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Consultation and Cumulative Effects: Is there a role for the duty to consult in addressing concerns about over-development?

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We have seen many changes to the consultation and accommodation landscape since the seminal decisions of *Haida Nation v. British Columbia (Minister of Forests)*[1]and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*[2]. One predominant response to these decisions has been the characterization of the duty to consult and accommodate as a potential "win-win" for both proponents and Aboriginal communities. This optimistic view of the duty to consult and accommodate is not unfounded. There have been many "wins" - instances where consultation has led to more responsible development, improved risk management, reasonably equitable sharing of resources, empowerment for affected communities, protection for Aboriginal and treaty rights, and other outcomes that are satisfactory to all parties. However, consultation does not always proceed smoothly. Despite *Haida Nation*'s promise that consultation offers a better means of achieving reconciliation, Aboriginal parties continue to turn to the courts for "all or nothing" solutions like injunctions.[3] There are many reasons why consultation might not result in a "win-win" solution in any given case. In this article, we will consider one factor that can create difficulties in the consultation process: the question of the cumulative effects of historic and present development.

Consultation generally proceeds on a project-by-project basis. This is mandated by both the "trigger" test and practicalities. An Aboriginal community does not have a free-flowing right to consultation when its Aboriginal or treaty rights are being affected by development. The duty to consult arises when the Crown contemplates conduct potentially giving rise to adverse effects on the Aboriginal rights or claims.[4]

What this means is that there is a potential for disconnect between the parties, from the beginning of the consultation process. For the Crown, the consultation process begins with the assessment mandated by the Supreme Court of Canada. The Aboriginal community, however, may begin the consultation process with an entirely different set of questions. The activity that "triggers" consultation is likely embedded in a much larger

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[1] 2004 SCC 73, [2004] 3 S.C.R. 511[*Haida Nation*].
[2] 2004 SCC 74, [2004] 3 S.C.R. 550 [*Taku River*].
[3] *Haida Nation, supra* note 1 at para. 14. The recent decision of *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al*., 2011 ONSC 7708 (CanLII), 108 O.R. (3d) 647 offers one example.
[4] *Haida Nation, ibid.* at para. 35

history of development in the particular Aboriginal territory, and the concomitant history of relations with the Crown and proponents. For example, the community will often be thinking about the loss of traditional territory and hunting and fishing grounds caused by previous and ongoing projects. Or there may be questions as to how the community's ability to thrive within its traditional territory is impacted by the cumulative effects of development, or of achieving greater economic self-sufficiency, or moving towards sovereignty. So, for the Aboriginal community, the starting question will often be broader and more complex than a singular concern with whether one particular project will affect a specific right. Any concerns with cumulative effects may be exacerbated by the fact that historical development took place when the Aboriginal community lacked the resources and legal mechanisms to have much input.

On a practical level, consultation proceeds on a project-by-project basis because it is often carried out by the proponent. While the Supreme Court of Canada has made clear that the Honour of the Crown and the ultimate legal responsibility for meeting the duty to consult cannot be delegated, it has also made clear that procedural and operational aspects of the duty can be delegated. Both the provincial and federal Crown frequently delegate procedural and operational aspects of the duty, whether explicitly or implicitly. In some situations, the consultation and accommodation process is largely proponent-funded. When a proponent is substantially carrying out or funding consultation, the potential to address cumulative effects will be very limited.

In *Carrier Sekani*, the Supreme Court clarified that the Crown does not owe a duty to consult for past impacts.[5] The Court was not, however, insensitive to the question of past impacts or cumulative effects. It found that the duty to consult did not arise for underlying or continuing breaches, unless the present decision could cause new and current adverse impacts. However, an Aboriginal group with a concern about past breaches of the duty to consult, or past adverse impacts, could have a claim in damages.[6]

In decisions following *Carrier Sekani*, courts have not interpreted this case as excluding consideration of cumulative effects from the duty to consult. Rather, courts have considered cumulative effects in at least two circumstances.

First, in injunctions cases, cumulative effects and historical development have been considered within the "irreparable harm" and "balance of convenience" analyses. Grauer J. clearly articulated this trend in the recent *Taseko Mines* decision:

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[5] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 45, [2010] 2 S.C.R. 650 [*Carrier Sekani*].
[6] *Ibid.* at para. 48.

> It seems to me, with respect, that this highlights one of the significant problems raised by the petitioners. Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.
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> The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished. This is supported by the evidence of Chief Baptiste, Alice William and Sonny Lulua.
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> In my view, this not only establishes significant irreparable harm to the petitioners' substantive rights, but also emphasizes again the importance of the process discussed above. It also speaks to the status quo. [7]

Second, cumulative effects may go to the level of consultation required. *Carrier Sekani* stands for the proposition that historical impacts do not trigger the duty. However, the historical context is relevant in assessing the extent of impacts from the decision at issue. This reasoning is found in the *West Moberly* decision from the B.C. Court of Appeal, for which leave to the Supreme Court was recently denied:

> I do not understand [*Carrier Sekani*] to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.

[7] *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675 at paras. 65-67, [2011] B.C.J. No. 2350 [*Taseko Mines*].

> The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners' ancestors' way of life and cultural identity, and the petitioners' people would like to preserve them. There remain only 11 animals in the Burnt Pine herd, but experts consider there to be at least the possibility of the herd's restoration and rehabilitation. The petitioners' people have done what they could on their own to preserve the herd, by banning their people from hunting caribou for the last 40 years.
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> To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs [emphasis in original]. [8]

Courts are struggling to acknowledge concerns about the cumulative effects of development on Aboriginal rights. Consultation is not, however, a free-flowing process by which these concerns can be fully addressed, and nor should it be, as long as it is project-specific. This shortcoming of the duty to consult is one reason, among many, that consultation at times does not lead to "win-win" results. More than this, though, consultation may not lead to a "win" outcome for Aboriginal communities that are concerned about over-development, because it constrains the Aboriginal communities' ability to say no.

As consultation and accommodation have increasingly become more of a practical reality for industry and Aboriginal communities, the Aboriginal consultation discourse has begun to frame consultation as a process by which deals are made. Indeed, myriad continuing legal education seminars for industry advertise expertise in creating "win-win" agreements with Aboriginal communities. Certainly this is an admirable goal, and undoubtedly the objective of any principled negotiation should be to arrive at a compromise where all of the parties benefit. However, the "win-win" discourse risks framing Aboriginal consultation as a process by which, with the right combinations of incentives and legal manoeuvring, a mutually beneficial project can always emerge. This framework glosses over the question of whether a project should proceed at all, because it starts from an assumption that both parties stand to gain from the project.

The "win-win" approach to consultation and accommodation is at least partially the result of the process by which the Crown "delegates" to proponents. Where the Crown takes a hands-off approach by which it simply tells the proponent to consult, the proponent expects that some kind of "win" is not only possible, but imminent. As soon as

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[8] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at paras. 117-119, 18 B.C.L.R. (5th) 234, leave to appeal refused to SCC refused, [2011] S.C.C.A. No. 399, 2012 CanLII 8361.

consultation is delegated to a proponent, the discourse naturally shifts gears and the question becomes framed as, "how does this project get done?"

The "win-win" discourse can be disadvantageous to both industry and Aboriginal communities. Because it is premised on the notion that consultation and accommodation will ultimately benefit all parties, it puts Aboriginal communities in the position of either agreeing to the project or appearing obstructionist and having to resort to injunctions, and in some cases, blockades. It is disadvantageous for industry because it can result in proponents with the best of intentions investing significant resources into a consultation process that may not be capable of addressing the Aboriginal community's concerns. When consultation breaks down, there is an ultimate cost to the public – not only the social and political costs of increased tension between Aboriginal communities, the Crown and industry, but financial costs as well.[9]

The case law is clear that consultation does not always impose an obligation on the parties to agree only to make good faith efforts. Further, the fact that an Aboriginal community must be consulted does not mean that the community has a veto power over development.[10] On the other hand, meaningful consultation must be carried out, "in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue".[11] The law must develop in such a way that, in some circumstances (e.g. where historic over-development has taken place), meaningful consultation and accommodation can mean no further development. When the ability of the Aboriginal community to raise concerns about over-development and cumulative effects is constrained by the project-specific nature of consultation, delegation to a proponent, and the push for "win-win" solutions, it may be difficult for such meaningful consultation and accommodation to occur.

It is important to remember that consultation itself is not a remedy. A declaration that the duty has been triggered, or that it has not been met, is a remedy in one sense, but consultation itself is a means to an end. That end is not always going to be a "win-win" solution for all parties, particularly where there are concerns about the cumulative effects of historical and proposed development. The question remains, can consultation ever address such concerns, and if not, is there a process that can?

As a starting point, it is clear that a proponent-driven process is insufficient where cumulative effects are at issue. Only the Crown is equipped to guide consultation within the broader context. Proponents may seek to understand the community's concerns about cumulative impacts, but ultimately, their concern is not to mitigate previous impacts. In consultation cases where this is an issue, the Crown must take a more active role in the consultation process. If the Crown is delegating consultation in such cases, it should be

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[9] As is evidenced by Ontario's recent decision to pay $3.5 million to God's Lake Resources to buy out the company's mining lease and claims in the traditional territory of the Kitchenuhmaykoosib Inninuwug First Nation (KI). See, Government of Ontario, "Ontario Reaches Agreement With God's Lake Resources" (29 March 2012), online: ON <http://news.ontario.ca/mndmf/en/2012/03/ontario-reaches-agreement-with-gods-lake-resources.html>.

[10] *Haida Nation, supra* note 1 at paras. 47-48.

[11] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 168, [1997] S.C.J. No. 108 (per Lamer C.J).

explicit about what has been delegated, as early in the process as possible. The Crown should also provide clear guidance to the parties throughout the consultation process, including (1) its assessment of whether the duty is triggered and why; (2) its assessment of the scope of the duty required; (3) the procedures by which it believes the duty will be met; (4) funding and resources, where appropriate; and (5) its assessment of what accommodations will meet the duty, where appropriate.

While the duty to consult proceeds on a project-by-project basis, the Crown must also address the bigger issues. Underlying many impasses in consultation are divergent understandings about the meaning of "traditional territory" and "Crown land", and what rights Aboriginal peoples have with respect to these lands. Concerns about over-development are, at heart, concerns about sovereignty. It is here that we must ultimately look for reconciliation, and this is an issue that only the Crown can address.

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