ull would cause delays in the consultation ... Unless Gilbralter provided funding ‘right away’ to the Xats’ull for, among other things, an interim benefit agreement ....”

• “If we cannot find agreement on mitigation which could accomplish relatively quickly, this could take a great deal more time as we will need to have much more discussion, possibly independent analysis (our consultants) of the discharge, we will need to find funding for this ....”

  • Xats’ull v. Gibraltar
  • B.C. Environmental Appeal Board
Unreasonable Demands

• “Such an approach made by (the negotiator) on behalf of the Xats’ull does not amount to consulting in good faith, and verges on sharp dealing. Under the circumstances, the Panel is not prepared to entertain an application for costs from the Appellant.”

• Xats’ull v. Gibraltar
• B.C. Environmental Appeal Board
Challenge #7
How much is enough?
How much is enough?

• So long as every reasonable effort is made to inform and to consult, so such efforts would suffice. The Government is required to make reasonable efforts to inform and consult; this suffices to discharge the duty.

_Haida (citing Nikal SCC) para 22_
Challenge #8
No Veto
No Veto

• 48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in Delgamuuukw is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

• Haida para 48
No Veto

• Aboriginal rights deserve the full respect of Canadian society and judicial system. Those rights do not, however, automatically trump competing rights, whether they be government, corporate, or private in nature.

*Kruger, Ontario Court of Appeal*
No Veto

- “The consultation process does not mandate success for the First Nations interest. Is should, however, provide a satisfactory, reasoned explanation as to why their position was not accepted.”

- West Moberly (C.A. 2011)
No Veto

• “A reasonable process is one that recognizes and gives full consideration to the rights of Aboriginal peoples, and also recognizes and respects the rights and interests of the broader community.”

• West Moberly (B.C. C.A. 2011)
UN Declaration on the rights of Indigenous Peoples

• 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
Challenge #9
Duty to Accommodate
Duty to Accommodate

• 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may *adversely affect it in a significant way*, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, 1999 CanLII 666 (S.C.C.), [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

• *Haida*
   Para 47
Duty to Accommodate

49. This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *The Concise Oxford Dictionary of Current English* 9th ed. (1995) at p. 9. The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

Haida

Para 49
Challenge #10
Capacity Funding
Capacity Building

• The First Nation must know, or be able easily to learn, where its members hunt and trap. None of that hard information was provided to the Board. Instead, the solicitors gave vague and adroitly-worded assertions of rights, some of which encompassed all the land in Alberta, or in any event, all Crown land in Alberta.

  • Dene Tha
  • Alberta CA 2005
Capacity Building

- The evidence while establishing that this community of First Nations is of limited means does not establish a community incapable of providing information sought.

  …in conclusion, while the SFN is represented by Chief Cameron, are adamant in their opposition to this project, they have been afforded the fulfillment of the duty upon the Crown to be consulted. Any responsibility for the absence of consultation lies with their own representatives.

  *Kelly Lake Cree Nation v. BC*  
  *(Minister of Energy and Mines)*
Alberta Discussion Paper
First Nations Consultation

• Capacity Funding
  – Currently government funding not sufficient
  – Enhanced program
  – Funded by industry levy
Public Lands Act

• 54.01(4) No person shall, directly or indirectly, induce or attempt to induce another person to provide money or other consideration for the purpose of gaining access to, passage on or over or used of public land ...

• (5) No person shall provide or receive money or other consideration for the purpose of gaining or allowing access to, passage on or over or used of public land ...
Challenge #11
Existing Processes
Existing Processes

• The consultation process provided for under the Act is comprehensive and provides the opportunity for significant consultation between the developer and the affected Aboriginal groups.

KA’A’GEE TU First Nation
Existing Processes

• The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discreet consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief. That is so because the consultation process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate.
Alberta Discussion Paper
First Nations Consultation

- Consultation Office
  - Greater role
  - Judge adequacy of consultation
Challenge #12
Impact Benefits Agreements
Royalty Deductibility
IBAs NOT Consultation

• 120 … the ECDA (Economic Community Development Agreement) discussions do not assist the Crown in demonstrating that it fulfilled its duties under *Haida* …

• *Louis B.C. C.A. 2013*
Royalty Deductibility
Suncor Decision

Allowable
• “... Costs that are expended post approval to comply with commitments made to stakeholders including aboriginal and Metis groups and the affected community during the approval process for the Projects, whether made in writing or orally during the approval process, or whether made formally during the hearing process or referred to in the application material, and which commitments are relied upon by those stakeholders in making representations respecting the Project..."
Royalty Deductibility
Suncor Decision

• “... Costs that were expended to carry out community communications and consultation activities after the project approval respecting the projects and any issues arising from the Projects

• Costs that were expended to make any changes to the Projects to address issues raised through the consultation process
Royalty Deductibility
Suncor Decision

• Non-Allowable Costs

• Corporate Good Will
• Support to Regional Groups
• General Operating Expense

• Oil Sands Information Bulletin 2010-06
  • Ministerial Decision
Challenge #13
Confidentiality - Transparency
Disclosure of payments by Resource Extraction Issuers

• *Dodd-Frank Wall Street Reform and Consumer Protection Act* s. 1504

• Payments made by a resource extraction issuer to a foreign government (foreign sub-national)
  – To further commercial development of oil, natural gas or minerals
  – Is not *de minimus*
  – Includes *royalties, fees, production entitlements, bonuses other material benefits*
“Section 1504 represents a strong shift in policy .... It takes securities disclosure from the realm of protecting investors against economic risks considerably further in the direction of protecting them against “moral hazard”.”

- King & Spalding (May 19, 2011)
Alberta Discussion Paper
First Nations Consultation

• Consultation Guideline

• Compulsory public disclosure system

• Assures increased transparency and accountability
Alberta Transparency

- Alberta would seek to develop a **compulsory public disclosure** system to include all related agreements in order to assure increased transparency and accountability in the consultation process.

  - First Nations Consultation Discussion Paper 2012
Alberta Transparency

• **Transparency of Process**
  Alberta is committed to achieving a consultation process which maintains integrity of that process.
  One tool to maintain the integrity of the process is negotiation of a consultation process agreement between Alberta and a First Nation.
  Where a cooperative arrangement protecting the integrity of the consultation process cannot be developed, Alberta will rely on the compulsory disclosure process enabled by the *Aboriginal Consultation Levy Act*. Under that process, industry proponents will provide to the consultation office all consultation-related agreements signed with First Nations as an outcome of consultation processes along with their consultation logs. Alberta will publish aggregated information regularly.

• DRAFT Alberta Corporate Guidelines for First Nations Consultation – June 3, 2013
• The parties acknowledge that disclosure of these agreements can **significantly harm relations** between the parties. As a result, the agreements will be kept confidential, and will not be made public or shared with any person or organization outside of Alberta staff except as required by law. Sanctions will be developed for proponents who fail to comply.
Aboriginal Consultation Levy Act
(not yet in force)

• Collection of information, records, etc.
• 8(1) The Minister may, in accordance with the regulations, require a proponent to provide the Minister with information, including third party personal information, records and other documents, including copies of agreements relating to consultation capacity and other benefits pertaining to provincial regulated activities, for one or both of the following purposes:
  • (a) to assist in determining the amount of grants to be provided to First Nations and other identified aboriginal groups;
  • (b) to plan and facilitate any required Crown consultation in respect of regulated provincial activities.
Aboriginal Consultation Levy Act
(not yet in force)

• (2) Where any information, record or document provided by a proponent to the Minister under subsection (1) is subject to any kind of confidence or is supplied, explicitly or implicitly, in confidence, the providing of that information, record or document does not waive or negate any confidence attached to the information, record or document, and the confidence continues for all purposes.

• (3) Notwithstanding subsection (2), the Minister may publish in aggregate form any information collected under this Act.
Federal Transparency

• “Prime Minister Stephen Harper, on his first full day of an eight-day European tour, announced the federal government will establish new mandatory reporting standards for Canadian extractive companies — including mining and oil and gas firms — in hopes of improving transparency on the payments they make to governments.

• The Conservative government will consult with provinces and territories, First Nations, aboriginal groups and industry over the coming months on the appropriate reporting regime — including possible fines and other penalties — that would apply to companies operating in Canada and domestic companies operating overseas.”

• Canada.com  June 12, 2013
Federal Transparency

• “The goal is to improve transparency and accountability around payments by extractive companies to all levels of governments — domestically and internationally — including for taxes, licence fees and other items.”

• Canada.com  June 12, 2013
Bill 27 - Financial Accountability and Transparency of First Nations

• Requires First Nation to publish, annually,
  – its audited consolidated financial statements
  – Schedule of Remuneration and Expenses of Chief and each Councillor

• Penalty for failure to do so:
  – Withhold flow of monies from Ottawa to first Nation

  – C-7 - Royal Assent March 27, 2013
Challenge #14
Anti-Corruption Law
Extractive Industries Transparency Initiative

• “EITI” announced in 2002 by U.K. Prime Minister Tony Blair seeks to:

• “require disclosure by natural resources companies of certain payments in order to heighten public awareness, and promote more equitable dispersal, or resource extraction payments to the inhabitants of developing countries.”
U.K Bribery Act

- Wider ranging than U.S FCPA
- Covers corruption between commercial entities
- No distinction between bribery and facilitation
- Prohibits corporate hospitality if it is determined to “subvert the duties of good faith and impartiality that the recipient owes to his or her employer”
Anti-Corruption Law

U.S. Foreign Corrupt Practices Act (FCPA)

- Extraterritorial application to U.S.-based companies in Canada

- Prohibition against paying, promising, offering, or authorizing a payment, directly or indirectly through a third party, of anything of value to a “foreign official” to persuade that official to help the company obtain or retain business or secure some improper advantage
  - The definition of “foreign official” is broad, …
  - Foreign officials would include all Canadian domestic government officials whether federal, provincial or municipal or aboriginal
  - The FCPA requires U.S. companies and affiliates to keep accurate and complete books and records
U.S. Foreign Corrupt Practices Act
SEC Rulings

• “… the payments to Azeri tax officials were the result of extortionate demands communicated to Tidewater entities …”

• “… the 2001 Audit was sort of a “shakedown” that the Azerbaijan Agent created in order to collect a fee.”
U.S. Foreign Corrupt Practices Act “conscious avoidance”

- Is defined in the FCPA as:
- “When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless he actually believes the circumstance does not exist.”
“… these improper payments were authorized by senior employees … while knowing, or ignoring red flags which indicated a high probability, such payments would be passed on to government officials, inaccurately recorded in the company’s or its affiliates’ books and records, and Tidewater failed to maintain sufficient internal controls to prevent such payments.”

“… it knew, or was reckless in not knowing, would be passed on to government officials in Azerbaijan.”
JP Morgan - Chase

• Prosecution in the Bernie Madoff case
• Fine $1,600,000,000

• “… ignoring numerous obvious signs …”
U.S. Foreign Corrupt Practices Act

- Alcatel also paid inflated consultant commission rates and approved consultant payments for little or no work, with the understanding that part or all of the funds would go to government officials.

- “Alcatel also entered into several suspicious consulting agreements, with a high probability that some or all of the fees would be passed on to government officials.”
Red Flag

• There was dissent among the XXX First Nations band members Wednesday morning. Protesters gathered in front of the band office to demand an answer to why $250,000 was given to an employee of one of the band's satellite companies — ....

• But one employee who was not rehired in the new company did not think it was fair and sent the $250,000 buyout information to other band members, ....

• "When the whistle was blown, that employee was fired," .

  • Mathew Klie-Cribb    Today staff    Article ID# 2810772
Red Flag

• “Nearly 40 per cent of all Manitoba First Nations have lost control of their finances due to mismanagement. … the grand chief … was turfed last week over allegations he misspent thousands of dollars, including at casinos and amusement parks.”

• “Poor governance – from nepotism to rigged elections to exorbitant pay for chiefs and band councillors – is the scourge of First Nations.”
  
  • Winnipeg Free Press November 11, 2013
Specified Auditing Procedures Relating to the Attawapiskat First Nation

Report to the Chief Audit and Evaluation Executive – Aboriginal Affairs and Northern Development Canada
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Challenge #15
Criminal Offences
Anti-Corruption Law

Dealings in Canada with Canadian Officials

Criminal Code

Sections 121, 123 – frauds on the government / bribery of Canadian officials / municipal corruption

Offence where a person “directly or indirectly …gives [or] offers … to an official or … to anyone for the benefit of such official… [a] benefit of any kind … as consideration for … exercise of influence or an act or omission in connection with the transaction of business … with the government”

_R. v Yellow Old Woman 2003 (ABCA)_

An official is not confined to public servants and includes a “position of duty, trust or authority … [and accordingly] a chief of the Siksika Nation held ‘office’”
- The Council of an Indian Band is a
  - “... federal board, commission or other tribunal...”
- within the meaning of the *Federal Court Act*
Breach of Trust
s. 122 Criminal Code

• 22 “... that the work of a public servant must be a real service in which no concealed pecuniary self-interest should bias the judgment of the officer, and in which the substantial truth of every transaction should be made to appear.”

• R. v. McKitka
  • (B.C. C.A.)
Breach of Trust
s. 122 Criminal Code

• Breach of trust law flows from an “ancient and important” principle that “public officials have a duty to use their offices for public good, not private benefit” and that “this duty lies at the heart of good governance”

• Brown, SCC 2006
Criminal Code

• **22.2** In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers …

• (c) knowing that a representative of the organization is or is about to be a party to the offence, **does not take all reasonable measures to stop them** from being a party to the offence.
Wilful Blindness

• “The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries but deliberately chooses not to make those inquiries.”

• Briscoe  SCC 2010
Wilful Blindness

• “… a finding of wilful blindness involves an affirmative answer to the question:

• Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge? .”

• Briscoe  SCC 2010
Wilful Blindness

• “wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant.”

• Briscoe SCC 2010
Influence Peddling

• “… the (FN) can provide significant assistance in the permitting and regulatory process to help ensure the project’s success.”

• “… the (FN) are … unique in terms of what the (FN) can do for the certainty of the regulatory and permitting process for the project due to their influence.”
Influence Peddling

• Frauds on the government
  (Criminal Code)
• 121 (1)(d) Everyone commits an offense who … having or pretending to have influence with the government, or with a minister of the government, or an official, directly or indirectly, demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or any act or omission in connection with … any matter of business relating to the government
Challenge #16
Bad Public Relations
Demands for Payment

• Judge finds Six Nations’ land claim ‘exceedingly weak’

• “While the judge didn’t outright describe the .. practice of demanding fees from developers as extortion, the language he used made it clear he believed a shakedown was just what was going on.”

• Globe and Mail, Nov. 22, 2010
Junior Mining companies in “Revolt” over native deals

- Globe and Mail  March 27, 2012

- Issue: “concessions and cash native bands expect from companies”
- “There is a growing backlash among junior miners about these agreements.”
- “What’s being asked of them has nothing to do with consultation. It has everything to do with compensation.”
- “They have to understand that we can’t be held, more or less, to ransom to get on the land.”
Four Idols
Francis Bacon – *The New Organon* (1620)

Moving forward…

… Letting go of Idols
Four Idols
Francis Bacon – *The New Organon* (1620)

• The idols of the tribe (innate tendencies)
  – Tendency of our senses to deceive us about reality
  – Inclination to impose more order and structure on nature
  – Inclination towards wishful thinking
  – Jump to conclusions before sufficient careful investigation
Four Idols
Francis Bacon – *The New Organon* (1620)

- The idols of the cave (particular to cultural background)
  - View phenomena in view of our pre-existing point of view
  - Excessive reverence for, and tendency to defer to, the opinions of our own particular “authorities’ and “experts”.
Four Idols
Francis Bacon – *The New Organon* (1620)

• The idols of the market place
  – Obstacles to understanding and reasoning that arise from interactions between men, and particularly from language
  – Use of vague and obscure jargon – pseudo-scientific gobbledygook
  – Tendency to imagine and name things that do not exist.
Four Idols
Francis Bacon – *The New Organon* (1620)

- The idols of the theatre
  - Attraction to the grandiose and theatrical leads away from truth
  - Theories and dogmas already familiar to us, take on special luster
  - Tendency to grandly explain everything on the basis of a few observed causes or in terms of a single insight. (i.e. Everything someone does can be explained by early childhood experience)
  - Inflating this observation into a complex theory accounting for all behaviour – over-dramatizing a single insight.