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A Guide to the Supreme Court of Canada's decision in Taku River Tlingit First Nation v. B.C.

Highlights of the Decision

On November 18th 2004, the Supreme Court of Canada handed down its decision in the *Taku River Tlingit First Nation v. British Columbia* case. For the Tlingits, this case was another stage in their ongoing struggle to protect their Aboriginal rights and way of life – in this case from the effects of Redfern's proposal to reopen the Tulsequah Chief mine by building an industrial highway through the heart of the Tlingits' traditional territory.

The Court also handed down a companion decision in the Haida Nation v. British Columbia case. Together these cases have changed Aboriginal rights law, by declaring that the Crown has a duty to consult and accommodate in cases where Aboriginal title and rights have not been proved in court. These decisions establish a strong legal foundation for the Tlingits' role as stewards of their territory - so they can continue their work to sustain the lands and resources on which their future depends, and ensure that steps are taken to effectively resolve their concerns about Redfern's proposal. These are the highlights of the duty declared in the two decisions:

- Canada's Aboriginal people were already here when Europeans came. Therefore, the honour of the Crown requires governments to negotiate treaties in order to have a just settlement of claims and to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty.
- The Crown's duty to act honourably is enshrined in s. 35(1) of the *Constitution Act, 1982*, and applies to all government dealings with Aboriginal peoples.
- An essential part of the Crown's s. 35 duty requires governments to consult Aboriginal peoples and accommodate their interests, before claims are resolved.
- The purpose of this duty to consult and accommodate is to preserve Aboriginal interests until treaties are concluded, and to foster relationships that will make effective negotiations possible.
- Aboriginal people do not have to go to court to prove their rights or title before this Crown duty arises.
- The duty arises whenever the Crown knows of the potential existence of an Aboriginal right or title, and is considering conduct that might adversely affect it.
- In such cases, governments must do what is necessary to maintain the honour of the Crown and achieve reconciliation with respect to the interests at stake. This will require balancing societal and Aboriginal interests when making decisions affecting Aboriginal claims.
- This duty will require government to change its plans or policies in order to accommodate Aboriginal concerns, if consultation shows that to be necessary.

In the TRTFN and Haida cases, the Supreme Court of Canada has established a general framework for the duty to consult and accommodate, in situations where Aboriginal title or rights claims have not yet been proven in court or recognized in a treaty.

The Duty to Consult & Accommodate

The constitutional source of the duty, and how it should be interpreted

"The honour of the Crown … is not a mere incantation, but rather a core precept that finds its application in concrete practice."
Haida, par. 16

The government's duty to consult with Aboriginal peoples and accommodate their interests finds its source in the the Crown's duty to act honourably. The honour of the Crown is always at stake in its dealings with Aboriginal peoples and must be interpreted generously in order to reflect the underlying realities from which it stems.

The historical roots of the duty

"The duty … flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group."
Haida, par. 53

Canada's Aboriginal people were already here when Europeans came. This is the historical foundation of the honour of the Crown. Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims. The potential rights embedded in these claims are protected by s. 35. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown requires it to consult and, where indicated, accommodate Aboriginal interests.

The purpose of the duty

"The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised ... the commitment is to a meaningful process of consultation"
Haida, par. 42

Reconciliation between Aboriginal peoples and the Crown is the goal of s. 35. This reconciliation is to be achieved through negotiations. It is a process flowing from the rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.

The process of reconciliation flows from the Crown's duty of honourable dealing toward aboriginal peoples. It arises from the Crown's assertion of sovereignty over an Aboriginal people and the Crown's control of lands and resources. With the assertion of Crown sovereignty there arose an obligation on the Crown to treat Aboriginal peoples fairly and honourably and to protect them from exploitation.

Interim measures are required to satisfy the duty

"Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982."*
Haida, par. 20

Consultation and accommodation before final claims resolution is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution. It also fosters a relationship between the parties that makes negotiations possible. Negotiations are the preferred process for achieving ultimate reconciliation.

When the duty is triggered

The provincial and federal governments argued that they have no duty to consult or accommodate prior to final determination of the scope and content of an Aboriginal right. The Court called this an "impoverished view" of the honour of the Crown. A proven right is not the only trigger for the legal duty to consult or accommodate. Reconciliation is not to be limited to proven rights or title. This kind of narrow thinking would mean that when proof is finally reached, by court determination or treaty, Aboriginal peoples might find their lands and resources changed and denuded. This is not reconciliation and it is not honourable.

The duty to consult arises whenever the Crown has knowledge of an Aboriginal rights or title claim and is considering actions that might negatively affect those claimed rights or title.

"The obligation to consult does not arise only upon proof of an Aboriginal claim ... [it] arises when a Crown actor has knowledge … of the potential existence of Aboriginal rights and title and contemplates conduct that might adversely affect them."
TRTFN, par. 25

The difference between the trigger and the content of the duty

There is a distinction between what triggers the duty to consult and accommodate and the content of the duty. Knowledge of a credible claim is sufficient to trigger the duty. The content of the duty will depend on the seriousness of the potentially adverse effects. In all cases, the honour of the Crown requires governments to act with good faith to provide meaningful consultation appropriate to the circumstances. Sharp dealing is not permitted.

How to satisfy the duty in serious cases

In cases where a strong Aboriginal rights claim is established, the right is important to the Aboriginal people, and there is a high risk of harm to that right, deep consultation, aimed at finding a satisfactory interim solution, is required. The consultation required at this stage may include the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. And while there is no duty to agree, there must be a commitment to a meaningful process.

"The scope of the duty to consult … will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process."
TRTFN, par. 29

Processes that might satisfy the duty

The government could adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases. The controlling question in all situations is what is required to maintain the honour of the Crown and to achieve reconciliation between the honour of the Crown and the Aboriginal people with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement on the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

What does the SCC decision mean for the Tlingits & Redfern?

The duty to consult and accommodate was triggered in this case:

The Supreme Court of Canada said that the Crown's duty to consult the Tlingits and accommodate their interests was triggered in this case, because:

- British Columbia knew of the Tlingits' claim of Aboriginal rights and title, because their comprehensive land claim was accepted by the federal government in 1984, and the federal and provincial governments have been negotiating with the Tlingits since 1993, under the treaty process facilitated by the BC Treaty Commission.
- The Tlingits have a credible claim of Aboriginal rights and title in their traditional territory, because acceptance of their comprehensive claim was based on an independent review of their traditional use and occupancy of the lands and resources in question.
- Redfern's proposed road has a high potential for negatively impacting the Tlingits' claim of Aboriginal rights and title because:
    - all the experts recognized the Tlingits' reliance on their system of land use to support their domestic economy and their social and cultural life;
    - the road would pass through an area critical to that domestic economy;
    - the road could act as a magnet for future development; and
    - the road could therefore have an impact on the Tlingits' continued ability to exercise their aboriginal rights, and could alter the landscape of their territory.

"There is sufficient evidence to conclude that the TRTFN have *prima facie* Aboriginal rights and title over at least some of the area that they claim."
TRTFN, par. 30

The duty to the Tlingits was satisfied in this case:

The Supreme Court of Canada concluded that the provincial government satisfied its duty to consult and accommodate Tlingit interests when it certified Redfern's proposal in 1998. (The SCC disagreed with the B.C. Supreme Court and the Court of Appeal on this point.)

The SCC noted that the 1998 government decision was made after a lengthy environmental assessment process in which the Tlingits participated in the Project Committee, with the result that their concerns were fully researched, made known to government and considered in the majority report of the Project Committee. Most important, the SCC said the 1998 Certificate was only one stage in the process by which a development moves forward. It was granted on the basis of the further steps to accommodate Tlingit interests that were recommended in the Project Committee's majority report or required by the Certificate.

Further steps required to satisfy the duty in this case:

The SCC noted that the majority report concluded that some Tlingit concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. Further steps required before the project would proceed included:

- more detailed environmental baseline information that may lead to adjustment of the road's course;
- further socio-economic studies; and
- establishment of a joint management authority.

The SCC said that it expected that, throughout the permitting, licensing and approval processes, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the Tlingits.

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TRTFN, par. 46

The effect of the decision on Redfern's project:

Redfern now has its Project Approval Certificate. That Certificate allows the company to apply for other provincial licences, permits and approvals it requires. It cannot proceed with its project until it has those.

Redfern also requires approvals under federal laws before it can proceed, although these were not considered in the case decided by the SCC. Those approvals cannot be granted until the completion of the environmental screening report now being prepared under the *Canadian Environmental Assessment Act*, as well as appropriate consultations between the Tlingits and the federal government after that.

The SCC has said that the recommendations and requirements from the majority report and the Certificate must be implemented throughout the remaining provincial regulatory processes, as well as in the development of a land use strategy. It follows that this will also need to be done in respect of approvals under federal laws.

These things must all be done to fulfill the Crown's duty to consult and accommodate in this case, and they must be done consistently with the honour of the Crown.

""To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of that resource. That is not honourable."
Haida, par. 27

Questions & Answers

Does this mean the Crown can use lands and resources however it chooses?

Absolutely not. The Crown cannot "cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests." The Court said that unilateral exploitation of resources during the process of treaty negotiations is not honourable.

Does this mean that the Province's title trumps Aboriginal rights and title?

No. The Court was very clear. The Province's title is not absolute, but is subject to the land-related rights of the Aboriginal peoples. Aboriginal peoples do not have a veto over Crown decisions about lands and resources, but the Crown has a constitutional duty to be responsive to aboriginal claims, and must change its plans if that necessary in order to preserve Aboriginal interests until treaties can be concluded.

Is Redfern allowed to build the road now?

No. Redfern has its Certificate, and may therefore apply for the necessary licences, permits and other approvals from the provincial and federal governments. As explained above, as both governments consider granting those approvals, the duty to consult and accommodate must be satisfied.

More specifically, the SCC upheld the Certificate on the basis that they expected the recommendations in the Project Committee report to be implemented, in order to effectively address the TRTFN's concerns. Those steps will need to be carried out consistently with the honour of the Crown, before Redfern will be able to proceed, in order to satisfy the SCC's decision.

Is it time to make a deal with Redfern?

There is no "deal" to be made with Redfern. The Tlingits' primary relationship is with the Crown. It is with the federal and provincial governments that the TRTFN must negotiate to ensure their aboriginal rights and title are protected. The Court said that the duty of the Crown is ongoing. The Court said it expected that throughout the permitting process, as well as in the development of a land use strategy, the Crown must accommodate the Tlingits' concerns.

After the Tlingits begin discussions with the provincial and federal governments to establish a framework for the consultation and accommodation measures still required, it will probably be appropriate to engage in discussions with Redfern.

What happened in the Haida case?

The Court said that the Haida had never been consulted in any way about the transfer of the Tree Farm Licence in dispute. That is why there is an outstanding obligation to consult and accommodate in that case. The validity of the transfer may be legally challenged after there is an opportunity for the Crown to satisfy the duty.

Is the honour of the Crown duty the same as a fiduciary duty?

No. The Court said that the honour of the Crown gives rise to different duties in different circumstances. When the Crown has assumed control over well defined aboriginal interests, or might adversely them, the honour of the Crown gives rise to a fiduciary duty. If the aboriginal interest is not that specific, such as when Aboriginal rights or title are asserted but not defined by litigation or a treaty, the honour of the Crown requires those rights to be determined, recognized and respected. In such cases the Crown's duty to consult and accommodate is intended to protect the rights until they can be defined in one of those ways.

This guide to the Tlingits' case at the Supreme Court of Canada has been prepared by the law firm of Pape & Salter. It is not intended as a statement of the legal positions of the Tlingits and should not be used in place of legal advice. The full text of the SCC decisions in *TRTFN* and *Haida* can be found at the Supreme Court of Canada's website at www.lexum.umontreal.ca/csc-scc/en/index.html. Please address questions to:

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