The Duty to Consult and Accommodate

The Crown's duty to consult and accommodate with respect to aboriginal and treaty rights

Justice Ronald S. Veale
Supreme Court of Yukon

Honour of the Crown

"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 is always at stake in its dealings with Aboriginal peoples."

Haida Nation v. *B.C. (Minister of Forests)*, 2004 SCC 73, para. 16

"The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of 'sharp dealing'."

Haida Nation, para. 19

Pre-Treaty
Haida Nation v. *British Columbia*

The Province of British Columbia held legal title to the land in question and issued a number of Tree Farm Licences without the consent of the Haida people who have claimed they have owned the land for more than 100 years.

The Haida claim was based upon unproven aboriginal rights to title and to harvest red cedar. The trial court considered the claim to be strong.

The Supreme Court of Canada decided that the province had a legal duty to consult with the Haida and suggested that significant accommodation would be required to preserve the Haida interest pending resolution of their claims.

The *Haida Nation* case says the following about the honour of the Crown

1. The honour of the Crown is always at stake in its dealings with Aboriginal peoples (para. 16).

2. The Crown must act honourably from the assertion of sovereignty to the resolution of claims and the implementation of treaties (para. 17).

3. The honour of the Crown infuses the processes of treaty making and treaty interpretation (para. 19).

4. It is a corollary of section 35[1] of the *Constitution Act* that the Crown acts honourably in defining the rights it guarantees and in reconciling them with other rights and interests (para. 20).

5. The duty to consult and accommodate is part of a process of fair dealing flowing from section 35(1) of the *Constitution Act* (para. 32).

[1] s. 35(1): “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

Pre-Treaty
Duty to consult and accommodate

"[T]he duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution."

Haida Nation, para. 32

In the pre-treaty context "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."

Haida Nation, para. 35

Evolving jurisprudence

The concept of the honour of the Crown is not new in the aboriginal treaty context –

e.g. Ontario v. Canada (1895), 25 S.C.R. 434 – Honour of the Crown pledged to the fulfillment of treaty obligations

R. v. George, [1966] S.C.R 267 – Treaties construed in manner upholding the honour of the Crown

R. v. Taylor and Williams (1982), 34 O.R. (2d) 360 (C.A.) – Honour of Crown at stake in treaty interpretation; no sharp dealing

The *Haida Nation* case is the first of its kind to reach the SCC and it has established a framework for the duty to consult and accommodate.

Duty to consult and accommodate

Duty triggered at low threshold: "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." *Haida Nation*, para. 35

Context-specific, "spectrum" of duties: "The honour of the Crown gives rise to different duties in different circumstances." *Haida Nation*, para. 37

Duty is proportionate to an assessment of strength of the case to right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

Minimal consult

Deep consult / accommodate

- Weak *prima facie* case for right
- Potential for minimal impairment of right

- Strong *prima facie* case for right
- Potential for significant impairment of right

Standard of judicial review

Existence or extent of duty is a legal question premised on an assessment of facts – deference afforded to the adjudicator's findings of fact.

Process most often reviewed on reasonableness standard: question is "whether the regulatory scheme or government action 'viewed as a whole, accommodates the collective aboriginal right in question'."
Haida Nation, para. 62

Correctness standard applies if the government errs in its assessment of the seriousness of the claim or the impact of the infringement.

Pre-Treaty
Taku River Tlingit First Nation v. *British Columbia*

In 1994, a mining company sought permission from the provincial government to re-open an old mine. The mining company proposed to build a road through the TRTFN's traditional territory.

The First Nation participated in the environmental assessment process. The government approved the road project in 1998.

The Supreme Court found the potential for negative impacts on the TRTFN's claim to be high, requiring more than the minimum consultation, and to a level of responsiveness requiring accommodation. It found that the process under the *Environmental Assessment Act,* R.S.B.C. 1996, c. 119, fulfilled the requirements of the duty to consult and accommodate.

Pre-Treaty
Taku River Tlingit First Nation v. *British Columbia*

The consultation process took more than three years, involved numerous studies and meetings, and extensions of statutory time periods.

“The Province was not required to develop special consultation measures to address TRTFN’s concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.”

Taku River Tlingit First Nation v. *B.C. (Project Assessment Director)*, 2004 SCC 74, para. 40

Post-Treaty
Mikisew Cree First Nation v. *Canada*

The Mikisew Cree signed Treaty 8 in 1899 surrendering to Canada 840,000 square kilometres of land in northern Alberta, northeastern British Columbia, northwest Saskatchewan and the southern portion of the Northwest Territories.

In exchange, the Mikisew Cree were promised reserves, some of which were not set aside until 1986. They also retained the right to hunt on land surrendered to the Crown except "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

The federal government approved a winter road without consulting the Mikisew Cree. The Supreme Court quashed the winter road approval and directed the federal government to consult "at the lower end of the spectrum" and attempt to minimize the adverse impact on the Mikisew Cree treaty rights.

Post-Treaty
Duty to Consult and Accommodate

The *Mikisew Cree* case was distinguished from *Sparrow* where the issue was infringement of the aboriginal fishing right.

"… This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably."

Mikisew Cree v. *Canada (Minister of Canadian Heritage*), 2005 SCC 69, para. 31

Post-Treaty
Duty to Consult and Accommodate

"In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43)." *Mikisew Cree*, para. 34

Post-Treaty
Duty to Consult and Accommodate

" … the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's substantive treaty obligations as well." *Mikisew Cree,* para. 57

Post-Treaty
Duty to Consult and Accommodate (cont’d)

“The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. … Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.” *Mikisew Cree*, para. 63

Summary
Content of Duty to Consult

Haida Nation: Strong Haida claim to rights/title and Crown conduct with potential to greatly infringe; duty significantly deeper than mere consultation and with significant accommodation. Not met.

Taku River Tlingit: Strong claim to rights and Crown conduct could greatly infringe; duty deeper than minimum consultation and some accommodation. Met by existing process that had encouraged TRTFN's participation and incorporated mitigating measures into government land use plan.

Mikisew Cree: Duty to both consult and accommodate not met and Crown to engage in consultation. Crown's duty at the lower end of the spectrum; to provide information about the project addressing Mikisew Cree interests and to attempt to minimize adverse impacts on the Mikisew hunting, trapping and fishing rights.

Application to Yukon context

Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources),
2008 YKCA 13,
2007 YKSC 28

"The central issue in this appeal is whether a duty to consult and, where possible, accommodate First Nations' concerns and interests applies in the context of a modern, comprehensive land claims agreement." 2008 YKCA 13, para. 1