Duty to consult

What is the duty to consult?

The duty to consult is a constitutional obligation that the Crown (federal, provincial, and territorial governments) has towards Aboriginal peoples.[1] The duty arises when the Crown knows or should know of a potentially existing Aboriginal or treaty right, and the Crown is contemplating conduct that might negatively affect that right.[2] In some instances, where the duty is triggered, the Crown will be obligated to accommodate the Aboriginal peoples.[3]

The courts are tasked with determining whether the government has fulfilled its duty to consult in any given case.[4] Where the government does not fulfill its duty, potential remedies can include a court ordering the government to stop the threatening activity, awarding damages, or ordering the government to carry out consultation with the groups affected prior to proceeding further.[5]

Where does the duty come from?

The Supreme Court of Canada established the duty to consult in the case of *Haida Nation v British Columbia (Minister of Forests)* in 2004.[6] The duty is rooted in the honour of the Crown – the constitutional principle that the Crown must act honourably in its dealings with Aboriginal peoples.[7] "This principle is in turn enshrined in section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing aboriginal and treaty rights".[8]

The honour of the Crown and section 35(1) require honourable negotiations leading to the just settlement of Aboriginal claims.[9] According to the Supreme Court, this implies that there is a constitutional duty to consult.[10]

Who owes the duty?

Only the Crown has a duty to consult with Aboriginal peoples.[11] The Crown can rely on regulatory agencies such as the National Energy Board to fulfill its duty, but only "procedural aspects" of consultation can be delegated to private parties.[12] For example, an energy delivery company seeking government approval on a pipeline can provide, obtain, and discuss information about the proposed project with affected Aboriginal communities – that would be considered "procedural aspects" of consultation.[13] Regardless of private or third party involvement, ultimately it is the Crown that is legally responsible for ensuring that affected Aboriginal communities are adequately consulted with or accommodated.[14]

The level of consultation varies case by case

The government has a duty to consult with Aboriginal peoples even before a right or title is proven.[15] This protection is necessary because negotiating treaties or proving Aboriginal rights is a lengthy process, potentially taking decades, and activities such as mining or

logging could diminish the value of the Aboriginal interests in the meantime.[16]

The level of consultation or accommodation required falls on a spectrum based on two factors:[17]

1. The strength of an Aboriginal group's claim to a right or title; and
2. The seriousness of the negative effects on the right or title.

The stronger the claim to a right or title is and the greater the negative effects are on their interests, the more consultation and potentially, accommodation is required between the Crown and Aboriginal groups.[18]

For example, on the lower end of the spectrum, the Crown may only be required to notify, give information, and discuss issues with the affected group.[19] On the higher end, the Crown may be required to allow the affected group to propose ideas for consideration or to participate in the decision-making process.[20] The Crown may have a duty to accommodate if the consultation with the Aboriginal group suggests a need for the Crown to adjust its plans, for example by changing the location of a proposed road.[21] Every case is approached individually and flexibly.[22]

The duty to consult does not create a veto power

The Crown's duty to consult does not give Aboriginal groups a veto on government decisions.[23] The duty is fulfilled as long as the government has made a reasonable effort to provide meaningful consultation.[24]

For example, in the case of *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, the Supreme Court of Canada determined that the province of British Columbia fulfilled its duty to consult and accommodate with the Taku River Tlingit First Nation ("TRTFN"), despite being unable to reach an agreement about a road building project.[25] The proposed road ran across traditional TRTFN territory and had potentially negative impacts on the wildlife and also affected the TRTFN's ability to use the resources in the area.[26]

The Supreme Court concluded that the province fulfilled its duty because the environmental assessment process required by British Columbia's *Environmental Assessment Act* provided meaningful consultation with the affected group.[27] The Act gave the TRTFN a large role in the environmental assessment process, their concerns were presented to the Ministers who approved the project, and the ultimate approval contained measures to address their concerns.[28]

The legal framework for the duty is still developing

The legal framework for the duty to consult continues to evolve as case law develops. Meanwhile legal uncertainties still remain.[29] For example, there is still uncertainty regarding what degree of consent is required within Aboriginal communities

during the consultation process, which can be a problem when there is internal conflict within a community, for example.[30] Also, it is unclear what the effect of Canada and Alberta implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) – which references the need to obtain "free and informed consent prior to the approval of any project affecting [Indigenous peoples'] lands or territories and other resources" – will be on the duty.[31] The duty to consult is a relatively recent development in law and will only continue to develop as cases arrive before the courts.

Critiques of the duty to consult

The duty to consult is a controversial doctrine which has numerous critics. One common critique is that the scope of the duty is too vague, and that the SCC's cautious approach in outlining its parameters, in favour of a flexible assessment, allows governments to act and then later argue that they have satisfied their obligations without any objective criteria.[32]

Another criticism holds that the duty to consult is an ineffective tool for achieving reconciliation between the Canadian state and Indigenous Peoples. Reconciliation requires "building new relationships of mutual benefit and respect between the Aboriginal peoples and the Crown,"[33] and some have argued that while the duty to consult may influence certain aspects of Crown decision making, it often reduces the obligation to a "technical exercise" which ignores the importance of relationship building.[34]

[1] *R v Kapp*, 2008 SCC 41 at para 6.

[2] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35 .

[3] *Ibid* at para 47.

[4] Peter W Hogg, *Constitutional Law of Canada*, vol 1, 5th ed (Scarborough: Thomson, 2007) (loose-leaf 2010 supplement) at 28.8(j) .

[5] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 37.

[6] *Hogg*, *supra* 4 at 28.8(j).

[7] *Haida*, *supra* note 2 at para 16. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42.

[8] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 19 .

[9] *Haida*, *supra* note 2 at para 20. *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24 .

[10] *Haida, supra* note 2 at para 20.

[11] *Ibid* at para 53.

[12] *Ibid*; *Clyde River*, *supra* note 8 at paras 21-22.

[13] British Columbia, Environmental Assessment Office, *Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process*, December 2013 at 4.

[14] *Haida*, *supra* note 2 at 53.

[15] *Hogg*, *supra* 4 at 28.8(j).

[16] *Ibid*.

[17] *Haida*, *supra* note 2 at para 39.

[18] *Ibid*.

[19] *Ibid* at para 43.

[20] *Ibid* at para 44.

[21] *Ibid* at para 47.

[22] *Ibid* at para 45.

[23] *Ibid* at para 48.

[24] *Ibid* at paras 42, 62.

[25] *Taku*, *supra* note 9 at para 22.

[26] *Taku River Tlingit First Nation et al v Ringstad et al*, 2000 BCSC 1001 at para 4.

[27] *Taku*, *supra* note 9 at para 2.

[28] *Ibid* at para 22.

[29] Malcolm Lavoie, "The Northern Gateway Pipeline and the purpose of 'duty to consult'" (27 July 2016), *The Fraser Institute Blog*, online: <www.fraserinstitute.org/blogs/the-northern-gateway-pipeline-and-the-purpose-of-duty-to-consult>.

[30] Martin Olszynski, "The Duty to Consult and Accommodate: An Overview and Discussion" (June 2016), online: <law.ucalgary.ca/files/law/duty-to-consult-and-accomodate-olszynski.pdf> at 48.

[31] *Ibid* at 25.

[32] Derek Inman, Stefaan Smis & Dorothee Cambou, "'We Will Remain Idle No More': The Shortcomings of Canada's 'Duty to Consult' Indigenous Peoples" (2013) 5:1 Goettingen J Intl L 253 at 284-285.

[33] Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, "Crown Policies on the

Duty to Consult and Accommodate: Towards Reconciliation" (2017) 13:1 McGill J Sust Dev L 1 at 7.

[34] *Ibid* at 50-51.