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# Taku River Tlingit and Haida II: the Honourable Duty to Consult?

**A**s Aboriginal peoples, we are used to our victories being bitter-sweet. Our interests are often balanced against broader societal interests, but we focus on the positive—it is the perspective of enduring and resilient Nations.

On November 18, 2004, the highest court, the Supreme Court of Canada, delivered two landmark Aboriginal cases, *Haida Nation v. BC* and *Taku River Tlingit First Nation v. BC*. The important question to be answered by the Court was, has the Province of British Columbia fulfilled its duty to consult and accommodate?

In *Haida*, the Court held that BC had failed to fulfill its duty to consult with respect to the transfer of Tree Farm Licence 39 on Haida Gwaii. No surprise. As the Chief Justice clearly stated, “the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.”

In *Taku River Tlingit*, the Court held that the process engaged by BC under the *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate with respect to the construction of a 160 kilometre road to the Tulsequah Chief mine. The Taku did

establish at lower courts that they had a strong *prima facie* case for assertion of Aboriginal rights and title, but the Court held that the consultation and accommodation process was sufficient. This may make Haida’s victory less sweet.

## What is the scope of the duty?

These cases were greatly anticipated and will likely provoke much discussion at negotiation and dinner tables. These cases answer the following key questions that have remained in ambiguity since *Delgamuukw*.

1. What is the source of the duty to consult and accommodate?
2. Who owes Aboriginal peoples the duty?
3. When does the duty arise?
4. What is the scope of the duty?
5. Who assesses the content and scope of the rights to be consulted and accommodated?

We will set out what the Court said and give you some preliminary analysis below.

### What is the Source of a Duty to Consult and Accommodate?

#### The Honour of the Crown

The source of the federal, provincial, and territorial governments’ duty to consult with Aboriginal peoples and accommodate their interests is *the principle of the honour*

*of the Crown*, which must be understood generously.

The honour of the Crown requires that these rights be **determined, recognized, and respected**. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

### Who Owes Aboriginal Peoples the Duty: Crown

The extension of the Court’s conclusion on the source is that only the Crown can uphold its honour. Therefore, the Court held that the duty to consult and accommodate flows from the Crown’s assumption of sovereignty over lands and resources formerly held by an Aboriginal group. The Court concluded that this theory provides **no support for an obligation on third parties to consult or accommodate**. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests. The honour of the Crown cannot be delegated. Of course, this meant in both *Haida* and *Taku River Tlingit* that neither Weyerhaeuser nor Redfern Resources owed a duty to consult and accommodate.

The Province of British Columbia argued that any duty to consult or accommodate rests solely with the federal



government. The Court flatly rejected this argument, stating the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty that pre-dated Confederation. It follows that the Province took the lands subject to this duty. The Court noted that this point was canvassed in *Delgamuukw*. In short, there is therefore no foundation to the province's argument on this point.

### **When Does the Duty to Consult and Accommodate Arise?**

#### **Upon Knowledge of the Asserted Right**

The Chief Justice speaking for the Court concluded that the duty to consult and accommodate arises before final claims resolution and is an essential outcome to the honourable process of reconciliation that Section 35 of the *Constitution Act, 1982*, demands. 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.**

Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. Clearly there is a mutual onus on the shoulders of Aboriginal groups to clearly inform the Crown of their asserted Aboriginal rights, titles, and interests.

The Government of British Columbia argued it had no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it argued, there exists only a broad, common law "duty of fairness."

The Supreme Court of Canada rejected and criticized the British Columbia's arguments by stating:

The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right...<sup>1</sup>

To limit reconciliation to the post-proof

sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. **This is not reconciliation. Nor is it honourable.**<sup>2</sup>

In even stronger language, in *Taku River Tlingit*, the Chief Justice stated that "The Province's submissions present an *impoverished* vision of the honour of the Crown and all that it implies."

Whatever the criticism, it is with great relief that Aboriginal groups will no longer have to listen to illogical arguments by governments that there is no duty to consult before judicial determination or treaty settlement. It is assuring to have the Court put this dated position to its final resting place.

## What is the Scope of the Duty?

### Proportionate to the Right and Adverse Effect

The Court has stated that the scope of the duty is “proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.” This means the Crown will be required to evaluate the strength of the Aboriginal right in question and consider the possible damage the proposed activity might have on that right.

The Court reviewed the case law that has evolved since *Delgamuukw* and commented on some basic fundamental tenets of consultation:

- duty to consult varies with the circumstances;
- good faith is required on both sides (this is an improvement over the comments made in *Delgamuukw* where the Court said “the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith”);
- sharp dealing is not permitted;
- the Crown’s intention must be to substantially address Aboriginal concerns;
- responsiveness is a key requirement of both consultation and accommodation;
- there is no duty to agree; rather, the commitment is to meaningfully consult;
- the Aboriginal group must not frustrate the Crown’s reasonable good faith attempts;
- the Aboriginal group should not take unreasonable positions to thwart government from making decisions; and
- mere hard bargaining will not offend an Aboriginal groups’ right to be consulted.

### Asserted versus Established Aboriginal Rights

A legal line has been drawn in the sand between Aboriginal rights:

- “asserted but unproven,” and
- “defined and established.”

Two important distinctions are made. The Court has held that where an Aboriginal group has asserted Aboriginal rights and title *but* those rights and title are yet unproven or defined by the Parties by treaty, a court, or tribunal:

- (1) the Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group’s best interest, as a fiduciary, in exercising discretionary control over the subject of right or title; and

**In such cases, deep consultation, aimed at finding a satisfactory interim solution, may be required.**

- (2) the duty to consult and accommodate does not give Aboriginal groups a veto over what can be done with land pending proof of a claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights.

In other words, the Supreme Court of Canada has stated that if an Aboriginal group does have established rights, title, and interests that:

- (a) the Crown, as a fiduciary, must act in the Aboriginal group’s best interests in exercising discretion with respect to those rights, and
- (b) the Crown may be required to obtain the consent of the respective Aboriginal group.

For treaty First Nations, e.g., Nisga’a, Douglas Treaty First Nations, Yukon First Nations, Treaty 8, and other modern and historical treaty First Nations, this distinction may provide them with favourable grounds to argue that their consent be obtained for decisions that affect their treaty rights, titles, and interests. Also, for Aboriginal groups that have had their Aboriginal rights affirmed by contract, litigation, or legislation, there may be an argument that their consultation may include obtaining consent.

## The Spectrum of Duties of Consultation Revisited

The Court made preliminary comments with respect to the spectrum of consultation. 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 the notice.”

At the other end of the spectrum lie cases where a strong *prima facie* case for 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.

While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive nor mandatory for every case.

Finally, the Court stated that where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests. Such a balancing of interests may require the Crown to make decisions in the face of disagreement as to the adequacy of the Crown’s response to Aboriginal concerns. In other words, the Crown’s duty to accommodate does not require it to agree or settle all Aboriginal concerns.

### Who will Assess the Strength of an Asserted Right?

#### Parties, Court, or Tribunal

The Court suggested that either of the Parties can assess the strength of the claim and, if they cannot agree, tribunals or courts can assist.<sup>3</sup> Some commentators

have noted the gap between Aboriginal and non-Aboriginal governments' view of the rights at stake and concluded that increased litigation may be inevitable as Aboriginal groups are forced to seek preliminary assessments from the Courts. The financial and human costs of such Court action may make this a non-option for many Aboriginal groups.

It is important to note that the Court did suggest that governments may wish to adopt dispute-resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.<sup>4</sup> This suggestion is consistent with the Royal Commission on Aboriginal Peoples recommendation for an independent comprehensive claims body. There may be an opportunity for the British Columbia Treaty Commission to exercise its dispute-resolution role in these circumstances.

### **Practical Implications on the Ground From *Haida II***

The Province of British Columbia must now consult Aboriginal groups prior to granting or transferring Tree Farm Licences, not prior to the authorization of cutting permits and operational plans.

### **From *Taku River Tlingit***

Redfern's proposed re-opening of the Tulsequah Chief Mine may proceed to the permitting, approval, and licensing process. The Court mentioned it is expected that, throughout the permitting, approval, and licensing process, as well as in the development of a land use strategy, the Crown will continue to be required to fulfill its honourable duty to consult and, if appropriate, accommodate the Taku River Tlingit.

### **Closing Comments**

The Soowahlie Chief Doug Kelly of the First Nations Summit, in response to the outcome of *Haida* and *Taku River Tlingit*, is reported as stating, "These Aboriginal rights cases are not about winning and losing... The decisions are intended to guide good faith negotiations." There is a lot of wisdom in that statement. At best, the result of these two cases would have created a safe harbour for fair and equitable agreements between Aboriginal groups and the Governments of Canada.

In terms of positive and constructive directions forward, we might suggest the following as preliminary thoughts.

1. All Aboriginal groups should evaluate how they assert their Aboriginal rights, titles, and interests in their Aboriginal-Crown communications, focusing on the nature and scope of those rights, titles, and interests. We might emphasize that this should not be an internal exercise that narrows the scope; it seeks to counter any Crown argument that it does not have sufficient knowledge of the existence of those rights and therefore no grounds to consult and accommodate.

**It is important to note that the Court did suggest that governments may wish to adopt dispute-resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.**

2. Agreements that are based upon a template with few deviations on content, e.g., Forest and Range Agreements, may no longer be sufficient to accommodate. The Court has stated the scope of the duty to consult and accommodate must be "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed." This means governments cannot take a "one size fits all" approach and must assess each Aboriginal group's rights on their merits. Clearly, a standard amount of 5 percent of forest resources within a group's traditional territories is not an evaluation specific to the Aboriginal group's rights at stake. The province should be persuaded to revisit their negotiation mandates.

3. Disposition processes should be evaluated to determine precisely when the key decision that may affect Aboriginal rights, titles, and interest occurs. In *Haida*, the Court held the key decision was made during the granting or renewing of Tree Farm Licences, not at the issuance of timber permits or the authorizing of operational plans. Other disposition processes must be reviewed to determine which decision triggers a duty to consult and what are appropriate accommodations.
4. Aboriginal umbrella organizations, e.g., Union of BC Indian Chiefs and First Nations Summit, might consider lobbying the provincial and other governments to amend legislation and regulations to create a more transparent and structured consultative process for all relevant natural resource areas, e.g., oil and gas, mining, forestry, guide outfitting, etc.
5. It is clear that the implementation of *Haida* and *Taku River Tlingit* will require a change in the way the Crown consults and accommodates. Whether that consultation and accommodation is sufficient will rest on a "preliminary assessment" of the rights at issues and the adverse effects. This assessment would likely be best conducted by a neutral third party in a non-adversarial context. The Court suggested in complex or difficult cases, governments may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers. This may be a key lobbying result of these decisions. ▲

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<sup>1</sup> *Haida, supra* at para 31.

<sup>2</sup> *Haida, supra* at para 33.

<sup>3</sup> *Haida, supra* at para 37.

<sup>4</sup> *Haida, supra* at para 44.