



## **What is the Crown's Duty to Consult and Accommodate Indigenous peoples?**

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There is renewed interest in the duty to consult and accommodate following the Federal Court of Appeal's decision to quash the Order in Council approving the Trans Mountain Pipeline. In *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153, the Court concluded that the Crown had breached its constitutional duty to consult and accommodate Indigenous peoples in relation to the Trans Mountain Pipeline by not engaging in meaningful two-way dialogue with the Indigenous groups in question. It remitted the matter back to the Governor in Council and ordered that new consultation efforts be undertaken.

The importance of the Crown's obligation to consult and accommodate Indigenous peoples cannot be overstated. The adequacy of consultation efforts and accommodation measures has an impact not just on Indigenous peoples but on all Canadians, given the economic importance of natural resource development in this country. In making decisions that might have a prejudicial effect on Aboriginal rights, the Crown has a constitutional obligation to engage with Indigenous peoples about those rights and to seek ways to accommodate them. It must also reconcile Indigenous interests with other interests. If the Trans Mountain Pipeline is any indication, the stakes are huge.

This article answers the basic questions related to the duty to consult and accommodate, with reference to ten leading cases.

### **1. What is the duty to consult and accommodate?**

The duty to consult and accommodate essentially means that when the Crown contemplates conduct that could have a prejudicial effect on a potential Aboriginal right or title, it must consult with the relevant Indigenous groups and reasonably take into account their interests.

The starting point of the duty to consult and accommodate is the honour of the Crown and s. 35 of the *Constitution Act, 1982*. Section 35 recognizes and affirms existing aboriginal and treaty rights, including treaty rights that exist by way of land claims agreements or that may be so acquired. It is a corollary of s. 35 that the Crown must act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.

The Supreme Court has recognized that Canada's Indigenous peoples were here when Europeans came and were never conquered. While many bands reconciled their claims with the Crown through treaties, others have yet to do so. The honour of the Crown requires that these rights be determined, recognized and respected, which in turn requires the Crown to participate honourably in the process of negotiation. While the process of negotiation is ongoing, the Crown may be required to consult with and accommodate Indigenous interests (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511).

## **2. When does the duty to consult arise?**

Three elements must be present for the duty to consult to arise:

1. The Crown must have real and constructive knowledge of a potential Aboriginal right or claim.

The existence of a potential claim is necessary, but not proof that the claim will succeed.

2. There must be Crown conduct or a Crown decision.

This is not confined to the exercise of statutory powers or to decisions or conduct which have an immediate impact on lands and resources, and extends to "strategic, higher level decisions."

3. There must be a possibility that the Crown conduct may affect the Aboriginal claim or right.

There must be a causal link between the Crown conduct and the prejudicial effect.

(*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511; *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650)

The Supreme Court has also confirmed that the development of a modern treaty does not extinguish the common law duty to consult. The Crown cannot contract out of the duty. However, where a modern treaty provides for some form of consultation, the process provided in the treaty will shape the scope of the duty to consult (*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103).

## **3. When does the duty to consult not arise?**

The development of legislation is "legislative action" that does not trigger the duty to consult. This is due to the doctrines of separation of powers, parliamentary privilege and parliamentary

sovereignty (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 SCR 765).

However, the Court held that this conclusion does not necessarily apply to the process by which subordinate legislation, such as regulations or rules, is adopted, as that conduct is clearly executive rather than legislative.

#### **4. What is the content of the duty to consult?**

The content of the duty to consult varies with the circumstances and is determined on a case by case basis. In *Haida Nation*, the Supreme Court held that the scope of the duty to consult is 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.

The duty to consult is thus said to be on a “spectrum”. Where the claim to title is weak, the Aboriginal right limited 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. However, where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Indigenous groups and the risk of non-compensable damage is high, “deep consultation” may be required. In such cases, consultation may require the opportunity to make submissions, formal participation in the decision-making process, and the provision of written reasons that indicate how the concerns raised by Indigenous groups were considered and taken into account.

Recently, the Federal Court of Appeal confirmed that when deep consultation is required, the Crown’s obligation extends far beyond merely listening to and recording the concerns of Indigenous groups and transmitting those concerns. It must engage in “meaningful two-way dialogue” with Indigenous groups in such a way as to grapple with their real concerns and explore possible accommodation of those concerns (*Tsleil-Waututh Nation v. Canada (PG)*, 2018 FCA 153).

#### **5. Whose duty is it?**

The obligation to consult rests with the federal and provincial governments. In *Haida Nation*, the Supreme Court held that the honour of the Crown cannot be delegated to third parties and neither can the duty to consult. As a result, resource development companies do not have an obligation to consult. The Crown may delegate procedural aspects of consultation to proponents, but the ultimate legal responsibility for consultation and accommodation rests with the Crown.

In *Rio Tinto*, the Supreme Court confirmed that administrative tribunals can fulfill the Crown’s duty to consult, assuming they have been expressly or impliedly empowered to engage in consultation and have been given the corresponding powers necessary to fulfill the obligations of the duty to consult in the specific circumstances.

The Supreme Court recently tweaked this position. It held that regulatory bodies such as the National Energy Board (soon to become the Canadian Energy Regulator) may also fulfill the Crown's duty to consult, as long as the board has been empowered to do so, possesses the powers necessary to fulfill the obligations required, and, importantly, the Indigenous parties have been put on notice that the regulatory board will be undertaking the consultation process (*Chippewas of the Thames v. Enbridge*, [2017] 1 SCR 1099, and *Clyde River c. Petroleum Geo-Services*, [2017] 1 SCR 1069).

## **6. What rights are protected by the duty to consult?**

Section 35 of the *Constitution Act, 1982* guarantees a process not a particular result. The Crown can meet its obligation to consult and accommodate without providing the specific accommodation sought by the Indigenous group in question.

The duty to consult does not provide Indigenous groups with a veto right over development projects (*Ktunaxa Nation v. British Columbia*, [2017] 2 SCR 386). That said, the Supreme Court has suggested that where Aboriginal title has been established, obtaining the consent of interested Indigenous groups may help avoid allegations of breaches of the duty to consult (*Tsilhqot'in v. British Columbia*, [2014] 2 SCR 257).

## **7. Who can complain about a breach of the duty to consult?**

The duty to consult is a collective right which can only be asserted by the Indigenous community as a collective. Individual members of an Indigenous group do not have standing to bring an action pursuant to a breach (*Behn v. Moulton Contracting Ltd*, [2013] 2 SCR 227).

## **8. What remedies are available when the duty to consult has been violated?**

A number of remedies for breach of the duty to consult are available. The Federal Court of Appeal's decision relating to the Trans Mountain Pipeline highlights a few of these remedies. In that case, the Court found that the Crown breached its duty to consult. The decision was quashed, the matter was sent back to the decision maker and it was ordered that adequate consultation take place on a particular phase of the project (*Tsleil-Waututh Nation*). Frequently, courts will also make declarations that the Crown has an obligation to consult (see *Haida Nation*, for instance).

*This article is based on a presentation delivered in French by Natai Shelsen to the Association des juristes d'expression française de l'Ontario (AJEFO) in June 2019, which was prepared with the assistance of Ella Bedard.*