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THE DUTY TO CONSULT: THE SUPREME COURT OF CANADA'S DECISIONS IN THE *HAIDA NATION* AND *TAKU RIVER TLINGIT FIRST NATION* CASES

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On November 18, 2004, the Supreme Court of Canada released its much-anticipated decisions in *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*. These important decisions provide clarification of a number of key issues relating to the duty to consult with and accommodate aboriginal groups affected by land and resource development.

In these cases, a unanimous Supreme Court of Canada set out the basic principles applicable to the duty to consult. The Court found that only government, and not industry, has a duty to consult and seek accommodation with First Nations. It also held that an aboriginal group is not required to first prove its asserted rights or title before government has a duty to consult. The government's duty to consult arises when it has real or constructive knowledge of the *potential* existence of the aboriginal right or title, and contemplates conduct that might adversely affect that right or title.

This is a critically important finding. As the Court noted, if the duty to consult were limited to situations where rights or title were already proven, the duty would be devoid of any meaningful content because "… when the distant goal of proof is finally reached, the aboriginal groups' lands and resources may be changed and denuded….".

The extent of the duty to consult will depend upon the circumstances of the case. The Court was clear in stating that the duty to consult does *not* provide First Nations with a veto right - government is not required to obtain aboriginal consent to a project before it approves it. Aboriginal groups also cannot attempt to frustrate the government's reasonable good faith efforts to consult.

The stronger the asserted right or title, and the more serious the potential adverse effect of the proposed project on the right or title, the broader the scope of the duty to consult. Where the claim is weak or the potential impact of the proposed project is minor, the only duty may be for the government to give notice, disclose information and discuss any issues raised in response. Where there is a strong claim and there is a risk of a significant impact, "deep" consultation may be required, which could include providing the First Nation with an opportunity to make submissions, having a formal decision-making process in

which the First Nation can participate, and providing written reasons.

Where there is a strong rights or title claim that is likely to be adversely affected by the proposed project, government may be required to accommodate the aboriginal group by taking steps to avoid irreparable harm or to minimize the impacts on the aboriginal group's rights. In these situations, government must balance aboriginal concerns reasonably with, on the one hand, the potential impact of the project on the asserted rights or title and, on the other hand, other societal interests. Consultation must be *meaningful* and *responsive,* and government must be willing to make changes to its plans based on information received through the consultation process.

The Court also noted that the duty to consult is a *process*, rooted in the honour of the Crown, and not necessarily a one-time endeavour. Government may be required to continue to consult with an affected First Nation as a project proceeds and additional licences and approvals are sought at various stages.

The Court did not specify with precision what degree of consultation will be required in any given fact scenario. However, it is noteworthy that the level of consultation in the *Taku River Tlingit* case, which the Court found to be sufficient, was relatively high, particularly compared to much of the consultation which has taken place in British Columbia. For instance, representatives of the *Taku River Tlingit* were part of the project committee, some funding was provided to the First Nation to participate on the committee, traditional use studies were funded, and the project was modified to try to take into account some of the First Nation's concerns. If this is the standard for adequate consultation, the bar is set relatively high.

One of the interesting questions which arises from the Court's analysis is whether government should be required to provide funding, or obtain it from the project proponent, for the First Nation to participate in the consultation process. Arguments can certainly be advanced, using the reasoning in the cases, that funding is a necessary part of consultation in appropriate cases.

It appears from the decisions that if a First Nation in British Columbia is participating in the Treaty Commission process, government will have a duty to consult with the First Nation about any projects affecting claimed rights or title in traditional territories asserted at the treaty table. In the words of the Court, government "cannot cavalierly run roughshod over aboriginal interests where claims affecting those interests are being seriously pursued in the process of treaty negotiation".

This finding may encourage some First Nations to stay in the Treaty process, if for no other reason than to strengthen their positions in relation to consultation requirements. However, if governments take their consultation obligations seriously as a result of the Supreme Court of Canada's decisions, and First Nations' interests and concerns are accommodated in meaningful ways - through, for instance, impact benefit agreements and revenue sharing - it may ultimately mean that treaties will become less critical. Instead, in some situations, aboriginal groups may be able to advance and protect their interests through meaningful resource development agreements that are negotiated incrementally over time.

Regardless of whether an aboriginal group is involved in the treaty process, aboriginal groups would be well-advised to clearly assert their rights and title claims to government, and to articulate, to the extent possible, likely impacts any proposed activities may have on their interests. By placing government on notice about their claims and the potential impacts of projects or activities, First Nations should be able to ensure government's duty to consult is triggered. The stronger the rights they assert, and the more impact they can show the proposed project will have on those rights, the higher the level of consultation that can be demanded from government.

Of particular note for business interests is the Court's finding in the *Haida Nation* case that industry does not have a duty to consult with First Nations. Nonetheless, in most cases, industry will have a vested interest in becoming involved in consultation and accommodation efforts, hopefully early on in the process, and would be well-advised to try to address concerns raised by affected First Nations. Although the *legal* responsibility for consultation and accommodation is that of government, industry has real and substantial interests in the outcome of governments' efforts to consult and accommodate. If government fails to adequately consult with aboriginal groups potentially affected by a company's proposed project, the project

may ultimately be delayed, or prohibited, by a court.

Industry is also often in the best position to try to address aboriginal groups' concerns through modifications to the project or involvement of aboriginal people in project design, implementation or operation. For these reasons, it makes sense for industry to be an active participant in consultation.

The decisions in *Haida Nation* and *Taku River Tlingit* are landmark decisions which provide much-needed guidance on many issues relating to the duty to consult. However, a number of issues remain unresolved, such as the precise requirements of the duty to consult in any given situation and when a duty to accommodate will be triggered. These issues will spark additional litigation as First Nations and governments attempt to implement the Supreme Court of Canada's decisions. As the Supreme Court itself notes in the decisions, it is through the caselaw that the parameters of the duty to consult will continue to be drawn.

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