Duty to Consult Primer

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What is the Duty to Consult?

The Supreme Court of Canada has summarized the duty to consult as follows: "Grounded in the honour of the Crown, this duty requires the Crown to consult (and if appropriate, accommodate) Aboriginal peoples before taking action that may adversely affect their asserted or established rights under s. 35 of the *Constitution Act, 1982*."[1]

The initial case which outlined the Crown's duty to consult was *Haida Nation v British Columbia*, which concerned the province's issuance and transfer of licences to harvest trees on the islands of Haida Gwaii, whose title had been claimed by the Haida people for over a century.[2] The Court stated that the duty to consult "is grounded in the honour of the Crown" which is "always at stake" when the Crown interacts with Indigenous peoples and which is a key aspect in achieving reconciliation.[3] The Court also stated that the honour of the Crown means that "potential rights" falling within the ambit of s. 35 must be "determined, recognized and respected" – this obliges the Crown to undertake negotiations during which a duty to consult, and possibly accommodate, may arise.[4] Put differently, the SCC found that the Crown cannot "cavalierly run roughshod over Aboriginal interests" and "unilaterally exploit a claimed resource" while an Aboriginal claim is being pursued.[5]

When is the Duty to Consult triggered?

The duty to consult is triggered when the Crown has either real or constructive knowledge "of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it".[6] The potential adverse impact must be "appreciable" to trigger the duty to consult given that "mere speculative impacts" are insufficient.[7] Acts and decisions by a regulatory agency, such as the former National Energy Board, are capable of triggering the duty to consult.[8] However, historical wrongs or grievances will not trigger "a fresh duty of consultation".[9] The focus when considering if a new duty to consult has been triggered is on the "current government conduct or decision in question" and its potential adverse effect on the

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[1] *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 at para 1 [*Mikisew Cree* 2018].

[2] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at paras 1, 4-5 [*Haida Nation*].

[3] *Ibid* at paras 16-17, 26.

[4] *Ibid* at para 25.

[5] *Ibid* at para 27.

[6] *Ibid* at para 35; see also *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 81 [*Ktunaxa Nation*].

[7] *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 46 [*Carrier Sekani*], citing *R v Douglas*, 2007 BCCA 265.

[8] *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 29 [*Clyde River*].

[9] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 at para 41 [*Chippewas of the Thames*]; *Carrier Sekani, supra* note 7 at para 49.

claimed or existing right.[10] It is, nevertheless, still possible to ask for remedies, such as damages, for "previous failures to consult".[11]

A wide range of government action is capable of constituting conduct that can trigger the duty to consult. The SCC has noted that conduct or decisions that have "a potential for adverse impact" would qualify.[12] However, in 2018 the SCC decided that legislative action does not engage the duty to consult.[13]

What is the scope / content of the Duty to Consult?

What the duty to consult entails depends on the circumstances, on the strength of the asserted claim and on how seriously the claimed right or title may be adversely affected.[14] The SCC has noted that "at one end of the spectrum… where the claim to title is weak, the Aboriginal right limited or the potential for infringement minor", this may only lead to an obligation to "give notice, disclose information, and discuss any issues raised in response to the notice".[15] At the opposite end, if there is a "strong prima facie case for the claim", then there is a need for "deep consultation" which may consist of various actions such as enabling "formal participation in the decision-making process, and provision of written reasons".[16] When dealing with treaty rights, factors such as "the specificity of the promises made", the "seriousness of the impact on the aboriginal people of the Crown's proposed course of action", as well as the "history of dealings" may be relevant.[17]

Crown compliance with the duty to consult could prompt a duty to accommodate when the adverse impact is such that action is required "to avoid irreparable harm or to minimize the effects of infringement".[18]

The consultation that the Crown carries out must be meaningful and both parties must act in good faith.[19] However, the duty to consult is limited in that "there is no duty to agree".[20] It entails a procedural right: as the SCC has stated it "is a right to a process, not to a particular outcome".[21] Furthermore, an Indigenous community does not have a veto power in the consultation process.[22] This stands in contrast to the standard adopted in the United Nations Declaration on the Rights of Indigenous Peoples which obliges states to "consult and cooperate in good faith with the indigenous peoples concerned… in order to obtain their free, prior and

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[10] *Carrier Sekani, supra* note 7 at para 49.
[11] *Ibid.*
[12] *Ibid* at para 44.
[13] *Mikisew Cree* 2018, *supra* note 1 at para 2.
[14] *Haida Nation, supra* note 2 at para 39.
[15] *Ibid* at para 43.
[16] *Ibid* at para 44.
[17] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 63 [*Mikisew Cree* 2005].
[18] *Haida Nation, supra* note 2 at para 47.
[19] *Ibid* at paras 41-42.
[20] *Ibid* at para 42; See also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 2 [*Taku River Tlingit First Nation*].
[21] *Ktunaxa Nation, supra* note 6 at para 83.
[22] *Haida Nation, supra* note 2 at para 48.

informed consent before adopting and implementing legislative or administrative measures that may affect them" [emphasis added].[23]

Discharging the Duty to Consult:

The Crown can rely on regulatory processes to discharge its duty to consult.[24] If the Crown decides to do so, it ought generally to ensure that the Indigenous community is aware of this.[25] Similarly, the Crown is allowed to "delegate procedural aspects of consultation to industry proponents seeking a particular development" (although, private proponents are themselves not subject to this duty to consult which is, as discussed above, tied to the honour of the Crown).[26] The Crown, therefore, retains the "ultimate responsibility for ensuring consultation is adequate."[27] For example, if a regulatory agency lacks adequate statutory powers to discharge the duty to consult, the Crown is obliged to "provide further avenues for meaningful consultation and accommodation".[28]

Some cases:

Taku River Tlingit First Nation v British Columbia, 2004 SCC 74: this case concerned an application by Redfern Resources Ltd to reopen a mine which included a proposal to construct an access road through the traditional territory of the Taku River Tlingit First Nation (TRTFN).[29] Following an environmental assessment procedure, the application for this project was approved, despite the TRTFN's opposition to the access road.[30] In the circumstances, the SCC found that the TRTFN "was entitled to something significantly deeper than minimum consultation".[31] The SCC held that the province's duty to consult was complied with because the TRTFN had taken part in the environmental assessment procedure and its concerns, which were made known to Ministers, were accommodated by measures set out in the project's final approval.[32]

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69: this case concerned rights under Treaty 8, which dates back to 1899 under which First Nations were promised reserves and granted various rights, including those related to hunting and trapping.[33] The federal government approved a winter road which would have adversely affected the traplines of Mikisew families living in the vicinity, as well as having other negative impacts.[34] The SCC emphasized the importance of the honour of the Crown in this treaty context, noting that the "surrender of the aboriginal interest in an area larger than France is hefty purchase price"

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[23] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), arts 19, 32(2).
[24] *Clyde River, supra* note 8 at para 1.
[25] *Ibid* at para 23.
[26] *Haida Nation, supra* note 2 at para 53.
[27] *Clyde River, supra* note 8 at para 22.
[28] *Chippewas of the Thames, supra* note 9 at para 32.
[29] *Taku River Tlingit First Nation, supra* note 20 at paras 1, 3.
[30] *Ibid* at para 3.
[31] *Ibid* at para 32.
[32] *Ibid* at para 22.
[33] *Mikisew Cree* 2005, *supra* note 17 at para 2.
[34] *Ibid* at paras 3, 15.

in return for "honourable conduct on the part of the Crown."[35] With regard to the duty to consult, the court found that the duty "lies at the lower end of the spectrum" and entailed the need to give notice and engage with the Mikisew.[36] The Crown, which only treated the Mikisew akin to the general public, failed to discharge its duty to consult.[37]

Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43: the background of this case concerned the Kenney Dam which had affected the traditional fishing grounds used by the Carrier Sekani Tribal Council (CSTC) First Nations.[38] The specific decision at issue was the BC Utilities Commission's approval of an Energy Purchase Agreement (EPA) from 2007 whereby Alcan sold excess power created by the Dam's operation to BC Hydro.[39] The Commission had concluded that the duty to consult had not been triggered by its decision regarding the 2007 EPA, finding, for example, that there was "no adverse impact".[40] The SCC upheld the Commission's decision.

Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53: this case, which arose in the context of a modern-day treaty with the Little Salmon/Carmacks First Nation (LSCFN), concerned a decision by the Yukon government to grant surrendered LSCFN land to a resident, Mr Paulsen.[41] The LSCFN argued that the government had failed to discharge its duty to consult. However, while the majority rejected the Yukon government's claim that no duty to consult was owed on these facts, they also disagreed with the LSCFN's argument, finding that the land subject to the grant was "a relatively minor parcel" whose use "would not have any significant adverse effect on the First Nation's interests."[42] Pointing to the agreed-upon definition of consultation contained within the LSCFN Treaty, the majority found that the duty to consult fell at "at the lower end of the spectrum" and concluded that the duty had been discharged because the LSCFN had been given notice and the chance to make its concerns known.[43]

Clyde River (Hamlet) v Petroleum Geo-Services Inc., 2017 SCC 40: this concerned the National Energy Board's decision to approve the application made by the proponents (Petroleum Geo-Services Inc et al) regarding "offshore seismic testing" in Baffin Bay and Davis Strait, which would have had an adverse impact on the Inuit of Clyde River's harvesting rights relating to marine mammals.[44] During the authorization process, the proponents, after not answering "basic questions" by community members, submitted a document of almost 4000 pages (which was mostly not translated into Inuktitut) that was then placed on the NEB's website.[45] The SCC found that "deep consultation" was necessary given the importance of the established treaty

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[35] *Ibid* at paras 51-52.
[36] *Ibid* at para 64.
[37] *Ibid* at paras 4, 9.
[38] *Carrier Sekani, supra* note 7 at paras 1, 3.
[39] *Ibid* at para 1, 5.
[40] *Ibid* at paras 14, 16, 60-62.
[41] *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53 at paras 3-4.
[42] *Ibid* at paras 5, 7, 14.
[43] *Ibid* at paras 74-75, 79.
[44] *Clyde River, supra* note 8 at paras 3, 7.
[45] *Ibid* at paras 10-11.

rights at stake and the high risk of harm.[46] It concluded that the consultation had been inadequate for many reasons (e.g. an absence of oral hearings and a lack of participant funding).[47]

Chippewas of the Thames First Nation v Enbridge Pipelines Inc., 2017 SCC 41: this concerned the National Energy Board's approval of Enbridge's application to modify part of its pipeline.[48] The pipeline in question traversed the Chippewas of the Thames's traditional territory. The SCC found that the NEB's process met the Crown's consultation requirements – for example, the Chippewas of the Thames were given participant funding enabling them to adduce evidence and they were able to make oral submissions before the NEB.[49]

More recently, there are lower court cases which look at the duty to consult in the context of pipelines. For example, *Coldwater First Nation v Canada (Attorney General),* 2020 FCA 34 concerned the Governor in Council's "re-decision" after the Federal Court of Appeal held in *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153, that the Crown had not discharged its duty to consult when approving the Trans Mountain Pipeline Expansion Project.[50] In this judicial review proceeding, the FCA highlighted the "limited" issue at stake in this case, namely the reasonableness of the Governor in Council's decision that the most recent consultation had "adequately remedied" the previous shortcomings.[51] Ultimately, the court upheld the Governor in Council's decision that the duty to consult had been discharged, finding it was reasonable and pointing, for example, to the fact that this decision was not just "a ratification of the earlier approval".[52] (Note that the SCC dismissed the application for leave to appeal.)

Suggested Further Reading:

General Background Reading:

Andrew Flavelle Martin & Candice Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018) 41:2 Dal LJ 443. Available online.

Janna Promislow & Naiomi Metallic, "Realizing Aboriginal Administrative Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Publishing, 2018).

John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010). Available online.

John Borrows et al., "How the United Nations Declaration on Rights Changes Canada's Relationship with Indigenous Peoples." Links to an external site.

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[46] *Ibid* at paras 43-44.
[47] *Ibid* at paras 45- 47, 52.
[48] *Chippewas of the Thames, supra* note 9 at paras 4-5.
[49] *Ibid* at paras 51-52.
[50] *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at paras 1-3.
[51] *Ibid* at para 16.
[52] *Ibid* at paras 10, 64, 77.

Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019). Available online.

Further Reading Related to the Duty to Consult:

Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon, SK: Purich Publishing Limited, 2014). Available online via the U of T library catalogue.

Richard Stacey, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?" (2018) 68:3 UTLJ 405.

Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729. Available online via Quicklaw.

Robert Yelkatte Clifford, "Saanich Law and the Transmountain Pipeline Expansion" (4 July 2019). Available online.

Sarah Morales, "Indigenous-led Assessment Processes as a Way Forward" (4 July 2019). Available online.