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Triggering the Duty of Consultation with Aboriginal Peoples

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by

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Triggering the Duty of Consultation with Aboriginal Peoples

Introduction

The law of the Crown's duty of consultation with Aboriginal peoples, and its complimentary duty of accommodation, was first articulated in 1990 in the Supreme Court of Canada's *R. v. Sparrow*[1] decision. *Sparrow* was the first post-Charter case to examine Aboriginal rights as set out on section 35[2] of the *Constitution Act, 1982.*[3] In the subsequent seventeen years, dozens of "consultation" cases have made their way through all branches of Canada's legal and regulatory system. Judicial, quasi-judicial and administrative[4] tribunals involved in criminal,[5] environmental,[6] real estate,[7] transportation,[8] natural resources (e.g., oil and gas,[9] minerals,[10] mining,[11] fisheries[12] and forestry[13]), and regulatory matters (e.g., utilities[14]) have all made pronouncements on some aspect of the duty of consultation. Numerous core definitional issues remain, however, on the scope and nature of the duty. One such issue is the determination of when the duty to consult is triggered. If the duty is not triggered, then the Crown avoids an administratively costly, time consuming and onerous constitutionally rooted process.

Recent case law reveals that the commencement of the duty of consultation is an integral and defining question in every project in Canada that potentially impacts Aboriginal rights, whether such rights are merely asserted or proven (by treaty or determined by a court). If a court determines that consultation has commenced in a late manner, then all Crown decisions or actions regarding a project are immediately suspect. By definition, late consultation is inadequate consultation. A Crown decision based on inadequate consultation with affected Aboriginal peoples potentially renders the decision invalid. Project proponents reliant on Crown

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[1] [1990] 1 S.C.R. 1075 [*Sparrow*].
[2] Section 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
[3] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[4] *Winger v. Regional Manager*, Decision No. 2006-WIL-018(a) (British Columbia Environment Appeal Board).
[5] *Pictou v. Canada*, (2000) T.C.J. No. 321, aff'd [2003] F.C.J. No. 33, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 107.
[6] *Hiawatha First Nation v. Ontario (Minister of Environment),* [2007] O.J. No. 506 [*Hiawatha*].
[7] *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management),* (2005) 251 D.L.R. (4th) 717.
[8] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388.
[9] *Saulteau First Nations v. British Columbia (Oil and Gas Commission),* 2004 BCSC 92, 2004 BCCA 286, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 341.
[10] *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] O.J. No. 3140 [*Platinex No. 1*] and *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, (1 May 2007), Ontario 06-0271 (Ont. S.C.J.) [*Platinex No. 2*].
[11] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.
[12] *Heiltsuk Nation v. British Columbia (Minister of Sustainable Resource Management)*, [2003] B.C.J. No. 2169.
[13] *Husby Forest Products Ltd. v. British Columbia (Minister of Forests),* [2004] B.C.J. No. 185.
[14] *TransCanada Pipelines Limited v. Beardmore (Town)*, [2000] 3 C.N.L.R. 153 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 264.

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authorizations (e.g., as permits, licences or leases) simply cannot move forward if such authorizations are found to have been issued in contravention of a constitutionally protected Aboriginal right. In a word, construction and operation of any project impacting an Aboriginal right, whether asserted or proven, will be uncertain.

This paper discusses the law of the timing of the triggering of the duty to consult. The 2006 Federal Court decision of *Dene Tha' First Nation v. Canada*[15] is the touchstone for the discussion. *Dene Tha'* builds upon the 2004 Supreme Court of Canada decision in *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*[16] which in turn relies on British Columbia case law on when the duty to consult arises, as set out in an earlier British Columbia case, *Halfway River First Nation v. British Columbia (Ministry of Forests)*.[17]

The Legal Test of When the Duty to Consult Arises

The legal test to determine precisely when the duty of consultation arises with Aboriginal peoples is set out by the Supreme Court of Canada in *Haida*. The court in *Haida* states:

> … when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that 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. (*emphasis* added by us)[18]

The *Haida* legal test is comprised of two parts:

(a) when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title; and

(b) the Crown contemplates conduct that might adversely affect such Aboriginal right or title.

The Potential Existence of an Aboriginal Right or Title

The first part of the *Haida* legal test, knowledge of the "potential existence" of an Aboriginal right or title, has a low threshold. The Supreme Court of Canada stated, "knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate".[19] The Haida Nation's claim included the Aboriginal right to exclusive use and benefit of certain lands and waters, including the seabed and air space. A lower court judge found there was a reasonable probability that the Haida Nation may establish Aboriginal title to "at least some parts" of the coastal and inland areas of the Queen Charlotte Islands and a substantial probability that the Haida will be

[15] [2006] F.C.J. No. 1677, leave to appeal to the F.C.A. granted [*Dene Tha'*].
[16] [2002] S.C.C.A. No. 417 [*Haida*].
[17] [1997] 4 C.N.L.R. 45 (B.C.S.C.)
[18] *Haida*, *supra* note 16 at para. 35.
[19] *Ibid.* at para. 37.

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able to establish an Aboriginal right to harvest old-growth red cedar trees. While the judge believed the final resolution of the issue would require a substantial amount of further evidence, he stated that it was "fair to say that the Haida claim goes far beyond the mere 'assertion' of Aboriginal title".

The first part of the *Haida* legal test is one that is easily fulfilled. Simply forwarding a credible claim of an Aboriginal right is likely sufficient. However, one must query the definition of a "credible" claim. The mere filing of a statement of intent with the British Columbia Treaty Commission[20] to commence the British Columbia treaty negotiation process with the federal and provincial Crowns may be sufficient.[21] If so, then by definition every Crown decision or action will automatically invoke the duty of consultation as the entire land base of the province is included in one or more statements of intent.

Contemplated Conduct that Might Adversely Affect an Aboriginal Right or Title

The second part of the *Haida* legal test, contemplated conduct, requires receipt of information from the affected Aboriginal group. A determination made solely by the Crown, without discussions with the affected Aboriginal group, is likely not sufficient to fulfil the second part of the *Haida* legal test.

Haida stands for the legal proposition that an adverse effect does not necessarily have to exist in order to trigger the duty to consult. In *Haida*, the word "potentially" appears before the phrase "adverse affect" in a number of paragraphs of the judgment, as does "may". This repeated wording suggests that a duty to consult is likely triggered where it is unclear if there will be an adverse impact on an Aboriginal right or title arising from a contemplated conduct. It would be difficult for the Crown to determine, on its own, whether or not a potentially existing Aboriginal right or title is affected by a contemplated conduct without having some degree of consultation with the Aboriginal people affected. Put another way, consultation is required to determine if consultation is required.

The case of *Hiawatha First Nation v. Ontario (Minister of Environment)*[22] is instructive for setting out the conditions where the duty of consultation is not triggered. *Hiawatha* was an application by seven Ontario First Nations for a declaration that the Crown respondent (Ontario Realty Corporation) breached constitutional and statutory duties of consultation in regard to a land transaction with private developers.[23] The applicant First Nations claimed an Aboriginal right to preservation of sacred burial sites of their ancestors they believed would be destroyed if the transaction and contemplated development took place. The court held that the First Nations' ancestors surrendered all rights of any kind to the lands containing the burial sites in exchange

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[20] <http://www.bctreaty.net/>.
[21] Tony Fogarassy & KayLynn Litton, "Consultation with Aboriginal Peoples: Impacts on the Petroleum Industry" (2004) Alta. L. Rev 41 at 58.
[22] *Hiawatha*, *supra* note 5.
[23] *Hiawatha* is particularly of interest in the context of the Ipperwash Inquiry and Aboriginal burial sites and the strongly held ancestral connections of Aboriginal peoples. A report of the Inquiry was slated to be released on May, 31, 2007, see online <http://www.ipperwashinquiry.ca/>.

for Crown promises made to them under the 1923 Williams Treaties. As such, there was no Aboriginal right or potential Aboriginal right to trigger the duty of consultation.[24]

Dene Tha' **and the Timing of Consultation**

The *Dene Tha'*[25] judgment deals squarely with the question of when the Crown's duty of consultation commences with Aboriginal peoples. The judgment has enormous implications for the Crown, both federal and provincial, and for energy and natural resource project proponents who rely on and require Crown authorizations to carry out their projects.

Facts

In late 2000, nine "core regulatory bodies" commenced development of a so-called "Cooperation Plan" to coordinate regulatory and environmental matters regarding the Mackenzie Gas Pipeline ("MGP"). The MGP is a multi-billion dollar natural gas pipeline designed to transport natural gas principally from the Beaufort Sea and Mackenzie Delta to northern Alberta.

The Dene Tha' First Nation ("DTFN"), were noticeably excluded in the development of the Cooperation Plan. The DTFN commenced court proceedings alleging that the government of Canada, through the Ministers of Environment, Fisheries and Oceans, Indian and Northern Affairs Canada and Transport (the "Ministers"), breached its constitutionally entrenched duty to consult the DTFN by excluding the DTFN from the development of the Cooperation Plan.

The court concluded, in part, that the Crown had breached its duty to consult the DTFN. As a result, the court granted a novel interim remedy to the DTFN.

Timing of the Duty to Consult

The court reviewed a key component of the duty to consult: timing. The court specifically reviewed when the duty to consult was triggered. The court's statements on timing lie at the heart of the reasons for judgment.

Quoting from *Haida* the court phrased the question as:

> … *when* did the Crown have or can be imputed as having knowledge that its conduct might adversely affect the potential existence of the Dene Tha' aboriginal right or title? In other words, did the setting up of the regulatory and environmental processes for the MGP constitute *contemplation* of conduct that could adversely affect a potential aboriginal right of the Dene Tha'? (*emphasis* added by us)

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[24] *Hiawatha*, *supra* note 5 at para. 60.
[25] *Dene Tha'*, *supra* note 15.

The court focused on the "contemplated" conduct of constructing the MGP. Said another way, the creation of the Cooperation Plan, whose processes were set up with the *intention* of facilitating construction of the MGP, were viewed as crucial by the court. The court stated:

> The Cooperation Plan was not merely conceptual in nature. It was not, for example, some glimmer of an idea gestating in the head of a government employee that had to be further refined before it could be exposed to the public. Rather, it was a complex agreement for a specified course of action, a roadmap, which intended to *do* something. It intended to set up the blueprint from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the construction of MGP. (*emphasis* by the Court)

The court stated that the precise moment when the duty to consult is triggered is not always clear. Relying on the *Haida* judgment which raised the spectre of Crown consultation obligations for decisions made during strategic planning processes, the court stated the Cooperation Plan "functioned as a blueprint for the entire project"[26] and was "a form of strategic planning. By itself, it confers no rights, but it sets up the means by which a whole process will be managed. It is a process in which the rights of the Dene Tha' will be affected".[27]

The processes emanating from the Cooperation Plan were "an integral step in the MGP, a project that the Crown admits has the potential to adversely affect the rights of the Dene Tha'".[28] Further, the court stated "The duty to consult arose … during the contemplation of the Cooperation Plan…".[29]

Remedy

From an Aboriginal law perspective, the court granted remedies which are in part standard, and in part novel.

The court declared that the Ministers are under a duty to consult the DTFN with respect to the MGP and that the Ministers breached their duty to consult.

However, the DTFN requested that there be "a "stick", an incentive, to goad the Crown into meaningful consultation".[30] The DTFN further requested the court provide detailed directions to the Ministers about what constitutes consultation, specifically the design of the environmental assessment process and provision of financial and technical support to assist the DTFN in the process.[31]

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[26] *Ibid.* at para. 107.
[27] *Ibid.* at para. 108.
[28] *Ibid.* at para. 109.
[29] *Ibid.* at para. 110.
[30] *Ibid.* at para. 121.
[31] *Ibid.* at para. 122.

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Further, the DTFN suggested the court play an ongoing supervisory role in the MGP consultation process.[32]

The court stated its priority is to fix the problem of lack of Crown consultation to the extent possible in a "real, practical, effective and fair way".[33] Therefore the court ordered an interim remedy enjoining the Crown from considering any aspect of the MGP which affects either the treaty lands of the DTFN or the Aboriginal rights claimed by the DTFN. Thus the court stated it will hold a remedies hearing on issues including:[34]

1. whether the Crown should be required to appoint a Chief Consulting Officer (similar to a chief negotiator in land claims) to consult with the DTFN;

2. the mandate for any such consultation;

3. the provision of technical assistance and funding to the DTFN to carry out the consultation;

4. the role, if any, that the court should play in the supervision of the consultation; and

5. the role that any entities including the National Energy Board should have in any such consultation process.

The remedy ordered by the court resulted in the Minister of Indian and Northern Affairs appointing, within three weeks of the release of the *Dene Tha'* judgment, a Chief Consulting Officer, to consult with DTFN on behalf of the Crown.

Discussion - What is Dene Tha' Really All About?

As a result of *Dene Tha'*, the law of Canada is that Aboriginal people who assert Aboriginal (or treaty) rights which may potentially be affected by a project reliant on Crown decisions or authorizations, must be consulted very early in the project planning process. The judgment stands for the proposition that after the first interaction between a third party project proponent and the Crown, the Crown must seriously consider and implement a consultation strategy such that it consults immediately, and meaningfully, with potentially affected Aboriginal peoples. Not doing so results in the Crown endangering the timelines and ultimately the viability of the project under consideration.

Considering the enormity of the MGP, the failure of the Crown's consultation process with the DTFN is remarkable. The court stated:

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[32] *Ibid.* at para. 123.
[33] *Ibid.* at para. 131.
[34] *Ibid.* at para. 134.

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> A striking feature of this present case is that while many government departments, agencies, entities and boards were involved, no one seemed to be in charge or at least responsible for consultation with First Nations. Clearly this was the case with Dene Tha'.[35]

Project proponents, therefore, must ensure the Crown carries out its constitutional obligations with affected Aboriginal peoples on a timely basis and in a manner that will adequately discharge the Crown's duties. The longer the Crown delays in meaningfully engaging First Nations, the more likely an Aboriginal group may obtain a declaratory relief or perhaps even an injunction to halt a project.[36]

British Columbia Business Council's Perspective on the Triggering of the Duty of Consultation

In January 2007, the Business Council of British Columbia ("BCBC") released a policy paper reflecting the province's business community's perspective of First Nations consultation (and accommodation).[37] The BCBC policy paper is notable in two respects. First, the paper sets out a "First Nation Consultation Intensity Matrix" and second, the paper calls for the creation, by legislation, of a First Nations Consultation Commissioner, appointed as an Officer of the Legislature.

First Nation Consultation Intensity Matrix

The First Nation Consultation Intensity Matrix (the "Matrix") was proposed by BCBC to the Government of British Columbia for application throughout all line ministries and agencies. The Matrix is set out in Appendix 1 of this paper.

To utilize the Matrix, one must determine the affected First Nations' Aboriginal rights on the one hand and characterize the impact of the Crown authorization of the planned the industry activity on the other hand. The result of using the Matrix may be that a proponent or the Crown no notification, information sharing, limited consultations, moderate consultations, intensive consultations or adherence to treaty provisions in the case of a treaty First Nation. While recognizing the Matrix is BCBC's attempt to logically quantify the common law of consultation, the Matrix concept suffers from various, likely fatal, flaws.

The major flaw of the Matrix is that determination of the scope and nature of a First Nation's Aboriginal right, in itself requires consultation. While gaps abound in the law of the duty of consultation, it is arguable that the Crown cannot, under any conditions, authorize an industry

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[35] *Ibid.* at para. 127.
[36] *Platinex No. 1*, *supra* note 10.
[37] "First Nation Consultation and Accommodation: A Business Perspective" Submission to The New Relationship Management Committee (19 January 2007), online: Business Council of British Columbia <http://www.bcbc.com/Documents/AB_20070119_NewRelationshipBusinessPerspective.pdf>.

activity without some form of First Nations consultation. Unless there has been a previous, and recent, identical project on the identical lands where Aboriginal rights are asserted (or proven), the Crown runs the risk of not receiving possible further relevant information from affected First Nations. The honour of the Crown would likely demand that the Crown engage First Nations afresh. To quote the Supreme Court of Canada, not doing so potentially results in the Crown cavalierly running "roughshod over Aboriginal interests".[38] As set out earlier in this paper, consultation is required to determine if consultation is required.

BCBC calls for immediate implementation of the use of the Matrix. While cognizant of other First Nations and government processes currently underway (such as BC Treaty Process and the New Relationship), the BCBC has published the Matrix in an effort to establish an interim mechanism of consultation that meets the needs of its members.

Consultation Commissioner

Integral to the implementation of the Matrix, BCBC proposes the establishment of the Office of the First Nation Consultation Commissioner. As an Officer of the Legislature, the Consultation Commissioner would have status similar to British Columbia's Information and Privacy Commissioner. The BCBC policy paper provides detail as to powers of the Consultation Commissioner including broad powers involving all aspects of consultation. However, the Consultation Commissioner would not have a role in the discharge of the duty of accommodation.

Summary

Project proponents will need to accurately describe the risks associated with the Crown's consultation process, or lack thereof, with project partners, lenders and investors. Not doing so will result in the proponent shouldering significant liability to such groups.

There is no doubt the *Dene Tha'* judgment is precedent setting. It is another Aboriginal law case which increases the bargaining power of Aboriginal peoples on every proposed energy and natural resource project in Canada. Since 1990, the Supreme Court of Canada has actively developed the law of consultation (and to a very limited extent, the law of accommodation) to protect Aboriginal rights. Of the dozens of cases litigated since 1990, Aboriginal people have been successful in the vast majority.

If you are a proponent whose project's success relies on a Crown decision or authorization, and your project may affect an Aboriginal right of a local Aboriginal people, then you should be in very close contact with your legal counsel (and a legal counsel that specializes in Aboriginal law). In turn, project proponents must be in close contact with the Crown to ensure that the Crown is upholding its constitutional duties to affected Aboriginal peoples. Our experience is

[38] *Haida*, *supra* note 16 at para. 27.

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that the Crown is often procedurally slow and, surprisingly, out of step with the evolving law of consultation.

The law of the duty of consultation (and accommodation) is complex. Employment of legally sound strategies for meeting the requisites of consultation with Aboriginal peoples is a must for any business operating, or contemplating operating on the traditional territories of Aboriginal peoples. As is now well known, such territories encompass the entire Crown land base of British Columbia, including the offshore.

APPENDIX 1

First Nation Consultation Intensity Matrix

Project or Activity \ First Nation Interests	No Interests	Occasional Use	Economic Use or Opportunities	Intensive Use	Intensive Use and Advanced Treaty Negotiations	Established Treaty Right or Title
Major Disturbance	No Notification	Moderate Consultations	Intensive Consultations	Intensive Consultations	Intensive Consultations	In Accordance with Treaty Provisions
Large Project or Large Area	No Notification	Limited Consultations	Moderate Consultations	Moderate Consultations	Intensive Consultations	In Accordance with Treaty Provisions
Small Project or Small Area	No Notification	Limited Consultations	Moderate Consultations	Moderate Consultations	Intensive Consultations	In Accordance with Treaty Provisions
Previously Disturbed Area	No Notification	Information sharing	Limited Consultations	Limited Consultations	Moderate Consultations	In Accordance with Treaty Provisions
Ancillary Permit, License or Tenure	No Notification	Notification	Notification	Notification	Limited Consultations	In Accordance with Treaty Provisions
No Demonstrated Impact	No Notification	Notification	Notification	Notification	Notification	In Accordance with Treaty Provisions

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