

THE DUTY TO CONSULT ABORIGINAL PEOPLES – GOVERNMENT APPROACHES TO UNRESOLVED ISSUES

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In a unanimous judgment delivered by Chief Justice Beverly McLachlin, the Supreme Court determined in *Haida Nation v. British Columbia (Minister of Forests)*³ that the Crown has a duty to consult aboriginal peoples when it acts in a manner that may adversely affect aboriginal or treaty rights guaranteed by section 35 of the *Constitution Act, 1982*. The existence of the rights need not be proven but only credibly asserted in order to trigger the duty.⁴ Where potential adverse impacts on asserted rights are identified, the objective of such consultation is to accommodate legitimate aboriginal concerns. From the perspective of governments, this is one of the most significant decisions of the Supreme Court of Canada in its first ten years under the leadership of Chief Justice McLachlin.⁵ For aboriginal peoples, it may be the most significant judgment since the seminal *Sparrow*⁶ decision established the framework for analyzing alleged infringements of aboriginal and treaty rights.

Prior to *Haida* and its companion case *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*⁷, the consultation obligation of the Crown was limited to instances where it sought to justify demonstrated infringements of aboriginal or treaty rights under the *Sparrow* test – a fairly narrow and contained set of circumstances.

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³ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 3 S.C.R. 511, at para. 35.

⁴ *Haida*, *supra* at 37.

⁵ There have been several decisions of the Supreme Court contributing to the aboriginal jurisprudence during the decade of Chief Justice McLachlin's tenure including *R. v. Powley*, *infra*, dealing with Métis aboriginal rights, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, dealing with the jurisdiction of administrative tribunals to determine s. 35 issues; *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, 2 S.C.R. 220 dealing with the admissibility of oral evidence, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *infra*, which follows *Haida* in the treaty context and is discussed below, as well as the following: *Lovelace v. Ontario*, 2000 SCC 37, 1 S.C.R. 950, *Mitchell v. Canada (Minister of National Revenue -M.N.R.)*, 2001 SCC 33, 1 S.C.R. 911, *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, 3 S.C.R. 746, *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, 2 S.C.R. 146, *Ross River Dena Council Band v. Canada*, 2002 SCC 54, 2 S.C.R. 816, *Wewaykum Indian Band v. Canada*, 2002 SCC 79, 4 S.C.R. 245, *R. v. Blais*, 2003 SCC 44, 2 S.C.R. 236, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, 3 S.C.R. 371, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, *infra*, *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, 2 S.C.R. 686, *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, 2 S.C.R. 846, *R. v. Morris*, 2006 SCC 59, 2 S.C.R. 915, *Canada (Attorney General) v. Lameman*, 2008 SCC 14, 1 S.C.R. 372, *R. v. Kapp*, 2008 SCC 41, 2 S.C.R. 483, *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, 384 N.R. 20.

⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 107.

⁷ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 3 S.C.R. 550.

In order to obtain the remedies of consultation and accommodation of adverse impacts, the onus was on the First Nation to first prove both the existence of the right and its infringement. The difficulty under *Sparrow* was that proving rights takes a long time; aboriginal rights litigation can require developing a detailed evidentiary record, a lengthy trial and possibly subsequent appeals – or alternatively claims may be addressed in negotiations sometimes lasting many years. The question left unanswered by *Sparrow* was whether projects could proceed unconstrained in the interim.

The specific problem dealt with by Chief Justice McLachlin in *Haida* was relatively straightforward: What are the obligations of the Crown when a proposed project affects lands against which a First Nation has made – but not yet proven – a claim?⁸ It would, according to the Chief Justice, render the s. 35 right illusory if governments could proceed with projects that affect such lands without regard to credible claims to those lands.⁹ The Court has determined that the fundamental objective of aboriginal law is the reconciliation of the sovereignty of the Crown with previous aboriginal occupation,¹⁰ and the Court recognized in *Haida* that limiting such reconciliation to the post-proof period was inconsistent with this intent.¹¹ What, then, was the best approach to protecting aboriginal peoples from the effects of projects undertaken during the period between the assertion of a right and the determination of the right? The Chief Justice rejected resorting to traditional interim injunctions¹² and instead relied upon the concept of honourable Crown conduct first introduced as part of the justification analysis in *Sparrow*.¹³ She held that honourable conduct entails a duty to consult aboriginal communities where they have a credibly asserted right and there are potential adverse impacts of the project on the right.¹⁴

Making the trigger for consultation a potential impact on a merely asserted right represents a vastly broadened Crown obligation as compared with the previous state of the law. The result has been an exponential increase in the volume of consultation activity undertaken prior to proceeding with projects and approvals, and a profound change in the importance of aboriginal concerns in government decision-making.

The application of the duty to consult was extended from the context of asserted aboriginal rights or title (common issues in British Columbia) to the treaty interpretation context in the subsequent decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*¹⁵. As a result, the duty also applies in those parts of Canada subject to treaties.¹⁶

⁸ *Haida*, *supra* at para. 26.

⁹ *Haida*, *supra* at para. 33.

¹⁰ See, e.g. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at para. 31.

¹¹ *Haida*, *supra* at paras. 17, 33. .

¹² *Haida*, *supra* at paras. 12-15.

¹³ *Sparrow*, *supra* at paras. 64, 75.

¹⁴ *Haida*, *supra* at para. 35.

¹⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 3 S.C.R. 388.

¹⁶ The duty likely also applies in parts of the country subject to modern land claim settlements: *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*, 2008 YKCA 13, 296 D.L.R. (4th) 99, leave to appeal to S.C.C. granted, [2008] S.C.C.A. No. 448 (QL).

Since *Haida* and *Taku River* were decided, the expanded Crown duty to consult has had a profound impact on the activities of governments across Canada and affects the day-to-day operations of ministries responsible for the mining, forestry, energy, transportation and land development sectors. Since the Crown activity that triggers consultation includes not only Crown-sponsored projects¹⁷ but also regulatory approvals of private sector projects,¹⁸ there is a particular impact on ministries responsible for land tenure issues and for Crown regulation of land use including environmental assessment, natural resource permitting and municipal planning. In addition, there have been important implications for ministries responsible for aboriginal policy and for the legal advice-giving and litigation functions of the federal and provincial attorneys-general.

Among the challenges for governments, not the least is the sheer volume of projects and the strain on human and financial resources imposed by the need to comply with this new constitutional imperative. Aboriginal communities have likewise faced significant new demands on their far more limited resources and have had to develop technical expertise or retain experts to respond to numerous offers of consultation. As well, where the Crown delegates some of the process to a third party proponent, there have been concerns raised by proponents about the cost of aboriginal consultation and delay of projects.

Equally, if not more challenging for the Crown, aboriginal communities and proponents, is the range of outstanding questions regarding the interpretation of the duty that create uncertainty in determining the respective obligations of the participants in consultation. Indeed, fundamental issues remain unresolved.

Over the past five years, governments across the country, including the Ontario government, have attempted to address the various open questions and comply with the duty through a variety of approaches and tools including legislation,¹⁹ regulations,²⁰ guidelines²¹ and other instruments.²² The Supreme Court has spoken of a dialogue

¹⁷ E.g. public roads and highways.

¹⁸ E.g. mines, housing developments, private sector energy projects.

¹⁹ See, e.g.: *Green Energy and Green Economy Act, 2009*, S.O. 2009, c. 12, Schedule B, *Electricity Act, 1998*, S.O. 1998, c. 15, s.-s. 5(1) amending s. 25.32 by adding s.-s. 4.4:

The Minister may direct the OPA to implement procedures for consulting aboriginal peoples and other persons or groups as may be specified in the direction, on the planning, development or procurement of electricity supply, capacity, transmission systems and distribution systems and the direction may specify the manner or method by which such consultations shall occur and the timing within which such consultations shall occur.

See also: Bill 173, *Mining Amendment Act, 2009*, 1st Sess., 39th Leg., Ontario, 2009.

²⁰ See, e.g.: Ontario Regulation 231/08 under the *Environmental Assessment Act, Transit Projects and Greater Toronto Transportation Authority Undertakings*, s. 8.

²¹ See, e.g.: Ontario Regulation 101/07 under the *Environmental Assessment Act, Guide to Environmental Assessment Requirements for Waste Management Projects* (15 March 2007), online: Ontario Ministry of the Environment <<http://www.ene.gov.on.ca/en/publications/forms/6168e.pdf>> at A.3.3.

²² See, e.g. Ontario Power Authority, Request for Proposals for approximately 500MW of Renewable Energy Supply (“RES III RFP”), online: Ontario Power Authority, <[http://www.powerauthority.on.ca/gp/Page.asp?PageID=122&ContentID=713&SiteNodeID=180&BL_ExpandID=>file 05 at 1.2, 3.3.1, 4.11, and files 10, 11, 12, 13.](http://www.powerauthority.on.ca/gp/Page.asp?PageID=122&ContentID=713&SiteNodeID=180&BL_ExpandID=>file%2005%20at%201.2,%203.3.1,%204.11,%20and%20files%2010,%2011,%2012,%2013.)>

between the Court and legislatures in developing the law,²³ and in future months and years an active dialogue between the McLachlin Court and government will be required to resolve some of the critical outstanding questions. Whereas governments speak through their policy instruments, the Court speaks through its judgments and remedies. A future judgment of the Court that considers recent government approaches to the duty and clarifies outstanding questions would be welcomed.

Some of the outstanding issues are dealt with below. These issues may be categorized under the broad questions of *who*, *when*, *how* and on *what* to consult.

i. Who should be consulted

The question of who must be consulted is not yet fully resolved. It is clear from the section 35 jurisprudence that, for First Nations at least, it is the local communities that hold section 35 rights – as distinct, for example, from the provincial Chiefs, a provincial/territorial organization (PTO) or tribal council²⁴. The communities are, therefore, the entities entitled to be consulted while umbrella organizations have less importance in consultation.

It is always open to individual communities to be represented in consultations by a tribal council or PTO or to put in place a process whereby an umbrella organization is the point of entry for consultation with them. For example, the communities that form part of Treaty No. 3 have requested that rather than consult individually with each community, Ontario should begin the process with the Office of the Grand Chief or Ogichidaakwe. The Grand Chief will consult with the affected communities and then return to the Crown with a response.²⁵ Similarly, in eastern Ontario where there is an outstanding Algonquin land claim, the [Algonquins of Ontario \(AOO\)](#), which includes both recognized and unrecognized First Nations, have negotiated with Canada and Ontario the establishment of a one-window consultation office for the purpose of making more efficient the process of giving notice and the internal review of projects.

Other models that promote efficiencies in the consultation process exist as well, including regional networks that enable First Nations to share community knowledge and consult more effectively and cohesively. Four communities including the Chalpeau Cree, Michipicoten, Hornepayne and Pic Mobert developed a regional “centre of excellence” approach to consultation wherein each community builds technical capacity within a particular resource-related field and provides support to the other communities on a reciprocal basis.

²³ See: e.g. *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 at paras. 129-142.

²⁴ E.g. Chiefs of Ontario, Grand Council of Treaty #3, Nishnawbe Aski Nation, Association of Iroquois and Allied Indians, Union of Ontario Indians, Mushkegowuk Tribal Council, Wabun Tribal Council, North Shore Tribal Council, United Chiefs and Councils of Manitoulin, and others.

²⁵ Grand Council Treaty #3 Great Earth Law, Manito Aki Inakonigaawin (the Great Earth Law), October 9, 2008.

The *Mikisew Cree* case tells us that for communities that are beneficiaries of treaties covering vast treaty areas (such as the Robinson and post-Confederation numbered treaties), the communities to be consulted do not include every First Nation that is a beneficiary of the treaty or is located within the treaty lands in question no matter how remote from the project. Rather, it is only communities whose traditional territories or traditional activities might be affected that are entitled to be consulted.²⁶

Of course, the determination of whether a particular First Nation has interests in a particular territory can be a matter of debate, and a matter on which governments, First Nations and proponents may disagree. On occasion, First Nation assertions overlap leading to disputes among them. In identifying the First Nations to consult, governments such as Ontario generally err on the side of inclusiveness in identifying communities to be notified of a project, leaving the harder choices regarding the extent of consultation and accommodation to later in the consultation process. Given the very low threshold for triggering the duty set by *Haida*, governments expect that the courts will be more deferential to Crown choices regarding how to consult than to a failure to notify altogether.

While the law on who to consult seems clear for reserve-based First Nations, what of the Métis? The *Powley*²⁷ decision of the Supreme Court of Canada recognized the section 35 aboriginal rights of the Métis peoples of Canada and it seems straightforward that credible Métis assertions can also therefore trigger the Crown duty.²⁸ Governments are beginning to systematically consult organizations representing asserted Métis rights-holding communities.

What is less obvious for governments is which Métis organizations to consult. There is no legislated recognition of Métis communities analogous to the band system under the *Indian Act* (Canada). In such circumstances the Crown will require some familiarity with the organizations asserting rights on behalf of Métis. The need to be satisfied in respect of the legitimacy of such organizations is necessary particularly given that consultation is typically accompanied by requests for capacity funding and governments are responsible to ensure careful stewardship of public funds.

Should the Crown consult local Métis groups or larger province-wide entities? To date, governments have largely assumed that the local community rights model applies equally to Métis as it does to First Nations, and have sought out local Métis partners with whom to consult, with the assistance of the larger province-wide Métis organizations. However certain Métis spokespersons now assert that the Métis people were historically more mobile than First Nations and, therefore, the rights-holding entity for Métis is a larger regional community or even a nation of considerable geographic extent, as distinct from a local community as is the case for First Nations. Were this view to be accepted by the courts the regional and umbrella organizations such as the Métis Nation of Ontario (MNO) would presumably seek to directly represent the rights-holders in consultations, reducing

²⁶ *Mikisew Cree*, *supra* at 48

²⁷ *R. v. Powley*, 2003 SCC 43, 2 S.C.R. 207.

²⁸ See, e.g. *Newfoundland and Labrador v. Labrador Métis Nation*, 2007 NLCA 75 (CanLII).

local Métis community councils (and arguably, other smaller independent Métis communities) to a less important role in consultations and in Métis-Crown relations generally. For governments, working with larger, better-resourced entities with offices in the larger centers can be easier and more efficient, and therefore an attractive proposition, but it remains unclear whether this will meet the legal imperative. Views on the question of regional versus community rights remain divided among the Métis, and it is an issue which the Supreme Court may be called upon to resolve.

Another open question is who is the Crown for the purposes of the Crown duty to consult? The question of who bears and can fulfill the duty is a significant area of uncertainty with important practical implications. Chief Justice McLachlin ruled definitively in *Haida* that the Crown bears the duty while private sector proponents do not.²⁹ Although proponents may be delegated procedural aspects of consultation, the duty itself is that of the Crown and cannot be delegated. Unfortunately, this state of the law leaves unresolved the status of quasi-governmental entities such as agencies, boards and commissions (ABCs), municipalities, universities, schools and hospitals (the MUSH sector), and Crown corporations. Can a municipality ignore the Crown duty on the basis that it is not the Crown, or to the contrary, as a government decision-maker whose decisions potentially affect constitutionally-protected rights, does it bear a “Crown-like” duty?³⁰

This issue points to a tension between the express rationale for the duty set out by the Chief Justice in the *Haida* decision and practical considerations in achieving broader reconciliation objectives. *Haida* is premised on an obligation of honourable Crown conduct in its dealings with aboriginal peoples,³¹ which itself finds its origins in the longstanding historical relationship between the Crown and First Nations and the need to reconcile Crown sovereignty with prior aboriginal occupation of the land.³² As indicated by Chief Justice McLachlin this underlying premise provides no support for imposing a duty to consult on non-Crown actors: the honour of the Crown cannot be delegated.³³ However entities such as municipalities and other non-Crown governmental authorities routinely issue regulatory decisions and permits having potentially significant adverse impact on asserted aboriginal or treaty rights.

To date many government ministries have applied a test of “Crown agency” to determine whether an entity bears and can fulfill the duty to consult. This test may correspond best with the legal theory underlying *Haida* and, pending resolution of the issue by the Supreme Court, is the more cautious, risk-averse approach. Under this test government bodies that are Crown agents bear the duty to consult, while non-Crown agents do not. Unfortunately, this approach raises significant practical difficulties because of the range of bodies it excludes. It does not appear likely that the Supreme Court will allow

²⁹ *Haida*, *supra* at para. 53.

³⁰ The issue has arisen in current litigation in Ontario: *City of Brantford v. Montour et. al*, Court file no. CV-08-334. In the *Factum on Behalf of the Respondent Corporation of the City of Brantford* the City argues that as a non-Crown municipal corporation it bears no duty to consult.

³¹ *Haida*, *supra* at para. 16.

³² *Haida*, *supra* at para. 17.

³³ *Haida*, *supra* at para. 53.

significant land use decisions to be made by municipalities, conservation authorities and other government-created entities without triggering the consultation duty as these may have a significant impact on treaty and aboriginal rights. Yet under the Crown agency test such entities may not be subject to the duty, likely leaving the provinces themselves to bear the duty where it is triggered by the activities of municipalities and other non-Crown governmental bodies. This disconnect between the decision-making activities of the front line regulatory bodies and the locus of constitutional responsibility in provincial ministries makes it difficult to meet the duty, and potentially compromises the constitutional right itself.

A possible alternative approach is to impose the duty to consult on the broader category of entities defined as “government” for the purposes of the application of the *Charter of Rights and Freedoms* in cases such as *Eldridge*.³⁴ In the result, the legal obligation to consult would fall on those entities that exercise government-like functions and are obliged through statutory delegation to exercise Crown duties.

ii. When is consultation required

The Supreme Court has indicated that consultation should occur early in the planning stages of projects, and certainly not be left so late that the project is fully defined, rendering any accommodation difficult or impossible.³⁵ Some have suggested that consultation is required at the earliest possible stage, e.g. when considering general policy or legislative initiatives which may lead to projects. Under this approach, the duty would arise when governments develop broad long-term plans such as exist in the areas of land use planning (e.g. Ontario’s Greenbelt Plan), energy (e.g. Ontario’s twenty-year Integrated Power System Plan or IPSP) and transportation (Ontario’s five-year Southern Ontario Highway Program or SOHP). Certainly including aboriginal peoples in the development of policies – including legislation – that affects them is wise. It is suggested that what *Haida* requires, at the very least, is consultation at the stage in planning of specific projects when decisions begin to significantly narrow the opportunities for accommodation of impacts on asserted rights.

It can be difficult and certainly requires imagination to reconcile standard government processes with the need for early consultation. For example, competitive procurements entailing requests for proposals (RFPs) require sealed bids and strict confidentiality to ensure fair processes and competitive bidding. This means that Crown consultation is not possible prior to bid selection, even though the choice made by governments to select certain projects over others arguably narrows the options for addressing aboriginal concerns. For such processes it is suggested that the extent of prior engagement activity by bidders should be a relevant consideration in the bid selection process, and further that Crown consultation should begin as soon as practicable after the bids are selected and the successful projects are announced. This was the model followed in the Renewable

³⁴ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577.

³⁵ *Haida*, *supra* at para. 76.

Energy Supply III RFP (RES III) process recently completed by the Ontario Power Authority.³⁶

One of the key steps in consultation is for the Crown to satisfy itself as to the sufficiency of Crown consultation and of any necessary accommodation of aboriginal interests. It seems clear that the Crown must satisfy itself that it has fulfilled its duty before issuing permits or approvals allowing the project to proceed.³⁷ What, however, is the requirement in terms of assessing consultation when multiple regulatory approvals are required – as is typically the case for large energy projects such as generating stations and high tension transmission lines? Do the different policy concerns dealt with by each regulator at each regulatory step require distinct consultation processes and separate decisions by each regulator on the sufficiency of Crown consultation?

In its recent decision in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*,³⁸ the British Columbia Court of Appeal ruled in the affirmative, requiring both the British Columbia Utilities Commission (responsible for issuing a certificate of public convenience and necessity or CPCN) and the British Columbia Ministry of the Environment (responsible for issuing an environmental assessment certificate or EAC) to determine whether aboriginal consultation on a high tension transmission line was sufficient. Such a requirement of multiple consultations and determinations of sufficiency of consultation on the same project can become duplicative and burdensome. An alternative approach was the one adopted by the Ontario Energy Board in its decision on a leave to construct application for the Bruce to Milton transmission reinforcement where it deferred the main decision on aboriginal consultation to the subsequent environmental assessment:³⁹

There is only one Crown. The requirement is that the Crown ensure that Aboriginal consultation takes place for all aspects of the project. It is not necessary that each actor that is involved with an approval for the project take on the responsibility to ensure that consultation for the entire project has been completed; such an approach would be unworkable. It would lead to confusion and uncertainty and the potential for duplication and inconsistency.

...

In fulfilling its responsibility to assess the adequacy of consultation, the Board must necessarily take responsibility for the aspects of the consultation that relate to the matter before it, but should do so with a recognition of any other forum in which consultation issues related to the project are being addressed.

...

The EA process, which must be approved by the Minister of the Environment is specifically charged with addressing Aboriginal consultation issues related to the project... A determination regarding the adequacy of consultation which is made by a Minister of the Crown after having considered the record of consultation conducted as part of an Environmental Assessment is an entirely appropriate and logical means by which the Crown can assume itself that consultation has been adequate.

³⁶ RES III, *supra*.

³⁷ *Haida*, *supra* at para. 76.

³⁸ *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68.

³⁹ Decision and Order of the Ontario Energy Board dated September 15, 2008.

A similar issue arises in major projects involving both federal and provincial Crown actors, such as major transportation routes and hydroelectric generation projects. Is each level of government required to consult independently and make an independent determination of whether the Crown duty is fulfilled? A more practical approach for all participants would be to permit a single consultation and determination by one Crown or the other so long as the full range of potential impacts on traditional activities and culturally significant sites is considered, and appropriate accommodation is implemented. Such cooperative government approaches should be encouraged by the courts in order to reduce duplication and relieve the consultation burden on aboriginal communities, governments and proponents – so long as such approaches do not diminish the ability of aboriginal peoples to be appropriately consulted.

Equally, in order to avoid over-burdening aboriginal communities with requests for consultation from multiple ministries within the same government or on matters on which the communities have no interest, governments should consider methods for easing the administrative burden. This can be done by having consultations on different matters at a consolidated event. For example, where aboriginal communities are overwhelmed by a proliferation of development and associated consultations those communities might be offered Crown-community forums where representatives from multiple ministries and proponents can meet and discuss projects with community representatives. Similarly, project proponents should, to the extent possible, be offered consolidated approval processes and one window sources of government information and assistance in relation to aboriginal consultation.⁴⁰ Where multiple ministries and agencies must be involved, governments also need to coordinate their consultation approaches and activities through internal coordinating mechanisms that ensure consistency and avoid duplication of consultation efforts.

iii. How to undertake consultations

In *Haida* the Court stated that the Crown should be guided by the twin principles of “balance” and “compromise” in order to achieve the over-riding goal of reconciliation.⁴¹ By way of example of a consultation process, the Chief Justice referred to the New Zealand Ministry of Justice consultation guide.⁴² It refers to consultation as a process by which both parties become better informed through open and transparent information gathering and a willingness to alter a proposed plan of action. It also provides for feedback not just during the consultation process but also after a decision has been made.⁴³

The Chief Justice further indicated that the depth of consultation required in a particular case falls on a spectrum and it is necessary to carry out a preliminary assessment and determine case-by-case where on this spectrum a particular consultation process should

⁴⁰ RES III, *supra*.

⁴¹ *Haida*, *supra* at para. 45.

⁴² *Haida*, *supra* at para. 46.

⁴³ *Haida*, *supra* at para. 46.

fall.⁴⁴ The preliminary assessment in turn requires a “project impact assessment” and “strength of claims assessment.” While the former assessment is a matter of engineering and science, including social science, the latter is a legal issue. Crown lawyers are able to provide advice on a case-by-case basis regarding the strength of particular claims including whether an assertion meets the minimum standard of a “credible” claim and the likelihood it will succeed. What is not known is whether the aboriginal communities are entitled to know the basis of the Crown’s decision regarding the depth of consultation afforded or whether this remains solicitor-client privileged legal advice. In practice governments require flexibility to determine the appropriate depth of consultation taking into account not only impacts and claims but also the desires of the communities and changing circumstances during project development.

In instances where deep consultation is required capacity funding has become a key part of consultation as there is typically limited or no ability of aboriginal communities to pay for needed expertise to respond to consultation requests. In Ontario, a fund has been established through which every aboriginal community can create a consultation office and officer. Funding is also available for larger projects requiring specific expertise and for participation in legislative reform on matters related to treaty and aboriginal rights.

An interesting procedural question regarding how consultation should be undertaken is the extent to which the Crown can delegate aspects of consultation to private proponents, and the appropriate mechanism for doing so. As a practical matter, many ministries of the Crown must rely, to some extent, on delegation to private proponents, while retaining legal responsibility for fulfilling the duty. Chief Justice McLachlin indicated in *Haida* that procedural aspects of consultation can be delegated but did not spell out what is procedural and what is substantive.⁴⁵ It is suggested that the aspects of consultation that are “substantive” and cannot be delegated by the Crown are those that entail applying the legal standards identified in this paper in relation to determining “who, when, how and on what” to consult. Accordingly the Crown must (i) identify the aboriginal communities to consult and at what stage of the project to do so, (ii) determine the depth of consultation required for the particular project and advise proponents and, (iii) satisfy itself that the consultation carried out (and necessary accommodation, if any) was sufficient.⁴⁶ All else is procedural and should therefore be susceptible to Crown delegation to proponents. Until further clarification by the courts, the Ontario government has set out this view of what is substantive and what is procedural in project-specific memoranda of understanding and contractually binding agreements with proponents setting out the respective roles of proponents and the Crown in consultation.⁴⁷

⁴⁴ *Haida, supra* at paras. 37, 43-45.

⁴⁵ *Haida, supra* at para. 53.

⁴⁶ The Crown should be able to consider proposals from proponents (and aboriginal communities) regarding these matters but should make the identification or determination itself.

⁴⁷ The Ministry of Energy and Infrastructure has entered into MOUs with Hydro One and the Ontario Power Authority. Binding consultation agreements between the Crown and proponents are required by RES III.

The Chief Justice indicated her preference for express delegation of procedural aspects of consultation through legislation, regulations or possibly guidelines.⁴⁸ Ontario has attempted to comply through legislation,⁴⁹ regulations,⁵⁰ directions,⁵¹ and guidelines.⁵² It would be advantageous for the Supreme Court to settle the question of the need and appropriateness of various approaches to defining consultation procedures and delegating the procedural aspects of consultation.

A further outstanding issue is the extent to which the First Nations' own consultation processes and guidelines should be followed by the Crown and proponents. The Chief Justice in *Haida* did not go so far as to suggest that there is a duty to consult on how to consult or a duty to consult in the manner preferred by aboriginal communities. Nonetheless it is wise in practice, and certainly consistent with reconciliation between the Crown and aboriginal peoples, to respect reasonable processes established by the communities themselves. Certain Ontario aboriginal communities have crafted processes to allow them to manage multiple consultation requests, and these should be respected to the extent possible.⁵³

Immediately after the *Haida* decision, governments across the country attempted to develop general guidelines for the numerous ministries involved in consultation. Some of these guidelines essentially involved repeating and interpreting the *Haida* decision itself, and were not agreed to by First Nations. In Ontario a second set of general guidelines is now being developed that seeks to better incorporate the views of First Nations on how consultation should take place. What is apparent is that different communities and treaty areas seek to be consulted differently. The diverse group of aboriginal communities in Canada have difference perceptions, experiences and history, all of which influence the way in which they wish to be consulted by the Crown.

iv. On what issues to consult

On what claims should the Crown consult? In *Haida* the Chief Justice indicated that there is a very low threshold for triggering the duty to consult – aboriginal communities need merely make a credible claim of a potential infringement of an asserted treaty or aboriginal right or title.⁵⁴ What amounts to a claim (or “assertion”) of section 35 rights? Is the Crown on notice where a person belonging to a First Nation or Métis community alleges in correspondence that they have certain rights? At the very least, where any kind of solemn written assertion is made by a person representing the collective interests of the aboriginal community, be it in a letter, land claim or notice of proceeding, the Crown is on notice that the community has made a claim potentially requiring consultation and accommodation.

⁴⁸ *Haida*, *supra* at paras. 44, 51, 55.

⁴⁹ See, e.g.: *Electricity Act, 1998*, S.O. 1998, c. 15, s.-s. 25.32 (4.4).

⁵⁰ See, e.g. O.Reg. 231/08. s. 8.

⁵¹ See, e.g. Direction to the Ontario Power Authority dated August 27, 2007.

⁵² See, e.g. O.Reg. 101/07, *Guide to Environmental Assessment Requirements for Waste Management Projects*, s. A.3.3.

⁵³ E.g. Great Earth Law, *supra*.

⁵⁴ *Haida*, *supra* at para. 37.

Note also that the Court has referred to “constructive” knowledge which presumably means that once an assertion is made to any representative of the Crown the entire government is deemed to be aware.⁵⁵ As a result it is now incumbent on governments to know what assertions it has received, a very complex task given the range of distinct interactions ministries and agencies have with aboriginal communities. In practice this means that governments need information coordination mechanisms such as a point and click application recently developed by Ontario to provide government officials information on assertions relevant to a particular location in the province, as well as information on established treaty rights and basic summaries of the applicable aboriginal law.

The question of what constitutes a potential adverse impact also remains open, but it has been assumed by governments until recently that at least some physical impact of a project was required in order for an aboriginal community to allege adverse impacts on rights.⁵⁶ There have been cases where the triggering event was the transfer of a permit or licence, such as *Haida* itself,⁵⁷ but in such cases there was the prospect of subsequent activity affecting the land and claims to land.⁵⁸ However the recent decision of the British Columbia Court of Appeal in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*⁵⁹ went further than *Haida* in holding that consultation was required for approval of a change in the use of electricity generated by an existing hydroelectric diversion complex, a proposal having no significant impact on water levels or flows. The British Columbia Court of Appeal noted that that there had never been consultation on the existing 1950s-era project and assumed this was a continuing infringement; accordingly a change in user of the electricity generated perpetuated the infringement and could not proceed absent consultation. As a result, in British Columbia, it appears that there is, in effect, a duty to consult on decisions in respect of existing development and facilities. This may overshoot the purpose of *Haida* of mitigating impacts on traditional harvesting or archaeological sites pending final resolution of claims. Leave has been sought and the McLachlin Court will have an opportunity to review this decision.

What is the scope of the adverse physical effects on which consultation is required? Some projects, such as high tension transmission lines, may be built for the purposes of enabling or facilitating other projects, such as new generating stations. It has been argued that the duty to consult requires consideration of subsequent projects enabled by the line including projects that may not yet have been proposed or even contemplated. It is far from clear that the duty requires consideration of secondary development enabled by a project, in circumstances where consultation will occur on the subsequent project itself once it is better defined. In practice, regulatory approval procedures, such as the environmental assessment process and Ontario Energy Board approvals, may not be able

⁵⁵ *Taku River*, at para. 25.

⁵⁶ A possible exception is the disposition of Crown land which could compromise aboriginal title claims.

⁵⁷ *Haida*, *supra* at para. 4.

⁵⁸ In *Haida*, there was the prospect of forest harvesting subsequent to the transfer of the licence.

⁵⁹ *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67.

to effectively consider all of the potential secondary impacts of development. That said, and irrespective of the limits of the *Haida* duty and of existing regulatory approval processes, Crown efforts to understand and incorporate aboriginal perspectives into long term planning plainly assists reconciliation. A beneficial effect of intensive consultation on the original project can be to improve relationships and establish forums that remain available to facilitate early consultation on subsequent development.

Is it necessary to consult on economic impacts and financial benefits from projects, matters outside the ambit of section 35 guaranteed rights? To date the jurisprudence requires consultation on potential impacts on aboriginal and treaty rights and is therefore limited (based on the scope of section 35 rights recognized to date) to consultations on impacts on hunting, fishing, trapping and plant harvesting, as well as possibly the potential disturbance of culturally significant burial and other archaeological sites. However communities often have different objectives in the consultations, and may prefer to discuss economic benefits from a project through an impact-benefit agreement (IBA) or other mechanism. In practice, project schedules and the costs of delay provide a strong incentive for proponents to reach agreement with aboriginal communities on pragmatic solutions that allow projects to move forward.

To some proponents the need to discuss economic benefits and IBAs may seem a distortion of purpose of *Haida*, especially when no obvious impacts on rights are demonstrated, but it should not be ruled out that this was an effect of the duty which the McLachlin Court anticipated. The socio-economic needs of aboriginal peoples are significant. Unemployment is significantly higher, education attainment levels lower, health outcomes worse, and housing often substandard. When the Crown and private proponents consult on large and potentially profitable initiatives, it is not surprising that they are being asked not only for capacity funding for consultation, but also for economic benefits from the project. In *Haida* the Court required the Crown to consult with local aboriginal communities on harvesting and archaeological impacts: it cannot have escaped the Court's contemplation that by bringing the communities closer into government and business decision-making processes for projects in their traditional areas the opportunity would be created for the communities to seek improvement of their often deplorable economic and social conditions.

v. Accommodation

Accommodation is the second half and an integral part of the duty.⁶⁰ What accommodation is required where there is a potential adverse impact on treaty or aboriginal rights? Easy examples include restoring the habitat of a harvested species or adjusting the route of a roadway to avoid a culturally significant archaeological site. More complicated accommodation includes profit sharing and IBAs to compensate for adverse impacts on rights. Such agreements can include cash payments, profit sharing, trusts, placement of a representative on the board of the proponent company, agreements to hire and provide skills training, or preferential treatment for contracted services such as catering or trucking.

⁶⁰ *Haida*, *supra* at paras. 46-50.

The Government of Ontario is increasingly focussed on addressing the needs of aboriginal communities by creating opportunities for economic participation and business partnerships. The issues of rights-driven accommodation, settlement of past grievances and socio-economic policy objectives merge in arrangements such as the agreement by Ontario Power Generation to include a 25% equity stake for Lac Seul First Nation in the recently opened Lac Seul hydroelectric project. Additional similar arrangements are anticipated in renewable energy projects undertaken under the *Green Energy and Economy Act*, supported by special legislative and regulatory provisions,⁶¹ a capacity-building fund to assist aboriginal community-owned enterprises to enter the field, higher prices per kilowatt/hour for aboriginal generation projects, and government loan guarantees.

vi. Broader implications

The aboriginal jurisprudence of the McLachlin Court encourages governments and aboriginal communities to reach negotiated solutions to land and harvesting disputes, without resort to litigation. The resolution of aboriginal rights and treaty interpretation issues in adversarial judicial proceedings can be difficult for all parties, and the Supreme Court has encouraged negotiated solutions through the requirement that the Crown enter into dialogue and accommodate the reasonable concerns of aboriginal communities. The establishment of the duty has also removed an incentive to litigation created by the Supreme Court itself in *Sparrow*, since it is no longer necessary to prove claims in court in order to obtain the remedy of Crown consultation and accommodation. In effect, the convergence of the government justification for breaches under the *Sparrow* test with the new duty to consult, combined with the opening of opportunities to address the very significant non-rights based needs of aboriginal communities, should help the process of negotiated resolution and reduce the volume of aboriginal litigation, especially once the content of the duty to consult is further clarified by the Supreme Court.

Disputes over broader government policy may also be reduced. Although the duty to consult does not appear to require consultation on legislative initiatives,⁶² in practice the *Haida* decision has altered the way in which Ontario seeks to ensure meaningful consultation with the aboriginal community in broader policy-making. Examples include Ontario's current legislative initiatives to modernize the mining regime and land use planning in the far north of the province. As part of the process of legislative reform of the mining legislation, the First Nations leadership from across the province met regularly over several weeks to discuss provisions for notice, consultation and accommodation. In addition, community-level information sessions were organized by both the Ministry and the PTOs to discuss the reforms. Among the changes to the

⁶¹ See *supra*, Schedule B and *Electricity Act, 1998*, S.O. 1998, c. 15, s.-s. 5(1) amending s. 25.32 by adding s.-s. 4.5:

The Minister may direct the OPA to establish measures to facilitate the participation of aboriginal peoples in the development of renewable energy generation facilities, transmission systems and distribution systems and such measures may include programs or funding for, or associated with, aboriginal participation in the development of such facilities or systems.

⁶² See: *R. v. Lefthand*, 2007 ABCA 206, 10 W.W.R. 1.

legislation made as a result of the process was the inclusion in the Bill's purpose clause of express recognition of the constitutional duty to consult.⁶³ Similarly, extensive discussions took place with the Nishnawbe Aski Nation prior to introduction of the *Far North Act, 2009*.⁶⁴ The discussions permitted consideration of the views of the 34 communities of Treaty No. 9 on the process for land use planning and development in their traditional territories. Under the Bill First Nations will have the ability to develop community land use plans and share decision-making with the Crown on future land use.

The impact of the duty to consult has been enormous already and clarification of the outstanding legal issues will allow the *Haida* case to more efficiently achieve its purpose. In future months and years governments in Canada require a robust Crown-judiciary dialogue on the duty, and in forthcoming appeals there will soon be opportunities for the Court to provide further clarification on the issues of "who, when, how and on what" to consult. From the McLachlin Court governments can anticipate consensual and pragmatic decisions of the type for which the Chief Justice of the Supreme Court has become known – decisions that promote recognition of section 35-protected treaty and aboriginal rights, reconciliation with the Crown, and reduce the need for recourse to litigation while creating needed economic opportunities for aboriginal communities.

⁶³ Bill 173, *Mining Amendment Act, 2009*, s. 2, 1st Sess., 39th Leg., Ontario, 2009. The *Green Energy and Economy Act*, s. 1(2), *supra*, also includes an interpretive section that explicitly recognizes section 35 and the duty to consult, as does Bill 191, *Far North Act, 2009*, 1st Sess. 39th Leg. Ontario, 2009, s. 3.

⁶⁴ *Far North Act, 2009, supra*.