

Aboriginal Consultation: A review of the Taku, Haida and Mikisew Cree decisions

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Background: Why does the Crown Consult?

- Good Governance / Policy Reasons
 - Make informed and appropriate decisions
 - Improve and create working relations with all those affected
 - Legal risk management
- Legal Reasons
 - Statutory requirements
 - Contractual requirements
 - Common law requirements – s. 35 – honour of the Crown

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Taku and Haida decisions

Issues

Is the Crown required to consult with Aboriginal groups and accommodate their concerns **before** they have proven their Aboriginal rights of title?

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Haida - Background

- The Haida people have claimed title to all the lands of the Haida Gwaii and waters surrounding it, but that title has not yet been legally recognized.
- The province of B.C. renewed and transferred a Tree Farm Licence to Weyerhaeuser, granting it exclusive rights to harvest timber over an area where the Haida claimed aboriginal rights and title.

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Taku - Background

- A mining company sought approval to reopen a mine which would involve building a road to the mine.
- The proposed road was to cross lands over which TRTFN claim Aboriginal rights and title
- The project was assessed in accordance with BC's Environmental Assessment Act which sets out a process of information sharing and consultation that requires a Project Committee to be established
- With financial assistance, the TRTFN participated in the assessment as Project Committee members
- The TRTFN objected to the plan of building a road however, the project was approved.

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Decisions in Haida and Taku

- **Federal and provincial governments have a legal duty to consult** and, if appropriate, **to accommodate** when the Crown **has knowledge of the potential existence of Aboriginal rights or title** and contemplates **conduct that might adversely affect them.**
- The honour of the Crown cannot be delegated and the legal responsibility for consultation and accommodation rests with the Crown
- There is no duty on third parties (private industry) to consult with Aboriginal peoples

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Source of the Duty to Consult and Accommodate

- The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the **honour of the Crown**
- The honour of the Crown arises from the assertion of sovereignty and is interpreted generously to promote the process of **reconciliation** between the Crown and Aboriginal peoples

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When does the duty arise?

- A duty to consult arises when three elements of the trigger are present:
 - “when **the Crown has knowledge**, real or constructive, of the potential existence of the Aboriginal right or title and **contemplates conduct that adversely affects it**”.
 - “Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate

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Scope and Content of the Duty

- “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.”
It varies with the circumstances
- Good faith on both sides is required
- In all cases, the honour of the Crown requires that the Crown act in good faith to provide meaningful consultation
- Meaningful consultation may oblige the Crown to accommodate Aboriginal concerns
- Responsiveness is a key requirement of both consultation and accommodation

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Accommodation

- Consultation may reveal a duty to accommodate
- Accommodation means:
 - Seeking compromise in an attempt to harmonize conflicting interests and move further down the path to reconciliation
 - Requires good faith efforts to understand each other’s concerns and move to address them
 - Addressing Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim
 - May oblige the Crown to make changes to its proposed action based on information obtained through consultations
- **Does not give Aboriginal groups a veto**
- No obligation on parties to reach agreement

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Mikisew Cree - Background

Issue

Had the Crown adequately consulted with the MCFN, a Treaty 8 First Nation, when the Crown approved the construction of a winter road through part of Wood Buffalo National Park which is located within the Treaty 8 area?

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Mikisew Cree

Facts

- The Thebacha Road Society sought approval from the Minister for the construction of a winter road which was originally supposed to run through the MCFN's reserve
- The winter road was subject to an environmental assessment during which the public and stakeholders were invited to participate in an open house session
- **The MCFN were invited to participate** but did not do so
- After the deadline for public comments, the MCFN formally indicated their opposition to the construction of the winter road
- The road alignment was subsequently modified to track the boundary of the reserve, without consulting the MCFN. The latter remained opposed to the construction of the road after its realignment.

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Mikisew Cree - Decision

- **This is the first Supreme Court of Canada decision where the Court applied the principles established in *Taku and Haida***
- Although the Crown has a right to “take up” surrendered lands pursuant to Treaty 8, the Crown was required to consult with the MCFN when “taking up” and had failed to adequately consult in this case.
- The trigger for the duty to consult as identified in *Haida* was satisfied since it was apparent that the proposed winter road would adversely affect the hunting and trapping rights of the MCFN
- **Because the impact of the proposed winter road was “fairly minor” and the taking up of land was expressly provided in the treaty, the content of the Crown’s duty was a the lower end of the spectrum**
- “The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights”
- **The MCFN had not been adequately consulted as the consultation process was “fundamentally flawed” and “failed to demonstrate an intention of substantially addressing Aboriginal concerns**

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Mikisew – Key Elements

- When the Crown exercises its “treaty right to take up surrendered lands” it has a duty to act honourably which requires that the Crown consult directly and in advance with First Nations whose rights under the treaty would be adversely affected. The process of “taking up” land must be compatible with the honour of the Crown
- In the case of a treaty, the Crown, as a party, will always have notice of its contents. The strength of the Aboriginal claim, identified as a factor in *Haida*, will not be relevant in the treaty context.
- The SCC confirms that the threshold for the duty to arise is quite low and that “flexibility lies not in the trigger... but in the variable content of the duty once triggered”
- The SCC reaffirms that consultation must be carried out in good faith
- The spectrum of consultation duties also exists in the treaty context and the kind of duties that arise will be governed by context

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Mikisew – Key Elements

- The SCC confirms that consultation imposes certain obligations on Aboriginal groups, and can give rise to a duty to accommodate in certain circumstances
- **It also confirms that “consultation will not always lead to accommodation” and that “accommodation may or may not result in an agreement**
- While public consultation processes may be used to consult with Aboriginal groups about a specific Crown activity, the Crown must ensure that the process takes into consideration the specific requirements for consulting with Aboriginal peoples as set out by the Courts
- **The Crown’s duty to consult will not arise in all cases where it is proposing to engage in an activity in the treaty area**

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Conclusion

- The design and adequacy of consultation will depend on the facts of each case
- Success of the consultation process depends on coordination to gather information on potential s. 35 rights and on implementing an appropriate consultation process
- Consultations that are well-planned and done in good faith will ensure that the Crown acts honourably by balancing the legal interests of Aboriginal groups with those of all Canadians

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