Consultation with First Nations and Accommodation Obligations

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On November 18, 2004, the Supreme Court of Canada released its long-awaited decision in *Council of the Haida Nation v. British Columbia*[1] and the related case of *Taku River Tlingit First Nation v. Minister of Forests*[2]. This unanimous decision provides much-needed clarification of the duties of consultation and accommodation in respect of government decisions which may impact on aboriginal rights. This paper will provide an overview of the main elements of the Court's decision.

I Summary of the Court's Decision

1. There were three issues before the Court:

    (i) whether the Crown has an obligation to consult Aboriginal people claiming unproven rights before making a decision that may infringe on those rights if proven;

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[1] 2004 SCC 73 ["*Haida* (SCC)"]

[2] 2004 SCC 74

(ii) if so, whether the obligation includes an obligation to accommodate these asserted interests; and

(iii) whether third parties obtaining rights through the Crown have a similar obligation to consult and/or accommodate Aboriginal interests.

2. The Court concluded that the Crown does have an obligation to consult prior to the establishment of the asserted rights. Third parties, however, do not.

3. The Court also concluded that the obligation to consult may carry with it an obligation to accommodate, or may not. That depends on what is discovered through the consultation process.

4. Where accommodation is required, the Aboriginal interest must balanced with other interests. The Aboriginal claimants do not have a veto over government action.

II. Source of the Duty to Consult

5. One of the perplexing questions in this area of the law has been what the source of a Crown obligation to consult might be. The two sources suggested in the Courts below have been the Crown's fiduciary relationship with Aboriginal people and the *Delgamuukw* decision. The Supreme Court rejected both of these as potential sources. Instead, the Court held that the source for this obligation was the honour of the Crown.

(i) Fiduciary principles do not apply.

6. The B.C. Court of Appeal had held that the source of this duty was the fiduciary relationship between the Crown and Aboriginal people. Writing for a unanimous panel in *Haida I*, Lambert J.A. expressed the principle in this way[3]:

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[3] *Haida Nation v. British Columbia and Weyerhaeuser* (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, paras. 33-37 ["*Haida I* (BCCA)"]

> In my opinion, the roots of the obligation to consult lie in the trust-like relationship which exists between the Crown and the aboriginal people of Canada. ...
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> The trust-like relationship is now usually expressed as a fiduciary duty owed by both the federal and Provincial Crown to the aboriginal people. Whenever that fiduciary duty arises, and to the extent of its operation, it is a duty of utmost good faith. ...
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> So the trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, in both of its sovereignties, federal and provincial, on the one hand, and the aboriginal peoples on the other. One manifestation of the fiduciary duty of the Crown to the aboriginal peoples is that it grounds a general guiding principle for s. 35(1) of the *Constitution Act, 1982.*

7. Even before the Supreme Court's decision in *Haida*, this view of the Crown fiduciary relationship with aboriginal people had been undermined. In *Wewaykum Indian Band v. Canada*[4], after referring to some of the leading decisions on fiduciary obligations and relating them to the established categories in relation to aboriginal people, Binnie J., speaking for a unanimous court, said this:

> But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

8. Binnie J. then points out without specific comment what he describes as "a flood of 'fiduciary duty' claims by Indian bands across a whole spectrum of possible complaints" and makes the following comments about fiduciary obligations:

> … I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (Lac Minerals, supra, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.[5]

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[4] 2002 SCC 79, at para. 81-83 (emphasis added)

[5] *ibid*, at para. 83

9. In the Supreme Court's decision in *Haida*[6], the Court specifically rejected the fiduciary characterization as a source for the obligation of the Crown to consult in these terms:

> As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:
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> > . . . "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. . . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
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> Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is 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 the right or title.

10. Later in the judgment, in rejecting the argument that third party licensees might owe a fiduciary duty to aboriginal people, the Court said pointedly, that "the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests."[7]

(ii) Delgamuukw is relevant but not controlling.

11. In the Court of Appeal, Lambert J.A. cited *Delgamuukw* extensively, but appeared to distinguish the "pre-proof" consultation from consultation in the infringement/justification analysis expressed in the Sparrow decision[8]:

> The duty to consult and seek an accommodation does not arise simply from a *Sparrow* analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection.

12. The Supreme Court reviews the *Sparrow*/*Delgamukw* line of infringement/justification cases in its explanation of the sources of the duty to consult[9], and quoted the principal paragraph

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[6] *Haida* (SCC), para. 18

[7] *Haida* (SCC), para. 54

[8] *Haida I* (BCCA), para 55.

[9] *Haida* (SCC), para. 20-24

from *Delgamuukw* dealing with the nature and scope of consultation in a justification analysis,[10] indicating that the *Delgamuukw* concepts of consultation have some application to pre-proof situations. However, the Court also distinguishes the two types of consultation, particularly in its rejection of any aboriginal veto:

> The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case.[11]

13. It appears that rather than regarding the *Delgamuukw* principle as a source for the pre-proof consultation, the Court regards the need for consultation in an infringement context as arising from the same general source of the Government's *sui generis* obligations to Aboriginal people, namely the honour of the Crown.

(iii) The source of the duty to consult is the honour of the Crown.

14. The Supreme Court is quite clear that the source of the duty to consult is the honour of the Crown. This judgment represents the first time that the honour of the Crown has been relied upon as the source of a positive duty to act. Previously the Court had referenced the honour of the Crown primarily in relation to treaty interpretation and application.[12]

15. The Court explains that it is the honour of the Crown that underlies all dealings of the Government with Aboriginal people:

> 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: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
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> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty

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[10] *Haida* (SCC), para. 40

[11] *Haida* (SCC), para. 48

[12] See e.g. *R. v. Badger*, [1996] 1 S.C.R. 771 and *R. v. Marshall*, [1999] 3 S.C.R. 456, referenced by the Court at para. 16

> to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.[13]

16. It is the honour of the Crown that is the source of the fiduciary duty that arises when (and only when) the Crown has assumed discretionary control over specific aboriginal interests.

17. There is no real analysis of the scope of the honour of the Crown in the judgment, but it is clear that the Court will not countenance Government acting towards Aboriginal people in a way that the Court regards as dishonourable. The development of principles of equity provides an obvious analogue for this concept, but the Court's increasingly narrow view of the scope of the Government's fiduciary obligations towards Aboriginal people suggests that equitable principles are unlikely to provide a reliable guide to understand the scope of enforceable duties which may be attributable to its obligation not to act dishonourably.

18. Since *Haida* and *Taku River* were released, the Federal Court of Appeal has released a judgment summarizing the scope of the honour of the Crown principle, concluding with this statement of principle[14]:

> I conclude that, with respect to the honour of the Crown, the concrete practices required of the Crown so far identified by the Supreme Court of Canada in the Aboriginal context are: acting appropriately as a fiduciary; interpreting treaties and documents generously; negotiating, and where appropriate, consulting with and accommodating Aboriginal interests; and justifying legislative objectives when Aboriginal rights are infringed. However, I do not suggest that this is an exhaustive list of the ways in which the honour of the Crown may be manifest.

19. However the Court rejected an extension of the principle to the conduct of ordinary litigation by the Crown[15].

III. Circumstances requiring Consultation

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[13] *Haida* (SCC), para. 16-17

[14] *Stoney Band v Canada*, 2005 FCA 15, at para 18

[15] *ibid*., para 21-33

20. The threshold here is a low one. The Crown must consult whenever the Government has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it.[16]

21. This is a concept similar to that proposed by the Court of Appeal. The difference in approach seems to be this: the Court of Appeal appears to set a slightly higher standard for when consultation is necessary, but then impose a greater substantive obligation to seek an accommodation of Aboriginal concerns. The Supreme Court on the other hand requires consultation in virtually any case where it might be necessary, but does not necessarily require any substantive element.

22. The Supreme Court does acknowledge the difficulty in addressing rights that have been asserted but not yet proven, and puts some onus on the Aboriginal claimant to clearly outline their claims:

> It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall*, *supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements.[17]

IV. Requirements of Consultation

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[16] *Haida* (SCC), para. 35

[17] *Haida* (SCC), para. 36. For an earlier expression of this obligation, see *Husby Forest Products v. British Columbia*, 2004 BCSC 142 at paras. 94 and 96: "It was incumbent on the Haida, if they did object to the granting of the cutting permits, to clearly define the nature and scope of the aboriginal right they claimed was being infringed…. The Haida must delineate whether they claim the right to red cedar and specifically what that means in relation to these cutting permit application, or the right to harvest cedar, or the right to preserve CMTs, or the right to preserve what they call the archaeological forests or some other right not yet encompassed in the various claims mentioned. They must do so in a site specific way."

23. The Supreme Court offers no bright line test for consultation, but instead uses the by now familiar spectrum approach to determining what must be done.

24. The content of the duty to consult and accommodate varies with the circumstances. The scope of the duty will 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. If the claim is weak or the potential for infringement minor, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. If the claim is strong, the potential infringement significant and the risk of non-compensable damage high, deep consultation, aimed at finding a satisfactory interim solution, may be required. The approach is to be one of balance and compromise on all sides.

25. The Court does state that there is no duty to agree, a theme the Court returns to in its discussion of accommodation. The Court also adopts a proposition developed in the British Columbia courts that Aboriginal claimants "must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions in cases where, despite meaningful consultation, agreement is not reached."[18]

V. The Accommodation Requirement

26. One of the significant changes in approach coming out of Haida is the treatment of accommodation, which been de-linked from consultation. Consultation is required at any time when government-approved action may interfere with claimed aboriginal rights, but whether the Government needs to accommodate aboriginal concerns will depends on the result of the consultation process. If the consultation process indicates the need to take steps to avoid irreparable harm or to minimize the effects of infringement, a duty to do so may arise.

27. The Court explained the requirement in this passage:

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[18] *Haida* (SCC), para. 36

> When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.[19]

28. The Court spends some time on the definition of accommodation. It is clear that accommodation does not mean meeting the concerns raised, but rather altering the decision to balance the aboriginal concerns with other non-aboriginal interests. Accommodation refers to reconciling and compromising interests.

29. Accommodation does not mean the aboriginal group has a veto. This is made very clear in the following passage:

> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.[20]

30. In British Columbia, a practice has developed of equating "accommodation" with some form of compensation for Aboriginal claimants prior to establishing their claims. The term "accommodation package" has been developed to refer to the basket of incentives offered to Aboriginal claimants who challenge government-approved projects on land they claim. This practice seems very much at odds with the concept of accommodation as explained by the Supreme Court.

31. The Court clearly relates accommodation to a modification of the Government's plans in order to harmonize those plans with Aboriginal interests or concerns whenever reasonably possible. Some care is spent on this part of the judgment, even to the point of looking at dictionary definitions of "accommodate". The result is an emphasis on harmonization rather than compensation:

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[19] *Haida* (SCC), para. 47

[20] *Haida* (SCC), para. 48

> The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.[21]

VI. Obligations of the Private Sector

32. The B.C. Court of Appeal had held that the obligation to consult and accommodate aboriginal interests extended to third licensees operating on Crown land, either generally as an independent obligation (per Lambert J.A.) or at least on some occasions when it was necessary in order to provide an effective remedy against the Crown (per Finch, C.J.B.C.).

33. The Supreme Court of Canada decisively rejected this proposition. Industry does not have an obligation to consult or accommodate aboriginal interests:

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests.[22]

34. The Court pointed out that it was open to the Government to delegate procedural aspects of consultation to industry proponents seeking a particular development, and references the terms of Weyerhaeuser's licence approvingly. It is clear, however, that this is a matter between the Crown and the licensees. It does not give rise to an obligation enforceable by Aboriginal people against licensees, who "cannot be held liable for failing to discharge the Crown's duty to consult and accommodate."[23]

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[21] *Haida* (SCC), para. 49

[22] *Haida* (SCC), para. 53

[23] *Haida* (SCC), para. 56

35. As a practical matter of course, industry has a considerable interest in ensuring that the Government conducts the consultation properly. The reality is that while Courts have been reluctant to set aside permits granted to third parties because of the Government's failure to consult properly, that is always a possible outcome, and the impact of such a remedy would fall on the permit holder.

VII. Regulatory Proposals

36. The Court seems to be encouraging Governments to establish administrative processes to guide decision-makers in the consultation process. If this is done, and the consultation is carried out fairly and properly, the Court has indicated that judicial review of the Government's conclusion would be carried out on a reasonableness standard. In other words, the Government's conclusions as to the accommodation required would be upset by the Court only if the Court concluded that they were "unreasonable". Such a standard of review affords considerable deference to the decision-maker, and may prove to be a strong incentive for Governments to make their consultation procedures more systematic.

37. With this judgment in hand, it does seem appropriate for governments to review those statutes and administrative regimes that could lead to infringement of aboriginal rights with a view to providing better guidance for statutory decision-makers. The judgment raises the spectre of the *Adams* decision to encourage governments to begin this review. The risk is that statutory schemes may be vulnerable to attack if they amount to "an unstructured discretionary administrative regime which risks infringing aboriginal rights."[24]

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[24] *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, cited at *Haida* (SCC), para. 51

38. The Court seems to view the Province's Consultation Guidelines[25] as a step in the right direction, although there seems to be a preference for a more traditional regulatory regime.

39. No direction was made on this point, and it remains to be seen whether governments will pick up on this point. There seem to be much to commend the idea that legislative schemes need to made more systematic to ensure that consultation is carried out effectively and to minimize the prospects of unjustifiable infringement of aboriginal rights.

VIII. The Role of Injunctions

40. Several parties argued that the Government should not be saddled with a consultation obligation, since aboriginal people could always seek injunctions if they needed interim relief prior to establishing the scope of their rights. The Court dealt with this argument directly, holding that while injunctions were available, they were not very practical in cases of aboriginal rights claims. It was accepted that the balance of convenience test generally tips the balance in favour of protecting jobs and government revenues, making it more difficult for Aboriginal people to use the injunctive remedy to protect their claims in the pre-proof period.

41. One byproduct of this analysis may be to make recourse to injunctions less likely, as the inadequacies of this remedy in aboriginal right cases appear to have been endorsed by the Court.

IX. Some Unanswered Questions

42. While many in British Columbia will consider this decision to be an end to a lengthy debate about the nature, timing and source of the consultation obligation, the Supreme Court regarded this case as just the first step in developing the law in relation to pre-proof obligations.

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[25] The Consultation Guidelines are referenced at para. 51 of *Haida* (SCC). The reference is not entirely accurate, as the Court indicates that British Columbia has had consultation guidelines in place since October 2002, whereas the Province in fact initiated such guidelines in the early 1990's. The 2002 version is just the most recent iteration of the Guidelines.

The Court stated that the decision set out a "general framework" for understanding these issues. Some of the questions not addressed by the Court include:

(i) When will permits be set aside for failure to consult and, where appropriate, accommodate?

The Court does not address this issue, which did not have to be decided in either case. It seems clear that setting aside a permit remains a possible remedy in these cases, but the fact that the Court reversed the decision in the *Taku River Tlingit* case may suggest that it requires a serious departure from the appropriate conduct to support such an extreme remedy.

(ii) Who is to be consulted?

The Court does not address this issue, presumably because the point was clear in the two cases before the Court. The decision seems to indicate that any aboriginal group making a claim of rights or title should be consulted. Weak or peripheral claims can be addressed by the minimal consultation of notice.

(iii) Who pays for the consultation costs of the aboriginal people?

A persistent practical problem in this area is the lack of financial and resource capacity of bands when consulted on complex projects. The Court does not address this issue.

43. While these and other questions remain, the Court has provided welcome clarification of the nature and scope of the obligation to consult and accommodate prior to proof of aboriginal rights or title.

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