Cassels

# Twenty Years Since Haida: The State of Crown Consultation Today

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Two decades ago this year, the Supreme Court of Canada (SCC) released its landmark decision in *Haida Nation v. British Columbia (Minister of Forests)*.[1]

In *Haida*, the SCC held that the Crown's duty to consult Aboriginal peoples is grounded upon the concept of the honour of the Crown, a core precept that finds its application in concrete practices.[2]

The Crown's duty to consult Aboriginal peoples is a *procedural* duty that is both legal and constitutional in nature.[3] While the Crown's duty to consult had previously been discussed by the SCC in cases such as *R. v. Sparrow*[4] and affirmed in *Delgamuukw v. British Columbia*,[5] *Haida* extended the Crown's duty to consult to *contemplated* Crown actions or decision that had the potential to adversely affect Aboriginal rights or interests, regardless of whether they have been formally recognized by the Crown or a court.[6]

Courts have subsequently held that for the Crown's duty to consult to be triggered, the potential must exist for an appreciable adverse effect on an Aboriginal or treaty right or interest.[7]

Since *Haida*, the law surrounding the Crown's duty to consult has evolved considerably, changing the landscape for project development and Crown decision making in Canada. Following *Haida*, the SCC has gone on to hold that the duty to consult extends to treaty rights[8] and decisions of Crown agencies.[9] Modern treaties must be interpreted within the essential framework of the Crown's duty to consult.[10] Regulatory tribunals may make determinations as to whether the Crown's duty to consult has been fulfilled and may even themselves be delegated the Crown's duty to consult, provided the delegation is communicated to the Aboriginal groups who are to be consulted.[11]

Other SCC jurisprudence has clarified the scope of the duty to consult. For example, past wrongs or a continuing breach of an Aboriginal or treaty right, including prior failures of the Crown to consult, will only trigger a duty to consult if the present Crown decision at issue has the potential to cause a novel adverse effect on an Aboriginal or treaty right.[12] Further, the Crown's duty to consult is owed only to an Aboriginal group asserting collective rights, not to individuals,[13] and the Aboriginal group is guaranteed a right to a process, not a right to a particular outcome.[14]

The SCC has also held that the Crown's duty to consult does not apply to the legislative process as the law-making process does not constitute "Crown conduct" that triggers the duty to consult.[15]

The SCC also confirmed that the content of the Crown's duty to consult will vary with the circumstances. Initially, the scope of the duty will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the Aboriginal right and the potential of a serious adverse effect on the Aboriginal right or title so asserted,[16] but the depth of consultation may change as additional information is revealed through the consultation process.[17]

## Impact on Project Proponents

As the law in respect of the Crown's duty to consult has developed, so too has the conduct and expectations of Indigenous groups, project proponents, and Crown decision makers.

In *Haida* the SCC stated that the Crown holds the ultimate responsibility associated with any constitutional duty to consult, and that the Crown cannot delegate this ultimate responsibility, which includes upholding the honour of the Crown.[18] While the Crown is ultimately responsible for fulfilling the duty to consult, it frequently delegates consultation efforts to proponents including information disclosure, seeking and collecting feedback, and holding information sessions and community meetings.

Since challenges to the Crown's consultation efforts are frequently brought as applications for judicial review, all parties involved in consultation activities, including project proponents, now understand the critical need to keep detailed consultation records and take these engagements seriously in order to minimize project risk.

Capacity funding has also emerged as a critical issue in the consultation process. Although there is no stand-alone duty to offer, and no stand-alone right to, capacity funding, it is important to be alive to the fact that many Aboriginal communities have limited resources to effectively participate in consultation processes. In some cases, the offer of capacity funding may be necessary to ensure that an Aboriginal community is able to meaningfully engage in the consultation process. In such cases, a failure by the Crown or proponents to offer capacity funding may constitute a factor in a court's finding that the Crown did not adequately discharge it duty to consult.[19]

Ultimately, consultation need not be an inherently oppositional process. In the evolution of the jurisprudence since *Haida* has demonstrated that the honour of the Crown, which must be maintained in the consultation process, finds its application in concrete practices: initiating consultation with a pre-determined outcome, failing to communicate expectations and positions, and failing to adhere to mutually agreed upon process all lead to flawed consultations which are often successfully challenged.[20] Indeed, the most successful consultations are those that are collaborative with all parties sharing information, communicating openly, and working together to find solutions in the interests of all parties involved.

While the consultation process may be onerous and can take time to properly conduct, the breakdown of

relations and trust between parties and the possibility protracted litigation resulting from poorly conducted consultations inevitably leads to even greater delays and uncertainty for project development.

## The Big Picture

From a practical perspective, the Crown's duty to consult has been, and will likely continue to be, an important component to Crown-Indigenous and business-Indigenous relations across Canada. It has dominated Aboriginal law litigation in recent years, has provided Aboriginal peoples with a powerful tool to influence government decision-making processes and has had a profound effect on industry and businesses that are dependent upon governmental approvals and regulation.

What emerges from the SCC's discussion of the Crown's duty to consult and reconciliation is the basis of modern Aboriginal law in Canada and the development of a diverse society and national economy: the Crown must seek to balance Aboriginal and treaty rights and interests on the one hand, and broader societal and non-Aboriginal interests on the other. This theme of balancing competing interests is central to understanding the SCC's approach to the Crown's duty to consult.

Public governments across Canada, of all political stripes, continue to struggle with governing in the face of section 35 of the *Constitution Act, 1982*, including with respect to implementing the Crown's duty to consult Aboriginal peoples and putting into place legal and regulatory regimes that are respectful of the principle of the "honour of the Crown" on the one hand, and provide reasonable stability, predictability, and transparency for government decision-making on the other hand.

The tension associated with the reconciliation of these two principles — adhering to the requirements of the "honour of the Crown" and providing regulatory certainty and predictability — continue to dominate this area of Canadian law and will likely do so for the foreseeable future.

Canada's ability to reconcile with Aboriginal peoples and its ability to attract investment, do business and govern depend on these issues being addressed and managed by the federal, provincial and territorial governments in a comprehensive, consistent, and transparent manner.  It has become increasingly clear that there is a palpable need for a long-term sustainable public policy approach to these issues that is respectful of Canadian law and which balances the rights of Indigenous peoples with the rights of non-Indigenous peoples in a fair and reasonable way. These issues do not lend themselves well to election-cycle decision-making but rather demand a longer-term, strategic, and thoughtful approach.

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[1] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

[2] *Ibid.* at para. 16.

[3] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 28 [*Behn*]. See also *Haida* at para. 10 and *R. v. Kapp*, 2008 SCC 41 at para. 6.

[4] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[5] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

[6] *Haida* at paras. 27, 35. Note "interests" includes "potential, but yet unproven" Aboriginal rights.

[7] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*]; See also *Mi'kmaq of PEI v. Province of PEI et al.*, 2019 PECA 26; *Ross River Dena Council v. Yukon*, 2020 YKCA 10; *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215. In considering the requirement for an "appreciable adverse effect" the potential adverse effect must be material, identifiable, and non-marginal.

[8] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

[9] *Clyde River (Hamlet) v. Petroleum Geo?Services Inc.*, 2017 SCC 40 [*Clyde River*]; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41.

[10] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53.

[11] *Rio Tinto*.

[12] *Ibid*.

[13] *Behn,* at paras. 30-31.

[14] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.

[15] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 2.

[16] *Ibid.* at para. 39.

[17] *Ibid*. at para. 45.

[18] *Haida* at para. 53.

[19] On this point see *Clyde River* at para. 47.

[20] See generally *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.

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